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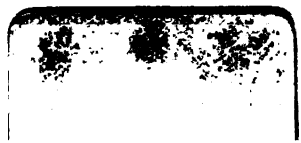
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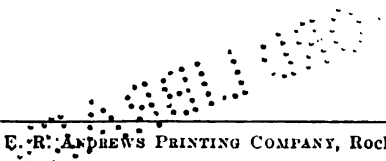
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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

WASHINGTON SUPREME COURT.

CITY OF SEATTLE, Appt.,
v.
RAY MACDONALD, Resp.

(47 Wash. 298, 91 Pac. 952.)

Municipal ordinance — co-ordinate statute — effect.

1. A valid municipal ordinance providing for the punishment of anyone maintaining or participating in a gambling game is not superseded by a subsequent statute making the carrying on of a gambling game a felony.

Gaming — specification — effect.

2. A gambling game within the general language of an ordinance prohibiting the

playing of any such game is not taken out of the operation of the ordinance by the fact that the general language is preceded by an enumeration of prohibited games which does not include the particular one in question.

(October 10, 1907.)

APPEAL by plaintiff from a judgment of the Superior Court for King County quashing a conviction of defendant for violating an ordinance against gaming. Reversed.

The facts are stated in the opinion.

Mr. Ellis De Bruler for appellant.

Messrs. Morris, Southard, & Shipley for respondent.

Subject Note. — Power of municipality to punish what is also an offense under state law.

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I. Ordinances authorized by power in statute or charter.

a. Generally.

1. Liquor.

The power of a municipality to punish what is also an offense under state law is controlled, to a large extent, by the language of the power conferred, as many ordinances under a direct grant of power would be sustained that would not be under the general welfare clause. The validity of ordinances is also largely governed by pro-

Fullerton, J., delivered the opinion of the court:

On November 17, 1899, the city of Seattle passed an ordinance relating to misdemeanors, § 23 of which reads as follows: "Whoever deals, plays at, wagers anything of value on, or in any manner takes part in, or whoever carries on or causes to be opened, or who conducts, sets up, keeps, or exhibits any game of faro, monte, roulette, lansquenet, *rouge et noir*, rondo, poker, draw poker, keno, or E. O., or roulette table, or shuffleboard, or fan-tan, or any gaming table or game whatever, for the purpose of gambling, or any game of chance for the purpose of winning or securing money by chance, played with cards, dice, or any device of whatever kind or nature, whether or not of the kind, character, or nature herein men-

tioned, for money, checks, credit, or any representative of value whatever, or whoever shall have in his possession, to be used for the purpose of gambling or winning money by chance, any gaming device whatever, shall be punished by a fine of not more than \$500, or by imprisonment not exceeding six months, or by both." Ordinance, No. 5657, § 23, Seattle Revised Ordinances, p. 242. On March 7, 1903, the legislature made it a felony to maintain a gambling resort; the act consisting of one section, which reads as follows: "Section 1. Any person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employee, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, roulette, *rouge et noir*, lansquenet, rondo, *vingt-un*

hibitory clauses in the Constitutions, and, in some states, by their statutes. A classification of cases by offenses enumerated would be of no value, as almost all of them would be legislated upon under a different source of power. It goes without saying that ordinances aimed against felonies will be void. As to petty offenses, the authorities seem to be unanimous that, under a direct grant of power, ordinances aimed against this class of crimes will be sustained although such acts may be offenses under the general law, where there are no prohibitory enactments in the Constitution or general laws. Some cases, especially in Missouri, reconcile the apparent conflict by holding that prosecutions under a penal ordinance are only civil actions for debt. In a number of cases upholding an ordinance passed under a direct grant of power, where a statute also covered the offense, the reasons frequently given in other cases, that there may be two offenses committed by the same act, or that, within corporate limits, a different application of police power is required, were not discussed, and the ordinances were sustained as a matter of course.

So, in *Marion v. Chandler*, 6 Ala. 899, where a town charter authorized the corporation to grant a liquor license and to regulate retailers, and, when deemed a nuisance, to restrain them, the court said that a by-law of a municipal corporation, imposing a penalty for an offense, is not void merely because the general laws of the state prescribe a punishment for the same offense.

A charter gave the town power to license, tax, and regulate places where liquor was sold in less quantity than one quart, and to provide penalties. An ordinance prohibiting the sale of liquor and the sale of liquor by druggists except as medicine was held valid, although the fine was from \$25 to \$100, and the dramshop law of the state imposed a fine of from \$20 to \$100. *Baldwin v. Murphy*, 82 Ill. 485. In this case the special charter was granted before the present Constitution, and the provision requiring uniform legislation did not apply.

And a city ordinance regulating the sale of liquor was held valid although a state 17 L.R.A. (N.S.)

law regulated such sales, in *Re Jahn*, 55 Kan. 694, 41 Pac. 956; *Salina v. Seitz*, 16 Kan. 143; *Emporia v. Volmer*, 12 Kan. 622. It was held that the state could confer upon municipalities the right to punish, in pursuance of their ordinances, illegal sales of intoxicating liquors. In the latter case the ordinance provided a fine for selling liquor without a license, under the power to enact ordinances to restrain, prohibit, and suppress tippling shops.

And in *Emporia v. Volmer*, 12 Kan. 633, an ordinance prohibiting a liquor shop was sustained under the power to restrain, suppress, and prohibit, although the dramshop act of the state authorized the selling of liquor. The court said: "As this law was passed subsequently to the dramshop act, if there were a conflict, it would be upheld as the last expression of the legislative will. But we do not think there is any conflict. Under the dramshop act the city council might grant licenses. Under this section they might grant or refuse."

In *State v. Young*, 17 Kan. 414, the case of *Emporia v. Volmer*, 12 Kan. 622, was distinguished, as that was a city of the second class, and the dramshop act provided that a city of the second class could dispense with the petition; but like authority was not granted to cities of the third class.

The Kansas prohibitory amendment to the Constitution and the prohibition act, Laws 1881, p. 233, repealed all provisions of law authorizing cities of the second class to issue licenses, or authorizing cities to pass ordinances for that purpose; but these did not annul the powers of cities authorized to punish persons for selling intoxicating liquors without a license in violation of a city ordinance, nor did they repeal the powers of cities to pass ordinances for such purposes. *Franklin v. Westfall*, 27 Kan. 614; *Topeka v. Myers*, 34 Kan. 500, 8 Pac. 726; *Topeka v. Zufall*, 40 Kan. 47, 1 L.R.A. 387, 19 Pac. 359.

In *Re Thomas*, 53 Kan. 659, 37 Pac. 171, which was a conviction under a city ordinance prohibiting the sale of liquor, it was held that the title of the ordinance was broad and substantially the same as the

(or twenty-one), poker, draw poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice, or any other device, or any slot machine or other gambling device, whether the same be played or operated for money, checks, credits, or any other representative or thing of value, in any house, room, shop, or other building whatsoever, boat, booth, garden, or other place where persons resort for the purpose of playing, dealing, or operating any such game, machine, or device, shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary for the period of not less than one nor more than three years." Laws 1903, chap. 51, p. 63. On October 17, 1906, one W. I. Peer made complaint before the police judge of the city

of Seattle, charging the respondent with violating the ordinance above quoted by playing at a dice gambling game called "Twenty-six," for the purpose of winning money, cigars, and articles representative of money by chance. The respondent pleaded not guilty to the charge before the police judge, and was tried and convicted and sentenced to pay a fine. The respondent appealed from the judgment of conviction to the superior court. In that court he filed a demurrer to the complaint on the ground, among others, that the facts charged did not constitute a crime. The superior court sustained the demurrer, and entered a judgment quashing the conviction and dismissing the proceeding. The city appeals.

The learned judge of the superior court

state liquor law. The objection to the ordinance was that the title was too broad. The court said: "The fact that the state, by its legislature, has made provision prohibiting and restricting the liquor traffic, does not prevent municipalities from enacting provisions for the control of the traffic within the limits of the same."

And, under the power to regulate liquor dealers, and the general welfare clause, an ordinance against selling liquor and other things was held valid in *Nashville v. Linck*, 12 Lea, 499.

But, under the power in a charter to regulate and restrain tippling houses, it was held that an ordinance requiring a town license was invalid. *Robinson v. Franklin*, 1 Humph. 156, 34 Am. Dec. 625. The state law required a county license. The court said: "This is not an ordinance imposing a fine for retailing without a license. Such a by-law would have been valid; it would not have contradicted, but would have been in accordance with, the state law."

2. Sunday observance.

A city ordinance licensing dramshops on Sunday was held valid, under a charter giving exclusive jurisdiction to a city to restrain, regulate, license, tax, or suppress dramshops, although a state law prohibited sales on that day. *State v. Kessels*, 120 Mo. App. 233, 96 S. W. 494.

And, under the power to restrain, prohibit, and suppress desecration of the Sabbath Day, it was held that a city ordinance was valid although it did not cover the whole ground occupied by the statute. *Kansas City v. Grubel*, 57 Kan. 436, 46 Pac. 714. In this case the statute prohibited keeping a liquor shop open on Sunday and the city ordinance prohibited keeping it open after 10 o'clock.

Where a city had power to regulate the sale of liquor and to pass an ordinance, it was held that an indictment would lie for keeping open a tippling house on the Sabbath under the state law, where no action had been taken under the ordinance. *Seibold v. People*, 86 Ill. 33. 17 L.R.A. (N.S.)

And, under Ga. act 1903, p. 96, authorizing the corporate authorities of each city to pass ordinances prohibiting the sale of liquor from 12 o'clock Saturday night until 12 o'clock Sunday night, and to provide ordinances for fine and punishment, it was held that a city could, by ordinance, provide for punishment, although the act was a criminal offense under the general laws of the state. *Littlejohn v. Stells*, 123 Ga. 427, 51 S. E. 390.

And, under a charter conferring power to pass an ordinance against keeping open a shop on Sunday, it was held that a suit for a penalty could be maintained, although the ordinance differed from the state law in allowing sales until 9 o'clock in the morning. *St. Louis v. DeLassus*, 205 Mo. 578, 104 S. W. 12.

But, under Tex. Rev. Stat. art. 391, power was given cities to close drinking houses on Sunday and prescribe hours for closing them. Penal Code, art. 186, made it a penal offense to barter or sell on Sunday. An ordinance authorizing sales on certain hours on Sunday was held invalid, as not authorized by the power given. It was further held that it conflicted with the Code. *Bohmy v. State*, 21 Tex. App. 597, 2 S. W. 886; *Ex parte Sundstrom*, 25 Tex. App. 152, 8 S. W. 207; *Flood v. State*, 19 Tex. App. 584.

This latter case overruled *Craddock v. State*, 18 Tex. App. 567, although the precise question here was not there presented.

Since these cases, the Texas Constitution was amended in 1891, divesting the legislature of the power to delegate to councils the power to annul any statute. (See subd. V.)

In the following cases Sunday ordinances were held to be valid: *St. Louis v. Cafferata*, 24 Mo. 94, subd. I. b; *State v. Ludwig*, 21 Minn. 202; *Brooklyn v. Toynbee*, 31 Barb. 282, subd. I. e.; *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564, subd. I. e; *State v. Welch*, 36 Conn. 215, subd. I. g. *Talladega v. Fitzpatrick*, 133 Ala. 613, 32 So. 252, subd. II. a; *Theisen v. McDavid*, 34 Fla. 440, 26 L.R.A. 234, 16 So. 321, subd. III. b; *Cohoes v. Moran*, 25 How. Pr. 385, subd. III. c; *McPherson v. Chebanse*, 114 Ill. 46,

sustained the demurrer on the ground that the city ordinance on which the complaint was predicated had been superseded by the statute above quoted. He rested his decision on the principle that a municipality, in the absence of express authority conferred upon it by its charter, is without power to enact an ordinance making punishable an act which is made punishable as a criminal offense by the general laws of the state; and held, as a necessary corollary to that rule, that an ordinance making the doing of an act an offense, enacted by virtue of the municipality's general power, is superseded by a general law of the state legislature, fixing and defining a punishment for the same act. There are many cases, representing, perhaps, the weight of authority, which support the rule followed by the trial judge. This court, however, has adopted the contrary rule. In *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324, we held that the city of Seattle, by virtue of certain provisions contained in its then charter, which have been continued in its present one, was authorized to enact ordinances for the punishment of offenses already made punishable by state

laws. This rule is not without well-considered cases in its support, and, as we think it more in consonance with the principles of good government than is the rule followed by the trial judge, we do not feel that it ought to be overruled or modified. We hold, therefore, that the ordinance was not superseded by the general statute quoted.

It is further contended that the judgment must be sustained on the ground that the game the defendant played at is not one prohibited by the ordinance. It is true the game known as "Twenty-six" is not enumerated in the ordinance, but the ordinance is general in its terms, and prohibits a person from playing at any game of chance played with dice for money, or representatives of money, and is broad enough to include the game played at by the respondent.

The judgment appealed from is reversed, and the cause remanded, with instructions to reinstate the case and overrule the demurrer.

Hadley, Ch. J., and Rudkin, Crow, Root, Dunbar, and Mount, JJ., concur.

55 Am. Rep. 857, 28 N. E. 454; *Karwisch v. Atlanta*, 44 Ga. 204; *Rothschild v. Darien*, 69 Ga. 503, subd. III. d; *Fant v. People*, 45 Ill. 259, subd. IV. c.

In the following cases Sunday ordinances were held invalid: *Wood v. Brooklyn*, 14 Barb. 425, subd. I. c; *Angerhoffer v. State*, 15 Tex. App. 613; *Flood v. State*, 19 Tex. App. 584; *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826, subd. I. g; *Kassell v. Savannah*, 109 Ga. 491, 35 S. E. 147, subd. I. h; *Penniston v. Newnan*, 117 Ga. 700, 45 S. E. 65, subd. II. d; *Canton v. Nist*, 9 Ohio St. 439; *State v. Langston*, 88 N. C. 692, subd. III. e; *Keck v. Gainesville*, 98 Ga. 423, 25 S. E. 559, subd. III. f; *Corvallis v. Carlile*, 10 Or. 139, 45 Am. Rep. 134, subd. III. f; *Baxter's Petition*, 12 R. I. 13, subd. V.

3. Gambling.

In *Chicago v. Brownell*, 41 Ill. App. 70, an ordinance was held to be within the power of the city, under authority to suppress gaming and gambling houses, but was held invalid on account of its proviso.

And in *Williams v. Warsaw*, 60 Ind. 457, under an act authorizing cities to suppress gaming and gaming houses, and to regulate and restrain all devices and places of any kind for sports or game, without a license, and to prohibit the use of the same, it was said that "a city may be authorized to provide by ordinance for the punishment of an act already punishable by the criminal law of the state."

And, an ordinance licensing and regulating billiard tables, under power to regulate and license billiard tables, was held valid, notwithstanding the state statutes on the 17 L.R.A. (N.S.)

subject, where they did not conflict. *Plattsburg v. Trimble*, 46 Mo. App. 459.

And under a charter giving power to regulate or suppress lottery-ticket dealers, an ordinance was held valid, although a state law on the same subject was in existence. *Ex parte Kiburg*, 10 Mo. App. 442. The prosecution was held quasi criminal.

And it was held no defense, under an indictment at common law for keeping a common gambling house, that the city council, under the power to prohibit gambling, had passed ordinances prohibiting that offense. *State v. Crummev*, 17 Minn. 72, Gil. 50. The court said: "Under the ordinance, he is prosecuted by complaint, in the name of the city, before the justice, and punishable by fine only. And if this were not so, a repeal by implication can only arise where the later statute is so inconsistent with the former that both cannot stand together."

Where the power to create and punish an offense was among the powers granted in the charter, it was held that a conviction for a violation of an ordinance against gaming was valid although the offense was provided against in the general statutes of the territory. *Ex parte Douglass*, 1 Utah. 108.

And, under the power to prohibit or restrain all gambling games or devices, a conviction under an ordinance prohibiting gambling was sustained although a state statute provided a penalty for that offense. *Blodgett v. McVey*, 131 Iowa, 552, 108 N. W. 239. In this case it was held that the power was expressly conferred, and therefore no question of inconsistency could arise.

4. Vagrants and disorderly persons.

Idaho Rev. Stat. § 2230, authorizing towns

and villages to pass ordinances for the punishment of vagrants, was held to sustain an ordinance, notwithstanding the Penal Code provides a penalty for vagrancy. *State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

And, under express power in the charter to define, restrain, and punish vagrants, an ordinance to that effect was held valid, although a state statute made vagrancy a misdemeanor. *Kansas City v. Neal*, 49 Mo. App. 72. It was also held that a proceeding under the ordinance was not a criminal proceeding.

And Mich. Comp. Laws, § 5923, defining disorderly persons, was held not to be a limitation upon the legislature to authorize municipal authorities to punish other acts within reasonable bounds. *Re Stegenga*, 133 Mich. 55, 61 L.R.A. 763, 94 N. W. 385. In this case the charter gave authority to provide for the punishment of all persons who shall be disorderly on the streets or public places, and to punish disorderly persons of all kinds. The chief point relied upon in this case was that the ordinance was in excess of the power granted, and not that the same crime was affected by the state statute.

And under a charter giving power to punish keepers of disorderly houses, an ordinance imposing the same penalties as the Penal Code was held valid. *Ex parte Wilson*, 14 Tex. App. 592. In *Ex parte Fagg*, 38 Tex. Crim. Rep. 573, 40 L.R.A. 212, 44 S. W. 294, it was said that in this case the constitutional provision, art 5, §§ 16-19, naming the courts having jurisdiction to try certain offenses, was not discussed.

5. Nuisances, streets and peddling.

Under a city charter authorizing the council to improve and repair streets and sidewalks, and to define, prevent, and remove nuisances, it was held that an ordinance prohibiting the obstruction of a sidewalk was valid, notwithstanding the Penal Code provided that the obstruction of a street or highway was a nuisance and a misdemeanor. *Ex parte Taylor*, 87 Cal. 96, 25 Pac. 258. In this case the judgment of the justice would have been valid also under the state law. In regard to this latter question, the court said that the case of *Re Sic*, 73 Cal. 142, 14 Pac. 405, did not discuss this proposition. In the present case the penalty was of the same character as that prescribed by the general laws, only less in degree.

And an ordinance prohibiting a nuisance was held to be valid under a charter authorizing the city to provide ordinances to prohibit, prevent, and abate nuisances, although the general laws authorized a punishment for the same offense. *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735.

And a city ordinance against stock running at large, under the power to abate and remove all nuisances, and giving exclusive power over streets and alleys, and to abate all obstructions and encroachments therein, was held to be valid, although the minimum 17 L.R.A. (N.S.)

fine was higher than that imposed by the state statute. *Quincy v. O'Brien*, 24 Ill. App. 591.

So it was held in *St. Joseph v. Vesper*, 59 Mo. App. 459, that an ordinance imposing a different fine for a nuisance from that imposed under the state law was valid. In this case the city was authorized to define, prevent, and abate nuisances.

And, under the power given cities to regulate projections on the sides of buildings, an ordinance prohibiting the projection of bay windows in the street was held valid, although a special statute of the state, Laws of 1799, 2 Mass. Spec. Laws, 340, prohibited a projection of more than 1 foot. *Com. v. Goodnow*, 117 Mass. 114. In this case the statute of 1799 was local, applicable to this city, and the subsequent statute was a general law, applicable to all cities.

The power to regulate peddling was held to authorize an ordinance against peddling on certain streets, notwithstanding a state license for peddling. *Ex parte Henson*, 49 Tex. Crim. Rep. 177, 90 S. W. 874. The court said: "Nor does the fact that the state, as is the case here, may license peddlers, exclude the idea of municipal supervision, where the power for such supervision is given in the charter." (See subd. V.)

And under N. Y. Laws 1904, chap. 538, providing for registering and regulating the speed of automobiles in the state, and allowing cities and villages to provide by ordinance for regulating the speed, provided they fix the same speed limitations for all other vehicles, and also post a notice showing the speed limit, and fix the penalty for all vehicles alike, it was held that the local authorities could pass ordinances. *People ex rel. Hainer v. Keeper of Prison*, 121 App. Div. 645, 106 N. Y. Supp. 314, Reversing 55 Misc. 611, 106 N. Y. Supp. 960.

An ordinance prohibiting physicians to employ drummers was held to be valid. *Burrow v. Hot Springs*, 85 Ark. 396, 108 S. W. 823. This was under the power to prohibit and punish any act which the laws of the state make a misdemeanor, and to impose penalties not exceeding the penalties imposed by the state statutes.

A state law prohibiting the driving of automobiles in a thickly-settled city or village at a greater speed than 12 miles an hour was held not to render invalid an ordinance prohibiting a speed greater than 6 miles an hour, under the power to regulate and control the use of the streets. *Bellingham v. Cissna*, 44 Wash. 397, 87 Pac. 481.

6. Peace and good order.

An ordinance for assault and battery, imposing the same punishment as was inflicted by the general laws of the state, was held valid, where the authority to enact such ordinance was conferred upon the city by its charter. *Amboy v. Sleeper*, 31 Ill. 499.

A conviction for disturbing the peace was held valid, notwithstanding a state statute relating to the same kind of offense, under

a charter giving power to pass an ordinance for the preservation of peace and good order. *Lebanon v. Gordon*, 99 Mo. App. 277, 73 S. W. 222. It was said that an acquittal or conviction would not be a bar to a prosecution by the state.

A city charter giving full power authorized an ordinance against carrying concealed weapons, although the state law also provided a penalty. *Abbeville v. Leopard*, 61 S. C. 99, 39 S. E. 248.

b. Two distinct offenses.

In some cases holding the ordinance valid the rule is asserted that the same act may constitute two offenses,—one against the municipality and one against the state.

An ordinance prohibiting the keeping of a tippling house was held not to conflict with a subsequent constitutional provision by which the manufacture and sale of liquors as a beverage were entirely prohibited. The charter gave the city power to restrain prohibit, and suppress tippling shops. It was held that, so far as "restrain" included the power to restrain by license, the Constitution superseded that clause; but, as to "prohibit and suppress," there was no conflict between the charter and the state law passed to carry into effect the provisions of the Constitution. *Yankton v. Douglass*, 8 S. D. 440, 66 N. W. 923. The court held that an act might constitute a penal offense under the laws of the state and further penalties might be imposed for its commission by municipal laws, and the enforcement of one would not preclude the enforcement of the other.

And a city charter authorizing the city council to levy and collect a license tax on liquor sellers, and a statute authorizing the county commissioners to collect a license on sales of liquors in quantities of less than one quart, were held not to conflict, and the county license was held to be no bar to a prosecution under the ordinance providing a penalty for the failure to secure such license. Both provisions were held to be police regulations,—one by the police power of the territory and the other by the police power of the corporation; but it was held that so much of the ordinance as punished by imprisonment was void, because such power was not conferred by the charter; but the remainder of the ordinance was valid. *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577. The court said: "The city cannot authorize or make legal the sale of liquors therein, because the territorial law prohibits the sale without a license from the county; yet it is competent for the city to further regulate and even prohibit the sale by the drink. . . . The same act may constitute two offenses and the defendant be liable to a punishment for both."

In *Howe v. Plainfield*, 37 N. J. L. 145, and *State, Riley, Prosecutor, v. Trenton*, 51 N. J. L. 498, 5 L.R.A. 352, 18 Atl. 116, where the charter gave the power to regulate or prohibit the sale of liquor, and imposed a fine for a violation of the ordinance, the de-

fendant insisted that it was void because depriving him of a jury trial; but it was held that an act might be an offense against the municipality and also one against the state.

A statute prohibited the sale of liquor within a certain town and provided punishment by indictment. A subsequent act authorized the town trustees to pass by-laws for the suppression of tippling houses. It was held that both acts were in force and that the party was liable to indictment. The court said that if there had been a conviction in the police court, it should have been pleaded in bar, and further said: "This court has heretofore recognized the rule that the existence of a valid city ordinance for the punishment of a misdemeanor does not necessarily supersede or invalidate a state statute against the same offense, and that there may exist in different courts concurrent jurisdiction to inflict different penalties, by different proceedings, for the same offense." *Hord v. Com.* 17 Ky. L. Rep. 570, 32 S. W. 176.

And under the charter, La. act 20 of 1882, authorizing the city to punish the sale of adulterated drinks, it was held that act 82 of 1882, making it an offense against the state to sell adulterated foods and drinks, did not repeal the authority given in the charter, and it was not necessary to decide whether or not the state law applied to this city, or whether a person could be put in jeopardy twice. *State v. Labatut*, 39 La. Ann. 513, 2 So. 550; *State v. Callac*, 45 La. Ann. 27, 12 So. 110.

The same was held in *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187, where it was held that the act was a separate and distinct offense from that which would have been charged under the state law.

Approving this case, it was held in *Amite City v. Holly*, 50 La. Ann. 627, 23 So. 746, that a prosecution under an ordinance for selling liquors without a license, authorized by the charter giving municipal corporations power to pass ordinances relative to the sale of liquor without first obtaining a license, was valid, although the state statute provided for a similar offense. The only difference between this case and the *Fourcade* Case was that, in this case, the state law denouncing the offense was enacted prior to the enactment of the statute conferring power on the city; but this was held not to affect in any way the legal principle involved. They both could stand and be enforced at one and the same time.

And, under the express power granted in the charter, a city ordinance against disorderly persons and lewd women was sustained. *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656. No reference was made to a state statute. The court said: "She was punished for an offense against the decency and morals of Hagerstown, and not against those of the state; she offended within the 'corporate limits,' and for such offense she was made to answer. This did not wipe out

all responsibility for the offense to the dignity and sovereignty of the state."

And, under the power given in the charter for the suppression of vice and for the prevention of crime, and to suppress disorderly houses and houses of ill fame, and provide for the arrest and punishment of keepers, it was held that an offense proceeding from an act which also constituted an offense under the general laws was not, for that reason, to be considered the same offense, because the two were distinct in their legal character, both as to the nature and quality of the offense and the jurisdiction offended against. *State v. Lee*, 29 Minn. 445, 13 N. W. 913. So it was held that a conviction under an ordinance was no bar to an indictment. In this case *Berry, J.*, overruled his former opinion in the case of *State v. Oleson*, 26 Minn. 507, 5 N. W. 959, where he held that such an ordinance was invalid, and the judges were divided as to the effect of such an ordinance.

And, under the power to define vagrants and to suppress and punish vagrants, it was held that an ordinance was valid, although Mont. Penal Code, § 1155, also defined vagrancy, and provided a punishment. *State ex rel. Butte v. District Court (Mont.)* 95 Pac. 841. In this case the court said: "An act may be made a penal offense under the statutes of a state and further penalties may be imposed for its commission or omission by municipal ordinance."

So, under a charter to suppress vice and immorality, and to suppress and restrain disorderly houses, an ordinance providing a fine upon conviction was held valid although the same offense was a misdemeanor under the state law. This was on the ground that an act might constitute a petty offense against the municipality which might be quasi criminal, and also an offense against the state. *Ogden v. Madison*, 111 Wis. 413, 55 L.R.A. 506, 87 N. W. 568.

And, under the power to restrain gaming, it was held that an act might be a penal offense under the laws of the state, and that further penalties could be imposed for its commission by by-laws or ordinances, and the enforcement of one would not preclude the enforcement of the other. *State ex rel. Milwaukee v. Newman*, 96 Wis. 258, 71 N. W. 438.

An act conferred power on the city of Chicago to suppress gambling houses; and an ordinance in pursuance thereof was held not a bar to an indictment under the state law for keeping a gambling house. *Hankins v. People*, 106 Ill. 628. The court said: "That the legislature may rightfully declare the same act to be two offenses, and to be punished as such, has long been the settled law of this state. . . . The limit of the fine a city or village can impose under the general act of incorporation is \$200, and the imprisonment not more than six months; hence, it cannot be inferred, under any circumstances, the city has jurisdiction to impose the penalty for the second and third offenses prescribed by this section. When jurisdiction was conferred on the city, it was to enable it to define and punish the

keeping a gaming house as an offense against the city and its inhabitants, and not to yield the power of the state to the municipality."

And, under a charter authorizing the city to prohibit keeping open stores on Sunday, a conviction under an ordinance was sustained although there was a state statute on the subject. This was on the ground that the legislature regulated the subject for the whole state, and the city government made such local regulations as they thought fit for the good order and peace of the city. The court said that the defendant was subject to both laws and amenable to the penalties. *St. Louis v. Cafferata*, 24 Mo. 94.

In *State v. Cowan*, 29 Mo. 330, the case of *St. Louis v. Cafferata*, supra, was distinguished, as that case merely decided that a certain ordinance was not repugnant to a general law.

The late decisions do not follow *State v. Cowan*, supra, as they now hold that actions for penalties under an ordinance are civil actions. (See subd. IV. b.)

And, under the power given in a charter to fix and collect a license tax upon solicitors, it was held that an ordinance was not invalid although a state law required a county license. *Ex parte Siebenhauer*, 14 Nev. 365. This was because the same act might constitute an offense against the state and also against the municipality.

Ill. Crim. Code, § 221, providing that it is a public nuisance to obstruct a public highway, although enacted after Ill. Rev. Stat. 1874, chap. 121, § 58, making the obstructing of a highway a nuisance, punishable by suit in the name of the town for a penalty, was held not to repeal the former, and it was held that it was within the power of the legislature to create two or more offenses, each of which was punishable by itself, and that a conviction under either statute would be no bar to a conviction under the other. *Wragg v. Penn Twp.* 94 Ill. 11, 34 Am. Rep. 199. This action was brought by a town to recover a penalty.

In *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516, where it was held that an ordinance was not invalid because not providing for a jury, but that a penalty of fine "and" imprisonment was void because the statute conferring the power to punish provided for fine "or" imprisonment, it was said: "The legislature may undoubtedly delegate to municipal corporations power to adopt and enforce by-laws or ordinances on matters of special local importance, even though general statutes exist relating to the same subjects. An ordinance must be authorized, and must not be repugnant to a statute in force over the same territorial area; but, if there be no other conflict between the provisions of the statute and ordinance save that they deal with the same subject, both may be given effect. The resulting or correlative doctrine is now too firmly established to admit of serious question that the same act may constitute two offenses, viz., a crime against the public law of the state, and also a petty offense against a

local municipal regulation. The weight of authority likewise fairly sustains the view that a prosecution and punishment for one of these offenses is no bar to a proceeding for the other."

c. Additional penalties.

Municipalities are held to have the right, when so authorized, to impose new and additional penalties.

So, a city ordinance against selling liquor on Sunday, under a charter authorizing regulation of all persons vending liquor, was held valid, on the ground that the legislature might authorize the municipal government to impose new and additional penalties for acts already penal by the laws of the state. *State v. Ludwig*, 21 Minn. 202.

And in *Mankato v. Arnold*, 36 Minn. 62, 30 N. W. 305, where it was held that a prosecution under a city ordinance could be had without a jury, the court said: "A city may be clothed with plenary power to regulate and prescribe reasonable conditions under which certain kinds of business, as that of auctioneers, druggists, dealers in spirituous liquors, etc., may be conducted; and its right to enforce its lawful ordinances in respect to the same by appropriate penalties is not, we think, affected by the existence of general statutes upon the same subject, in which the state undertakes to regulate and restrict the same kinds of business, and to provide penalties for infractions of such statutes."

In *Wood v. Brooklyn*, 14 Barb. 425, where it was held that a city ordinance prohibiting selling liquor on Sunday contravened the state law allowing taverns to sell to guests, the charter authorized the prohibition of the sale of liquor by unlicensed persons. The court said: "There is undoubtedly good reason why city corporations should be authorized to impose penalties in addition to those inflicted by the laws of the state. Particular acts may be far more injurious, while the temptation to commit them may be much greater, in a crowded city than in the state generally. They consequently require more severe measures for prevention. State laws are, of course, for the general good, and cannot always answer the peculiar wants of particular localities. The power of making laws of general operation belongs exclusively to the legislature of the state; but local legislation may be delegated to municipal corporations. Their acts under the power are valid when there is no conflict, and super-added penalties are not inconsistent with those previously imposed."

In *Ex parte Hong Shen*, 98 Cal. 681, 33 Pac. 799, the case of *Wood v. Brooklyn*, 14 Barb. 426, was distinguished, as there a statute prohibited the sale of liquor on Sunday to any but lodgers and travelers, and the ordinance of the city of Brooklyn provided that no person should sell liquor on Sunday; and therefore these two provisions—one permitting and the other prohibiting—were in direct conflict.
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But it was held that this ordinance was valid where the defendant had not a tavern keeper's license. *Brooklyn v. Toynbee*, 31 Barb. 282.

In *Moundsville v. Fountain*, 27 W. Va. 182, it was held that an ordinance, under an express power, requiring a town license to sell liquor, was valid although the state law required another license; and that the legislature could authorize the authorities of the town to provide by ordinance for the punishment of all offenses by a summary proceeding, whether they be crimes or not, and whether, if crimes, they are punished by the state by fine only or by fine and imprisonment, provided that the defendant is allowed to appeal to a court where the case can be tried by a jury. But it was held that an ordinance could not be authorized to punish by imprisonment a crime which the state punishes by imprisonment. The court said: "And the legislature may authorize the municipal authorities to do this, though the offense against the town or city, where punishment is authorized to be provided for by an ordinance, be an offense which the state does not punish as a crime, or an offense which the state does punish as a crime, but does not punish by imprisonment. As, for example, assault and battery in this state, which, as a crime, is punished only by fine, may be punished by a town ordinance by imprisonment."

In *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A. 413, 41 S. E. 197, the case of *Moundsville v. Fountain*, supra, providing that municipal corporations may punish for unlawfully retailing liquor, was distinguished, as there the statute expressly gave power to such corporations to impose a license tax, from which it resulted that the council should have power to enforce its regulation.

And, under power to suppress and prohibit bawdy houses, an ordinance imposing a penalty was held valid although a statute also provided for such an offense. *Wong v. Astoria*, 13 Or. 538, 11 Pac. 295. The court said: "The notion that a municipal corporation has no right to prescribe a penalty for the doing an act that is criminal in its nature, or which is a crime under the general laws of the state, cannot be upheld by authority or principle."

An ordinance imposing a penalty for using a sidewalk, enacted under express power given in the charter, was held valid in a civil suit to recover the penalty, notwithstanding a subsequent statute making the violation of the ordinances in that city a misdemeanor. *New York v. Hyatt*, 3 E. D. Smith, 156. The court said: "Here the corporation, in virtue of its charter, imposes a penalty for the breach of its authority and ordinance, and collects the debt which such violation creates in its favor. The state punishes the offender for the public wrong. In my opinion the statute in question in no wise conflicts with or impairs the right of the corporation in this respect."

And, under the power to make ordinances relating to weights and measures, it was

held that the fact that the ordinance in question superadded a penalty for acts penal by statute did not render the ordinance invalid, as a municipal government could be authorized to pass ordinances imposing new and superadded penalties for acts already penal by the laws of the state. *New York v. Marco*, 58 Misc. 225, 109 N. Y. Supp. 58.

d. Concurrent jurisdiction.

Some cases hold that the jurisdiction under police power may be concurrent, and that it is no defense in a prosecution to allege that the defendant is liable to a prosecution in another forum. The question whether or not a prior conviction would be a bar to a subsequent prosecution was not involved in these cases.

A charter granting power to license liquor sellers and to punish violators by fine was held no defense to an indictment. *Wightman v. State*, 10 Ohio, 452. No ordinance was shown. The court said: "Under the general law the measure of punishment may be greater, and the mode of effecting it different; but still we apprehend that distinct tribunals may have concurrent jurisdiction, in the absence of any expression clearly indicative of the intention to confer it exclusively upon the corporation. It is said by counsel, if this concurrent jurisdiction is sustained, a man may be twice tried for the same offense, and twice subjected to conviction and punishment. This does not seem to us to follow; but it is clear that a fine assessed by either jurisdiction, the court of common pleas, or by the authority of the corporation, would be a bar to another prosecution for the same offense in another jurisdiction."

In a prosecution under the state law for keeping a gambling house, it was claimed that the power given to restrain, prohibit, and suppress games and gambling houses gave the city the exclusive power to punish the keepers of gambling houses; but it was held that such power was not exclusive, and could not, by implication, be extended to nullify the plain provisions of a statute not in conflict with it. *Rice v. State*, 3 Kan. 141. The court said: "It is not necessary in this case to decide whether both can punish for the same act; but we have no doubt but that the one which shall first obtain jurisdiction of the person of the accused may punish to the extent of its power."

And the power given in the city charter over the subject of gaming was held not to repeal the general law, and an ordinance in relation to the same was not a bar to an indictment under the state law. *Berry v. People*, 36 Ill. 423. The court said: "The jurisdiction is concurrent, and judgment in a case brought by the city for a violation of this ordinance would be a bar to a recovery by the state for the same cause."

Referring to the case of *Berry v. People*, supra, the court, in *Wragg v. Penn Twp.* 94 Ill. 11, 34 Am. Rep. 199, said that, in *Fant v. People*, 45 Ill. 259, the court receded from 17 L.R.A. (N.S.)

the position taken in *Berry v. People*, 36 Ill. 423, and declined to decide whether the ordinance and state law could be enforced together. (But in this latter case there had been no judgment under the ordinance, and what was said in regard to that was only a dictum.)

In *Hankins v. People*, 106 Ill. 628, it was said that *Wragg v. Penn Twp.* supra, overruled *Berry v. People*, supra.

The power conferred on a city to provide for the inspection and sealing of weights and measures, and to enforce using proper weights and measures, was not repealed by implication by a subsequent state statute on the same subject. *Spring Valley v. Spring Valley Coal Co.* 71 Ill. App. 432. The court said: "In matters of this nature, the state and municipal authorities have concurrent jurisdiction, and, in the absence of a prosecution by the city, the state may interfere. It has never been held, so far as we are aware, that the granting of these powers to municipal authorities withdrew original jurisdiction upon these subjects from the state." In this case it was also held that the fact that the city ordinance and the state law differed in maximum and minimum penalties imposed did not make a conflict.

The authority in the charter to prohibit, prevent, and suppress keeping a house of ill fame was held valid, although the state statute made the offense of keeping such a house a felony. *People v. Hanrahan*, 75 Mich. 611, 4 L.R.A. 751, 42 N. W. 1124. The court said: "The local act may be exclusive of the general law, and operate to repeal it by implication; as where its provisions are repugnant to or inconsistent with the general law. Both laws may be concurrent; as where there is no repugnance, or where one is merely auxiliary or cumulative to the other. In the former case, there can be no prosecution except under the local law. In the latter case, prosecutions may be instituted under either law, and the court that first acquires jurisdiction over the person of the accused has exclusive jurisdiction to hear, try, and determine the case; and a conviction for an offense which is the same in both laws will be a bar to a prosecution for the same offense under the other law. I think the ordinance in question is valid, and that the charter provisions authorizing its enactment were not repealed by implication, but are in force and valid."

e. Different regulations and offenses.

Some cases hold the ordinance valid on the ground that the police power of the city requires different regulations from that of the state. In some of the cases the ordinance was upheld on the ground that the offense could be distinguished from that covered by the general law.

So, the legislature was held to have the power to authorize the city council to pass ordinances in relation to keeping open tipping houses on the Sabbath Day, although

there was then in existence a general penal statute on this subject. *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564. In this case the prior Georgia cases holding apparently the contrary were distinguished on the ground that in none of them was there any express grant of authority, but that the ordinances were enacted under the general welfare clause, and the deduction is made that where there is an express grant of authority the act may be an offense against the peace and quietness of the city in a different way from which it would be an offense against the dignity of the state.

In *Kassell v. Savannah*, 109 Ga. 491, 35 S. E. 147, the case of *Hood v. Von Glahn*, supra, was distinguished, as there the conviction was for keeping open the doors of a retail shop, and the question as to whether or not a barkeeper was amenable to the municipal code for violating a state law was not made in that case.

So, under *Idaho Const. art. 12, § 2*, authorizing counties, cities, or towns to make and enforce police, sanitary, and other regulations not in conflict with the charter or with the general laws, it was held that an ordinance for the offense of battery was valid and did not contravene the general law, although battery was a crime under the general criminal statutes of the state. *State v. Quong*, 8 Idaho, 191, 67 Pac. 491. The court said: "The municipal government may not take from the citizen any constitutional right,—has no power to do so,—yet, by the express provisions of § 2, article 12, the power to make and enforce sanitary and police regulations is expressly given to cities and towns. The object of the provision is apparent, its necessity urgent. The burden of policing the different cities should not be thrown upon the state, nor upon the county in which the particular city in question may be situated."

In *Monroe v. Meuer*, 35 La. Ann. 1192, which was a prosecution under a city ordinance for keeping a disorderly house, under a charter giving authority to preserve peace and good order and to abate nuisances, it was held that the legislature had power to confer such authority on towns and cities, under La. Const. arts. 92, 136. The court said that the distinction between crimes against the state and violation of municipal ordinances touching the mode of punishment was clearly recognized.

And under *Iowa Code, § 456*, providing that cities have power to prevent riots, noise, disturbances, or disorderly assemblies, it was held that an ordinance providing that the keeping of a house where loud noises are permitted is a nuisance, and prescribing punishment, was valid, as this was not covered by any state statute. *Centerville v. Miller*, 57 Iowa, 56, 10 N. W. 293.

And under express power given, an ordinance imposing heavier penalties than the state statute was held valid. *Polinsky v. People*, 73 N. Y. 65, affirming 11 Hun, 390. This ordinance provided against bringing impure milk into the city for sale. The statute prohibited selling impure milk. The 17 L.R.A. (N.S.)

court said: "But it may well be, that if the legislature was dealing directly with the subject, it might be considered that the offense of bringing impure milk into the city for sale, by producers or large dealers, deserved severer punishment than the sale of it by the small dealers, to whom they furnished it."

f. Superseding statute.

If the general law is superseded by a particular charter as applied to that locality, the ordinance will, of course, prevail, and there can be only one prosecution.

So, under *Scates's Comp. Stat. (Ill.) 206*, providing that incorporated towns have the power to prohibit the sale of liquor within their limits and have the exclusive privilege of granting licenses, it was held that, if the defendant was within the provision of the ordinance, he could not be punished under the state law. *Bennett v. People*, 30 Ill. 389. The court said: "For the reason that this whole subject has been committed by law to incorporated towns, and the town of Salem, having acted upon it, by passing the necessary ordinances, an indictment for the offense alleged to have been committed in that town cannot be maintained."

In *Seibold v. People*, 86 Ill. 33, the case of *Bennett v. People*, supra, was distinguished, as there the charter conferred exclusive jurisdiction upon the municipal authorities and was therefore held to operate as a repeal of the general law within the municipality. In this case the charter merely conferred concurrent authority.

And, under *Illinois township law of 1861, art. 4, § 5*, granting to a town, at a town meeting, power to prohibit cattle running at large, and to provide penalties, it was held that an action under this act, inconsistent with the general law, superseded the general law. *Westgate v. Carr*, 43 Ill. 450.

g. Ordinances conflicting with statutes.

Where a statute prohibits or allows certain acts to be done, it is held that an ordinance conflicting with the statute will be invalid.

So, under a charter authorizing by-laws and giving power to close saloons at such hours as the common council designated, it was held that the council had power to pass a by-law closing saloons in certain hours of the night, although a statute forbade the sale of liquor, but did not prohibit the keeping open of the places where it was sold except on the Sabbath. *State v. Welch*, 36 Conn. 215. In this case it was held that the statute did not apply to the evenings of week days, and consequently did not interfere with the operation of the by-law on those evenings. The court said: "Both, however, cannot be enforced in respect to the same act, so as to subject a party to a double penalty. In such cases the superior jurisdiction would ordinarily prevail to the exclusion of the inferior. But the statute does not render the by-law wholly

inoperative. The most that can be claimed is that it is inoperative so far as its operation interferes with the operation of the statute."

The subsequent passage by the state of a statute defining an offense against which a city had previously been authorized to make ordinances was held to repeal the power of the city, and the offense charged—soliciting orders for liquors—was not one that in its nature, constituted separate and distinct offenses,—one against the laws of the state and the other against the city. *Strauss v. Waycross*, 97 Ga. 475, 25 S. E. 329.

And, under Iowa Code, § 2455, authorizing cities to levy additional taxes and adopt rules and ordinances for further regulating and controlling the liquor traffic, not in conflict with this chapter, and providing that saloons shall be closed on election days, it was held that an ordinance closing saloons on election days and fixing a fine of \$50 was in conflict with the state law, as that subject was fully covered by the general statutes, and the fine was much less than that imposed by the statute, and the enforcement of the ordinance would have a tendency to impair the administration of criminal justice. *Iowa City v. McInnery*, 114 Iowa, 586, 87 N. W. 498. It was further held that, as the statute itself required the closing of saloons on election days, an ordinance requiring the same thing would not be a further regulation.

In *Avoca v. Heller*, 129 Iowa, 227, 105 N. W. 444, the case of *Iowa City v. McInnery*, supra, was distinguished, as there the ordinance prescribed a different penalty from the statute, and was conflicting.

And, under power to close and regulate dramshops, an ordinance fixing the hours that liquor could not be sold on Sunday was held invalid, and no defense to a prosecution under the state law prohibiting keeping open on Sunday. *Angerhoffer v. State*, 15 Tex. App. 613.

In *Flood v. State*, 19 Tex. App. 584, *Overruling Craddock v. State*, 18 Tex. App. 567, it was held that a charter power to close drinking houses, etc., on Sunday, and prescribe hours for closing them, did not authorize an ordinance allowing sales contrary to Tex. Penal Code, art. 186, prohibiting sales on Sunday.

And, under the authority to prohibit the doing of any regular business on the Sabbath Day, an ordinance not containing the same exemptions as are contained in the Code was held void. *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826. This was on the ground that it would repeal by implication the general law.

The charter of a village, authorizing it to regulate victualing shops, was held to be inconsistent with the general statute requiring a town license, and it was held that the special act superseded the general law as to that village. *St. Johnsbury v. Thompson*, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571.

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The enactment of a general law in regard to shell fish, after the power had been conferred upon the borough, was held to show that the legislature intended to take the regulation of the matter out of the hands of the corporation, and the by-law was held invalid. *Southport v. Ogden*, 23 Conn. 128.

And, under the power to regulate and restrain the speed of cars passing through the city, it was held that an ordinance regulating the speed at one mile an hour less than under the statute was prohibitory and repugnant to the statute, and therefore void. *Horn v. Chicago & N. W. R. Co.* 38 Wis. 463.

And where a statute licensed pool selling, it was held that an ordinance prohibiting the same under the power to suppress gambling was invalid, where the charter provided that the penal laws of the state should not be repealed or suspended. *Ex parte Ogden*, 43 Tex. Crim. Rep. 531, 66 S. W. 1100; *Ex parte Powell*, 43 Tex. Crim. Rep. 391, 66 S. W. 298.

h. Ordinances in excess of power.

The power granted to make ordinances must be strictly pursued, and ordinances are held invalid where they are in excess of the power granted. Some cases hold that the power "to suppress" does not include "prohibit" where there is a general penal law on the same subject.

A charter authorizing the city to regulate the sale of liquor and issue licenses was held not to confer the power to make an ordinance prohibiting the retailing of liquors without a license, which was an offense under Ga. Penal Code, § 431. It was further held that this section of the Code, making it a misdemeanor to sell liquor without a license, and providing that no person shall be liable to indictment who has been tried by the corporate authorities, did not confer on every municipal corporation the power to prescribe punishment, nor did it recognize power as existing, but it was applicable only where the legislature clearly granted corporate authorities jurisdiction. *Moran v. Atlanta*, 102 Ga. 840, 30 S. E. 298.

A municipal corporation was held to have no power, without valid legislative authority, to pass an ordinance for the punishment of an act which constituted an offense against the penal statutes of the state. *Kassell v. Savannah*, 109 Ga. 491, 35 S. E. 147. In this case the power conferred was to pass all ordinances in relation to keeping open tippling houses on the Sabbath Day and in relation to selling liquor to slaves or free persons of color in the city. The ordinance required closing a barroom from 12 o'clock Saturday night until 12 o'clock Sunday night, and the conviction was had for selling liquor on Sunday. It was held that the legislative authority did not authorize legislation upon the sale of liquors on Sunday, as this was a penal offense against the state law, which prohibited pursuing ordinary callings on the Lord's Day.

In *Petersburg v. Metzker*, 21 Ill. 205, it was held that, under the charter of a town authorizing an ordinance, and providing such punishment as is or may be provided by law for like offenses against the laws of the state, the city or town could not provide a greater punishment or fine than was provided by the state law for the same offense.

Under Iowa Code, § 4013, providing that the crime of keeping a house of ill fame shall be punishable under the laws of the state, and Code, § 456, conferring upon cities the power to suppress and restrain houses of ill fame, it was held that a city had no power to punish for keeping such a house, as the power to suppress does not authorize a punishment. The power to suppress might be exercised by providing for closing the house, removing the nuisance, and other like proceedings, and the keepers made liable for costs and for fine for refusing assistance to the officers. *Chariton v. Barber*, 54 Iowa, 360, 37 Am. Rep. 209, 6 N. W. 528.

The power to suppress gaming was held not to authorize a city to pass an ordinance to define and punish the crime of gaming generally. *Re Lee Tong*, 9 Sawy. 333, 18 Fed. 253. The court said: "Even if it be admitted that authority to suppress gambling houses and gaming would empower the council to define and punish the crime of gaming, if the law of the state was silent on the subject, still, when the general law of the state has defined the crime of gambling and keeping a gambling-house, and prescribed the punishment therefor, the power of the council to suppress must be exercised within those limits. The council cannot suppress a game that the general law has not prohibited. Its power to suppress 'gaming' must be understood as only applicable to games which the state has made illegal. Nor do I think it can suppress such games by prescribing a different or additional punishment therefor from that prescribed by the state."

The power in a charter to make ordinances to secure the inhabitants against violation of law and the public peace, to suppress gambling, and generally to provide for the safety, prosperity, and good order of the city, was held not to authorize an ordinance to punish gambling. *Mt. Pleasant v. Breeze*, 11 Iowa, 399. The court said: "It is true that the effect of the suppression may be to secure inhabitants against the evils named, but it is to be done by their suppression, and not by laws providing for their punishment as misdemeanors."

And, under the power given by Iowa Code, § 456, to cities and towns to abate a nuisance, it was held that a city had no power to punish for maintaining a nuisance, as Iowa Code, § 489, provided a punishment by the state. *Nevada v. Hutchins*, 59 Iowa, 506, 13 N. W. 634; *Knoxville v. Chicago*, B. & Q. R. Co. 83 Iowa, 636, 32 Am. St. Rep. 321, 50 N. W. 61. 17 L.R.A. (N.S.)

II. Where power to enact ordinance was not stated.

a. Generally.

Where the power to enact the ordinance is not stated in the opinion, it is supposed that the ordinance was enacted under the general welfare clause; but, as that question is not certain, it is thought best to group that class of cases by themselves. Quite a large number of cases sustain the validity of the ordinance without discussion other than that one is for the peace and good order of the city and the other for the peace and dignity of the state. Other cases hold that the penalty under the ordinance is a civil proceeding.

So, an ordinance against keeping a faro table was held properly enforced, although the same offense was provided for under a previous law. *McLaughlin v. Stephens*, 2 Cranch, C. C. 148, Fed. Cas. No. 8,874.

And an ordinance against selling lottery tickets was sustained although the state statute provided a different penalty. *Kansas City v. Hallett*, 59 Mo. App. 160; *Kansas City v. Zahner*, 73 Mo. App. 396. The ordinance fixed the penalty at from \$25 to \$250, and the state statute at not exceeding \$1,000. The charter provision was not set out.

And a city was held to have the power to enact and enforce an ordinance against disturbing public worship although a state statute covered the same kind of offense, in *Talladega v. Fitzpatrick*, 133 Ala. 613, 32 So. 252. This was on the ground that the offense against the corporation and that against the state were distinguishable, the one intended for the peace and good order of the city, and the other for the maintenance of good government and the dignity of the state.

Mich. Const. art. 13, § 12, provides that the fines collected for breaches of penal laws shall be applied to township libraries. The charter authorized a police justice to try for vagrancy, disorderly conduct, and violations of ordinances for breaches of the peace, and imposed fines, and the ordinance authorized the police justice to try and punish for vagrancy, disorderly conduct, and drunkenness. It was held that fines collected for these offenses were for breaches of the "penal laws," notwithstanding there was a state statute in regard to these offenses. *Wayne County v. Detroit*, 17 Mich. 390. The question as to the power to make these ordinances was not discussed. It was also held that the city charter was the statute imposing the penalty.

In *People ex rel. Fennell v. Bay City*, 36 Mich. 186, where the question was as to whether fines collected for violations of city by-laws were for violations of the "penal laws," it was said: "It so happens that, on some subjects contained in these ordinances, there is state legislation also; and in one instance it is identical in substance with the ordinances (in regard to a class of drunkards); but it cannot be claimed that a state prosecution could be interfered with

or the penalty remitted by the corporation. How far a double jurisdiction may lawfully go in such cases is a question not before us. But, with this one exception, the city ordinances either punish by fine that which the state has not so punished, or impose punishment very different in degree. The charter does not permit most misdemeanors to be punished by ordinance as severely as under the state laws, and the penalties are very different, and the whole system is aimed at furthering local interests and redressing wrongs against the municipal policy."

An ordinance imprisoning a free negro who hired his own time was held valid although a state statute punished differently. *Hoggatt v. Bigley*, 6 *Humph.* 236. The charter does not appear in the case.

And, in *Seattle v. Pearson*, 15 *Wash.* 575, 46 *Pac.* 1053, it was held that a saloon ordinance fixing a minimum penalty was valid although the state statute fixed no minimum. The power in the charter was not referred to.

A city ordinance requiring railroads to have the bell rung more frequently than required by statute was held valid. *Gulf C. & S. F. R. Co. v. Calvert*, 11 *Tex. Civ. App.* 297, 32 *S. W.* 246. The charter giving power was not referred to in the case.

This case conflicts with *Louisville & N. R. Co. v. Com.* 117 *Ky.* 350, 78 *S. W.* 124, *Rehearing denied* in 25 *Ky. L. Rep.* 2050, 79 *S. W.* 275, where a city ordinance imposing a fine against a railroad company obstructing a highway for more than ten minutes was held void. The state statute made it unlawful to obstruct a highway for more than five minutes. (See *Horn v. Chicago & N. W. R. Co.* 38 *Wis.* 463, *subd. I. g.*)

A city ordinance imposing a penalty for an affray was held valid notwithstanding it was an offense against the penal laws of the state. *Ex parte Freeland*, 38 *Tex. Crim. Rep.* 321, 42 *S. W.* 295. A conviction under the ordinance was said to bar a further prosecution by the state. This ruling was on the ground that an affray was a petty offense and the ordinance imposed the same penalty as the Penal Code.

In *Platteville v. McKernan*, 54 *Wis.* 487, 11 *N. W.* 798, the question whether it was within the province of a municipal corporation to pass ordinances upon the same subject-matter as criminal statutes, with the same or different penalties, was not decided.

In *Burns v. La Grange*, 17 *Tex.* 415, the question as to whether or not two fines may be imposed, one by the state and one by the town, for the same act, was not decided. The act conferring jurisdiction on the mayor to try in a summary way was held unconstitutional.

In *Bogart v. New Albany*, 1 *Ind.* 38, it was held that a civil action for a penalty for retailing liquor in a city without a city license could be maintained, as the by-law only subjected the offender to an action of debt, and the case, therefore, differed from *Madison v. Hatcher*, 8 *Blackf.* 341.

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An ordinance against cruelly beating an animal was held not void on the ground that a state statute covered the same offense. *St. Louis v. Schoenbusch*, 95 *Mo.* 618, 8 *S. W.* 791. The court said: "It is the well-settled law of this state that municipal corporations may, by ordinance, prohibit acts which are made misdemeanors under the general statutes of the state; and, for a violation of such ordinances, the city may maintain a proceeding in its own name to impose and collect a fine." The rule in *Missouri* is that a prosecution for a breach of an ordinance is a civil proceeding.

b. Two distinct offenses.

In some cases holding the ordinance to be valid the rule is asserted that the same act may constitute two separate offenses,—one against the municipality and one against the state.

So, where a new trial was granted in the police court for a conviction of selling liquors contrary to an ordinance, it was contended that the police court had no jurisdiction to grant a new trial. It was held that a prosecution for a violation of municipal regulations was within its summary jurisdiction as a police court, and offenses of greater moment were within its jurisdiction as a court of record. Selling liquor without a license was an offense against a municipal regulation, but it was also an offense against the general laws of the state, and a misdemeanor; and a prosecution for such an offense was a quasi criminal prosecution, and not within its summary jurisdiction, but within its jurisdiction as a court of record. *State ex rel. Hamilton v. Municipal Court*, 89 *Wis.* 358, 61 *N. W.* 1100.

In *Ogden v. Madison*, 111 *Wis.* 413, 55 *L.R.A.* 506, 87 *N. W.* 568, the court said: "The decision [*State ex rel. Hamilton v. Municipal Court*, *supra*] seems to assume that the act of selling intoxicating liquor without a license, contrary to a city ordinance, rose to the grade of a misdemeanor for no other reason than that it was also forbidden by the state law. Why this conclusion should follow is not pointed out. It is, as we have seen, contrary to the great weight of authority, and, followed to its logical result, would so blend the two offenses that a prosecution for one would be a bar to a prosecution for the other. When it is admitted that the same act constitutes an offense both against the city and against the state, and that both may punish, then it follows that each may punish in accordance with the rules of procedure prescribed therefor, unless some constitutional inhibition prevents."

In *O'Haver v. Montgomery* (Tenn.) 111 *S. W.* 449, in defining a misdemeanor it was said: "However, it may happen, and often does happen, that an offense against the city may also be an offense against the state, and both jurisdictions may punish."

c. Difference in regulations and offenses.

Some nice distinctions are made in considering ordinances that obviate the necessity of holding that the act is in violation of both ordinance and statute, by holding that, in the case under discussion, the ordinance was directed against some phase of the crime not covered by the statute. Other cases hold that the ordinance regulations are to meet a different requirement not contemplated by a general statute, as that the act might be more aggravated when committed in a municipality than in the state at large.

So, under an ordinance of the District of Columbia prohibiting the propulsion of horseless carriages at excessive speed, it was held that this was not the same offense as the common-law crime of driving through a crowded street at a fast speed, to the injury of persons, and therefore the constitutional guaranty of a jury trial did not apply. *Bowles v. District of Columbia*, 22 App. D. C. 321. It was said that municipal ordinances as such have nothing to do with the state, or the state with them, except that the state might override and nullify them, or might provide means for their enforcement, and that trial by jury was exclusively one of the processes of the state, and not of the municipality.

And Conn. Gen. Stat. § 2559, prohibiting a person keeping a place resorted to for gaming, was held not to cover the same act as a city ordinance imposing a penalty for keeping a place for the purpose of carrying on the game of policy. *State v. Flint*, 63 Conn. 248, 28 Atl. 28. In this case the court held that a conviction under the ordinance could be had although such place had never been resorted to or used, which was requisite under the state statute. The court said: "If the acts charged upon him in both proceedings were the same, the judgment in the first would be a bar to the second."

And a city ordinance against idling, loitering, and loafing was held not contrary to the penal laws of the state against vagrancy, as, under the state law, it was necessary to show that the accused was without means of support. *Taylor v. Sandersville*, 118 Ga. 63, 44 S. E. 845.

And, under an ordinance to prevent nuisances, a conviction for keeping a disorderly house was held not identical with the offense under the statute of keeping a disorderly inn, tavern, alehouse, gaming house, or brothel, on the ground that there was a large class of nuisances against public order not included in the statute which it was the duty of municipalities to suppress. *Municipality No. 1 v. Wilson*, 5 La. Ann. 747.

So, in *State v. Sherrard*, 117 N. C. 716, 23 S. E. 157, where an ordinance for the punishment of disorderly conduct was sustained, it was said: "Disorderly conduct, *per se*, is not forbidden by the general state law. There are acts amounting to disorderly conduct which come under the ban of

the general law, and there are other acts, not amounting to criminal offenses against the state, which would also be disorderly conduct. To this latter class of cases do city ordinances against disorderly conduct apply."

And, in *State v. Wilson*, 106 N. C. 718, 11 S. E. 254, an ordinance prohibiting the obstruction of water ways in a city was held valid although the state statute prohibited a nuisance. It was held that the ordinance was to prevent a nuisance. The charter power was not stated.

An ordinance against obstructing an officer in the discharge of his duties, and imposing a fine, was held to be valid, although the offense described was substantially the same as that of W. Va. Code of 1906, § 4317, relating to offenses against public justice. *Oceana v. Cook* (W. Va.) 60 S. E. 145. This was on the ground that where the state law defines an offense generally, without reference to the place where committed, and the act, when committed in a city, would be attended with aggravation, the corporate authorities may provide against it by ordinance, because that ingredient might not be supposed to be included in the state law.

d. Conflicting with the statute.

Some cases hold that, in the absence of power conferred in the charter, an ordinance covering the same subject as the general laws will be void. So, where the provisions of the ordinance and statute differ in regard to the same offense, the ordinance is held void as conflicting with the statute. Of course, in the absence of power, an ordinance prohibiting anything allowed by the statute will be held to conflict and to be invalid. In some of the cases the conflict is easily seen. But there are some cases that broadly lay down the doctrine that municipalities cannot legislate on matters made penal by the laws of the state. Some say it conflicts, others, that it is a usurpation of powers. It will be noticed that most of these cases are in California. The case of *Re Sic*, 73 Cal. 142, 14 Pac. 405, has been criticized and is not regarded as in accord with the weight of authority.

Cal. Penal Code, § 435, provides that any person who carries on a business for the transaction of which a license is required by any law of this state, without procuring such license, is guilty of a misdemeanor. An ordinance of the city and county of San Francisco required a license for carrying on a liquor business, and provided a fine and imprisonment for violation. It was held that the penalty clause was in conflict with the Penal Code, and was therefore void; but that the ordinance requiring the license, and the Penal Code making the failure to procure it a misdemeanor, would be read and interpreted together, and therefore so much of the ordinance would be enforced. *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747. Referring to the case of *Re Sic*, supra, the court said: "The case of *Sic* is not

like that before us. There the law did not refer or relate to the ordinance, but each provision was complete in itself, and provided for the punishment of the same act, and the objection was, that if both were valid, a man might be punished twice for the same offense. Nothing of the kind could happen under the provisions under consideration here."

In *Ex parte Mansfield*, 106 Cal. 400, 39 Pac. 772, it was held that the penal portion of an ordinance against selling liquor was void, as contrary to the Penal Code, which provided a different penalty; but that so much of the ordinance as required a license would authorize a punishment under the Penal Code.

And, an ordinance undertaking to punish acts which were punishable under the general laws of the state was held to be in conflict with such general laws and for that reason void. But a void penal clause which was independent from that part of the ordinance declaring the act to be a misdemeanor or was held not to vitiate a judgment, where it was in accordance with the general laws. *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86.

An ordinance prohibiting keeping open a business house or working on the Sabbath Day, excepting the sale of drugs and works of necessity, was held to conflict with Ga. Penal Code, § 422, providing that any person who shall pursue his business or the work of his ordinary calling on the Lord's Day shall be guilty of a misdemeanor. It was held that the municipal corporation had no power to legislate on any matter which was made penal by the laws of the state. But the ordinance was held valid so far as it relates to trading or trafficking by persons whose ordinary business did not consist in doing those things. It was also held valid as applied to keeping open business houses other than those excepted, but would not apply to keeping open a business house for the purpose of selling drugs. If, in this case, the store was kept open to sell drugs, and other things were sold, then the accused was guilty of a violation of the state law and could not be punished under the ordinance. *Penniston v. Newnan*, 117 Ga. 700, 45 S. E. 65.

An ordinance prohibiting maintaining a betting place was held invalid, in the absence of express legislative authority, as it was an act prohibited by Ga. Penal Code, § 398. *Thrower v. Atlanta*, 124 Ga. 1, 1 L.R.A.(N.S.) 382, 110 Am. St. Rep. 147, 52 S. E. 76. The court said: "The case of *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564, relied on by counsel for the city, and the more recent one of *Littlejohn v. Stells*, 123 Ga. 427, 51 S. E. 390, are not in point, for the reason that in those cases the municipal ordinances which were attacked had been authorized by express legislative enactment, while it is not claimed that the city in this case had any such legislative authority. Nor is the case of *Odell v. Atlanta*, 97 Ga. 670, 25 S. E. 173, in conflict with what is here held. The *dictum* of Mr. Jus- 17 L.R.A.(N.S.)

tice Lumpkin in the *Odell* Case, to the effect that the city, under the 'general welfare' clause of its charter, had the right to break up the 'business' of selling pools on horse races, was fully explained in the case of *Thrower v. State*, 117 Ga. 758, 45 S. E. 126, on the ground that the court in the first case mentioned was dealing solely with the legality of the alleged business or occupation, and did not have before it the question whether the city could make penal acts which were already prohibited by the state law against keeping gaming houses."

In *New York v. Nichols*, 4 Hill, 209, it was held that an ordinance requiring an inspection and weighing of hay contravened 1 N. Y. Rev. Stat. 574, §§ 5, 8, authorizing sale without inspection.

An ordinance of the city and county against smoking opium was held to conflict with the general law on this subject, and this was on the ground that the Constitution provided that no one should be twice put in jeopardy for the same offense. *Re Sic*, supra.

In *Hood v. Von Glahn*, supra, the case of *Re Sic*, supra, was distinguished on the ground that the question of the grant of power was not involved in that case.

In *State v. Preston*, 4 Idaho, 215, 38 Pac. 694, the case of *Re Sic*, supra, was not followed, as contrary to the weight of authority.

Where the state statute prohibited the offense of gambling and keeping gambling houses, it was held that an ordinance prohibiting the game of keno was not valid, as the municipality had no authority to impose a penalty on that which the state law had made punishable as an offense. *New Orleans v. Miller*, 7 La. Ann. 651. The power under which this ordinance was enacted does not appear in the case.

A by-law in regard to selling liquor without a license was held invalid, as the matter was covered by the statute law of the state. *Schroder v. Charleston*, 3 Brev. 533. It was held to be a usurpation of powers. This case was overruled in *State ex rel. Burton v. Williams*, 11 S. C. 288.

III. General welfare clause.

a. Generally.

Ordinances under the general welfare clause have been sustained in many cases, notwithstanding the offense was covered by the general laws. On this question, however, there is quite a conflict of authority. In the following cases the ordinances were held valid:

In *SEATTLE v. McDONALD*, which upheld the ordinance, the court said that there seemed to be a conflict of authority on this question, but the rule in this state was that an ordinance enacted by virtue of the municipality's general power was not superseded by a general law fixing and defining a punishment for the same act.

Cities were held vested by the general law for their incorporation, in Indiana, with the power to exact by ordinance a license

for retailing liquor, and such ordinance would not be inconsistent with the general laws of the state. *Lawrenceburg v. Wuest*, 16 Ind. 337.

And, under Iowa Code, § 680, giving municipal corporations power to provide for safety, and to improve the morals, order, and comfort of the inhabitants, an ordinance against assault and battery, prescribing the same punishment as the state statute, was held not inconsistent and was valid. *Avoca v. Heller*, 129 Iowa, 227, 105 N. W. 444.

And, under the general welfare clause, an ordinance provided a fine for keeping a dog that should bite any person. It was contended that the state law in civil actions required a *scienter*. It was held that the state law did not require a *scienter*, but that, if it had, the city had unquestionable power either to keep dogs out of the city, or to provide that any person keeping the same should be punishable for all damage to the peace and security of the city which might result, even without his fault. *Com. v. Steffee*, 7 Bush, 161.

And, under the general welfare clause, a city ordinance against slot machines was sustained, although a state law was in force, imposing a greater penalty. *New Orleans v. Collins*, 52 La. Ann. 973, 27 So. 532. La. Const. art. 188, declared gambling to be a vice. It was also held that an ordinance could provide a punishment for that which was also punishable under a state statute.

A conviction under a city ordinance for playing craps was held valid, notwithstanding the state statute prohibited the playing of the game and fixed a penalty. *Monroe v. Hardy*, 46 La. Ann. 1232, 15 So. 696. In this case the power delegated was to preserve good order and peace; and, as gambling was denounced by the Constitution as a vice, it was held that its regulation and prohibition were within the police power of the city, and, in such class of offenses, the power of the state and that of the municipal authorities to prohibit were held concurrent.

The power under the charter to provide for the general welfare, and to punish all practices dangerous to public safety and health, and for the preservation of public morals, subject to the limitation that the punishment should not exceed that provided by the state law for misdemeanors, was held to authorize an ordinance against running a lottery, although it did not contain the exception found in the Wash. Penal Code, § 139, providing that nothing herein shall apply to a lottery for charitable purposes. It was further held that an ordinance providing a punishment of not less than \$20 was not contrary to the state law, which provided a maximum punishment of \$500, but did not fix the minimum punishment. *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324.

So, under the power to pass police regulations, an ordinance against carrying concealed weapons was held valid, although it

did not contain the exceptions granted in the Penal Code. It was held that the exceptions would apply in the city. *Ex parte Boland*, 11 Tex. App. 159.

And a city ordinance against carrying concealed weapons was held valid although it did not make an exemption provided in a state law for the same kind of offense, where the accused was not prevented from urging the exemption. *Linneus v. Dusky*, 19 Mo. App. 20.

A charter giving power to make regulations for good order and government was held to cover authority to maintain peace, and an ordinance against carrying concealed weapons was valid although a state statute imposed a different penalty. It was also held that such ordinance did not conflict with the state law, and a conviction under the ordinance was affirmed. *Opelousas v. Giron*, 46 La. Ann. 1364, 16 So. 190.

A charter giving power to regulate the police of the city was held to authorize an ordinance punishing vagrants. It was held that the general laws of the state, authorizing a vagrant to be proceeded against before a justice of the peace, did not prevent the corporation making a local regulation on the same subject,—a subject affecting the well-being and prosperity of the community to as great an extent as almost any other within the control of the corporation. *St. Louis v. Bentz*, 11 Mo. 61.

And, in a suit for a writ of prohibition to prevent removal from office, it was held that, under the provisions of the city charter, under the general welfare clause, authorizing the imposition of other penalties, an ordinance providing for the removal from office was valid notwithstanding the state law punishing for such misconduct. *State ex rel. Reid v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 457.

A city ordinance against aiding an escape of persons confined, passed under the general welfare clause, was held valid notwithstanding a state statute on the same subject. *De Soto v. Brown*, 44 Mo. App. 148. The prosecution was held to be a civil action.

b. Two offenses.

There are a number of cases holding that, under the general welfare clause, an ordinance is valid on the ground that it creates and defines an offense against the municipality, and the state law creates a different offense against the state, although both offenses may be occasioned by the same act.

So, a city ordinance prohibiting drunkenness, similar to Iowa Code, § 1548, was held valid, as the same act might constitute an offense against the state and against the city, and be punished by both. *Bloomfield v. Trimble*, 54 Iowa, 399, 37 Am. Rep. 212, 6 N. W. 586.

In *Foster v. Brown*, 55 Iowa, 686, 8 N. W. 654, the case of *Bloomfield v. Trimble*, supra, was distinguished, on the ground that no express authority was conferred on the

plaintiff to punish any person for drunkenness, nor was the same prohibited; and it was therefore held, under the general powers conferred on cities and towns by Iowa Code, § 482 (general welfare clause), that the town might declare drunkenness an offense and punish anyone who violated the ordinance.

In *Neola v. Reichart*, 131 Iowa, 492, 109 N. W. 5, it was said that, under the power to enact ordinances for the safety, health, and morals of the corporation, an ordinance against riotous conduct and violent and profane language was valid although the same penalty was provided by the statute of the state, defining the same offense. In this case the prior Iowa cases are reviewed, and also the cases of other states, and the principle was announced that an act might constitute two offenses,—one against the state and the other against the city or town,—and that a conviction of one would not be a former jeopardy. It was also held that, under the general power conferred on cities and towns, an ordinance could be enacted although covered by the law of the state.

A city was held to have the power to pass ordinances although the offenses covered thereby were made penal by the statutes of the state prior thereto. *Van Buren v. Wells*, 53 Ark. 368, 22 Am. St. Rep. 214, 14 S. W. 38. In this case it was held that, when such acts were made penal by the state and the city or town, each act became a separate offense against the state and the municipality. It was further held that such authority could be delegated to a municipal corporation in general terms, and that the ordinances in question were not invalid because they made offenses punishable twice.

In *Theisen v. McDavid*, 34 Fla. 440, 26 L.R.A. 234, 16 So. 321, a city ordinance prohibiting business on Sunday was sustained although a prior state statute provided for a similar offense. This was on the ground that the municipal government could be clothed with legislative power to punish by ordinance any act made penal by the state law when perpetrated within the city; that it was no objection that it prescribed the same penalties; that the offender could be tried for the same act under the ordinance and the state law; that a conviction under one was no bar to a prosecution under the other, and that it was no objection to the municipal ordinance that the trial was without a jury. In this case the power was held to have been granted in the authority to pass ordinances to preserve the public peace and morals.

An ordinance against a breach of the public peace of the city was held to be valid notwithstanding the state provided a penalty for an assault and battery, as the municipality had the power to create an offense against municipal law out of the same act that constituted an offense against the state law, and the two were held to be distinct offenses. It was further held that the failure to secure a trial by jury did not render 17 L.R.A. (N.S.)

the ordinance invalid. *Hunt v. Jacksonville*, 34 Fla. 504, 43 Am. St. Rep. 214, 16 So. 398.

And, under the general welfare clause, an ordinance against bawdy houses was held valid, although the offense was indictable at common law. *State ex rel. Burton v. Williams*, 11 S. C. 288. It was said that there might be two offenses by the same act, and that *Schroder v. Charleston*, 3 Brev. 533, was overruled in *Heisembrittle v. Charleston*, 2 McMull. L. 233, and *Charleston v. Ahrens*, 4 Strobb. L. 241.

An ordinance of a town incorporated under the general laws, prohibiting the sale of liquor in quantities of less than one barrel without taking out a license, was held valid, notwithstanding a state law prohibiting the sale of liquor without a license in less quantity than one quart. *Byers v. Olney*, 16 Ill. 35.

And a conviction under a city ordinance for selling liquor without a license was held valid although the accused was under arrest for violations of a state law by the same act. *Anderson v. O'Donnell*, 29 S. C. 355, 1 L.R.A. 632, 13 Am. St. Rep. 128, 7 S. E. 523. The charter was not stated, but it was held that the same act might constitute two offenses. The case was reversed because the trial before the mayor and council on appeal was not by witnesses.

And, under general police powers, an ordinance against selling liquor was held valid although the charter provided that all persons selling liquor shall be liable to indictment. *McCormick v. Calhoun*, 30 S. C. 93, 8 S. E. 539. This was held to mean that there was no authority to license, and, if attempted, the person selling would still be liable to punishment by the state.

So, under the general welfare clause, an ordinance against maliciously meddling with or trespassing upon the property of another was held valid, on the ground that the same act might constitute an offense both against the state and against the municipality. *Brownville v. Cook*, 4 Neb. 101. But the title of the prosecution was held invalid, as all prosecutions must be in the name of the state.

c. Cumulative penalties.

In *State ex rel. Reid v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 457, where the question was as to the power of the city to remove an officer charged with dereliction of duty, it was held that nothing could more conduce to the good government and welfare of a city than that it should annex "other penalties" (than those enacted by the general laws of the state) for the punishment of its own officers,—than that incompetent and unworthy officers should be removed in a more summary way than that afforded by the method of procedure provided in the statutes.

d. Different regulations and offenses.

In many cases the ordinance was sustained on the ground that the offense cov-

ered by it was not the same as the statutory crime, although both offenses related to the same subject; that the ordinance covered matters omitted in the statute.

So, where the Penal Code made it an offense to sell liquor by the quart or retail without an oath and license from the corporate authorities of the city, and an ordinance provided for punishing without regard to license or oath, it was held to be prohibition pure and simple, and was valid. It was further held that if it was not valid, Ga. Code, § 4565, providing that no person shall be liable to indictment for violating this section in regard to keeping a tippling shop, where said person has already been tried by the corporate authorities for the same offense, would prevent a second trial and give the corporation jurisdiction. It was further held that the claim of the right to a jury trial was of no avail, as this was an offense against the city, and such provisions in the Constitution have never been held to apply to the police power of cities or towns under ordinances. *Hill v. Dalton*, 72 Ga. 314.

In *Moran v. Atlanta*, 102 Ga. 840, 30 S. E. 298, the case of *Hill v. Dalton*, supra, was distinguished, as there the ordinance absolutely prohibited the sale of liquor, and this was not the same as the Penal Code, which prohibited the sale of liquor without a license.

In *Kassell v. Savannah*, 109 Ga. 491, 35 S. E. 147, the case of *Hill v. Dalton*, supra, was distinguished, as there it was held that the ordinance against selling liquor did not provide for the same offense as that prescribed by the Code, which prohibited the keeping of a tippling house without a license, and the violation of the Sunday law was not involved.

A statute provided that, in case of local option, it should not be lawful to sell or give away liquor. An ordinance prohibiting the keeping of such liquor for the purpose of illegal sale was held not to cover the same ground as the state law, and was valid. *Mayson v. Atlanta*, 77 Ga. 662; *Menken v. Atlanta*, 78 Ga. 668, 2 S. E. 559.

And, under an act giving a city and village power to regulate the police and to pass and enforce all necessary police ordinances, it was held that an ordinance was valid which prohibited persons from keeping open their places of business for the purpose of selling goods on Sunday, notwithstanding Ill. Crim. Code, § 261, prohibiting such labor on Sunday as disturbs the peace and good order of society. *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857, 23 N. E. 454. The court said: "The police regulations of a village may differ from those of the state upon the same subject if they be not inconsistent therewith. . . . The ordinance does not prohibit what the statute permits."

And, under the general powers delegated to maintain the good order and government of a city, it was held that a municipal ordinance prohibiting the keeping open of any

doors by dealers generally on Sunday was valid, although the state law prohibited the dealer from pursuing his ordinary calling upon the Sabbath Day, and § 4461 of the Code provides a punishment for keeping open a tippling house on the Sabbath Day. *Karwisch v. Atlanta*, 44 Ga. 204. The court said: "The ordinance leaves his guilt on these matters to the state laws, but punishes the keeping of such stores open as an act independent of the violation of the state laws or Sunday statutes. The ordinance is to protect the people against the violation of the state laws."

An ordinance prohibited a laborer or tradesman from exercising any labor connected with his usual daily avocations on the Lord's Day, or opening any store for the sale of merchandise. It was held that the latter portion only was valid, as the prior portion was covered by the laws of the state, and a municipal corporation could not legislate upon subjects already made offenses by the laws of the state. *Rothschild v. Darien*, 69 Ga. 503.

In *Logan v. Childs*, 51 Fla. 233, 238, 41 So. 197, 198, where a party was arrested and fined for failing to destroy a cesspool, it was held that the ordinance was not shown to be in conflict with the public health law of the state, where the public health board declined to interfere with the municipal ordinance. Fla. Const. art. 15, § 3, conferring supervision of matters of public health on the state board, subject to legislative control, did not affect this.

In *Vason v. Augusta*, 38 Ga. 542, it was held that a city council, under the general power conferred for the security, welfare, and convenience of the city, and peace and good government, had the power to provide for punishment under their ordinances of such offenses as were not punishable under the laws of the state. In this case the Penal Code provided for punishing for maintaining a nuisance "after notice," and the city ordinance against maintaining a nuisance would be effective until after notice.

And, under the general welfare clause, an ordinance against being "drunk and disorderly" was sustained, although the general statutes provided for being "drunk and grossly intoxicated." *Ex parte Schmidt*, 24 S. C. 363. This was on the ground that the ordinance was local, and on the further ground that the two offenses were not the same.

And, under the general welfare clause, an ordinance against permitting a place, house, or room to be used for gambling, although a state statute defined a gambling house differently, and made provision for punishment, was held valid. *Greenville v. Kemmis*, 58 S. C. 427, 50 L.R.A. 725, 36 S. E. 727. The court said: "The state legislation upon the subject, even if construed as contended for by appellant, and the municipal legislation here in question, can both stand together, and there is no conflict whatever. The utmost that can be said is that the municipal corporation, under the authority

vested in it by its charter, has seen fit to make an act done within the corporate limits a criminal offense, which the legislature has not seen fit to constitute such an offense. Indeed, it is well settled, in this state, at least, that the same act may be made an offense both against the state and the municipal law."

e. Inconsistent and conflicting ordinances.

Ordinances under the general welfare clause that conflict with the general laws or are inconsistent therewith are held to be invalid. In North Carolina, it is held that all ordinances against offenses described in the general laws are in conflict therewith, and therefore void, unless passed under special power.

A charter conferring power in general terms to pass all by-laws not inconsistent with the Constitution and laws of the state was held not to confer the power to pass an ordinance making it a penal offense to sell spirits in quantities of a quart or more, to be drunk on the premises, as the state law authorized any citizen to sell liquor to white people in quantities of a quart or more, to be drunk anywhere. *Adams v. Albany*, 29 Ga. 56. The ordinance and the statute were inconsistent.

And, under the general welfare clause in the city charter, an ordinance defining one who fails to support himself or family as an idle or disorderly person was held void as against the domestic relation law of the state, and it was held that the punishment of idle or vagrant persons must be under La. Rev. Stat. § 3877, providing that idle persons who live without employment, and habitual drunkards who abandon, neglect, or refuse to support their families, shall be deemed vagrants. It was also held that the city ordinance must conform to this statute when punishing vagrants, and was therefore held to conflict with the laws of the state relating to the marriage contract. *State v. Burns*, 45 La. Ann. 34, 11 So. 878.

And, under the general welfare clause, an ordinance prohibiting the sale of liquor, in any licensed person on Sunday was held void, where the statute prohibited a sale by any person, and the punishment was greater under the statute. *State v. Langston*, 88 N. C. 692.

And the same was held in regard to an ordinance prohibiting the sale of liquor, in *State v. Brittain*, 89 N. C. 574.

And the same was held in regard to an ordinance against resisting officers, in *State v. Keith*, 94 N. C. 934.

So, an ordinance against gambling was held void, where the subject was covered by a statute. *State v. McCoy*, 116 N. C. 1059, 21 S. E. 690. The fact that the regulations were different was held to make no difference.

Under the general welfare clause, a Sunday ordinance was held invalid where it did not contain the exceptions mentioned in the 17 L.R.A. (N.S.)

statutes. *Canton v. Nist*, 9 Ohio St. 439. This was held to be inconsistent with the statute.

f. Ordinances in excess of power.

In the absence of power specifically given, ordinances relating to the same offenses as are covered by the general laws have been held invalid on the ground that they were in excess of power. In the cases following it was held that the general welfare clause did not authorize ordinances on matters covered by the general laws:

Thus, in *Ex parte Smith*, Hempst. 201, Fed. Cas. No. 12,967a, it was held that an act of incorporation authorizing an ordinance for the suppression of vice and immorality and for the well-being and good police of the town did not confer power to punish for an assault. It was further held that this charter did not delegate any power to make ordinances on the subject of offenses for the punishment of which the general laws provided.

And, where the state law provided for an offense and penalty, it was held that a city ordinance prescribing for the same offense and another penalty was void. It was held that, under the general grant of power delegated in the city charter, the city authorities could cover all cases not provided for by the paramount authority of the state. It was further held that the fact that a trial under the city ordinance would be without a jury was an objection to the power. *Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452.

The city authority, under a general grant of power, could not pass ordinances declaring acts offenses against the city which are punishable by the state statute. *Jenkins v. Thomasville*, 35 Ga. 145. The objections to such an ordinance were that it would punish the offense twice, and that the person would be deprived of the right to a trial by jury.

And, in *Kahn v. Macon*, 95 Ga. 419, 22 S. E. 641, which held that an offense against the municipal ordinance was not established by evidence, and that the defendant was properly held bound over for a state offense, it was said: "Where an act is punishable under a general law of the state, a municipal corporation cannot punish for it as an offense against municipality, unless there is an express legislative grant of authority so to do. . . . The claim that it was 'disorderly conduct,' however, rested wholly upon the fact that it was gambling,—a violation of the penal law of the state; and this fact, as we have shown, so far from being a reason why the corporation could punish for it as disorderly conduct, was a reason why the act could not be dealt with at all as an offense against the municipality."

And, *Braddy v. Milledgeville*, 74 Ga. 516, where it was held that there was no statute prohibiting night walking, it was said that, if such provision were found on the statute books, the municipality could not provide for it.

In *Keck v. Gainesville*, 98 Ga. 423, 25 S. E.

559, it was held that quietly working in a closed church on the Sabbath Day, on the benches, without making any noise, was not a violation of the city ordinance prohibiting disorderly acts or making unnecessary noise calculated to disturb the peace, quiet, and good order of the community. It was said that, if the defendants were pursuing their ordinary calling, they were violating the Penal Code of the state, and should have been indicted under that law. The court said: "A municipal corporation has no power to impose a punishment for an act made penal by the law of the state, unless expressly authorized to do so."

And, under the general welfare clause, an ordinance closing stores on Sunday was held invalid for want of power; and it was held that the offense was within Or. Crim. Code, p. 437, prohibiting keeping open stores on Sunday. *Corvallis v. Carlile*, 10 Or. 139, 45 Am. Rep. 134.

In *Com. v. Turner*, 1 Cush. 493, the authority to make by-laws to preserve peace and good order and police was held not to confer the power to make a by-law prohibiting the sale of liquor without a license. The distinction was made in this case between the power to make "by-laws" and "laws." The court said: "This is a legislative power, which has been exercised by the government from the earliest times; and, at the time when this by-law was adopted, laws of the commonwealth were in force on the same subject, certainly as regards intoxicating liquors, and the by-law makes no distinction."

And, in *Ex parte Bourgeois*, 60 Miss. 663, 45 Am. Rep. 420, it was held that, under the general welfare clause, a city had no power to enact an ordinance against drunkenness, where there was a state statute against the same act.

And, under the general welfare clause to regulate the police of the city, it was held that the city had no power to pass an ordinance against riots, routs, and unlawful assemblies. *Jefferson City v. Courtmire*, 9 Mo. 692. The court said: "If, under this general, undefined, and undefinable power, 'to regulate the police of the city,' the corporate authority can punish summarily, for the offense here charged, by what rule can their powers be limited to punish offenders for grand larceny, manslaughter, murder, or any other felony? Neither is there any necessity for giving to the corporation any such power; for, by reference to the 12th section, it will be seen that the enumeration of powers therein named embraces every object which by possibility may conduce to the interest of the city to regulate, without encroaching upon the province of the legislature, abridging the rights of citizens."

Distinguishing this case, the court, in *St. Louis v. Bentz*, 11 Mo. 61, said that this was a summary proceeding before an alderman for an offense made indictable by law.

In *State v. Cowan*, 29 Mo. 330, the case of *Jefferson City v. Courtmire*, supra, was distinguished, on the ground that the founda-

tion of the judgment was that there was no authority conferred by the charter to pass the ordinance under which the conviction was had. If there had been such authority, the conclusion would have been different.

To an indictment for keeping a ferry without a county license, it was pleaded that a license from the city had been granted. This was held no defense, as the charter of 1843, Mo. Sess. Laws, p. 119, giving power to regulate and license a ferry within the limits of a city, omitted the word "exclusive" power, which was in the charter of 1839. *Harrison v. State*, 9 Mo. 530.

An ordinance making a statutory offense a criminal act, punishable by fine or imprisonment, and in less degree than the state statute, was held void in *Washington v. Hammond*, 76 N. C. 33. The court said: "The question does not arise, in our case, whether the state may not expressly confer upon a municipal corporation the power to pass local laws which shall exclude the general laws of the state on particular and enumerated subjects. By-laws and state laws may stand together, if not inconsistent, and possibly the same act may constitute an offense both against the state and municipal law, and both may be punished if the by-law is strictly a police regulation only."

Power to pass ordinances for the "health and comfort" of a town was held not to authorize an ordinance against a breach of the peace, in *Raleigh v. Dougherty*, 3 Humph. 11, 39 Am. Dec. 149. This was on the ground that, if the authority were recognized, it would include all the catalogue of criminal offenses.

An ordinance creating an offense for which no express authority was given in the charter was held void. *People v. Brown*, 2 Utah, 462. In this case the power claimed was the power to regulate the police, and the ordinance was against assault and battery.

Carrying a concealed deadly weapon was held to be a crime against the state law, and could not be made an offense against a municipal corporation, where it was not expressly authorized by the charter. *Judy v. Lashley*, 50 W. Va. 628, 57 L.R.A. 413, 41 S. E. 197. This power was claimed under the general authority to preserve peace and good order. The court said: "It is evident that the exercise of such municipal power cannot extend to the whole range of acts made criminal by the state law. There must be a limit, and, in the cases holding that double punishment may be inflicted, under the indefinite delegation of power, the acts in question were generally those constituting the milder offenses under the state law. Usually they are such as bear a direct relation to, or are fairly to be included within the terms of, the power delegated to preserve peace and good order."

In *Oceana v. Cook* (W. Va.) 60 S. E. 145, the case of *Judy v. Lashley*, supra, was distinguished, as there the crime of carrying weapons, provided for by the state, was so remote from a breach of the peace, that the

authority to preserve peace and good order could not be held to cover such offense.

In the absence of any specific authority to regulate gaming or gambling devices, it was held that a town ordinance relating to such offense was void where *W. Va. Code*, chap. 151, fully covered the whole subject. *State ex rel. Morley v. Godfrey*, 54 W. Va. 54, 46 S. E. 185.

IV. As a bar to further prosecution.

a. Jeopardy.

The cases generally hold that a conviction under an ordinance or under the general law will not be a bar to prosecution under the other, on the ground that the same act might constitute two offenses,—one against the municipality and one against the state. This indirectly sustains the power to pass such ordinances, although the question is not always involved, as the accused presenting a former conviction in bar will always contend that such power was properly exercised, in order to make it available. The courts generally refuse to sustain the plea of former jeopardy, on the ground that there were two offenses arising from the same act. To that extent, these cases are authorities on the question of power of municipalities to impose penalties for acts made criminal by the general laws. In Missouri the plea of former jeopardy is denied on the ground that the prosecution for a penalty under an ordinance is a civil proceeding.

A single act, punishable by law and also by a town ordinance, was held to constitute two distinct and separate offenses, subject to two punishments, in *Hughes v. People*, 8 Colo. 536, 9 Pac. 50. In this case it was held that a distinction is sometimes made that, under the ordinance, it is a civil proceeding. Another distinction has been made that, under the ordinance, it is an exercise of the police power, in contradistinction to the general judicial power of the state. In this case the accused pleaded to an indictment for disturbing the peace, that he had been previously convicted under a town ordinance for the same offense.

In *State v. Mason*, 3 Lea, 649, it was said: "The warrants issued by the mayor to recover penalties for violations of the ordinances of the town are not state prosecutions for crime, as has been several times held by this court in unreported cases; nor does such a proceeding to recover a fine, tried upon the mayor or recorder's warrant for violation of a town ordinance, form a bar to a prosecution for an offense against the laws of the state, committed by the same act."

In *State ex rel. Karr v. Taxing Dist. 16 Lea*, 240, it was said that the imposition of a penalty for a violation of municipal ordinances of a taxing district was not a bar to a prosecution for an offense against the laws of the state, committed by the same act.

And, in *State v. Charles*, 16 Minn. 474, Gil. 426, on an indictment under the state law making it a felony to keep a house of ill 17 L.R.A. (N.S.)

fame, the defendant pleaded not guilty; secondly, that the city council was duly authorized to pass an ordinance covering the same crime; and, thirdly, that she had already been convicted in the city court. It was held on the second plea that an act might be contrary to the state law and also, at the same time, contrary to the ordinance; and the offender would be liable to punishment for the infraction of either by the court of either the state or the city. But, as to the plea of former conviction, there was no connection shown between the second and third pleas, and that was not discussed.

A party was indicted for keeping a bawdy house, and pleaded a former conviction under a city ordinance. It was held that the offense against the city and that against the state, although the same act, were distinguishable, and proceeded on different grounds,—that of the city for violating a city ordinance; and the prosecution by the state, for violating its criminal laws; and each had the right to punish without reference to the jurisdiction of the other. *Kemper v. Com.* 85 Ky. 219, 7 Am. St. Rep. 593, 3 S. W. 159. In this case the charter authorized ordinances for the purpose of suppressing disorderly houses within the city limits, and prescribed a punishment.

In *Respaw v. Com.* 107 Ky. 139, 53 S. W. 24, it was said that, in *Kemper v. Com.* supra, the offense there under consideration was one under the common law.

After a conviction and an appeal for violating a city ordinance for assault and battery, and before the trial on appeal, a conviction was had for the same act under a different prosecution in the circuit court. It was held that this latter was not a bar to the prosecution under the city ordinance. *Mobile v. Allaire*, 14 Ala. 400. The court said: "The offense against the corporation and the state, we have seen, are distinguishable, and wholly disconnected; and the prosecution at the suit of each proceeds upon a different hypothesis: the one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view,—the maintenance of the peace and dignity of the state."

And the authority given in a charter to preserve the peace and good order of the city was held sufficient to sustain an ordinance against fighting and disturbing the peace; and an acquittal thereunder was held not a bar to a prosecution under the state law for assault and battery. The ordinance and statute were held not inconsistent, and each should be enforced. *State v. Clifford*, 45 La. Ann. 980, 13 So. 281.

And a conviction under a city ordinance for repression of breach of the peace was held, in *Hamilton v. State*, 3 Tex. App. 643, no bar to a prosecution by the state, as the same act might constitute two separate offenses. The charter was not stated.

In *McRea v. Americus*, 59 Ga. 168, 27 Am. Rep. 390, it was held that an acquittal in a prosecution by the state for assault and battery was not a bar to a trial under a

although it was concurrent, a conviction under the ordinance was held to be a bar to an indictment. *State v. Cowan*, 29 Mo. 330. The court said: "The Constitution forbids that a person shall be twice punished for the same offense. To hold that a party can be prosecuted for an act under the state laws after he had been punished for the same act by the municipal corporation within whose limits the act was done, would be to overthrow the power of the general assembly to create corporations to aid in the management of the affairs of the state. For a power in the state to punish, after a punishment had been inflicted by the corporate authorities, could only find a support in the assumption that all the proceedings on the part of the corporation were null and void. The circumstance that the municipal authorities have not exclusive jurisdiction over the acts which constitute offenses within their limits does not affect the question. It is enough that their jurisdiction is not excluded. If it exists, although it may be concurrent, if it is exercised it is valid and binding, so long as it is a constitutional principle that no man may be punished twice for the same offense."

c. Ordinances as a bar.

Ordinances, without a prosecution thereunder, are held not a bar to prosecutions under the general laws.

It was contended under an indictment for an assault that an ordinance fixing a fine of \$100 would bar a prosecution under the state law. It was held that the charter providing that any person prosecuted to conviction or acquittal for a violation of an ordinance of the city should not be afterwards prosecuted by indictment for the same offense, and *vice versa*, shows that both the statute and the city ordinance were in full force, and that a city ordinance did not repeal a law previously in force upon the same subject. *March v. Com.* 12 B. Mon. 25.

And a charter authorizing an ordinance against keeping a tippling house open on the Sabbath, and an ordinance providing a penalty, were held no bar to an indictment. in *Fant v. People*, 45 Ill. 259. The court said: "Even if the jurisdiction should be held to be concurrent, and that the exercise of the power by the city was cumulative, the state first acquired jurisdiction; and, there being no pretense that plaintiff in error had been proceeded against under the city ordinance, it can, therefore, be no defense that he had been liable to prosecution under the ordinance. Had he been convicted under the ordinance for this offense, then a very different question would have been presented."

In *Wragg v. Penn Twp.* 94 Ill. 11, 34 Am. Rep. 190, it was said that a fair construction of the opinion in *Fant v. People*, supra, was that a city ordinance on the same subject as a general law, both imposing penalties for the same act, neither repealed the law nor was it repugnant thereto; but that the ordinance and the law are either sepa-

rate provisions,—that is, both capable of being enforced,—or concurrent remedies,—that is, only one of which may be enforced; and the court failed to determine whether they were separate or concurrent.

The power given a city to pass an ordinance prohibiting the sale of liquor was held no bar to an indictment under the state law in *Gardner v. People*, 20 Ill. 430. The court said: "It has been held that by the legislature conferring upon an incorporated city or town such power does not, by implication, repeal the general law on the same subject; but, to have that effect, the repeal must be express or the acts repugnant in their provisions."

And an act incorporating a city, providing that the council shall have the exclusive right, any law to the contrary, to fix the rate of license for retailers of liquor, was held not a bar to an indictment under the state law for selling liquor without a county license. It was held that the grant to the city fixed the rate, which should be construed to mean for city purposes only, and that a release from state obligations should be in express terms. *Sloan v. State*, 8 Blackf. 361.

And it was therefore held that, under a liquor ordinance under this charter, a license was not a bar to an indictment. *Ambrose v. State*, 6 Ind. 351.

In *Waldo v. Wallace*, 12 Ind. 569, it was said that *Madison v. Hatcher*, 8 Blackf. 341, and *Indianapolis v. Blythe*, 2 Ind. 75, were wholly overruled by *Ambrose v. State*, 6 Ind. 351. But this latter case held that a liquor ordinance did not exempt from state license and prosecution, and, approving *Madison v. Hatcher*, supra, said: "But that the same act may be an offense against two different jurisdictions is no longer an open question."

And *Kan. Laws 1871*, chap. 60, *Laws 1872*, chap. 102, authorizing cities of the third class to levy and collect a license tax on saloons, was construed in connection with the dramshop act of the state, and a license under a city ordinance was held no bar to a prosecution for failure to comply with the dramshop act. *State v. Young*, 17 Kan. 414. The dramshop act required a petition as a condition precedent to a license, and this could not be dispensed with. (See *Hankins v. People*, 106 Ill. 628, subd. I. b; *Berry v. People*, 36 Ill. 423, subd. I. d.)

V. Ordinances prohibited or controlled by Constitution or statute.

A statute prohibited the sale of opium unless a record was kept, and a city ordinance provided that no opium should be sold without a prescription. It was held that, as the regulation was different from that of the state, there was no conflict, and it did not violate *Cal. Const.* art. 11, § 11, providing that any county, city, town, or township may make and enforce such local, police, sanitary, and other regulations as are not in conflict with the general laws. *Ex parte Hong Shen*, 98 Cal. 681, 33 Pac. 799.

This ordinance was passed in 1889, and the statutes were passed in 1880 and 1891. The court said: "While the regulation is different from that of the state, there is no conflict, and therefore it is not in violation of the provision of the Constitution above quoted."

But, under a city charter authorizing the city council to prohibit the sale of liquors unless such prohibition would be inconsistent with the laws of the state, it was held that a city ordinance against selling liquor was invalid, where Iowa Code, § 463, provided that cities and towns shall have the power to prohibit the sale of liquor not prohibited by the laws of the state. By this provision the state reserved to itself the exclusive right to punish for the sale of liquor prohibited by the state law. *Foster v. Brown*, 55 Iowa, 686, 8 N. W. 654. In this case it was said that any attempt by a city to take jurisdiction of criminal offenses and punish by different modes and penalties might have the effect to impair the administration of criminal justice.

The same was held in *New Hampton v. Conroy*, 56 Iowa, 498, 9 N. W. 417, and *Mt. Pleasant v. Breeze*, 11 Iowa, 399.

In *State v. Tyrrell*, 73 Conn. 407, 47 Atl. 686, under a city charter forbidding the enactment of an ordinance on any matter which was or should thereafter be regulated by any public statute, or the power to regulate which has been or should be conferred upon any other authority by any public statute, a prosecution was had for selling milk without a license first had from the health officer. It was held that, if the purpose of the ordinance was to regulate the sale of impure milk, the ordinance was in excess of the power of the city to enact, as this was provided for by statute; but, if the ordinance was not invalid, a demurrer to the information was properly sustained, as the ordinance required the license to be issued to the owner of the vehicle, and this defendant was not the owner of any vehicle.

A reincorporating town act (Ga. act 1893, p. 291), giving the mayor and council sole and exclusive right to grant a liquor license and to enact laws and ordinances, was held contrary to Const. 1877, art. 1, § 4, Civil Code, § 5732, providing that laws of a general nature shall have uniform operation, and no special laws shall be enacted for which provision has been made by an existing general law, as in 1893 there was a general penal statute making it a misdemeanor to sell any liquor without a license. It was further held that selling liquor was not an offense peculiarly affecting peace and good order, for which a municipality could separately punish without interfering with the right of the state to deal with the offense. *Aycock v. Rutledge*, 104 Ga. 533, 30 S. E. 815.

In Indiana, since 1881, municipalities are prohibited by statute from legislating on crimes covered by the general laws. Ordinances, however, have been sustained, that

applied to different acts or to acts not punishable by the state.

So, under Ind. Rev. Stat. 1881, § 1640, providing that whenever any act is made a public offense against the state by any statute, and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any city or town, and all prosecutions shall be under the state law only, it was held that a civil action brought by a city to recover a penalty under an ordinance did not make the penalty any less a punishment, and the form of the action to recover the penalty was immaterial, and a statute providing for drunkenness in a public place prevented a prosecution under the city ordinance. *Jett v. Richmond*, 78 Ind. 316.

Ind. act 1883, p. 89 (Metropolitan police act), providing that anyone who interferes with the police force shall, on conviction, be fined from \$100 to \$1,000, was held to prevent a prosecution for interfering with a policeman under a city ordinance. Ind. Rev. Stat. 1881, § 1640, prohibited a prosecution under an ordinance for any public offense which may be prosecuted by the state. *Indianapolis v. Huegele*, 115 Fed. 531, 18 N. E. 172.

And, under Ind. Rev. Stat. 1881, § 1640, prohibiting city ordinances on matters covered by public statutes, it was held that Ind. Rev. Stat. 1881, § 1964, prohibiting the obstruction of any public highway, prevented a prosecution under a city ordinance for driving on a sidewalk. *Indianapolis v. Higgins*, 141 Ind. 1, 40 N. E. 671.

And Ind. act 1867, p. 194, Burns's Anno. Stat. 1894, § 4398, prohibited riding or driving on a brick, stone, plank, or gravel sidewalk in any town or village. It was held that a complaint under a city ordinance against riding a bicycle on a sidewalk was defective, in that it failed to show that it was a sidewalk other than those enumerated in the state statute. *Whiting v. Doob*, 152 Ind. 157, 52 N. E. 759. It was held that a city might prohibit driving on other sidewalks than those enumerated in the statute.

In *Madison v. Hatcher*, 8 Blackf. 341, the charter authorized the city to make by-laws necessary for good government, and provided that the mayor should have jurisdiction the same as a justice, and the statute relating to justices gave them jurisdiction of a fine not exceeding \$20. It was held that a prosecution for the violation of a city ordinance for an assault, before the mayor, if it could be maintained without violating the Constitution prohibiting jeopardy twice for the same offense, yet it would violate § 12 of the Constitution, prohibiting a person being put to answer a criminal charge except by presentment, indictment, and impeachment.

And in *Indianapolis v. Blythe*, 2 Ind. 75, which was an action of debt for a penalty for maintaining a nuisance, it was held that keeping a nuisance was a criminal offense, and the court followed *Madison v. Hatcher*, supra.

But Ind. Rev. Stat. 1881, § 1640, was

the laws of the state. *State v. McCulla*, 16 R. I. 196, 14 Atl. 81.

Under the Constitution and statutes of Texas, an ordinance covering the same offense made criminal by a statute will be held invalid. The legislature cannot delegate power to a city council to make an ordinance, the enforcement of which would affect in any way the penal laws of the state, under the Constitution of 1891.

A charter gave the city power to make acts penal by state laws also offenses against the city. An ordinance in regard to gaming, enacted under this power and also under special power in the charter, was held invalid, in *Ex parte Fagg*, 38 Tex. Crim. Rep. 573, 40 L.R.A. 212, 44 S. W. 294. This was because it was a "prosecution." The crime was one within the jurisdiction of the county court, as the penalty, under the Code of Crim. Proc. arts. 91 & 96, was imprisonment in the county jail, and Tex. Const. art. 5, § 12, provides that all "prosecutions" shall be carried on in the name of the state. It was held that the legislature could not, by vesting jurisdiction in some other than a state tribunal, so change the nature of the offense as to take it out of the category attached to it by law of a prosecution for a criminal offense. It was said that this rule would also apply in prosecutions for petty offenses.

In *Ex parte Coombs*, 38 Tex. Crim. Rep. 648, 44 S. W. 854, 47 S. W. 163, discussing the change in the Texas Constitution, 1891, art. 1, § 28, "No power of suspending laws in this state shall be exercised except by the legislature," omitting "or its authority," which was in the previous Constitution, it was held that, if the legislature cannot confer jurisdiction upon city courts to try violations of state laws, and cannot grant municipal corporations authority to suspend state laws, it would follow that city councils cannot pass ordinances covering the same acts which are made criminal offenses against the state.

So a city was held to have no authority to pass an ordinance covering the same acts provided for in the Penal Code, in *Ex parte Wickson* (Tex. Crim. App.) 47 S. W. 643.

And where an ordinance covered the same act as the Penal Code and made the same penalty, it was held that the ordinance was invalid, in *Crowley v. Dallas* (Tex. Crim. App.) 44 S. W. 865, and *Ballard v. Dallas* (Tex. Crim. App.) 44 S. W. 864. In the latter case the court said: "We hold that the city council had no authority to create the ordinance in question, because the Penal Code provided a punishment for the same act, and the legislature had no authority to confer upon the city council the power to create the ordinance."

And, where the legislature authorized turf exchanges and the selling of pools on horses, it was held that it could not delegate authority to a municipal corporation to create or pass ordinances contrary to that law, either by repealing it or suspending it, under Const. art. 1, § 28. *Ex parte Ogden* (Tex. Crim. App.) 66 S. W. 1100. 17 L.R.A. (N.S.)

A charter authorizing the city to regulate the opening and closing of saloons, and providing that the charter should supersede the general laws, was held void, under Tex. Const. art. 1, § 28, providing that no power to suspend laws shall be exercised except by the legislature. *Arroyo v. State* (Tex. Crim. App.) 69 S. W. 503; *Fay v. State*, 44 Tex. Crim. Rep. 381, 71 S. W. 603.

And whenever the penalty under an ordinance was in excess or less than the penalty prescribed by the state law, it was held that the ordinance would be invalid, in *Ex parte McHenry* (Tex. Crim. App.) 103 S. W. 390. This was a prosecution under an ordinance for obstructing a street, where the fine imposed was from \$10 to \$50, and the Penal Code provided a fine not to exceed \$500. The power in the charter was not stated.

An ordinance imposing a higher penalty for gambling than that imposed by the Penal Code was held invalid, in *Clark v. State*, 46 Tex. Crim. Rep. 566, 81 S. W. 722.

A town ordinance imposing a fine of \$25 for obstructing a street was held invalid where the state statute made the penalty not to exceed \$500, in *Ex parte Cross*, 44 Tex. Crim. Rep. 376, 71 S. W. 289.

Tex. Code Crim. Proc. art. 896 (White's Code Crim. Proc. art. 931, Acts of 1879, extra session, chap. 19), provides that no person shall be punished twice for the same act or omission, although such act or omission may be an offense against the penal laws of the state as well as against the ordinances of such city or town; provided that no ordinance of a city or town shall be valid which provides a less penalty for any act, omission, or offense than is prescribed by the statutes, where such act or omission is an offense against the state.

So, it was held that an ordinance making a municipal offense that which was already made an offense by statute, and imposing a different penalty, was void, in *McLain v. State*, 31 Tex. Crim. Rep. 568, 21 S. W. 365.

See case note as to power of municipality to pass an ordinance under general welfare clause, *Thrower v. Atlanta*, 1 L.R.A. (N.S.) 382.

I. T.

COLORADO SUPREME COURT.

W. O. BURNSIDE, Appt.,
v.

MARY PETERSON.

(— Colo. —, 96 Pac. 256.)

Master — trapdoor — negligence.

1. A master may be found to be negligent in providing, without hinges or fastenings to guide or hold it into place, a trapdoor

Case Note. — Servant's assumption of risk from latent danger or defect.

As to the servant's assumption of risk of danger imperfectly appreciated, see case

for an opening in the floor, so much smaller than the opening that, when close to the floor at one end, it will slip past the supporting cleat on the other, and precipitate a person stepping onto it through the aperture.

Servant — assumption of risk — ignorance.

2. A servant does not assume the risk of injury from the absence of fastenings upon a trapdoor to prevent its sliding on its supports so as to let him through in case he steps on it, merely because he knows that there are no hinges upon it, where such fastenings might have been placed upon the under side, which he never had occasion to examine, and in fact did not see.

Instruction — definition — "become."

3. An instruction allowing a recovery against a master if he allowed a device to

become loose is not erroneous merely because there is no evidence that he allowed it to become loose, it being loose when constructed, if it is plain that the word "become" was used in the sense of "be."

Same — insufficiency — absence of request.

4. A party cannot complain of an instruction upon the subject of damages because it is not specific enough, if he fails to request one which supplies the defect.

(June 1, 1908.)

A PPEAL by defendant from a judgment of the District Court for Teller County in plaintiff's favor in an action brought to recover damages for personal injuries

note to Tuckett v. American Steam & Hand Laundry, 4 L.R.A. (N.S.) 990.

As to the assumption of risk from a defective tool, machine, or appliance, where the defect is obvious, but its importance not appreciated, see case note to Rogers v. Roe, 13 L.R.A. (N.S.) 691.

The servant assumes those risks which are incident to his service, as he is supposed to have contracted on those terms; and, included among such incident risks, are those dangers arising from latent defects, not known to the master, and which he would not have discovered by the exercise of reasonable care. The injuries resulting from such defects are regarded as accidents, mere casualties, and the resultant misfortune must rest upon the servant. For this class of cases, see case note to Sack v. Ralston, post, 104.

On the other hand, it is generally held that the servant does not assume the risks arising from latent dangers or defects known to the master, or of which he would have known by the exercise of reasonable care. The degrees of care required of a master and of his servant are not the same, it being the duty of the master to provide and inspect both the place of work and the appliances furnished, while it is not incumbent upon the servant to exercise an active inspection, as he may proceed upon the assumption that the master has performed his duty both as to place and appliances; and in such case, therefore, he assumes only those risks which are obvious and are fully understood by him.

In view of the practically unlimited number and general unanimity of adjudications in this latter class of cases, an exhaustive note would be but a work of supererogation. The more important cases, briefly noted, are as follows:

The following cases lay down the general rule that an employee is not bound to search for latent defects; Little Rock, M. R. & T. R. Co. v. Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 So. 50; Green v. Sansom, 41 Fla. 94, 25 So. 332; Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225, Affirming 68 Ill. App. 523; Illinois Steel Co. v. Mann, 197 Ill. 186, 64 17 L.R.A. (N.S.)

N. E. 328, Affirming 100 Ill. App. 367; Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818; Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 2 L.R.A. 520, 9 Am. St. Rep. 883, 19 N. E. 453; Cincinnati, H. & D. R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. Rep. 67, 20 N. E. 287; Wabash & W. R. Co. v. Morgan, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 98 Am. St. Rep. 281, 66 N. E. 882; Pittsburgh, C. C. & St. L. R. Co. v. Woodward, 9 Ind. App. 169, 36 N. E. 442; Salem Stone & Lime Co. v. Tepps, 10 Ind. App. 516, 38 N. E. 229; Summit Coal Co. v. Shaw, 16 Ind. App. 9, 44 N. E. 676; Pfisterer v. Peter, 117 Ky. 501, 78 S. W. 450; Adams Exp. Co. v. Smith, 24 Ky. L. Rep. 1915, 72 S. W. 752; Huddleston v. Lowell Machine Shop, 106 Mass. 282; Murphy v. Marston Coal Co. 183 Mass. 385, 67 N. E. 342; Morton v. Detroit, B. C. & A. R. Co. 81 Mich. 423, 46 N. W. 111; Porter v. Hannibal & St. J. R. Co. 71 Mo. 66, 36 Am. Rep. 454; Connolly v. St. Joseph Press Printing Co. 166 Mo. 447, 66 S. W. 268; Franklin v. Missouri, K. & T. R. Co. 97 Mo. App. 473, 71 S. W. 540; Jarvis v. Northern New York Marble Co. 55 App. Div. 272, 67 N. Y. Supp. 78; Missouri P. R. Co. v. Crenshaw, 71 Tex. 341, 9 S. W. 262; Carpenter v. Mexican National R. Co. 39 Fed. 315.

And in the following cases it is expressly held that a servant is bound only to see patent defects, and that he does not assume the risks arising from latent defects or dangers in the machinery, appliances, or place furnished for his use by the master: Archer-Foster Constr. Co. v. Vaughn, 79 Ark. 20, 94 S. W. 717 (latent danger in loading dynamite hole); Boyd v. Blumenthal, 3 Penn. (Del.) 564, 52 Atl. 330 (defective elevator); German-American Lumber Co. v. Brock (Fla.) 46 So. 740 (log-splitting saw in lumber mill); Monongahela River Consol. Coal & Coke Co. v. Hardsaw (Ind. App.) 77 N. E. 363 (defective floor on barge); Champion Ice Mfg. & Cold Storage Co. v. Carter, 21 Ky. L. Rep. 210, 51 S. W. 16 (insecure nut on boat); Faren v. Sellers, 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363 (building improperly razed); Myhan v. Louisiana

alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Charles A. Prentice and Charles O. Butler for appellant.

Mr. Eugene Engley for appellee.

Maxwell, J., delivered the opinion of the court.

This appeal is from a judgment in favor of appellee in an action for personal injuries sustained by appellee while in the employ of appellant as a domestic servant.

The house was of several stories. Beneath the kitchen was a basement, and under that a cellar. The floor of the basement was of 2-inch plank, 8 or 10 inches wide, unmatched. In the floor of the base-

ment was an opening about 2 feet square, which gave access to the cellar. To cover this opening a trapdoor was provided, made of the same material as the floor, the plank composing the trapdoor being fastened together by 2-inch strips nailed to the bottom thereof. Cleats about 4 inches wide, nailed to the joists below the floor on either side of the opening, of the same material as the floor and trapdoor, afforded support for the trapdoor. The trapdoor fitted into the opening in the basement floor, and was not attached to the floor or joists by hinges, or otherwise. The trapdoor fitted in the opening somewhat loosely, resting upon the cleat on one side, about $1\frac{1}{4}$ inches, on the other side about an inch, and at one corner about $\frac{1}{2}$ inch, thus affording some

Electric Light & P. Co. 41 La. Ann. 964, 7 L.R.A. 172, 17 Am. St. Rep. 436, 6 So. 799 (negligently constructed wires carrying heavy electric current); Budge v. Morgan's L. & T. R. & S. S. Co. 108 La. 349, 58 L.R.A. 333, 32 So. 535 (defective truck causing freight to split switch, throwing servant); Ingham v. John B. Honor Co. 113 La. 1040, 37 So. 963 (knot in plank used in constructing stage for unloading vessel); Caven v. Bodwell Granite Co. 99 Me. 278, 59 Atl. 285 (stage for unloading vessel broke down, due to defective guy cable); Garant v. Cashman, 183 Mass. 13, 66 N. E. 599 (defective railing on platform used by servant); Finnegan v. Winslow Skate Mfg. Co. 189 Mass. 580, 76 N. E. 192 (defective elevator mechanism); McDonald v. Champion Iron & Steel Co. 140 Mich. 401, 103 N. W. 829 (unguarded cogs to machine); Southern R. Co. v. Wiley, 88 Miss. 825, 41 So. 511 (defective steam shovel crane); Porter v. Hannibal & St. J. R. Co. 71 Mo. 66, 36 Am. Rep. 454 (hidden hole under tie into which brakeman stepped); Nicholds v. Crystal Plate Glass Co. 126 Mo. 55, 27 S. W. 516, 28 S. W. 991 (defective crane chain); Herdler v. Buck's Stove & Range Co. 136 Mo. 3, 37 S. W. 115 (insufficiently braced iron columns used in constructing building); Clowers v. Wabash, St. L. & P. R. Co. 21 Mo. App. 213 (defective hand-car lever); Gibson v. Midland Bridge Co. 112 Mo. App. 594, 87 S. W. 3 (seam in high bank where servant directed to work); Paulmier v. Erie R. Co. 34 N. J. L. 151 (latently defective railroad bridge); Appel v. Buffalo, N. Y. & P. R. Co. 2 N. Y. S. R. 257 (defective frog in railroad yard); De Grazia v. Piccardo, 15 Pa. Super. Ct. 107 (defective rope used to stop machine); Bannon v. Lutz, 158 Pa. 166, 27 Atl. 890 (defective appliance for opening stills); Finnerty v. Burnham, 205 Pa. 305, 54 Atl. 996 (defective chain); Missouri P. R. Co. v. Crenshaw, 71 Tex. 341, 9 S. W. 262 (defective baggage truck); San Antonio & A. P. R. Co. v. Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 668 (defective step to locomotive); Gulf, C. & S. F. R. Co. v. Jackson (Tex. Civ. App.) 109 S. W. 478 (unloading gravel from hopper-bottom freight car); Texas & P. R. 17 L.R.A. (N.S.)

Co. v. Archibal' 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777 (broken brake apparatus); New York, N. H. & H. R. Co. v. O'Leary, 35 C. C. A. 562, 93 Fed. 737 (derick guy stretched low over railroad track); Crawford v. American Steel & Wire Co. 59 C. C. A. 293, 123 Fed. 275 (defective roofing allowing servant to fall through); George Matthews Co. v. Bouchard, Rap. Jud. Quebec 8 B. R. 550 (projecting screw on revolving shaft); see also Brydon v. Stewart, 2 Macq. H. L. Cas. 30 (defective appliance in mine shaft).

Unless the dangerous condition is obvious or is understood by the injured employee, he cannot be said to have assumed the risk arising from such condition. Osborne v. Alabama Steel & Wire Co. 135 Ala. 571, 33 So. 687 (water way on employer's premises not sufficiently covered); Southern R. Co. v. Howell, 135 Ala. 639, 34 So. 6 (derailment of car, defective track); Choctaw, O. & G. R. R. Co. v. Jones, 77 Ark. 367, 4 L.R.A. (N.S.) 837, 92 S. W. 244 (dangerous method of taking down "bent"); Crown Cotton Mills v. McNally, 123 Ga. 35, 51 S. E. 13 (dangerous cotton-working machine); Bowen v. Adams, 129 Ga. 688, 59 S. E. 795 (dangerous printing press); Chicago & E. I. R. Co. v. Hines, 132 Ill. 161, 22 Am. St. Rep. 515, 23 N. E. 1021 (unfilled spaces between ties in railroad yard); Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818, Affirming 106 Ill. App. 30 (disintegrated wooden cover in catch basin); Shickle-Harrison & H. Iron Co. v. Beck, 212 Ill. 268, 72 N. E. 423, Affirming 112 Ill. App. 444 (uncovered cog wheels in dark place); Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 N. E. 65, Affirming 128 Ill. App. 30 (defective scaffolding); Rice & B. Malting Co. v. Paulsen, 51 Ill. App. 123 (loose plank on scaffold); McFarland v. Edmunds Mfg. Co. 97 Ill. App. 629 (cut rafters where servant directed to work); Siegel, C. & Co. v. Treka, 115 Ill. App. 56, Affirmed in 218 Ill. 559, 2 L.R.A. (N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053 (improperly protected doorway in elevator); Bates Mach. Co. v. Crowley, 115 Ill. App. 540 (defective rope used on hoisting sling); Chicago, R. I. & P. R. Co. v. Daugaard, 118 Ill. App. 67

play for the door within the opening. The basement was of two rooms, the front room occupied by appellee, the rear room used as a laundry and furnace room. The exact location of the trapdoor in the basement floor is not apparent from the evidence; but it appears that, in the discharge of her duties, appellee frequently passed over the trapdoor. Appellee was not informed of the existence of the trapdoor, and knew nothing about it until about two weeks after she entered the service, when a porter in the employ of appellant came up through the trapdoor from the cellar with kindling; there being an entrance to the cellar from the outside. The evidence shows that, previous to the accident, the appellee saw the trapdoor opened two or three times

only, when someone came through it from the cellar. Appellee knew that the trapdoor was without hinges or other visible fastenings to the upper side of the floor, never had any occasion to use, and never used, it, never opened it, and never made any inspection of it to determine whether or not it was in any manner fastened to the underside of the floor. There was ample light in the room where the trapdoor was located. About half past 8 o'clock of the evening of June 1, 1903, appellee, in crossing the floor of the basement, in the discharge of her duties, stepped upon the trapdoor, which "tipped up on one end," and precipitated her into the cellar below, resulting in injuries which are the basis of her suit. The complaint alleged that the

(machine in sawmill); Louisville, N. A. & C. R. Co. v. Graham, 124 Ind. 89, 24 N. E. 668 (insufficient braces in tunnel); Salem Stone & Lime Co. v. Griffin, 139 Ind. 141, 38 N. E. 411 (dangerously constructed passageway); Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 98 Am. St. Rep. 281, 66 N. E. 882 (improper ring in mining shaft hoist); Wright v. Chicago, I. & L. R. Co. 160 Ind. 583, 66 N. E. 454 (proximity of switch stand to track); King v. Chicago & N. W. R. Co. 108 Iowa, 748, 78 N. W. 837 (hole in car floor); Hammer v. Janowitz, 131 Iowa, 20, 108 N. W. 109 (insufficiently braced traveling train); Harney v. Chicago, I. R. & P. R. Co. (Iowa) 115 N. W. 886 (dangerous ripsaw machine); Consolidated Kansas City Smelting & Ref. Co. v. Sharber, 71 Kan. 700, 81 Pac. 476 (improper razing of building); Consolidated Kansas City Smelting & Ref. Co. v. Tinchert, 5 Kan. App. 130, 48 Pac. 889 (boiler plates placed in position such that they tipped over, injuring servant); Pfisterer v. Peter, 117 Ky. 501, 78 S. W. 450 (defective scaffolding); Conrad Tanning Co. v. Munsey, 25 Ky. L. Rep. 936, 76 S. W. 841 (defective plank in passageway); Cumberland Teleph. & Teleg. Co. v. Graves, 31 Ky. L. Rep. 972, 104 S. W. 356 (servant directed to tie live wire); Daly v. Kiel, 106 La. 170, 30 So. 254 (servant placed at work near gravel bank, which caved, injuring him); Whitworth v. South Arkansas Lumber Co. 121 La. 894, 46 So. 912 ("nick" in shaft); Sawyer v. Rumford Falls Paper Co. 90 Me. 354, 60 Am. St. Rep. 260, 38 Atl. 318 (defective dynamo belt); Scanlon v. Boston & A. R. Co. 147 Mass. 484, 9 Am. St. Rep. 733, 18 N. E. 209 (signal post so close to track that servant struck while on ladder to freight car); Anderson v. Clark, 155 Mass. 368, 29 N. E. 589 (defective windlass and tackle on vessel); Dawson v. Lawrence Gaslight Co. 188 Mass. 481, 74 N. E. 912 (pole decayed below surface, fell with light trimmer. But in Melsaac v. Northampton Electric Light Co. 172 Mass. 89, 70 Am. St. Rep. 244, 51 N. E. 524, the danger from a pole decayed below the surface of the ground was held to be an obvious one, provided the general appearance of the pole 17 L.R.A. (N.S.)

was such as to make it probable that it was unsafe); Manning v. Excelsior Laundry Co. 189 Mass. 231, 75 N. E. 254 (servant directed to work on ironing machine, the dangers of which she did not understand); Flynn v. Prince, C. & M. Co. 198 Mass. 224, 84 N. E. 321 (dangerous shaft projecting into servants' dressing room); Broderick v. Detroit Union R. Station & Depot Co. 56 Mich. 262, 56 Am. Rep. 382, 22 N. W. 802 (improperly constructed ventilator); Chilson v. Lansing Wagon Works, 128 Mich. 43, 87 N. W. 79 (dangerous saw); Bernard v. Pittsburg Coal Co. 137 Mich. 279, 100 N. W. 396 (defect in derrick); Clemens v. Gem Fiber Package Co. (Mich.) 117 N. W. 187 (dangers in metal stamping press); Stiller v. Bohn Mfg. Co. 80 Minn. 1, 82 N. W. 981 (defective crosscut-saw machine); De Maries v. Jameson, 98 Minn. 453, 108 N. W. 830 (defective rope in tackle); Hamilton v. Rich Hill Coal Min. Co. 108 Mo. 375, 18 S. W. 977 (failure to block switch rails); Doyle v. Missouri, K. & T. Trust Co. 140 Mo. 1, 41 S. W. 255 (loose plank in scaffold); Connolly v. St. Joseph Press Printing Co. 166 Mo. 447, 66 S. W. 268 (defective shaving machine in printing plant); Minnier v. Sedalia, W. & S. W. R. Co. 167 Mo. 99, 66 S. W. 1072 (defective roadbed, etc.); Sheperd v. St. Louis Transit Co. 189 Mo. 362, 87 S. W. 1007 (defective street car step); Clippard v. St. Louis Transit Co. 202 Mo. 432, 101 S. W. 44 (defective car bearings); Musick v. Jacob Dold Packing Co. 58 Mo. App. 322 (unguarded tank in dark room,—servant justified in believing it covered under circumstances); Weldon v. Omaha, K. C. & E. R. Co. 93 Mo. App. 668, 67 S. W. 698; (defective boxing in hand-car wheel); Kearney Electric Co. v. Laughlin, 45 Neb. 390, 63 N. W. 941 (insufficient bracing to sides of excavation); New Omaha Thompson-Houston Electric Light Co. v. Dent, 68 Neb. 668, 94 N. W. 819. Affirmed on rehearing in 68 Neb. 674, 103 N. W. 1091 (insulation to live wire); Lappelle v. International Paper Co. 71 N. H. 346, 51 Atl. 1068 (dangerous wood pulp machine); Burns v. Delaware & A. Teleg. & Teleph. Co. 70 N. J. L. 745, 67 L.R.A. 956. 59 Atl. 220, 592 (latent danger of telephone

injuries received caused appendicitis. The court instructed the jury to disregard all damages claimed on this account, as the testimony failed to show that the fall was the proximate cause of appendicitis.

It is contended that the judgment should be reversed upon the grounds:

(1) That no negligence upon the part of appellant was shown. A witness called by appellee, who examined the premises a few days before the trial, testified as to the size, shape, material, and construction of the trapdoor, the manner in which it rested upon the cleats; and, then, quoting from the abstract: "With reference to this trapdoor, I don't think it was in a safe and secure condition as to construction, without fastenings, hinges, or bolts, or any-

thing of that kind. To make this trapdoor secure and safe it would be necessary to have hinges." And upon cross-examination: "After measuring this trapdoor the other night, I put it in position, and then I had my weight on various parts of it; could not in any way throw it out of position by my weight. If the trapdoor was placed in position, it would be as safe then as any other trapdoor, so, when I answered that the trap was not safe, I simply meant that it would not be as safe as a trapdoor with hinges. Q. A trapdoor with hinges, if it were put to the edge of the cavity? A. Yes. All I meant was that, if those were carelessly placed, a person might not notice that,—that was all I meant,—but when that trapdoor was placed in position, no matter

wires becoming charged by contact with trolley wires); *Polo v. Palisade Constr. Co.* (N. J.) 70 Atl. 161 (dangers arising from uncovering of exploded blast of dynamite); *Gates v. State*, 128 N. Y. 221, 28 N. E. 373 (bridge upon which servant was working fell); *Simone v. Kirk*, 173 N. Y. 7, 65 N. E. 739, Reversing 57 App. Div. 461, 67 N. Y. Supp. 1019 (servant directed to work under dangerous overhanging lime paste); *Latorre v. Central Stamping Co.* 9 App. Div. 145, 41 N. Y. Supp. 99 (dangers from plunging hot iron into turpentine bath); *Kochman v. Chase*, 32 App. Div. 630, 52 N. Y. Supp. 740 (unknown dangers of machinery); *Boyle v. Degnon-McLean Constr. Co.* 47 App. Div. 311, 61 N. Y. Supp. 1043. motion for reargument and leave to appeal denied in 49 App. Div. 636, 63 N. Y. Supp. 1106, and appeal dismissed in 163 N. Y. 591, 57 N. E. 1127 (dangerous opening in railroad trestle); *Jarvis v. Northern New York Marble Co.* 55 App. Div. 272, 67 N. Y. Supp. 78 (dozy and rotten derrick mast); *Pursley v. Edge Moor Bridge Works*, 56 App. Div. 71, 67 N. Y. Supp. 719. Affirmed without opinion in 168 N. Y. 589, 60 N. E. 1119 (defectively-constructed scaffolding); *Murtaugh v. New York C. & H. R. R. Co.* 49 Hun. 456, 3 N. Y. Supp. 483 (explosion of emery wheel); *Thall v. Carnie*, 1 Silv. Sup. Ct. 401, 5 N. Y. Supp. 244 (place of latent danger); *Turner v. Goldshoro Lumber Co.* 119 N. C. 387, 26 S. E. 23 (knives in planing machine); *Wainright v. Lake Shore & M. S. R. Co.* 11 Ohio C. D. 530 (unknown danger of passing through tunnel on top of car); *Hoffman v. Clough*, 124 Pa. 505, 17 Atl. 19 (wellhole in factory floor); *Carlson v. Sioux Falls Water Co.* 8 S. D. 47, 65 N. W. 419 (wall to trench caved in); *Tennessee Coal, Iron & R. Co. v. Jarrett*, 111 Tenn. 565, 32 S. W. 224 (buckling of jack and timber); *Missouri P. R. Co. v. Callbreath*, 66 Tex. 526, 1 S. W. 622 (danger of peculiarly constructed car); *Galveston, H. & S. A. R. Co. v. Smith*, 100 Tex. 267, 98 S. W. 240. Affirming (Tex. Civ. App.) 93 S. W. 184 (defectively fastened hand hold on locomotive); *Missouri, K. & T. R. Co. v. Gordon*, 11 Tex. Civ. 17 L.R.A. (N.S.)

App. 672, 33 S. W. 684 (defective water spout to tank); *Galveston, H. & S. A. R. Co. v. McCray* (Tex. Civ. App.) 43 S. W. 275 (improperly loaded train); *Galveston, H. & S. A. R. Co. v. Smith*, 24 Tex. Civ. App. 127, 57 S. W. 999 (improperly constructed locomotive); *Galveston, H. & S. A. R. Co. v. Hitzfelder*, 24 Tex. Civ. App. 318, 66 S. W. 707 (unknown danger of working under car); *Gulf, C. & S. F. R. Co. v. Gray*, 25 Tex. Civ. App. 99, 63 S. W. 927 (coal bin bulged over track); *Southern P. Co. v. Winston*, 27 Tex. Civ. App. 503, 66 S. W. 477 (improper car couplings); *Galveston, H. & S. A. R. Co. v. Mortson*, 31 Tex. Civ. App. 142, 71 S. W. 770 (building erected so near track that servant injured while on side ladder to car); *General Electric Co. v. Murray*, 32 Tex. Civ. App. 226, 74 S. W. 50 (improperly strung live wires); *International & G. N. R. Co. v. Shaughnessy* (Tex. Civ. App.) 81 S. W. 1026 (defective roadbed); *Faulkner v. Mammoth Min. Co.* 23 Utah, 437, 66 Pac. 799 (servant directed to excavate under dangerous ledge); *Drown v. New England Teleph. & Teleg. Co.* (Vt.) 70 Atl. 599 (dangers from proximity of live wires to telephone wires); *Bertha Zinc Co. v. Martin*, 93 Va. 791, 70 L.R.A. 999, 22 S. E. 869 (dynamite thawed in fire near servant's place of work); *Shoemaker v. Bryant Lumber & Shingle Mill Co.* 27 Wash. 637, 68 Pac. 380 (defective shingle bolt carrier); *Richards v. Riverside Iron Works*, 56 W. Va. 510, 49 S. E. 437 (defective scaffolding); *Knapari v. Marsh*, 74 Wis. 562, 43 N. W. 368 (defective scaffolding); *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044 (defective pulley and belt adjusters); *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, Affirming 50 C. C. A. 591, 112 Fed. 883 (spout to water tank close to top of cars); *Carpenter v. Mexican National R. Co.* 39 Fed. 315 (defective brake on car); *Rillston v. Mather*, 44 Fed. 743 (dangers of dynamite caps, etc.); *Valley R. Co. v. Keegan*, 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849 (hole in plank between rails in railroad yard); *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 239, 97 Fed. 423 (defective

which way it was placed, it might be turned end for end. It was absolutely safe." And on redirect examination: "When I answered that this trapdoor was safe as any other trapdoor, I did not mean to state to the jury or to have the jury infer from that that the trapdoor was safely and securely constructed to prevent accidents." The foregoing is substantially all the testimony upon this point, and it was undisputed. Counsel for appellant contended that, upon the statement of this witness, upon cross-examination, to the effect that, "when the door was placed in position, it was absolutely safe," no negligence upon the part of appellant has been proven; and the absence of hinges or other fastenings cannot be held to be negligence, upon the theory

that the master is under no obligation to furnish any particular kind of appliance, or to adopt the latest improvements, citing *Denver Tramway Co. v. Nesbit*, 22 Colo. 408, 45 Pac. 405, where this court, after stating the principle relied on by counsel, said: "He [the master] is only bound to see that that which he does employ is reasonably safe and suitable for the purpose for which it is designed." The witness had testified that the trapdoor, without fastenings, hinges, or bolts, was not safe and secure, and that such appliances were necessary to make it safe and secure. His statement upon cross-examination, to the effect that the trapdoor was absolutely safe, in view of the explanation of this statement upon redirect examination, simply

roadbed); *Western U. Teleg. Co. v. Burgess*, 47 C. C. A. 168, 108 Fed. 26, writ of certiorari denied in 181 U. S. 620, 45 L. ed. 1031, 21 Sup. Ct. Rep. 924 (dangers of sawing down telegraph poles in sections,—inexperienced employee); *Mountain Copper Co. v. Pierce*, 69 C. C. A. 148, 136 Fed. 150 (inexperienced servant directed to adjust belt on pulley shaft from which set screws projected); *Norfolk & W. R. Co. v. Beckett*, 163 Fed. 479 (standpipe in such close proximity to track that servant injured while on ladder to car).

And the employer is liable unless the employee had, or would have had, if he had exercised ordinary care, full knowledge of the unsafe condition of the place or appliance. *Little Rock. M. R. & T. R. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50 (defective roadbed); *Elledge v. National City & O. R. Co.* 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720 (employee directed to work near unsafe ledge of rock); *Keast v. Santa Ysabel Gold Min. Co.* 136 Cal. 256, 68 Pac. 771 (improper hook used in mining shaft); *Stauble v. Potomac Electric Power Co.* 21 App. D. C. 160 (employee directed to work near highly charged iron lug in switch board); *McDade v. Washington & G. R. Co.* 5 Mackey, 144 (defective pulley and bolt); *Barrow v. B. R. Lewis Lumber Co. (Idaho)* 95 Pac. 682 (method of using railway); *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, 63 N. E. 664, Affirming 96 Ill. App. 288 (falling gravel from high bank); *Chicago Hair & Bristle Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51, Affirming 106 Ill. App. 21 (bales of hair so piled in storehouse that they fall); *Mobile & O. R. Co. v. Vallowe*, 214 Ill. 124, 73 N. E. 416, Affirming 115 Ill. App. 621 (post near railway track); *Siegel, C. & Co. v. Treka*, 218 Ill. 559 2 L.R.A. (N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053, Affirming 115 Ill. App. 56 (dangerous elevator passageway); *Swift & Co. v. Fue*, 66 Ill. App. 651, Affirmed in 167 Ill. 443, 47 N. E. 761 (suction of powerful air-cooling fan); *Atchison, T. & S. F. R. Co. v. Carey (Kan.)* 49 Pac. 662 (defect in locomotive); *Seeds v. American Bridge Co.* 68 Kan. 522, 75 Pac. 17 L.R.A. (N.S.)

480 (insufficient tackle appliances for building bridge); *Brinkmeier v. Missouri P. R. Co.* 69 Kan. 738, 77 Pac. 586 (defective car coupling); *Missouri, K. & T. R. Co. v. Quinlan (Kan.)* 93 Pac. 632 (defective sledge hammer furnished to fellow servant); *Louisville & N. R. Co. v. Foley*, 94 Ky. 224, 21 S. W. 866 (servant injured while coupling car); *James v. Rapides Lumber Co.* 50 La. Ann. 717, 44 L.R.A. 33, 23 So. 469 (dangerous edger in sawmill); *Gualden v. Kansas City Southern R. Co.* 106 La. 409, 30 So. 889 (defective hose attachment used in blowing off steam of locomotive); *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598 (defective boiler to locomotive); *Wheeler v. Wason Mfg. Co.* 135 Mass. 294 (insufficient guard to circular saw); *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075 (insufficiently supported side of trench in which servant directed to lay pipe); *Bjbjian v. Woonsocket Rubber Co.* 164 Mass. 214, 41 N. E. 265 (dangerous rubber compounding machine); *Gagnon v. Seaconnet Mills*, 165 Mass. 221, 43 N. E. 82 (timber improperly loaded on gear); *Jarvis v. Coes Wrench Co.* 177 Mass. 170, 58 N. E. 587 (bounding back of block from saw); *Grimaldi v. Lane*, 177 Mass. 565, 59 N. E. 451 (servant ignorant of danger from dynamite which was being unloaded from a hole in an unsafe way); *Wagner v. Boston Elev. R. Co.* 188 Mass. 437, 74 N. E. 919 (servant injured by trolley pole flying up and striking overhead platform on which he was working); *Moylon v. D. S. McDonald Co.* 188 Mass. 499, 74 N. E. 929 (defective guides in elevator); *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205 (inexperienced employee directed to help stop train); *Phelps v. Chicago & W. M. R. Co.* 122 Mich. 171, 81 N. W. 101, 84 N. W. 66 (fish chute in such close proximity to main track that it struck employee on ladder to car); *McDonald v. Chicago, St. P. M. & O. R. Co.* 41 Minn. 439, 16 Am. St. Rep. 711, 43 N. W. 380 (defective turntable and method of operating); *Gray v. Commutator Co.* 85 Minn. 463, 89 N. W. 322 (dangerous "drawing-machine"); *Dell v. McGrath*, 92 Minn. 187, 99 N. W. 629 (hazard of piling logs high upon skidway); *Devlin v. Wabash, St. L. &*

meant that the door was safe when in the position in which he had placed it when he tested it; or, in other words, that the door placed in proper position, resting fairly and squarely upon the cleats, so far as material and construction was concerned, was safe; but without hinges or fastenings of some kind it was not safely and securely constructed to prevent accidents. In view of the entire testimony of this witness, we think the above quotation from *Denver Tramway Co. v. Nesbit* applies to this case, rather than the proposition relied upon by counsel. It is the duty of the master to exercise ordinary care in seeing that the servant is provided with a reasonably safe place in which to work. *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Colorado Mill*.

& *Elevator Co. v. Mitchell*, 26 Colo. 284, 58 Pac. 28; *McKean v. Colorado Fuel & Iron Co.* 18 Colo. App. 285, 71 Pac. 425; *Roche v. Denver & R. G. R. Co.* 19 Colo. App. 208, 73 Pac. 880. The question of the negligence of appellant under the testimony in this case was peculiarly for the jury, who were the exclusive judges of the weight to be given the testimony and the credibility of witnesses; and, they having found that defendant was guilty of negligence in not having provided the trapdoor with hinges or fastenings, the verdict will not be disturbed, unless it should appear that they were incorrectly instructed as to the law.

(2) It is said that the only risk that appellee contends she was subjected to was

P. R. Co. 87 Mo. 545 (defective railroad track); *Wendler v. People's House Furnishing Co.* 165 Mo. 527, 65 S. W. 737 (unguarded elevator hatchway); *Henderson v. Kansas City*, 177 Mo. 477, 76 S. W. 1045 (inexperienced servant employed around dangerous machinery); *Reisert v. Williams*, 51 Mo. App. 13 (defective flue to forge, causing bellows to explode); *Deweese v. Maramec Iron Min. Co.* 54 Mo. App. 476, Affirmed on opinion of lower courts in 128 Mo. 423, 31 S. W. 110 (unprotected slope in mine); *Haworth v. Mineral Belt Teleph. Co.* 105 Mo. App. 161, 79 S. W. 727 (servant directed to go among live wires represented as insulated and safe); *Rigsby v. Oil Well Supply Co.* 115 Mo. App. 297, 91 S. W. 460 (lumber insecurely piled on skids); *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, 80 N. W. 276 (inexperienced servant directed to wipe belt while in motion); *Ryan v. H. W. Johns Mfg. Co.* 46 N. Y. S. R. 305, 18 N. Y. Supp. 754 (latently dangerous grinding machine); *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611 (unguarded saw); *Toomey v. Avery Stamping Co.* 20 Ohio C. C. 183 (defective belt); *Millen v. Pacific Bridge Co. (Or.)* 95 Pac. 196 (excavating in sewer trench); *Bolton v. Ovitt*, 80 Vt. 362, 67 Atl. 881 (defective ensilage cutter); *Myrberg v. Baltimore & S. Min. & Reduction Co.* 25 Wash. 364, 65 Pac. 539 (increased danger from exposing dynamite to heat and rain); *Dorsey v. Phillips & C. Constr. Co.* 42 Wis. 596 (cattle chute in such close proximity to track that servant injured while on ladder to car); *Blumenthal v. Craig*, 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320 (broken guard on "flushing machine"); *Smith v. Baker* [1891] A. C. 325 (defective crane used in swinging stones over servants); see also *Thruswell v. Handyside*, L. R. 20 Q. B. Div. 359 (servant directed to work in dangerous place).

The servant does not assume the risk of unusual dangers unknown to him, or of which, by the exercise of ordinary care, he would not learn. *Leighton & H. Steel Co. v. Snell*, 217 Ill. 152, 75 N. E. 462, Affirming 119 Ill. App. 199 (use of jib crane); *Louisville, N. A. & C. R. Co. v. Wright*, 115 Ind. 17 L.R.A. (N.S.)

378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584 (low overhead railroad bridge); *Indianapolis v. Cauley*, 164 Ind. 304, 73 N. E. 691 (falling of bridge with car on which servant was riding, bound for point beyond); *Pittsburgh, C. C. & St. L. R. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514 (low limb of tree projecting over railroad); *Morby v. Chicago & N. W. R. Co.* 116 Iowa, 84, 89 N. W. 105 (engine ran against another which servant was working under, by green hand who was practising); *Thompson v. New Orleans & C. R. Co.* 108 La. 52, 32 So. 177 (charged trolley pole due to defective insulation); *Stewart v. Texas & P. R. Co.* 113 La. 525, 37 So. 129 (servant not properly warned of danger, swept from bridge while assisting in breaking a jam); *Welch v. Bath Iron Works*, 98 Me. 361, 57 Atl. 88 (servant injured by explosion of dynamite left in ground from imperfect explosion where he was directed to dig); *Erickson v. Monson Consol. Slate Co.* 100 Me. 107, 60 Atl. 708 (servant injured by explosion of dynamite, left in rock from imperfect explosion, which servant drilled into); *Martineau v. National Blank Book Co.* 166 Mass. 4, 43 N. E. 513 (defective belt and driving pulley causing machine to start unexpectedly); *McLean v. Pere Marquette R. Co.* 137 Mich. 482, 100 N. W. 748 (servant followed train, upon a car of which he had seen loose blocks carelessly piled, with hand car, and was injured by derailment of hand car, caused by striking one of the blocks which had fallen from the train); *Nickel v. Columbia Paper Stock Co.* 95 Mo. App. 226, 68 S. W. 955 (sorter of paper in mill diseased by waste paper and matter gathered from hospital); *Kelley v. Cable Co.* 7 Mont. 70, 14 Pac. 633 (servant injured from explosion of dynamite left in ground after imperfect explosion); *Kiras v. Nichols Chemical Co.* 59 App. Div. 79, 69 N. Y. Supp. 44 (danger of explosion when hot slag comes in contact with water); *Dyer v. Brown*, 64 App. Div. 89, 71 N. Y. Supp. 623, Appeal dismissed in 170 N. Y. 616, 63 N. E. 1116 (explosion from pouring molten iron into damp and rusty holes in castings); *Hough v. Grants Pass Power Co.* 41 Or. 531, 69 Pac.

that arising from the absence of hinges on the trapdoor, and that she assumed this risk. If appellee's right to recover depended upon the absence of hinges alone, it might be successfully contended, under the facts disclosed by the evidence, that this risk was assumed by her. The rule applicable to assumption of risk is thus stated: "An employee assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence." *Monarch Min. & Development Co. v. De Voe*, 36 Colo. 270, 273, 85 Pac. 633, and cases cited. The testimony is to

the effect that, in the absence of hinges, fastenings, or bolts, the trapdoor was unsafe and insecure. The absence of hinges or other fastenings on the top of the door was open and obvious; not so, however, with reference to fastenings which might have been attached to the underside of the trapdoor, which would have made the same safe and secure, or to the cleats upon which the door rested. The testimony showed that appellee had no occasion to use, and never did use, the trapdoor; that she never saw the underside of it or the cleats upon which it rested. There is no rule which imposes upon a servant the duty of making an inspection or examination for the purpose of discovering defects which are not open and obvious. The exercise of the ordinary dili-

655 (power turned on while lineman was working on "dead" wires); *Manning v. Portland Steel Ship Bldg. Co. (Or.)* 96 Pac. 545 (defective chisel); *Levy v. Rosenblatt*, 21 Pa. Super. Ct. 543 (dangerous qualities of hydrofluoric acid); *Cox v. American Agri. Chemical Co.* 24 R. I. 503, 60 L.R.A. 629, 53 Atl. 871 (poisonous gases from decomposed animal matter); *Texas & N. O. R. Co. v. Gardner*, 29 Tex. Civ. App. 90, 69 S. W. 217 (poisonous vapors from chemicals); *Texas & N. O. R. Co. v. Kelly*, 34 Tex. Civ. App. 21, 80 S. W. 1073, Affirmed in 98 Tex. 123, 80 S. W. 79 (obstruction of track and defective appliances); *San Antonio Foundry Co. v. Drish*, 38 Tex. Civ. App. 214, 85 S. W. 440 (servant carrying molten metal stepped into excavation in path); *Trihay v. Brooklyn Lead Min. Co.* 4 Utah, 468, 11 Pac. 612 (insufficiently timbered roof to mine); *Downey v. Gemini Min. Co.* 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 414 (platform at foot of ladder in mine removed without notifying servant having to use same); *Johnson v. Tacoma Mill Co.* 22 Wash. 88, 60 Pac. 53 (open barrel sunk in ground, but filled with water, covered with pieces of bark); *Shannon v. Consolidated Tiger & P. Min. Co.* 24 Wash. 119, 64 Pac. 169 (accidental discharge of missed blast where servant directed to work); *McMillan v. North Star Min. Co.* 32 Wash. 579, 98 Am. St. Rep. 908, 73 Pac. 685 (missed blast at servant's place of work); *Pearson v. Federal Min. & Smelting Co.* 42 Wash. 90, 84 Pac. 632 (dangerous projection into shaft of mine); *Northwestern Fuel Co. v. Danielson*, 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915 (treble over workmen weakened by removal of brace, causing it to fall); *Sink v. Sikes Co.* 134 Fed. 144 (saw out of repair,—inexperienced employee).

And an employee does not assume the risk of a danger of which he has no knowledge, or which, as a reasonably prudent person, he is not bound to anticipate. *Flowers v. Louisville & N. R. Co. (Fla.)* 46 So. 718 (improperly set trimming machine for inexperienced servant); *Illinois C. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593 (awning projecting from railroad station close to

cars); *Summit Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. 676 (thin partition wall in mine); *Gaar, S. & Co. v. Wilson*, 21 Ind. App. 91, 51 N. E. 502 (defective appliance for holding "arbor" in locomotive works); *Vohs v. A. E. Shorthill Co.* 124 Iowa, 471, 100 N. W. 495 (flying bits of steel from chisel); *Barto v. Iowa Teleph. Co.* 126 Iowa, 241, 106 Am. St. Rep. 347, 101 N. W. 876 (defectively insulated live wire on telephone pole); *Calloway v. Agar Pkg. Co.* 129 Iowa, 1, 104 N. W. 721 (unprotected shaft); *Mumford v. Chicago, R. I. & P. R. Co.* 128 Iowa, 685, 104 N. W. 1135 (defective switch causing injury to brakeman); *Mirick v. Morton*, 62 Kan. 870, 64 Pac. 609 (grinding machine in mill); *Brower v. Timreck*, 66 Kan. 770, 71 Pac. 581 (unknown knives in planer); *United Laundry Co. v. Schilling*, 21 Ky. L. Rep. 1798, 56 S. W. 425 (mangle in laundry); *Harp v. Cumberland Teleph. & Telegr. Co.* 25 Ky. L. Rep. 2133, 80 S. W. 510 (dynamite left in hole where servant directed to excavate); *Bland v. Shreveport Belt R. Co.* 48 La. Ann. 1057, 36 L.R.A. 114, 20 So. 284 (trolley pole fell, injuring servant); *Campbell v. Eveleth*, 83 Me. 50, 21 Atl. 784 (defectively constructed lath machine); *Drapeau v. International Paper Co.* 96 Me. 299, 52 Atl. 647 (unsuitable capstan from which cable slipped, striking servant); *Lorentz v. Robinson*, 61 Md. 64 (servant called to stop unmanageable elevator, he not knowing its condition); *Pikesville, R. & E. G. R. Co. v. State*, 88 Md. 563, 42 Atl. 214 (single pole placed so near track that servant was injured while on running board for purpose of collecting fares); *Crown Cork & Seal Co. v. O'Leary (Md.)* 69 Atl. 1068 (dangerous machine for making stoppers for bottles); *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675 (improper belt-shifting appliance); *Hogarth v. Pocasset Mfg. Co.* 167 Mass. 225, 45 N. E. 629 (unguarded trapdoor); *Donahue v. Boston & M. R. Co.* 178 Mass. 251, 59 N. E. 663 (unusual pile of stones near track); *Joyce v. American Writing Paper Co.* 184 Mass. 230, 68 N. E. 213 (servant ordered to operate rag-dusting machine which he did not understand); *Smith*

gence imposed upon an employee does not extend to this length. If an inspection of the underside of the trapdoor, or of the cleats upon which it rested, was necessary to apprise appellee of the defect in the door, its fastenings, or its supports, which defect caused the accident, it is manifest that the defect was not obvious, and, under the testimony, was unknown to appellee, and not of such a character as to charge appellee with notice or knowledge thereof, so as to bring her within the rule of assumption of risk. "As a general rule, the servant is under no obligation either to inspect that part of the plant by which his safety may be affected, or to inquire into the details of the system adopted for the conduct of the master's business, for the purpose of discovering concealed dangers which would not be disclosed by superficial observation." 1 Labatt, Mast. & S. p. 1137. *Huddleston v. Lowell Machine Shop*, 106 Mass. 282, was an action brought by a servant against his master to recover for personal injuries re-

ceived by him in breaking and falling through a floor in his master's shop, over which it was his duty to pass. It appeared that he knew the floor was decayed and that there were holes in it, but it did not appear that he could have ascertained that the place where he broke through was dangerous without examining parts of the floor not open to his inspection. The court said: "In this case the evidence shows that the plaintiff had some knowledge of the condition of the floor. If it was sufficient to put him on his guard at the time, he cannot recover. But, from the nature and condition of the building, and the nature of the defect, the court cannot say that the plaintiff could, without having examined the parts of the floor that were not exposed to his inspection, be aware that there was danger at the place where he broke through. If it would require an inspection of the under side of the floor, or of the parts of the building under it, to make him aware of the danger, then the injury might have

v. Peninsular Car Works, 60 Mich. 501, 1 Am. St. Rep. 542, 27 N. W. 662 (servant directed to carry molten iron near snow and ice without being informed of the danger of explosion from contact of such iron with snow or water); *Thomas v. Ann Arbor R. Co.* 114 Mich. 59, 72 N. W. 40 (defective rope); *Hayes v. Frederick Stearns & Co.* 130 Mich. 287, 89 N. W. 947 (unguarded trapdoor); *Kopf v. Monroe Stone Co.* 140 Mich. 649, 104 N. W. 313 (dangers of loading hole with frozen dynamite); *De Kallands v. Washtenaw Home Teleph. Co.* (Mich.) 116 N. W. 564 (unknown result of telephone wire touching trolley wire); *Lane v. Minnesota State Agri. Soc.* 62 Minn. 176, 29 L.R.A. 708, 64 N. W. 382 (permitting servant to ride vicious horse in race); *Dowling v. Gerard B. Allen & Co.* 102 Mo. 213, 14 S. W. 751, Reaffirming 74 Mo. 13, 41 Am. Rep. 298, and 88 Mo. 293 (set screw on revolving shaft, invisible when shaft in motion); *McCabe v. Montana C. R. Co.* 30 Mont. 323, 76 Pac. 701 (switch stand in dangerous proximity to track); *Murray v. Boston & M. R. Co.* 72 N. H. 32, 61 L.R.A. 495, 101 Am. St. Rep. 660, 54 Atl. 289 (jigger stand over which servant fell unusually close to switch); *Boyce v. Johnson*, 72 N. H. 41, 54 Atl. 707 (log slipped on skidway,—danger deceptive from servant's apparently safe post of duty); *Thomas v. Exeter, H. & A. Street R. Co.* 73 N. H. 1, 58 Atl. 838 (defective bearings and unstable supports allowing steam ironing machine to sway forward); *Kasjeta v. Nashua Mfg. Co.* 73 N. H. 22, 58 Atl. 874 (dangerous cotton picking machine,—inexperienced employee); *Hamel v. Newmarket Mfg. Co.* 73 N. H. 386, 62 Atl. 592 (dangers of repairing shaft); *Smith v. Oxford Iron Co.* 42 N. J. L. 467, 36 Am. Rep. 535 (dangerous qualities of "giant powder" as compared with ordinary powder); 17 L.R.A. (N.S.)

Lechman v. Hooper, 52 N. J. L. 253, 19 Atl. 215 (defectively constructed wall); *Meany v. Standard Oil Co.* (N. J. L.) 55 Atl. 653 (dangerous gas and oil works); *Fowler v. Buffalo Furnace Co.* 41 App. Div. 84, 58 N. Y. Supp. 223, appeal dismissed in 160 N. Y. 665, 55 N. E. 1095 (premature dumping of car used to convey molten slag); *Wyman v. Orr*, 47 App. Div. 136, 62 N. Y. Supp. 195 (dangerous machine in paper mill); *Pursley v. Edge Moor Bridge Works*, 56 App. Div. 71, 67 N. Y. Supp. 719, Affirmed in 163 N. Y. 539, 60 N. E. 1119 (improperly constructed scaffold); *True v. Niagara Gorge R. Co.* 70 App. Div. 383, 75 N. Y. Supp. 216, Affirmed in 175 N. Y. 487, 67 N. E. 1090 (tracks so close together that running boards of passing cars overlapped); *Nelson v. New York*, 101 App. Div. 18, 91 N. Y. Supp. 763 (corrosion of boiler,—water impregnated with chlorin); *Walker v. Newton Falls Paper Co.* 111 App. Div. 19, 97 N. Y. Supp. 521 (set screw in revolving shaft); *Helmke v. Stetler*, 69 Hun, 107, 23 N. Y. Supp. 392 (vicious propensity of horse furnished servant); *Spaulding v. O'Brien*, 26 Misc. 184, 56 N. Y. Supp. 1095 (defective wagon wheel); *Ianne v. United States Gypsum Co.* 126 App. Div. 244, 110 N. Y. Supp. 496 (unsupported roof to gypsum mine); *McGarry v. New York & H. R. Co.* 28 Jones & S. 367, 45 N. Y. S. R. 564, 18 N. Y. Supp. 195 (servant employed to care for horse whose vicious propensities were unknown to him); *Womble v. Merchants Grocery Co.* 135 N. C. 474, 47 S. E. 493 (defective elevator); *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330 (defective rope used in lowering timbers); *Patterson v. Harrisburg Trust Co.* 211 Pa. 173, 60 Atl. 265 (automatic starting of dangerous machine); *Miller v. Boston & M. R. Co.* 73 N. H. 330, 61 Atl. 360 (low overhead bridge over railroad);

happened without his fault. The evidence on this point should be submitted to a jury, to determine, under proper instructions, whether he used due care at the time of the accident." There is nothing in the evidence tending to show that appellee was guilty of negligence at the time the accident occurred.

(3) Two of the instructions given by the court are objected to because they contain a statement to the effect that, if the jury believed from the evidence that the defendant was negligent in permitting the trapdoor to become loose, or to be loose, they should find for the plaintiff, upon the ground that there was no evidence tending to show that defendant permitted the trapdoor to become loose. Reading the instructions together, it is manifest that the word "become" was used in the sense of "be." The instructions upon this point, taken as a whole, could not have misled the jury. The duty of guarding against defects or want of repair is a continuing

one. The master is chargeable with knowledge of all defects which might have been discovered upon reasonable inspection. Dresser, *Employers' Liability*, p. 195. The objection urged to these instructions is entirely too technical, and is without merit.

(4) The court instructed the jury that, in assessing damages, they should take into consideration, among other things, "money expended for necessary medical and surgical attention, and for nursing and drugs." Appellee testified that she had expended for doctors' bills, hospital bill, and drug store bills, \$262. It is contended that, inasmuch as the court withdrew from the consideration of the jury as an element of damages the fact that appellee was stricken with appendicitis, and as there was no evidence to show what her expenses were on account of the operation for appendicitis and sickness occasioned thereby, separate from her expenses on account of the direct injuries resulting from the fall, the jury, by this instruction, were permitted to enter the

Whipple v. New York, N. H. & H. R. Co. 19 R. I. 587, 61 Am. St. Rep. 796, 35 Atl. 305 (pole in such close proximity to track that servant was struck while on ladder to car); Peacock v. Linton, 22 R. I. 328, 53 L.R.A. 192, 47 Atl. 887 (stones improperly piled near trench in which servant worked); Hightower v. Bamberg Cotton Mills, 48 S. C. 190, 26 S. E. 222 (latently dangerous picking machine in mill); Jennings v. Edgefield Mfg. Co. 72 S. C. 411, 52 S. E. 113 (defective underground pipe known to master); Missouri P. R. Co. v. Watts, 64 Tex. 568 (servant set to work between two cars, supposing that both cars were to remain until repaired); Texas Mexican R. Co. v. Douglas, 73 Tex. 325, 11 S. W. 333 (unknown danger from difference in height of deck plate and draw head); Martin v. Wrought Iron Range Co. 4 Tex. Civ. App. 185, 23 S. W. 387 (servant given vicious team to drive, master representing that they were gentle); International & G. N. R. Co. v. Smith (Tex. Civ. App.) 30 S. W. 501 (viciousness of bull which servant was directed to assist in handling); The Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117, Sustained on subsequent appeal in 17 Tex. Civ. App. 692, 41 S. W. 130, which was reversed on question of procedure in 93 Tex. 425, 55 S. W. 1111 (defective elevator); Missouri, K. & T. R. Co. v. Blackman, 32 Tex. Civ. App. 200, 74 S. W. 74 (bent axle to hand car); Galveston, H. & S. A. R. Co. v. Manns, 37 Tex. Civ. App. 356, 84 S. W. 254 (shovel left lying in passageway); Texarkana & Ft. S. R. Co. v. Tolver, 37 Tex. Civ. App. 437, 84 S. W. 375 (unblocked frog in railroad yard); Garity v. Bullion-Beck & C. Min. Co. 27 Utah, 534, 76 Pac. 556 (defective planking in passageway in mine); Leach v. Oregon Short Line R. Co. 29 Utah, 285, 110 Am. St. Rep. 708, 81 Pac. 17 L.R.A. (N.S.)

90 (bridge upright so close to car that servant injured while performing duty); Noyes v. Smith, 28 Vt. 59, 65 Am. Dec. 222 (defective boiler to locomotive); Drown v. New England Teleph. & Telegr. Co. 80 Vt. 1, 66 Atl. 801 (telephone lineman working on pole in close proximity to electric wires); Columbia & P. S. R. Co. v. Hawthorne, 3 Wash. Terr. 353, 19 Pac. 25 (improperly constructed pulley and shaft); Baker v. Duwamish Mill Co. 43 Wash. 149, 86 Pac. 167 (hole in floor of sawmill concealed by shavings and sawdust); Strahlendorf v. Rosenthal, 30 Wis. 675 (insufficiently braced walls to shaft); Grant v. Keystone Lumber Co. 119 Wis. 229, 100 Am. St. Rep. 883, 96 N. W. 535 (servant at work near dangerous machine); Yess v. Chicago Brass Co. 124 Wis. 406, 102 N. W. 932 (unknown dangers of machine on which servant was directed to work); Pullman's Palace-Car Co. v. Harkins, 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932 (servant directed to work in close proximity to revolving shaft); Union P. R. Co. v. James, 6 C. C. A. 217, 12 U. S. App. 482, 56 Fed. 1001, Affirmed in 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109 (unblocked frog); The Anchoria, 113 Fed. 982, Affirmed without opinion in 56 C. C. A. 452, 120 Fed. 1017 (rungs of stationary ladder on ship projected beyond side of the ladder, so that loading appliances were liable to catch on them); Choctaw, O. & G. R. Co. v. Holloway, 52 C. C. A. 260, 114 Fed. 458, Affirmed in 191 U. S. 334, 48 L. ed. 207, 24 Sup. Ct. Rep. 102 (absence of brakes on engine); Jennett v. Louisville & N. R. Co. 162 Fed. 392 (defective track from heavy rains); Watling v. Oastler, L. R. 6 Exch. 73 (defective machine allowing it to start unexpectedly).

realm of conjecture, and guess at the amount appellee expended on account of the injuries resulting from the fall. The instruction complained of expressly excluded from the consideration of the jury expenditures for medical attention, nursing, and drugs on account of appendicitis, and it not open to the objection urged against it. Further, if appellant desired a more specific instruction upon this phase of the case, he should have tendered one. This he did not do, and now is in no position to complain of the instruction given, as it fairly instructed the jury as to the measure of damages to be applied to the evidence adduced.

The instructions as a whole fully, fairly, and clearly presented the law of the case to the jury, and are commendable for their brevity. There being no error in the record, the judgment will be affirmed.

Steele, Ch. J., and Helm, J., concur.

IDAHO SUPREME COURT.

VILLAGE OF HAILEY, Resp't.,

v.

W. T. RILEY, Appt.

(14 Idaho, 481, 95 Pac. 686.)

Waters — desert entry.

1. Water applied to a desert entry for the purpose of reclaiming the same does not become inseparable therefrom, and may be conveyed separate and apart from a conveyance of the land.

Same — town-site plat — dedication.

2. The making and filing of a plat laying out a town site upon a desert entry will not dedicate to the public the water used upon the streets and alleys of said town site, under a water right subsequently located and acquired.

Dedication — intention — free use.

3. A finding that a desert entryman and his successors in interest intended that the occupants of a town site should have the free use of water on the streets of such town site is not sufficient to show a perpetual dedication of said water to a public use.

Same — necessary use.

4. A finding "that the use of water on the streets of a town site is necessary for a reasonable enjoyment of the streets, and private rights and public convenience and accommodation would be materially affected by an interruption of the use of the

Headnotes by STEWART, J.

Rehearing headnotes by AILSHIE, Ch. J.

Note. — Search has failed to reveal any other case involving the dedication to public use of appropriated water.
17 L.R.A. (N.S.)

water on the streets of said town site," is not sufficient to show an intention to dedicate or the fact of dedication of such water perpetually to a public use.

Same — long-continued use.

5. Where the findings of fact show a long-continued use, with the knowledge of the owner, of water upon streets and alleys of a municipality, such findings are not inconsistent with a permissive use and a license to use the same, and do not show an intention to perpetually dedicate the same to a public use.

Waters — dedication by user — proof.

6. To constitute dedication by user, it is necessary to find the prooative facts which of themselves constitute dedication, or the ultimate fact of dedication. It is not enough to find facts which merely have a tendency to prove dedication, as the use found to exist must be inconsistent with a permissive use or a mere license.

Trial — statute of limitations — finding.

7. In an action to quiet title to an easement in a ditch and the right to use water flowing therein, where the answer interposes, as a defense, the statute of limitations under §§ 4036 and 4037 of Rev. Stat. 1887, it is incumbent upon the trial court to make a finding upon such defense, unless a finding thereon would not affect or control the judgment or call for a different judgment than authorized by the findings made.

Appeal — insufficient findings and conclusions.

8. Where the findings and conclusions of law do not support the judgment, the judgment will be reversed.

On Petition for Rehearing.

Water — dedication to public use.

9. Under the facts shown in this case, there has been such a dedication of water to the streets, alleys, and lots of the village of Hailey, within the purview and meaning of § 4, art. 15, of the Constitution and the statutes of this state, that the water cannot hereafter be withheld from such streets, alleys, and lots to which it has been applied, so long as the consumer pays the reasonable rental therefor, as the same may be established by authority of law; and to that extent the public and individual use of such water cannot be disputed or interrupted.

Estoppel — in favor of public.

10. The doctrine of estoppel *in pais* cannot be applied in favor of the public against the property owner, unless it can be shown that he has stood by, and, by his action or silence, concurred in allowing the public and individuals to so use and enjoy his property and the right thus initiated that thereafter to deprive them of it would work an injustice or fraud upon them, and invade the right founded on the presumption he has thus allowed to be raised.

Trial — findings — conclusion of law.

11. A finding to the effect that, unless a

certain use be held to amount to a dedication, private rights and public accommodation would be materially affected, and that an interruption or cessation thereof would materially affect both public and private interests, is a conclusion of law rather than a finding of fact; and it is the duty of the trial court to find the facts upon which such conclusion must necessarily rest.

(March 12, 1908.)

APPEAL by defendant from a judgment of the District Court for Blaine County in plaintiff's favor in an action brought to establish title to a public easement in a certain water ditch. Reversed.

The facts are stated in the opinion.

Messrs. R. M. Angel and Richards & Haga, for appellant:

Dedication was not complete.

9 Am. & Eng. Enc. Law, p. 59.

The public acquired an easement only.

2 Dill. Mun. Corp. 4th ed. §§ 628, 633, 741; St. Mary v. Jacobs, L. R. 7 Q. B. 53; Tiedeman, Mun. Corp. §§ 217, 234; Elliott, Roads & Streets, 2d ed. § 115; 9 Am. & Eng. Enc. Law, pp. 23, 73; 2 Abbott, Mun. Corp. § 725.

The owner of a water right, whether by purchase or original appropriation, has a right to dispose of it as he sees fit, either with or without the land on which it was formerly used.

Hard v. Boisé City Irrig. & Land Co. 9 Idaho, 589, 65 L.R.A. 407, 76 Pac. 331; Gould, Waters, § 234; Kinney, Irrigation, §§ 264, 265; Long, Irrigation, § 79; 3 Farnham, Waters, §§ 643, 679.

The presumption is that the use was merely permissive.

Davis v. Clinton, 58 Iowa, 389, 10 N. W. 768; Mayberry v. Standish, 56 Me. 342; Jones v. Phillips, 59 Ark. 35, 26 S. W. 386; Hemingway v. Chicago, 60 Ill. 324; Wood v. Hurd, 34 N. J. L. 88; Daniels v. Almy, 18 R. I. 244, 27 Atl. 330; Tutwiler v. Kendall, 113 Ala. 664, 21 So. 332; Post v. Pearsall, 22 Wend. 425; California Nav. & Improv. Co. v. Union Transp. Co. supra.

Messrs. W. A. Brodhead, McFadden & Brodhead, and Sullivan & Sullivan for respondent.

Stewart, J., delivered the opinion of the court:

This is an appeal from the judgment. The record presented to this court consists of the judgment roll and a statement of the case settled and allowed by the trial court.

The plaintiff alleges, in the complaint: That it is the owner and in possession of a public easement of an undivided one ninth 1; L.R.A. (N.S.)

interest in a certain ditch, and has the right to convey in said ditch, known as the "Big Ditch," taking water from Wood river, in Blaine county, Idaho, 700 inches of water through said ditch and laterals; that it is the owner and in the possession of all ditches and laterals for the purpose of conveying water along, over, and upon the lots, blocks, streets, and alleys of Hailey; and that it is the owner of a public easement, and in the possession and entitled to the right to use 700 inches, under 4-inch pressure, of the waters of Big Wood river, through said ditch and laterals, for irrigation and domestic purposes. It is then alleged that the defendant claims some interest in said property which is without any right whatever. Plaintiff demands judgment that the defendant set forth his claim to said property, and that a decree be entered, adjudging that he has no interest in said property, and that the plaintiff's title is good and valid, and that the defendant be enjoined from asserting any claim to said property.

The defendant puts in issue the allegations of the complaint by denials, and alleges: That in April, 1883, the Oregon Land & Improvement Company located and appropriated a water right to the extent of 6,000 inches of water out of the waters of Wood river, and constructed the canal mentioned in plaintiff's complaint, known as the "Big Ditch," for the purpose of carrying and conveying said water to the place of intended use, and prosecuted said work diligently until the same was completed to the full carrying capacity appropriated; that this defendant and his predecessors in interest have for more than twenty years been in the sole, exclusive, complete, absolute, and undisputed control, possession, and management of said ditch, and of the laterals connected with or used in connection therewith, and of the water flowing in, or carried or conducted through, said ditch and laterals, to the full capacity of said ditch, to wit, 6,000 inches; that for more than twenty years before the commencement of this action the defendant and his predecessors in interest have been the sole, exclusive, absolute, and undisputed owners of said ditch and laterals, and said water right and water appropriation, to the full capacity of said ditch and laterals, and during all this time have exercised and enjoyed all the power and rights of ownership in fee, and during all of said time have received and collected for their sole and exclusive use and benefit the rents, profits, and income from the use of said property; that, through mesne conveyances, said property has been transferred and conveyed by the original owner and locators to this defendant, who is now the sole, exclusive, and absolute owner thereof, and for several years

before the commencement of this action has had the sole, exclusive, complete, and absolute control and management of said ditch and laterals and said water right and water appropriation, to the full capacity of said ditch; and that this defendant and his predecessors in interest have for more than twenty years paid all the taxes levied and assessed against said property.

As a further defense, the defendant pleads the statute of limitations, under §§ 4036, and 4037 and 4060 of the Revised Statutes of 1887. Upon the issues thus presented, the court made his findings of fact and conclusions of law, and entered a decree as follows: "Wherefore, by reason of the law and findings aforesaid, it is ordered, adjudged, and decreed: That the village of Hailey is entitled to the right to the use and possession of 271.45 inches of the waters of Big Wood river, through what is known as the Idaho & Oregon Land Improvement Company Ditch, or 'Big Ditch,' and laterals, which is taken from said Big Wood river about $4\frac{1}{2}$ miles north of the village of Hailey, Blaine county, Idaho, measured under a 4-inch pressure, at the point where the main lateral is diverted from said ditch, near the northeast corner of the town of Hailey, for any and all legitimate street purposes on the streets and alleys of the said village of Hailey. That the defendant has no right, title, or interest whatever in the plaintiff's right to the use of said water or any part thereof, except and provided, however, that if, at any time or times, the said full quantity of 271.45 inches of water shall not be necessary to be used as aforesaid, the said village shall, at such times, take of said quantity only so much as shall be so necessary, and permit the remainder to flow uninterrupted in said ditch. That the village of Hailey has an easement in said Idaho & Oregon Land Improvement Company Ditch, or 'Big Ditch,' and in the laterals extending from the same to, along, and upon the streets and alleys of said village, to the extent of conveying through said ditch and laterals 271.45 inches of water; and the defendant has no right, title, or interest whatever in said easement. That plaintiff have judgment for its costs expended herein, amounting to the sum of \$103. Dated February 2, 1906."

By the pleadings, the issues presented to the court for decision are: (1) Is the plaintiff the owner of a public easement and in the possession of an undivided one-ninth interest in what is known as the "Big Ditch," taken from Wood river in Blaine county, Idaho, and an equal interest in the laterals extending from said ditch to said village; and has the plaintiff the right to convey 700 inches of water through said ditch and laterals for use on the streets of 17 L.R.A. (N.S.)

said city or village? (2) Is the plaintiff the owner and in the possession of any and all ditches taken from said ditch and laterals for the purpose of conveying water along, over, and upon the lots, blocks, streets, and alleys of said village of Hailey? (3) Is the plaintiff the owner of a public easement in the possession and right to the use of 700 inches of water, measured under a 4-inch pressure, of the waters of said Big Wood river through said ditch and laterals for irrigation and domestic purposes? (4) Has the defendant been the sole and exclusive owner of the whole of the property described in the complaint and seized and possessed of the same, and in the sole and exclusive control thereof, and paid taxes thereon, for a period of time exceeding five years?

An examination of the findings shows: That the court found that the village of Hailey is a municipal corporation organized on April 21, 1903. That on the 6th day of December, 1880, John Hailey made a desert entry containing 484.70 acres, and in the spring of 1881, laid out the town of Hailey into streets and alleys, blocks and lots, etc., and made a plat of the same, and filed said plat in the county recorder's office in said county on the 10th day of May, 1881. That on the 24th day of August, 1882, said Hailey filed a revised plat of said town of Hailey, embracing the same land included in the original plat, and covering substantially all of said desert entry. In 1881, John Hailey constructed a ditch from Indian creek to the town of Hailey as then platted, and during the years 1881 and 1882, conveyed water through said ditch from Indian creek to the town of Hailey, and used the same on the streets by the inhabitants of said town for irrigation and other street purposes. That on the 7th day of June, 1882, said Hailey entered into an agreement of sale with the Idaho & Oregon Land Improvement Company, agreeing to sell to said company the land embraced in said desert entry, excepting such lots as had previously been disposed of; said Hailey to make proof and then convey according to said agreement. That on the 24th day of March, 1883, the Oregon Land & Improvement Company located a water right for 12,000 inches, to be taken from Wood river about $4\frac{1}{2}$ miles above the town of Hailey, said water to be used for irrigation purposes upon said desert entry and upon other claims, and in the summer of 1883 constructed what is known as the "Big Ditch," from Wood river, and in the fall of 1883, and every summer since, water has been conveyed through said ditch to the town of Hailey and used by the inhabitants of said town for irrigating the trees along the streets and for other street

purposes. That on the 6th day of December, 1883, said company deeded to John Hailey an undivided one-ninth interest in said Big Ditch, and also the right to the use of 700 inches of water from said water right through said ditch for the purpose of irrigating said desert entry. That, after the summer of 1883, the Indian creek water was not used on said desert entry, and on the 11th day of February, 1884, prior to said Hailey's making proof on said desert entry, he conveyed all his interest in the water of said Indian creek. That said Hailey's original filing on the unsurveyed land for said desert entry comprised an area of 484.70 acres, but after survey the lines were adjusted and patent issued for 440 acres. That final proof was made on said desert entry on the 1st day of March, 1884, showing that said Hailey had the right to the use of 700 inches of water of Wood river, through said Big Ditch, and had used the same upon said desert entry. That patent was issued to said Hailey on the 5th day of April, 1884.

Then follows what is denominated a "history" of the use of said water in said town, in which it is recited by the trial court: That, as soon as the plat of the original town of Hailey was filed, the people began purchasing lots and erecting buildings, and water was conveyed to said town from Indian creek and used in the years of 1881, 1882, and 1883. That the Big Ditch was dug in the summer of 1883, taking water from Big Wood river, which, during the latter part of the year 1883, was used on the streets in the town of Hailey, and, as the town grew, ditches were extended, trees planted, and water used, and from the year 1881, up to the present time, the lot owners and inhabitants have planted trees yearly, and said Hailey and his successors in interest have planted trees and encouraged the planting of trees. That such trees required irrigation, and had been irrigated every year by the water and ditches in question. That the use by the public of said water for legitimate purposes has been continuous and uninterrupted since the first occupation of the tract until the present time,—a period of over twenty years. That from the time water was put on said desert entry, and this defendant acquired the same, the water was turned by said Hailey and his successors, and by this defendant, into the ditches on the streets of Hailey and used by whomsoever desired, and without any objection on their part. That it was the intent of Hailey and his successors and this defendant that the occupants of the town tract should have the full use of said water on the streets for legitimate purposes. That the purchasers of said lots, down to the time this de-

fendant acquired said property, were induced to believe, and did believe, that the public should have the right to the full use of the water on the streets of said town for all legitimate purposes, and did so use the water, and did not understand that they were to be charged for such use, although some of them paid. That since 1881, there has always been sufficient water from such source to irrigate the trees on the streets and other street purposes, in the main lateral leading from said Big Ditch to the town. That, previous to the organization of Hailey as a village, there was no municipal government for the town, and when the village was organized, it found a large community occupying the town laid out, owning lots sold to them by Hailey and his successors, according to the plats. That many years since 1881, the ditches on the streets were not cleaned out or repaired by anyone engaged to do this work, and no person in particular attended to the same. That the inhabitants of the town of Hailey have been in possession of the water so used on the streets of Hailey, since it was first brought on said desert claim. That since the settlement of said town in 1881, except the years 1884 and 1885, the defendant, Riley, has been associated in the management of said ditch and water right connected therewith, and never claimed to the inhabitants that the owners of said Big Ditch were the owners of the water flowing through the ditches of said town, but permitted its free use. That the use of the water on said streets is necessary for a reasonable enjoyment of the streets, private rights, and public convenience. That of the part of the Hailey entry included in the town plat, 181.09 acres are covered and included within the streets and alleys platted.

The court, as conclusions of law, found: That, by the incorporation of the village, the municipality took exclusive control and authority of the streets of Hailey and all right and authority to use water on the streets; that the land covered by the streets and alleys was set apart and dedicated by John Hailey for public use for highways, for public traffic, and for all uses and purposes, and the setting apart of the streets was more than a common-law dedication. That it was a dedication enlarged by statute to the extent that the lot owners purchased with their lots the right to plant trees in the streets of Hailey, and by statute were granted the right to use the soil for tree growing, and that this statutory enlargement is something more than a mere right of passage, and gives a right to the use of the soil for the growth of vegetation, and that this right to the use of the soil cannot be separated from the right to the use of the necessary

water to induce growth. There being a grant to the use of the land, the right to the use of the water follows. That the water in question is appurtenant to the land in the streets and alleys, and the use of the same for legitimate street purposes is inseparable therefrom, and is incident to and necessary for a reasonable enjoyment thereof. That the beneficial uses to which water can be put on the streets and alleys of Hailey include all sanitary considerations, extinguishing fires, betterment and preservation of roadways, etc. That the village of Hailey is entitled to the right to the use of 271.45 inches of said waters of Big river, through said Big Ditch mentioned, under a 4-inch pressure, at the point where the main lateral is diverted from said ditch, to be used for legitimate street purposes when necessary. That the village has an easement in said ditch and laterals to the extent of conveying through said ditch and laterals 271.45 inches of water and is entitled to a decree of such water and easement in said ditch. And that the defendant has no interest or estate whatever in the plaintiff's right to use said water or its easement.

The respondent contends that the findings show: First, a common-law dedication of the water itself, separate and distinct from the dedication of the streets and alleys; second, that water for street purposes passed with the dedication of the streets and alleys, or as incident and necessary to the enjoyment thereof; and, third, that the water used on the desert entry and the water right supporting the same became a part of the freehold and inseparable therefrom.

In considering these three questions, we will take up the latter first. It will be seen from the findings that the trial court proceeded upon the theory that, by the use of the water through the Big Ditch from Big Wood river upon the desert entry of said Hailey, under which said desert entry was reclaimed, and upon which final proof was made, said water became an appurtenant to said land and inseparable therefrom. If this be the theory upon which said case was tried, and the view of the law upon which the findings are founded, then said findings are unwarranted by law. There is no statute of the United States, or of this state, which prohibits a desert entryman from disposing of the water used for final proof, separate from the land, after proof has been made. When the water had been used for reclaiming said land, and final proof of the same had been submitted to the government and patent issued therefor, the entryman had complied with the legal requirements prescribed by the government, and took title to his land without any conditions or restrictions. The land became his property, to dispose of as he might see

fit, either the water and the land together or separately. In the case of *Hard v. Boise City Irrig. & Land Co.* 9 Idaho, 589, 65 L.R.A. 407, 76 Pac. 331, this court held that the owner of a water right, by purchase or original appropriation, had a right to dispose of the same and sell the water separate and apart from the land. To the same effect is *Johnston v. Little Horse Creek Irrigating Co.* 13 Wyo. 208, 70 L.R.A. 341, 110 Am. St. Rep. 986, 79 Pac. 22. If this be a correct statement of the law, then the trial court erred in its conclusion of law, to the effect that the water applied to the desert entry became appurtenant to the land and inseparable therefrom.

The next question is: Do the findings show that, when the desert entryman filed a plat, laying out the town site of Hailey in the spring of 1881, and in August, 1882, he thereby made a dedication of the streets and alleys of said platted ground, and that such dedication carried with it, as an incident and necessary to the enjoyment thereof, the water which had been applied to said land? The findings show that the appropriation of water from Big Wood river was not made until the 24th day of March, 1883, and the ditch was constructed during the summer of 1883, and, in the latter part of the summer or fall of 1883, water was conveyed through said ditch from Big Wood river to the town of Hailey, and used upon the streets of said village; therefore, the water appropriated from Big Wood river and conducted through said Big Ditch had not been applied to the desert entry of Mr. Hailey at the time said plats were made and recorded; consequently, the dedication made by the making and recording of said plats, if any, would not cover the water from Big Wood river, which was not appropriated until seven months after the filing of the amended plat. The water used on said desert entry at the time said plats of the village of Hailey were filed for record was water taken from Indian creek, and not from Big Wood river through said Big Ditch, so whatever passed by the dedication in the making and recording of said plat would only apply to the condition of the land, marked as streets and alleys, at the times when said plats were filed, if at all, and would not pass to the public use any of the waters of Big Wood river carried through said Big Ditch.

It is further contended by respondent that the findings of the court show a dedication of the waters of Big Wood river, carried through said Big Ditch, by user, and that the same will arise out of either one of the following conditions: (1) For a prescriptive period; (2) for the period prescribed by statute as a bar for real actions; (3) for said period as an interruption in

the use would affect private rights and the public convenience. It is admitted, however, that to support the first two classes the limit of adverse user must exist, and the use must not be permissive only, and that the findings do not show a dedication upon such grounds. But it is contended that the user of said water has been for such a period of time that, to deny the respondent's right thereto at this time, would affect private rights and public convenience. This is the real and important question in this case: Has the municipality of Hailey and the people within said village used the waters in controversy a sufficient length of time and under such conditions that the same amounts to a dedication by user? Before the findings of the court can establish a dedication by user, it must appear therefrom that the owner intended to dedicate the water to the public use. As said by the supreme court of California in the case of *Hartley v. Vermillion*, 70 Pac. 273: "The intention of the owner to dedicate is a vital element in every case, and that intention also is a pure question of fact. A mere permissive user, by the owner, of land for a highway, never can amount to a dedication. That is a user by license, and nothing more, and of itself never would ripen into a dedication, no matter how long continued." In the case of *Cooper v. Monterey County*, 104 Cal. 437, 38 Pac. 106, 311, the supreme court of that state had under consideration the sufficiency of a finding to show a dedication of a public highway. The finding in that case, after describing the highway, continues: "Has been continuously and uninterruptedly traveled and used by the general public as and for a public road or highway ever since 1872; and that 'the same is a public highway;' and 'that such use of said portion of said land as a road or highway by the general public has been with the knowledge of plaintiff and without objection on his part.'" The court, commenting on that finding, says: "The finding that the strip of land in question was traveled and used by the public ever since 1872, with the knowledge of the plaintiff and without objection on his part, is only the finding of probative facts, tending to prove a dedication; but the fact of dedication, which, by the way, is neither alleged nor found, does not necessarily follow from these probative facts, since they are not necessarily inconsistent with a total absence of intention to dedicate, and may indicate merely a license." In the case of *San Francisco v. Grote*, 120 Cal. 62, 41 L.R.A. 335, 65 Am. St. Rep. 155, 52 Pac. 128, the court says: "It is no trivial thing to take another's land [without compensation], for the reason the courts will not

lightly declare a dedication to public use. It is elementary law that an intention to dedicate upon the part of the owner must be plainly manifest." And in the case of *Hartley v. Vermillion*, supra, the court further says: "And while long-continued user, without objection, and with the knowledge and consent of the owner, is some evidence of a right in the public, still there must be joined to that user an intention upon the part of the owner to dedicate, or no dedication will be consummated, for the long-continued user by the public, without objection by the owner, is entirely consistent with a license to the public to use the land, and therefore evidence of long-continued user alone will not support a finding of fact that a dedication was created. Neither will a finding of fact of mere long-continued user support a conclusion of law that a public highway was created. As previously stated, in order to constitute a dedication of a highway by evidence *in pais*, there must be convincing evidence that the owner intended to appropriate the land to the public use."

The findings "that it was the intent of Hailey and his successors down to Riley, that the occupants of the town tract should have the free use of this water on the streets of the town for all legitimate purposes," and "that the use of this water on the streets of Hailey is necessary for a reasonable enjoyment of the streets, and private rights and public convenience and accommodation would be materially affected by an interruption of the use of this water on the streets of Hailey," are findings of probative facts. Such probative facts only tend to prove a dedication; but there is no finding of probative facts, or of the ultimate fact of dedication. The dedication, in fact, would not necessarily follow from the probative facts found, inasmuch as such probative facts are not necessarily inconsistent with the total absence of intention to dedicate, and may indicate merely a license. The fact that the predecessors in interest of the defendant permitted the free use of said water in said village is not conclusive proof that such owners intended such use to be perpetual. At most, the use found to exist by the findings above might be permissive only and amount to a mere license. To constitute dedication by user, it is necessary to find the probative facts which of themselves constitute dedication, or the ultimate fact of dedication. It is not enough to find facts which merely have a tendency to prove dedication. We are therefore clearly of the opinion that the findings in this case are not sufficient of themselves to show a dedication by user. An examination of the findings clearly

shows that the court proceeded upon the theory that the use of the water by Mr. Hailey on his desert entry in the reclamation thereof, and for the purpose of making final proof, affixed said water to the land and made the same inseparable therefrom; for it is found by the trial court that said desert entry consisted of 440 acres, and that the original plat and the revised plat included substantially all the lands embraced in said Hailey's desert entry, and that the streets and alleys set apart upon said plat include 181.09 acres of said entry, thereby showing that the court considered the acreage of the streets and alleys to be the basis for figuring the water dedicated to the same. It will be observed, however, that the court did not find the amount of water which had actually been used or necessary to be used upon said streets and alleys. This it was necessary for the court to do, as the extent of the dedication, if there be a dedication of said water, was one of the issues in said case.

Again, the defendant's answer presented an issue under § 4036 of the Revised Statutes of 1887, which is as follows: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action; and this section includes possessory rights to lands and mining claims." Also under § 4037 of the Revised Statutes of 1887, which is as follows: "No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appears that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor, of such person was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made." Upon the issue thus presented, the court made no finding. In the case of *Later v. Haywood* (Idaho) 93 Pac. 374, this court held that, where the trial court fails to find on all the material issues, the judgment will be reversed, unless a finding thereon, whether for or against the successful party, would not affect the judgment entered. And where the court fails to find on an issue presented, and a finding thereon might call for a different judgment, it is reversible error. It is apparent, therefore, in this case, that had the court made a finding upon the issue interposed, of the statute of limitations, it would affect and control the judgment, and, if in favor of the defendant, the judgment must follow such finding, and be for defendant. The failure to find upon this issue is reversible error.

Again examining the findings, we are unable to discover any facts found which would justify a judgment that the plaintiff or the public had any interest in said water appropriation, or any interest in the Big Ditch through which the waters of said appropriation were carried. At most, the facts found disclose that the water used by the public upon the streets of said village of Hailey was taken from a lateral leading from the Big Ditch. If this be correct, the findings would not warrant a judgment giving the village of Hailey the right to the use and possession of 271.45 inches of the water of Big Wood river through the Big Ditch. Had the judgment followed the findings and decreed that the village of Hailey was entitled to 271.45 inches of water at the point where the main lateral is diverted from said ditch, then the findings in that particular would have supported a judgment therefor; but such is not the judgment.

Again, there is no finding to warrant the judgment that the village of Hailey has an easement in said Big Ditch to the extent of conveying through said ditch and laterals 271.45 inches of water. There is no finding to support that part of the judgment to the effect that the said village of Hailey is entitled to the right to the use and possession of 271.45 inches of water from said Big Wood river through said Big Ditch and laterals, when necessary, as there is no finding to show the amount of water necessary for said use, or the extent of the use of said water by said village through said ditch. The evidence is not before the court, and we cannot inquire whether or not it supports the findings. But it does appear clearly to this court: First, that the case was tried and decided upon the theory that the water used upon said desert entry became appurtenant and inseparably fixed thereto, which the law does not warrant; second, that the findings do not show a dedication of the waters used on said land to a public use; third, that the findings do not show any title or interest in said water or ditch by adverse user; fourth, that there is no finding upon the issues tendered by the defendant in his answer; fifth, that there is no finding of the extent of the dedication, even if there be a dedication in fact; sixth, that the findings do not support the judgment.

The judgment in this case is therefore reversed, and the cause remanded for a retrial. Clerk's costs on appeal, and the costs of printing 25 pages of the transcript,

and the reply brief, are awarded to appellant.

Allshie, Ch. J., concurs.

A petition for rehearing having been filed. Allshie, Ch. J., handed down the following response on May 11, 1908:

In this case the respondent has filed a petition for rehearing, in which it is contended that we have misapprehended the law as applicable to the question of dedication to a public use, where a denial of or interference with its continued use would impair or interrupt the public convenience and private rights. Various questions have been presented by counsel in their petition for rehearing, but we do not deem it necessary to consider or discuss any of the propositions relied on, except the one touching the question of the public convenience and accommodation and private rights, as the same might be affected or interrupted by a refusal to recognize the principle of dedication as contended for by counsel.

In the first place, and before passing to a consideration of the main proposition here presented, it is well enough to observe that there can be no question in this case but that there has been a dedication of the water to the streets and alleys of the village of Hailey and to all of the lands to which the water has been applied within the purview and meaning of § 4 of article 15 of the Constitution and the statutes of this state, as well as under the repeated decisions of this court. That dedication is such that the water cannot hereafter be withheld from the streets and alleys and lots to which it has been applied within the village of Hailey, so long as the consumer pays the reasonable rental therefor, as the same may be established under and by authority of law. In that sense, there is an unquestioned dedication, and to that extent the use and convenience of the public, as well as of the individual property owners, cannot be disputed or interrupted. On the other hand, we are still convinced that the findings of the court are not sufficient on which to base a decree to the effect that there has been such a dedication of these waters as to entitle the municipality and property owners to a free perpetual use of the same. That will be one of the questions to be determined on a retrial. In determining that question, both the use and nature and extent thereof and the intention of the owner of the ditch and water right must be taken into account, as well as any representations made by the owner or owners of the town site who were, at the same time, the owners of the ditch and water right.

We pass now to a consideration of the
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proposition for which respondent contends:

"A presumption of dedication arises from permissive user where private rights and public accommodation would be materially affected by an interruption of the use." The principal case on which respondent relies is that of *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452. In that case the Supreme Court of the United States had under consideration the question of dedication of a public common, and in considering the question of use by the public and private property owners and the acquiescence in the use by the owner of the common, the court said: "This was for the public use and the convenience and the accommodation of the inhabitants of Cincinnati, and doubtless greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public grounds. And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." In the case of *Schettler v. Lynch*, 23 Utah, 305, 64 Pac. 955, the supreme court of Utah was considering an implied dedication and a dedication by user. In speaking of the principle of implied dedication, the court said: "An implied dedication is founded on the doctrine of equitable estoppel; and when land has been thus set apart as a highway for the use, convenience, and accommodation of the public, and enjoyed as such, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication." The Utah court, in discussing the point as to when and under what circumstances the evidence will justify the application of the rule, said: "Where the evidence shows such a course of conduct and such acts respecting the land in controversy as clearly manifest an intention on the part of the owner to appropriate it to the public use as a highway, and such as were calculated to induce people to believe that the land was devoted to such purposes, and tull them into security as to any rights they might acquire with reference thereto, the law will imply a dedication."

From these authorities, as well as the numerous others that have been cited by respondent, it will be seen at once that where the principle has been applied by the courts, to the effect that a dedication will be presumed where to disturb the right would im-

pair private rights and disturb the public convenience, the courts have, in substance, rested the doctrine upon the principle of estoppel *in pais*. In other words, the courts have held that where an individual has stood by and allowed the public to use his property as though it had been dedicated to the public use, and has allowed private rights to grow up under that assumption, and in view of such belief and opinion, and a disturbance of those rights would amount to an injustice, an inequity, or a fraud, the owner will thereafter be estopped to set up the true state of facts or assert his own title to the prejudice of the public or the private rights thus accrued. An examination of all these authorities will at once disclose that they rest upon the basic principle of estoppel *in pais*. It would therefore be unjust to apply the principle of estoppel against the property owner, unless it can be shown that he has stood by and by his action or silence concurred and assented in allowing the public and individuals to use and enjoy the property and the right thus acquired in such a manner that to thereafter deprive them of it would work an injustice or fraud upon them and the right founded on the supposition he has thus allowed or invited them to acquire. In *Demartini v. San Francisco*, 107 Cal. 402, 40 Pac. 496, cited by respondent, the supreme court of California, in considering the question of dedication by user, said that it would only be considered as a dedication in cases where it clearly appeared that such user was with the knowledge and consent of the owner or without his objection, and under such circumstances as to fairly give rise to the presumption that the owner intended to dedicate to such use.

Again, in reference to the findings to the effect that, unless this use be held to amount to a dedication, private rights and public accommodation would be materially affected, and that an interruption or cessation thereof would materially affect both the public and private interests, we are satisfied that this proposition is a conclusion of law, rather than a finding of fact. It is the duty of the court to hear the evidence from which such a conclusion is to be reached, and to find the facts upon which that conclusion must necessarily rest as a proposition of law. We have no inclination to deny the soundness of such a legal proposition. It is clearly entitled to application in this state where the facts of the case will justify invoking that principle. The trouble with this case, as we have viewed it from the time we arrived at our conclusion on the original hearing, is that the findings of the court were not sufficient upon which to rest the conclusions of law and the judgment 17 L.R.A. (N.S.)

that the court has announced in the case. We are not familiar with the facts in this case upon which the findings and conclusions rest, as the evidence is not before us. Those are questions to be presented and considered on a retrial of the case, and it is for that reason that we have remanded the case for further hearing.

We do not find anything contained in the petition that we had not previously examined and considered, although we may not have discussed some of the particular questions argued by counsel at such length as we might have done. We did not do so, thinking it best to leave those questions to be determined in connection with the evidence. We think, however, the foregoing observations sufficient to make clear the position of this court with reference to the legal propositions involved.

The petition is denied.

Stewart, J., concurs.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS

v.

HANNAH PORN.

(196 Mass. 326, 82 N. E. 31.)

Physician — license — midwife.

1. A person without license may be found guilty of violating the statute requiring a license to practise medicine who practises midwifery making use of the instruments usually employed for that purpose, and of certain printed formulas for conditions encountered in the practice.

Evidence — expert — question for court.

2. Expert evidence is not admissible upon the question whether a person doing the things upon which the parties agree is practising medicine, that being a question for the court to decide.

Physician — constitutional rights — midwife.

3. No constitutional rights are infringed by including midwifery in the provisions of a statute requiring a license to practise medicine.

(October 15, 1907.)

Case Note. — Midwifery as practice of medicine contravening statute.

A search has disclosed but one additional case in which this question has been passed upon.

In *People v. State Bd. of Health v. Arendt*, 60 Ill. App. 89, the practice of midwifery by defendant was held to violate a statute requiring certain qualifications of all persons practising medicine. The

EXCEPTIONS by defendant to rulings of the Superior Court for Worcester County made during the trial of a prosecution against her for illegally practising medicine, which resulted in a conviction. Overruled.

The facts are stated in the opinion.

Mr. Francis Bergstrom for defendant.

Messrs. George S. Taft and Ernest I. Morgan for the Commonwealth.

Rugg, J., delivered the opinion of the court:

This is a complaint charging that the defendant "did practise medicine" and "hold herself out as a practitioner of medicine," contrary to Rev. Laws, chap. 76, § 8. After the case was before us in 195 Mass. 443, 81 N. E. 305, the defendant was tried again in the superior court upon an agreed statement of facts, by which it appeared that at the time mentioned in the complaint, and for some years before, the defendant held herself out as a midwife and practised midwifery, but did not claim to be a general practitioner of medicine, nor was she lawfully authorized to practise medicine as provided by Rev. Laws, chap. 76, § 3. She delivered many women in childbirth for compensation, and carried with her to her patients the usual obstetrical instruments, which she used rarely on occasions of emergency, but never if a physician could be called in time. She used six printed prescriptions or formulas in treating her patients, which contained directions for their application, and the purposes for which they were used, as follows: "For vaginal douche," "For post-partum hemorrhage," "To prevent purulent ophthalmia in the newborn," "For afterpains," "For uterine inertia," and "For painful hemorrhoids or piles." She used no other prescriptions or formulas. She was a trained nurse of experience, and was a graduate of the "Chicago Midwife Institute," from which she received a diploma which stated that she had received theoretical and practical instruction in the art of midwifery for a period of six months, and was declared a graduated midwife. Upon these facts the

superior court ruled that the jury would be authorized to find the defendant guilty, and the defendant's first exception relates to this ruling. When the facts are undisputed, it is generally a question of law whether they constitute a violation of the statute. *Com. v. Porn*, 195 Mass. 443, 81 N. E. 305. Both medical and popular lexicographers define "midwife" as a female obstetrician, and "midwifery" as the practice of obstetrics. Rev. Laws, chap. 76, § 7, mentions obstetrics as one of the subjects of examination for the purpose of testing an applicant's fitness to "practise medicine." This goes far toward showing that obstetrics is a branch of the practice of medicine. It requires no discussion to demonstrate that when, in addition to ordinary assistance in the normal cases of childbirth, there is the occasional use of obstetrical instruments, and a habit of prescribing for the conditions described in the printed formulas which the defendant carried, such a course of conduct constitutes a practice of medicine in one of its branches. Although childbirth is not a disease, but a normal function, of women, yet the practice of medicine does not appertain exclusively to disease, and obstetrics as matter of common knowledge has long been treated as a highly important branch of the science of medicine. In *Higgins v. McCabe*, 128 Mass. 13, 30 Am. Rep. 642, it is intimated that treatment of eyes of the infant (for which one of the prescriptions of the defendant was employed) is not within the duties of midwifery. In view of all the agreed facts, there was no error in submitting the case to the jury.

The defendant also offered expert testimony to prove that the practice of the defendant, as shown in the agreed facts, was not the practice of medicine in any of its branches, and that the conduct of the defendant was not holding herself out as a practitioner of medicine. The evidence thus offered was excluded against the objection and exception of the defendant.

In the former opinion in this case it was said that expert medical evidence was admissible to prove "what a midwife does or is expected to do as such, so that the court

court said: "Midwifery is an important department of medicine, and is so recognized by the act. The lawmaking power of the state has enacted that 'no person shall practise medicine in any of its departments in this state without the qualifications required by this act.' The validity of such a law is not denied, but it is urged only that the defendant had not practised medicine within the meaning of the act. It needs no argument to show the importance of obstetrics as a department of medicine, nor the necessity that those who assume 17 L.R.A. (N.S.)

to practise in that department should possess due knowledge and skill. The welfare of their patients is certainly within the purview of the law, no less than in other departments, where, in many instances, at least, even less care and skill may be essential, and where the consequences of ignorance and unskillfulness may be less unfortunate."

For a note on the application of statutes regulating practice of medicine to persons giving special kinds of treatment, see case note to *O'Neil v. State*, 3 L.R.A. (N.S.) 762.

may see whether her acts or any of them are to be regarded as the practice of medicine in any of its branches. . . . Whether upon such evidence it would appear that the ministrations of a midwife are those of a physician or rather of an attendant nurse and helper would ordinarily be a question of fact, or, if the facts were not in dispute, a question of law." 195 Mass. 445, 81 N. E. 306. At the present trial the facts were agreed. All that the defendant sought to show was that these facts in the opinion of experts did not constitute the practice of medicine. But as the facts were not in dispute, within the former decision, the question was not one for expert evidence, but for the court. Moreover, on all the facts shown as to the use of prescriptions and the pains they were stated to alleviate and the use of obstetrical instruments, as well as the attendance and service at childbirth by the defendant, it would be contrary to the plain intent of the statute and flying in the face of the common use of words to permit experts to testify that the language employed in the statute did not comprehend the acts confessedly performed by the defendant. We are far from saying that it would not be within the power of the legislature to separate by a line of statutory demarcation the work of the midwife from that of the practitioner in medicine. See midwives act 1902, 2 Edw. VII., chap. 17, and collection of statutes in 1 Witt-haus & B. Med. Jur. 137 et seq. The statute now under consideration does not make such a separation. *State v. Welch*, 129 N. C. 579, 40 S. E. 120. Whatever hardship there may be upon the defendant, who is a woman of good character and reputation as shown by the agreed facts, comes from the scope of the statute.

The defendant contends that the statute as thus construed is unconstitutional. Its validity cannot be questioned on this ground. The maintenance of a high standard of professional qualifications for physicians is of vital concern to the public health, and reasonable regulations to this end do not contravene any provision of the state or Federal Constitution. *Hewitt v. Charier*, 16 Pick. 353; *Brown v. Russell*, 166 Mass. 14, 23, 32 L.R.A. 253, 55 Am. St. Rep. 357, 43 N. E. 1005; *Decie v. Brown*, 167 Mass. 290, 45 N. E. 765; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Meffert v. Packer*, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790.

Exceptions overruled.

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MASSACHUSETTS SUPREME JUDICIAL COURT.

JOSEPH LONG

v.

INHABITANTS OF ATHOL, Appts.

(196 Mass. 497, 82 N. E. 665.)

Contract — cancellation — fraud — mistake.

1. One who has been induced to enter into a contract to perform public work by fraudulently underestimating the amount of work to be done and concealing from him the plans and specifications in accordance with which he is to do the work, or by mutual mistake based on erroneous estimates of the public's engineer of the amount of work to be done, may, in absence of laches or negligence on his part, maintain a bill for cancellation of the contract and recovery of whatever money may be incidentally necessary to afford full relief, if defendants can be put substantially into their original position.

Same — stipulations of contract — waiver of errors.

2. One who has contracted to do public work according to the plans and specifications, in reliance upon the estimate of the engineer in charge of the work on behalf of the public, which believes the estimate to be correct, is not precluded from securing a cancellation in case the estimate is not even approximately correct, by the fact that the contract stipulates that the estimate is approximate only, and that he is satisfied therewith and has judged for himself as to all conditions affecting the cost of performance.

Same — absence of actual misrepresentation.

3. A municipal corporation cannot avoid cancellation of a contract for public work based on the estimate of its engineer, on the theory that it did not represent the estimate to be true, and did nothing to prevent full investigation by the contractors.

Same — testing estimates.

4. One bidding for public work is not bound to employ a skilled engineer to test the accuracy of the estimates of the public engineer of the amount of work to be done, which is given out as the basis for the bids.

Same — statu quo.

5. A municipal corporation which has induced a contractor to undertake public work by mutual mistake as to the amount to be done is placed *statu quo*, so as to warrant cancellation of the contract, by being required to pay merely the full value of the labor and materials already furnished.

Same — demonstration of error.

6. That work already done on a public

Note. — As to mistake in computation by contractor as ground for relief, see case note to *Steinmeyer v. Schroepfel*, 10 L.R.A. (N.S.) 114.

contract shows that the original estimate is not correct, so that a new contract cannot be secured on as advantageous terms, will not prevent a cancellation of the contract for mutual mistake as to the amount of work required, on the theory that the public cannot be put in *statu quo*.

Reference — presumption as to rulings.

7. In the absence of a request for ruling, and exception, the court cannot assume that the master made a certain ruling from language which contains an intimation that he made it, if other language indicates that he may not have intended to do so.

Evidence — mistake.

8. A contractor for public work who seeks cancellation of the contract because of mutual mistake as to the quantity of work to be done may show that, in making his bid, he acted on a mistake caused by an erroneous estimate by the public's engineer of the amount of work to be done.

Contract — cancellation — quantum meruit.

9. Upon cancellation of a contract for public work because of mutual mistake as to the amount of work to be done, the contractor may recover upon a *quantum meruit* for all that he has done.

Same — extra work.

10. Neither the cost nor the value of extra work is material in fixing the amount to be awarded for work done under a contract for public work, which contract is canceled for mutual mistake of the parties.

(November 26, 1907.)

APPEAL by defendants from an order overruling a demurrer to a bill filed to cancel a contract for construction of a sewer, and exceptions to the master's report. Exceptions overruled.

The facts are stated in the opinion.

Messrs. Herbert Parker and Frederick N. Nash for appellants.

Messrs. Whipple, Sears, & Ogden and Alexander Lincoln for appellee.

Sheldon, J., delivered the opinion of the court:

The defendants appealed from the interlocutory order overruling their demurrer to the bill, and their counsel have discussed some of the questions naturally arising thereon. As, however, all these questions are raised, and perhaps more advantageously for the defendants, upon the master's report and the exceptions thereto, and as the appeal has not been argued specifically, it need not be considered at any great length. We think it plain that the bill as amended sets forth a good cause of action. It is drawn with a double aspect, seeking to obtain a cancellation of the contract of the plaintiffs with the defendants, first, upon the ground that it was fraudulently

obtained from the plaintiffs by giving to them as a basis for the proposed contract erroneous estimates of the work to be done, which largely understated the amount thereof, and keeping from the files of the town clerk of Athol and concealing from the plaintiffs the maps, drawings, profiles, and specifications in accordance with which the contract was to be, and in fact was, made; and, secondly, upon the ground that the contract was made under a mutual mistake of both parties arising from the fact that the estimates upon which the plaintiffs made their bid, and upon the faith of which they entered into the contract, which estimates were made by an engineer employed by the defendants for that purpose, and were given to the plaintiffs by the defendants as correct, were erroneous and materially underestimated the amount of the work to be done. If the proof came up to the averments of the bill on either of these grounds, it would entitle the plaintiffs to relief. It would be enough if either of the grounds alleged were made out. *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1; *Davies v. London & P. Marine Ins. Co.* L. R. 8 Ch. Div. 489; *Newbigging v. Adam*, L. R. 34 Ch. Div. 582; *Traill v. Baring*, 4 De G. J. & S. 318, affirming s. c. 4 Giff. 485; *Rawlins v. Wickham*, 3 De G. & J. 304; *Daniel v. Mitchell*, 1 Story, 172, Fed. Cas. No. 3,562; *Goodwin v. Massachusetts Loan & T. Co.* 152 Mass. 189, 25 N. E. 100; *Motherway v. Wall*, 168 Mass. 333, 47 N. E. 135; *Keene v. Demelman*, 172 Mass. 17, 51 N. E. 188; *Boles v. Merrill*, 173 Mass. 491, 73 Am. St. Rep. 308, 53 N. E. 894; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371; *Winnipisseegee Lake Cotton & Woolen Mfg. Co. v. Perley*, 46 N. H. 83. The bill could be maintained both for a cancellation of the contract and for the recovery of whatever money might be incidentally necessary to afford full relief. *Rackemann v. Riverbank Improv. Co.* 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; *Davis v. Peabody*, 170 Mass. 397, 49 N. E. 750; *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416; *Franklin v. Greene*, 2 Allen, 519. Nor does the bill show upon its face that the plaintiffs had such means of ascertaining the real facts, or were guilty of such gross negligence in relation thereto, as to deprive them of the right to relief for this reason. *Conner v. Welch*, 51 Wis. 431, 8 N. W. 260. The statement of Jessel, M. R., upon this subject in *Redgrave v. Hurd*, supra, was quoted and followed in *Smith v. Land & House Property Corp.* L. R. 28 Ch. Div. 7, 17, and in *Karberg's Case* [1892] 3 Ch. 1, 13. Nor does the bill show that the plaintiffs were guilty of such laches as to lose their right to relief. Their right

to cancellation depended upon the refusal of the defendants to correct the mistake, so far as the bill rested upon that ground (*Keene v. Demelman*, 172 Mass. 17, 23, 51 N. E. 188); and the bill seems to have been brought promptly after the discovery of the mistake and the defendants' refusal to rectify it (*Rawlins v. Wickham*, *supra*). It does not appear by the bill that the defendants cannot, as to all essential matters, be put substantially into their original position under the rule of *Thayer v. Turner*, 8 Met. 550, and *Snow v. Alley*, 144 Mass. 546, 59 Am. Rep. 119, 11 N. E. 764. See *Drohan v. Lake Shore & M. S. R. Co.* 162 Mass. 435, 38 N. E. 1116; *Rackemann v. Riverbank Improv. Co.* 167 Mass. 1, 4, 5, 57 Am. St. Rep. 427, 44 N. E. 990. We cannot doubt that the demurrer was rightly overruled. The cases which hold that, without a cancellation of the contract, the plaintiffs would be held to performance in conformity to its terms, and could not set up the antecedent error, are beside the point, and need not be considered.

It sufficiently appears by the master's report that, although no fraud was practised upon the plaintiffs, their contention that the contract was entered into under a mutual mistake caused by the error of the engineer employed by the defendants to make the estimate that was furnished by the defendants to the plaintiffs and other contractors for them to base bids upon was proved. The plaintiffs had access also to correct profile maps and drawings and to printed specifications; and it would have been possible for a skilled engineer, by correctly scaling these plans, to ascertain and correct the mistakes made in the estimate furnished by the defendants to the plaintiffs and other bidders. It is manifest, however, and, as we understand, is not disputed, that the mistakes could have been discovered only by one skilled in such matters, and only by careful and accurate scaling and processes of computation. The master has found that the officers of the defendants acted in good faith in furnishing this estimate, and believed that the information given therein was at least approximately correct, and were ignorant that any material errors had been made in compiling it; that the mistakes made were unintentional, and that all parties were ignorant of any serious discrepancies in the estimate, but that the plaintiffs were not grossly negligent in not examining the plans more minutely, and had the right to assume that the engineer's estimate was at least approximately correct, and to rely thereon in making up and submitting their bids. He also has found that the statements of this estimate were not even approximately correct; that the amount

of excavation required of the plaintiffs was so much in excess of that shown by the erroneous estimate that the plaintiffs were justified in fact in refusing to proceed further with their contract.

Upon these findings taken by themselves, under the circumstances which appear here, it is manifest, upon the cases already referred to, that the plaintiffs are entitled to the relief which they seek, unless this should be refused to them by reason of some of the specific objections of the defendants, or unless it should appear, upon some of their exceptions, that there has been material error on the part of the master; and we proceed to consider these questions.

The defendants contend that there was no right of cancellation by reason of the issuing of the paper containing the inaccurate estimates, because this was put forth in good faith; its inaccuracy was unknown and unsuspected by the defendants' officers until after the plaintiffs had begun their work; and because the plaintiffs in their contract expressly covenanted to do the work "in strict accordance with the maps, drawings, profiles, and specifications prepared therefor and on file in the office of the town clerk, . . . all of which are to be considered as part and parcel of these presents, and to be construed therewith," and further in the same contract in express terms admitted and agreed "that the amounts and quantities of materials to be furnished and work to be done as stated in the notice to bidders, governing the making of proposals for said work, are approximate only," and that they were satisfied therewith in determining the prices for doing the work required by the contract, and that they had judged for themselves as to all conditions affecting the cost of the performance of the work. And the defendants contend that the plaintiffs, after having made these express stipulations, cannot now, upon discovery of the mistake which was common to them and the defendants, assert that the contract was represented to them to be an agreement to do the work according merely to the erroneous estimate. *Sullivan v. Sing Sing*, 122 N. Y. 389, 25 N. E. 366; *Williams v. Daiker*, 33 Misc. 70, 68 N. Y. Supp. 348. Certainly, the plaintiffs cannot make such an assertion. As long as the contract remains in force they are bound by its provisions. *Stuart v. Cambridge*, 125 Mass. 102; *Lentillon v. New York*, 102 App. Div. 548, 92 N. Y. Supp. 897. But the equitable right to avoid an agreement which has been entered into upon a mutual mistake as to material facts, knowledge of which would have prevented the parties from making it, is not to be defeated by reason merely of the stringency of the covenants which it contains. We

have found nothing in the New York decisions already referred to inconsistent with this position. If, as the defendants contend, on the authority of *Weeks v. Trinity Church*, 56 App. Div. 195, 67 N. Y. Supp. 670, and *Gearty v. New York*, 171 N. Y. 61, 63 N. E. 804, they could be construed as denying such a right of cancellation, we should not be willing to follow them.

It is contended, also, that the agreement should not be set aside by reason of this mistake, because it is not to be treated as a mistake of fact. The paper, it is contended, was given to the plaintiffs merely as an estimate. The defendants, though believing it to be accurate, did not attempt to pass off their belief as knowledge. *Chat-ham Furnace Co. v. Moffatt*, 147 Mass. 403, 9 Am. St. Rep. 727, 18 N. E. 168. They did nothing to prevent a full investigation. *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 315. They contend, substantially in the language of this court in *Schramm v. Boston Sugar Ref. Co.* 146 Mass. 211, 216, 15 N. E. 571, that a contract is not to be set aside merely because before the making thereof there may have been an honest expression of opinion, or an honest statement of a fact not purporting to be as of knowledge, that the thing contracted for will turn out better than it proves to be; and they cite, also, *Comins v. Coe*, 117 Mass. 45; *Powers v. Mayo*, 97 Mass. 180; *Gordon v. Parmelee*, 2 Allen, 212; *Mooney v. Miller*, 102 Mass. 217; *Roberts v. French*, 163 Mass. 60, 10 L.R.A. 656, 25 Am. St. Rep. 611, 26 N. E. 416; *Brownlie v. Campbell*, L. R. 5 App. Cas. 925, 936, 937, and *Smith v. Chadwick*, L. R. 9 App. Cas. 187. But this argument overlooks the fact that in the case at bar the erroneous estimate was the basis of the plaintiffs' bid and the ground of their making the contract; it was a material element in the minds of both parties; it was given by the town both to the plaintiffs and to all other contractors who asked for information on the subject; both parties regarded it as approximately correct, and the plaintiffs relied upon it; and the errors were unknown to all parties until after the execution of the contract. The plaintiffs' admission in their contract as to the character of the quantities stated in the estimate went no further than that these were approximate only, and the defendants seem to have been content with this; but the master has found that they were not even approximately correct. There was here a material mistake as to the very basis upon which the contract was made. *Spurr v. Benedict*, 99 Mass. 465. And for that mistake the defendants are in the first instance responsible. *Keene v. Demelman*, 172 Mass. 17, 21, 51 N. E. 188; *Rackemann v. Riverbank* 17 L.R.A. (N.S.)

Improv. Co. 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990. The case is not within the contention of the defendants as to this point.

Nor was there such negligence of the plaintiffs in accepting the erroneous estimate without employing the other means of knowledge furnished by the defendants as to bar their relief as matter of law. The master has found that the maps and plans were in the selectmen's rooms, which were used also by the town clerk, that the plaintiffs saw them there and had full opportunity to inspect them and to scale them for the purpose of comparing them with the estimate, but that the plaintiffs were not grossly negligent in not examining the plans more minutely, and had a right to assume that the engineer's estimate was at least approximately correct. The defendants rely here upon the many cases in which it has been held that one to whom fraudulent representations are made has no right to rely upon them if the facts are within his observation, or if he has equal means of knowing the truth. *Savage v. Stevens*, 126 Mass. 207; *Brown v. Leach*, 107 Mass. 364; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506. This to be sure presents usually a question to be passed upon by the jury at law or by the master here. *Arnold v. Teel*, 182 Mass. 1, 64 N. E. 413; *Whiting v. Price*, 172 Mass. 240, 70 Am. St. Rep. 262, 51 N. E. 1084, and cases cited. And the defendants admit that negligence as a defense in cases of fraud has been in danger of being pushed too far. *Arnold v. Teel*, supra; *Holst v. Stewart*, 161 Mass. 516, 522, 42 Am. St. Rep. 442, 37 N. E. 755; *Way v. Ryther*, 165 Mass. 226, 229, 42 N. E. 1128. But they contend that one who has merely put forth in good faith an inaccurate estimate should be allowed to avail himself fully of the negligence of one who claims to have been misled by this innocent mistake. *Slaughter v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; *Farnsworth v. Duffner*, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164; *Long v. Warren*, 68 N. Y. 426; *Conner v. Welch*, 431, 8 N. W. 260. But it must be remembered that the only finding of the master upon this point is that a skilled engineer, by correct scaling of the maps and drawings, might have ascertained the errors in the engineer's estimate. It is not found that examination by others would have disclosed them. The engineer's estimate was erroneously supposed by both parties to be a correct rendering into ordinary language of the hidden

sense of the maps, plans, and drawings, and the defendants furnished it to the plaintiffs as such, merely requiring the plaintiffs to stipulate that its figures were approximate only. The master may have found on the evidence that the case stood as if the correct plans had been expressed in some foreign language or in hieroglyphics which only some peculiarly skilled persons could translate, and that the defendants had innocently furnished the plaintiffs with a materially incorrect version of them. Nor do we know what the evidence was upon which the master made his findings. We cannot say that the plaintiffs did not have under the circumstances the right which the master has found that they did have, or that the finding that they were not grossly negligent in this matter is not enough to protect them. This was substantially the rule adopted in equity in *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1; *Smith v. Land & House Property Corp.* L. R. 28 Ch. Div. 7, 17; *Karberg's Case* [1892] 3 Ch. 1, 13; *Aaron's Reefs v. Twiss* [1896] A. C. 273, 279. And see *Goodwin v. Massachusetts Loan & T. Co.* 152 Mass. 189, 201, 25 N. E. 100; *Keene v. Demelman*, supra.

And, for the reasons already stated, the defendants' contention that there having been on their part no fraud or concealment or inducement to omit investigation, the plaintiffs cannot go behind the conditions of the contract and their bid, to assert that they intended to bid upon the estimate, and not upon the maps, plans, and specifications, cannot be supported. This contention is correct so long as the contract remains in force; it is not correct when cancelation is sought on the ground of a material mistake of both parties in the basis of the contract. Upon the findings of the master, there is nothing in *Blaiberg v. Keeves* [1908] 2 Ch. 175, or in *Brownlie v. Campbell*, L. R. 5 App. Cas. 925, to help the defendants here.

But it is argued that the contract cannot now be canceled, because the defendants cannot be put *in statu quo*. The master's finding as to this is that the plaintiffs "could not, by rescinding their contract, place the defendants in the same condition that they were in before the beginning of the work, or, in other words, could not undo the work of construction, so far as it had been done, and reclaim the materials furnished and labor performed." This is far from being an unqualified finding that the defendants cannot be put *in statu quo*. If the contract is set aside and the defendants are held to pay the plaintiffs for the fair value of the materials and labor furnished by the latter, and no more, we do not see why the defendants are not in legal sense put in

statu quo. This was the rule adopted at law in *Bailey v. Marden*, 193 Mass. 277, 79 N. E. 257; *Brown v. Woodbury*, 183 Mass. 279, 67 N. E. 327; *Posner v. Seder*, 184 Mass. 331, 333, 68 N. E. 335; *Simmons v. Lawrence Duck Co.* 133 Mass. 298; and *Fitzgerald v. Allen*, 128 Mass. 232. The same rule has been adopted in equity. *Franklin v. Greene*, 2 Allen, 519; *Davis v. Peabody*, 170 Mass. 397, 49 N. E. 750; *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416; *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. 315, 329, 108 Am. St. Rep. 479, 74 N. E. 653. The case comes really within the rule laid down in *Snow v. Alley*, 144 Mass. 546, 59 Am. Rep. 119, 11 N. E. 764.

But the defendants contend that the cancelation of this contract, and the consequent necessity of paying upon a *quantum meruit* for what has been done by the plaintiffs, prevents them in another way from being put *in statu quo*. The result of the work done by the plaintiffs was to show that the necessary excavation was more difficult and expensive than was anticipated; and the total expense of the work has been increased accordingly. The result of this is that a new contract for the same work could not have been let on so favorable terms for the defendants as if this fact had not been brought to light; and so the defendants say that they neither have been, nor could be, put into as favorable a condition as that which they at first occupied. But it seems to us that this amounts only to saying that the real facts which have become known have operated to deprive them of an inequitable advantage which they formerly enjoyed over prospective contractors for this work, by reason of the general ignorance of the character of the soil and the difficulty of excavation in it. It was perhaps unavoidable, while these matters remained unknown, that one of the parties should derive a certain degree of advantage or of detriment from that fact; the loss of that advantage to the one and the removal of that detriment to the other is not a change of which either party has the right to complain. It does not in our judgment prevent the defendants from being put *in statu quo*.

It is contended that the master erred in ruling that the burden of proving why the plaintiffs complained about the extra depths of excavation and abandoned the contract rested upon the defendants. But it does not sufficiently appear that he did so rule. In his report, after stating the defendants' contention upon this subject, he says: "I find that the defendants did not sustain the burden of that contention, . . . but I find that the real reason for the complaint and action of the plaintiffs was the result of the errors made by" the

engineer "in scaling said profile plans and preparing said engineer's estimate." The latter part of this finding, which involved the real issue, seems to have been made independently of any question of the burden of proof. The master's language in the opening of the sentence, though it perhaps may have contained an intimation that he wrongly threw the burden upon the defendants, does not seem to us to be decisive of this. If the defendants were apprehensive that he did so rule, they might have settled the question by a request for a ruling, and if that were refused might have filed an objection and exception founded on it. *O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 588. They have not done so, and we cannot say that the master made the ruling of which they complain.

The exceptions to the testimony of the witness McKenzie ought not to be sustained. It was competent to show that the plaintiffs acted on the mistake caused by the errors in the estimate, and relied on the latter as correct. And when he spoke of what was in the mind of himself and the plaintiffs it sufficiently appears that he referred, and was understood to refer, to what was in his own mind as representing them. The admission of testimony that the other bidders also relied on the estimate came under the rule of *Cass v. Boston & L. R. Co.* 14 Allen, 448, and *Lane v. Boston & A. R. Co.* 112 Mass. 455.

We do not find that any of the other exceptions to the rulings of the master in admitting or rejecting evidence should be sustained. The language of *Bigelow, Ch. J.*, in *Fisher v. Plimpton*, 97 Mass. 441, 443, and of the present Chief Justice in *Koplan v. Boston Gaslight Co.* 177 Mass. 15, 23, 58 N. E. 183, as to the necessity of showing a really material error in this respect, such as has been prejudicial to the excepting party, is peculiarly applicable to evidence taken before a master in a case like this.

It is not necessary to consider the other exceptions to the master's report in detail. Most of them are disposed of by what has been said already; and none of the others can be sustained. The master rightly refused to pass upon the additional questions of fact requested by the defendants. The contract having been avoided, the plaintiffs could recover upon a *quantum meruit* for all that they had done; and we do not find that any objection was made to the master's settling this upon the basis of actual cost to the plaintiffs. Neither the cost nor the value of the so-called extra work was material. The case was not like the cases in which a plaintiff who has substantially, but not exactly, done the work called for by the terms of a contract to put a structure upon

another's land, is allowed, within the limits of the contract price, to recover for the benefit thus conferred upon the latter; for there the contract is not abrogated. *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455; *Blood v. Wilson*, 141 Mass. 25, 6 N. E. 362; *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268. A decree should be entered overruling all the exceptions to the master's report, ordering the contract between the plaintiffs and the defendants and the bond accompanying the same to be delivered up and canceled, and that the defendants' pay to the plaintiffs the sum found by the master, with interest from the filing of the bill, and for costs.

So ordered.

NEBRASKA SUPREME COURT.

METTE KRUGER, by Next Friend,

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, Appt.

(— Neb. —, 114 N. W. 571.)

Carrier — frightened passenger — alighting from moving car.

1. Where a passenger, a girl under fourteen years of age, unaccustomed to riding upon street cars, becomes frightened and frenzied by the negligence of the defendant's servants in carrying such passenger past her known destination; and the conductor knows, or by the exercise of due care and diligence under the circumstances should know, of such passenger's frightened and frenzied con-

Headnotes by Good, C.

Case Note. — Duty of carrier to prevent minor passenger from alighting from moving car.

In *St. Louis, A. & T. R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266, the court said: "We do not understand it to be a rule of law that a carrier owes to every passenger precisely the same care without respect to age, sex, or bodily infirmity. The degree of care is the same,—that is to say, the greatest care; but what would be sufficient to insure the safety of one person may not be sufficient for others."

So, a carrier who undertakes to transport passengers of tender years owes a duty to them, in view of their inexperience and infancy, to protect them the more carefully from danger. *Ryall v. Kennedy*, 8 Jones & S. 347.

In *Hemmingway v. Chicago, M. & St. P. R. Co.* 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. 804, it appeared that the passenger, an ordinary country boy not quite eleven years old, did not know that the train upon which he was riding customarily passed the station at which he wished to alight

dition, and that she is about to leave the moving car,—it is his duty to exercise the highest degree of care possible under the circumstances, to prevent such passenger from alighting from the moving car.

Same — liability.

2. In such a case, if the conductor fails to exercise the degree of care required of him, and the passenger, in consequence of such failure, receives injuries while alighting from the moving car, the street railway company is liable in damages for the resulting injuries.

Same — contributory negligence.

3. In such a case it is erroneous to instruct the jury that the plaintiff may recover, even though she was negligent in acting as she did.

Trial — instructions.

4. Instructions examined, and held prejudicial.

(January 8, 1908.)

A PPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. John W. Webster and W. J. Connell for appellant.

Mr. Arthur C. Pancoase for appellee.

and then backed on another track for passengers to alight at the platform. Seeing an adult passenger alight, and thinking the train would carry him off, he became frightened and excited, and jumped from the train while it was slowly moving past the station. It was held that the conductor should have informed him, when he collected his fare, that the train would pass the depot and then back up, or, failing to do this, he should have been present, or have had someone present, to prevent the boy from leaving the train to his injury.

In *Philadelphia City Pass. R. Co. v. Hassard*, 75 Pa. 367, a ten-year-old boy, a passenger on a street car, jumped from the front platform while the car was in motion, and was injured. The trial court charged the jury: "If, from his age, he was not required to exercise a greater degree of care and prudence than he did, then the company was bound to notice that, and to guard this boy from the perils that inhere in tender years; then it was their duty to close the front door, or to put someone with him, whereby, in his youthful impulse, he could have been prevented from doing that which resulted in so terrible an accident to him." The supreme court, affirming the judgment in his favor, said: "If the plaintiff, on account of his age and inexperience, was incapable of taking proper care of himself, then the defendants were

Good, C., filed the following opinion:

Mette Kruger, a minor, by her next friend, instituted this action against the Omaha & Council Bluffs Street Railway Company in the district court of Douglas county to recover damages for injuries alleged to have been sustained while alighting from one of the defendant's street cars. There was a trial to a jury, which resulted in a verdict and judgment for the plaintiff. The defendant appeals.

Two acts of negligence are complained of by the plaintiff: First, that defendant, although informed of and knowing plaintiff's destination, carelessly and negligently failed to stop its car, and carried plaintiff past her known destination; secondly, having carried plaintiff to become frightened and frightened from fear at being carried past her known destination, that defendant failed to exercise that degree of care required of it to prevent plaintiff from alighting from the moving car. Defendant answered, admitting that plaintiff was a passenger, denied any negligence on its part, and alleged contributory negligence on the part of the plaintiff. From the record it appears that Mette Kruger was a girl thirteen years and nine months of age at the time of the injuries complained of; that, about 7 o'clock in the evening of the 26th day of October, 1904, she and a girl companion of about the same age were passengers on one of defendant's

bound to exercise the highest care and vigilance necessary and proper to secure his safety."

In *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503, a twelve-year-old boy and his four-year-old brother boarded a street car and were sitting upon the front platform with their feet on the step when the conductor took their fare. The smaller boy fell or jumped from the moving car, and was injured. It was held that the carrier should have compelled the children to occupy a proper place in the car, and that it did not perform its duty by merely warning them.

In *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421, a five-year-old girl, although told by the driver to remain on the car and he would stop and let her off, attempted to get off the front platform while the car was in motion, and was hurt. It was held that the child should have been compelled to go inside the car, and that the company was negligent in permitting it to ride on the front platform.

In *Crissey v. Hestonville, M. & F. Pass. R. Co.* 75 Pa. 83, it was held to be a question for the jury whether or not a street railway company exercised proper care in permitting its passenger, a thirteen-year-old boy, to stand upon and get off the front platform before the car came to a full stop.

street cars going westward on Q street in South Omaha. The destination of the two girls was Thirty-first street. Plaintiff claims that, when the conductor took up their fares at about Twenty-sixth street, they informed him of their desire to alight at Thirty-first street. The car in which they were riding was one in which the seats ran lengthwise along the side of the car. The two girls sat on the south side of the car near the rear, and were looking out of the car windows to the south. At that time in the evening it was dark. The car failed to stop at Thirty-first street, and the plaintiff observed the lights in a neighboring store, recognized the place, and realized that she and her companion were being carried past their destination. She became alarmed and frightened, hurriedly arose, and passed out upon the rear platform of the car, where the conductor was standing, and stepped from the car while in motion, fell to the pavement, and received severe injuries. The conductor observed the plaintiff as she came out upon the platform and stepped from the moving car. Plaintiff contends that she was so alarmed and frightened and in such a frenzied condition that she did not know or realize her danger in alighting from the moving car, and that the conductor was negligent in failing to warn her of her danger and prevent her from leaving the car under the circumstances. Plaintiff's evidence tends to support her contention. The defendant denied that the conductor had been previously informed of the destination of the girls, and denied that he had any knowledge that plaintiff was frightened and alarmed, and alleged that he did warn her against stepping off by calling to her to wait, that he would stop the car, and that, seeing that she did not heed his warning, he attempted to grab her and prevent her from leaving the car. The evidence as to whether the conductor warned the plaintiff, or that he knew of her destination and her excited condition, or that he attempted to prevent her from leaving the car, is in conflict.

The defendant contends that it was under no obligation to prevent plaintiff from leaving the moving car, that it owed no duty of preventing passengers from alighting from its moving cars, and that, as a matter of law, it was not liable for the injuries received by the plaintiff, and that the court should have so instructed the jury. We are cited to several cases from other jurisdictions, some of which apparently hold to this doctrine. But the rule in this state is different. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 643, 54 N. W. 976; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887; *Chicago, B. & Q. R. Co. v. Hyatt*, 17 L.R.A. (N.S.)

48 Neb. 167, 67 N. W. 8; *Fremont, E. & M. Valley R. Co. v. French*, 48 Neb. 641, 67 N. W. 472. It is generally held that whether or not one is guilty of such negligence in alighting from a moving car or train as will prevent a recovery for injuries received therefrom is ordinarily a question of fact to be determined by the jury. *Hemmingway v. Chicago, M. & St. P. R. Co.* 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. 804. Under some circumstances, jumping or alighting from a moving train has been held such negligence as will defeat a recovery. *Chicago, B. & Q. R. Co. v. Martelle*, 65 Neb. 540, 91 N. W. 364. In that case, however, the plaintiff was a man of mature years, and deliberately jumped from the moving train. It did not appear that he was frightened, or that he had lost his self-control, but that he deliberated upon the matter, and, after deliberation, voluntarily jumped from the moving train. It was held that he was guilty of such negligence and deliberate recklessness as to prevent a recovery. But the case at bar is different. The plaintiff was little accustomed to riding upon street cars, and, according to her contention, which finds support in the evidence, she was carried past her destination by the fault of the defendant. It was after dark, and she was frightened and excited, and had no realization of what she was doing, or of the danger incident to the alighting from the moving car. It is inferable from the evidence that the conductor was aware of her excited and frenzied condition, and might, by the exercise of that degree of care required of common carriers, have prevented her from leaving the moving car and thus have avoided the injuries. We think there is a clear distinction between the duty owed by a common carrier to an infant of tender years and that owed to an adult, and between the duty owed to a passenger who has lost control of his mental faculties of which the carrier is aware, and that owed to one in full possession of his faculties. When street car companies carry passengers of tender years and passengers whom they know to be of unsound mind, it is only proper that they should be required to exercise a higher degree of care toward them than they would toward passengers of mature years and in possession of their full faculties; and if, by acts of their own negligence, they have caused passengers to become frightened and excited, and to be in a measure deprived of their faculties, they cannot consistently and reasonably claim that the passengers are negligent in not exercising the prudence and foresight that they ordinarily would, except for their frenzied and excited condition. We think the record in this case clearly

makes out such a state of facts as required the submission of the case to the jury; and this court cannot say, as a matter of law, that the defendant was not negligent, or that such negligence did not produce the injuries complained of. The case was one for the determination of the jury under proper instructions.

Defendant also complains of numerous instructions given by the court upon its own motion, and of the refusal of the court to instruct the jury as requested by the defendant. We have carefully examined all the instructions given and refused that are complained of, and find no error except in two instructions given, which we now proceed to consider. By the sixth instruction the court informed the jury that, if the conductor was aware that plaintiff was about to jump from the moving car in time for him to have prevented it, and if he failed to exercise the degree of care required of him in that respect, and if such failure of the conductor was the proximate cause of plaintiff's injuries, the plaintiff might recover, even though they should find "that the plaintiff was guilty of negligence in acting as she did." This instruction, as well as the ninth instruction given by the court, indicates quite clearly that the trial court was applying the doctrine of the "last clear chance," and proceeded upon the theory that, notwithstanding contributory negligence upon the part of the plaintiff, the defendant would still be liable if it could have prevented the injuries to the plaintiff. The doctrine of the "last clear chance" simply means that, notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care. *Styles v. Richmond & D. R. Co.* 118 N. C. 1084, 24 S. E. 740. We think an analysis of the situation in which the parties in the instant case were placed will show that the doctrine of the "last clear chance" can have no application. If the plaintiff was negligent at all, it was because she knew and realized the danger in alighting from the moving car, and the only negligent act of the plaintiff was in stepping from the car. It is evident that no act of the defendant after the plaintiff had been guilty of negligence could have prevented the injuries. To make the doctrine of the "last clear chance" apply, the situation must be such that the defendant might avoid the injuries after the plaintiff had, by her own act, placed herself in a position of peril that was or should have been apparent to the defendant. If the plaintiff in this case was guilty of negligence at all, it was in

stepping from the moving car with the knowledge and realization of the danger in so doing. If she possessed this knowledge and realization, then the proximate cause of her injuries was her own negligence, and she would not be entitled to recover. As applied to the situation in this case, the only theory upon which the plaintiff can recover is that she did not know and realize the danger in stepping from the moving car. Therefore it follows that her right to recover depends upon the absence of contributory negligence upon her part. The instruction above mentioned misstated the law, and permitted the jury to find for the plaintiff upon a state of facts which in law will not sustain a recovery. The ninth instruction states the same proposition of law in a negative manner, and is bad for the same reason.

There are other errors assigned and discussed in the brief of the appellant; but, as they are not necessary to a determination of this case, and do not appear likely to arise upon a new trial, we refrain from discussing them. Because of errors in the court's instructions to the jury, we recommend that the judgment of the district court be reversed, and the cause remanded for a new trial.

Duffie and Epperson, CC., concur.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded for further proceedings.

PENNSYLVANIA SUPREME COURT.

WILLIAM P. SACK, Appt.,
v.

ROBERT RALSTON.

(220 Pa. 216, 69 Atl. 671.)

Elevator — fall — liability.

The owner of a building is not liable for injury to one using its elevator to deliver merchandise therein, by its fall which was caused by a latent defect in a bolt embedded in a beam, which had been put in by a competent workman in repairing the elevator, which repairs had been approved by a casualty company and official public inspectors.

(March 2, 1908.)

Case Note. — Applicability to latent defects of rule imputing to master notice of defects in original construction.

The rule imputing notice to a master of original structural defects clearly does not apply in case of a latent defect. The rule

APPEAL by plaintiff from a judgment of the Court of Common Pleas No. 3, for Philadelphia County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Henry J. Scott, for appellant:

The defect in the bolt was a structural defect within the rule that the master is presumed to have knowledge; and notice thereof to him was unnecessary.

Finnerty v. Burnham, 205 Pa. 306, 54 Atl. 996.

itself, under proper construction, is but a limited one, and this limitation in itself precludes application in such case. The rule does not broaden the duty of a master, or in any way make him a guarantor, or a warrantor, of appliances or place of work, which would be the result if construed to include all latent defects. An exhaustive study of the cases shows that the rule imputes notice to the master of only such structural defects as were caused by his negligence or his lack of reasonable care in obtaining a perfect construction. If he furnished proper material, competent workmen, and used reasonable care, the law relieves him from liability; but, if the defect was the result of a lack of ordinary care upon his part, and injury resulted, the law imputes knowledge of such defect, since he should have had knowledge of it and protected his servant against it; and thus he is held liable under the general rule that a master must use reasonable care in providing his servants with safe appliances and a proper place for work.

An extended search reveals no case in addition to SACK v. RALSTON in which an attempt has been made to apply the rule of imputed notice of defects in original construction to latent defects; but the following cases, selected from an almost unlimited number, tend to show the well-established principles governing the liability of a master in case injury is the result of a latent defect.

In *The Lizzie Frank*, 31 Fed. 477, it was held that, where a vessel is constructed and equipped in a manner usual and customary with other vessels of like character, and in a mode approved by competent and experienced judges, the owner is not liable in case of injury by reason of a latent defect (insecure "chock" in such construction or equipment).

The mere fact that an employee was injured by reason of the breaking of a bolt, due to a latent defect therein, is not sufficient to remove the presumption that the master had furnished a proper appliance, where the bolt was of proper character, and was used in construction by a competent mechanic. *Baxley v. Satilla Mfg. Co.* 114 Ga. 720, 40 S. E. 730.

If a latent defect exists of which the mas-

ter has no knowledge, or of which, in the exercise of ordinary care and diligence, he would not have learned, he is excused from liability in case a servant is injured because of such defect. *McCall v. Pacific Mail S. S. Co.* 123 Cal. 42, 55 Pac. 706 (defective rope in sling); *Myers v. American Steel Barge Co.* 64 Ill. App. 187 (hook used in holding cable); *Indiana, I. & I. R. Co. v. Snyder (Ind.)* 32 N. E. 1129 (defect in handle to hand car); *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108 (unknown defect in coupling to car); *New Castle Bridge Co. v. Steele*, 38 Ind. App. 194, 78 N. E. 208 (defective hook to derrick); *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204 (defective drawhead on passenger coach); *Missouri, K. & T. R. Co. v. Young*, 4 Kan. App. 219, 45 Pac. 963 (lifting jack in railroad shop); *Collins v. Louisville & N. R. Co.* 27 Ky. L. Rep. 825, 86 S. W. 973 (defectively stopped sulphuric-acid carboys); *Clippard v. St. Louis Transit Co.* 202 Mo. 432, 101 S. W. 44 (defective car bearings); *Breen v. St. Louis Cooperage Co.* 50 Mo. App. 202 (defective shaft in planing machine); *Hester v. Jacob Dold Packing Co.* 95 Mo. App. 16, 75 S. W. 695 (plank weakened by nail holes which were painted over); *Henggeler v. Cohn*, 68 N. J. L. 240, 52 Atl. 280 (defective hinge to ladder); *Burns v. Delaware & A. Teleg. & Teleph. Co.* 70 N. J. L. 745, 67 L.R.A. 956, 59 Atl. 220, 592 (charged telephone wires); *Wright v. New York C. R. Co.* 25 N. Y. 562 (improperly conducted railroad); *Probst v. Delamater*, 100 N. Y. 266, 3 N. E. 184 (defective cable); *Grant v. Pennsylvania & N. Y. Canal & R. Co.* 133 N. Y. 657, 31 N. E. 220 (drawhead on engine); *Prentice v. Wellsville*, 50 N. Y. S. R. 557, 21 N. Y. Supp. 820 (defective explosive compound); *Stackpole v. Wray*, 99 App. Div. 262, 90 N. Y. Supp. 1045, Affirmed without opinion in 182 N. Y. 567, 75 N. E. 1134 (defective elevator); *Hohl v. Hewitt Motor Co.* 121 App. Div. 866, 106 N. Y. Supp. 881, Reversing 103 N. Y. Supp. 755 (improperly tempered "back center" to lathe); *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312 (defective brake, etc., on car); *Warner v. National Malleable Casting Co.* 7 Ohio N. P. 331 (defect in construction of building);

Mr. James Gay Gordon, for appellee:

The defendant exercised due care in selecting the persons employed by him to build a safe elevator, and this was the full extent of his duty under the law.

Ardesco Oil Co. v. Gilson, 63 Pa. 147; *Meany v. Abbott*, 6 Phila. 256; *Walden v. Finch*, 70 Pa. 460; *Walton v. Bryn Mawr Hotel Co.* 160 Pa. 3, 28 Atl. 438; *Anderson v. Hays Mfg. Co.* 207 Pa. 106, 63 L.R.A. 540, 56 Atl. 345; *James McNeil & Bro. Co. v. Crucible Steel Co.* 207 Pa. 493, 56 Atl. 1067; *Service v. Shoneman*, 196 Pa. 63, 69 L.R.A. 792, 79 Am. St. Rep. 689, 46 Atl. 292.

ter has no knowledge, or of which, in the exercise of ordinary care and diligence, he would not have learned, he is excused from liability in case a servant is injured because of such defect. *McCall v. Pacific Mail S. S. Co.* 123 Cal. 42, 55 Pac. 706 (defective rope in sling); *Myers v. American Steel Barge Co.* 64 Ill. App. 187 (hook used in holding cable); *Indiana, I. & I. R. Co. v. Snyder (Ind.)* 32 N. E. 1129 (defect in handle to hand car); *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108 (unknown defect in coupling to car); *New Castle Bridge Co. v. Steele*, 38 Ind. App. 194, 78 N. E. 208 (defective hook to derrick); *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204 (defective drawhead on passenger coach); *Missouri, K. & T. R. Co. v. Young*, 4 Kan. App. 219, 45 Pac. 963 (lifting jack in railroad shop); *Collins v. Louisville & N. R. Co.* 27 Ky. L. Rep. 825, 86 S. W. 973 (defectively stopped sulphuric-acid carboys); *Clippard v. St. Louis Transit Co.* 202 Mo. 432, 101 S. W. 44 (defective car bearings); *Breen v. St. Louis Cooperage Co.* 50 Mo. App. 202 (defective shaft in planing machine); *Hester v. Jacob Dold Packing Co.* 95 Mo. App. 16, 75 S. W. 695 (plank weakened by nail holes which were painted over); *Henggeler v. Cohn*, 68 N. J. L. 240, 52 Atl. 280 (defective hinge to ladder); *Burns v. Delaware & A. Teleg. & Teleph. Co.* 70 N. J. L. 745, 67 L.R.A. 956, 59 Atl. 220, 592 (charged telephone wires); *Wright v. New York C. R. Co.* 25 N. Y. 562 (improperly conducted railroad); *Probst v. Delamater*, 100 N. Y. 266, 3 N. E. 184 (defective cable); *Grant v. Pennsylvania & N. Y. Canal & R. Co.* 133 N. Y. 657, 31 N. E. 220 (drawhead on engine); *Prentice v. Wellsville*, 50 N. Y. S. R. 557, 21 N. Y. Supp. 820 (defective explosive compound); *Stackpole v. Wray*, 99 App. Div. 262, 90 N. Y. Supp. 1045, Affirmed without opinion in 182 N. Y. 567, 75 N. E. 1134 (defective elevator); *Hohl v. Hewitt Motor Co.* 121 App. Div. 866, 106 N. Y. Supp. 881, Reversing 103 N. Y. Supp. 755 (improperly tempered "back center" to lathe); *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312 (defective brake, etc., on car); *Warner v. National Malleable Casting Co.* 7 Ohio N. P. 331 (defect in construction of building);

There is no liability for injuries caused by such latent and occult defects in materials.

McClain v. Henderson, 187 Pa. 283, 40 Atl. 985; O'Dowd v. Burnham, 19 Pa. Super. Ct. 464.

Mr. H. J. Rebman also for appellee.

Brown, J., delivered the opinion of the court:

The appellant, a drayman in the employ of wholesale dealers in groceries, was injured by the fall of an open platform elevator on the premises of the appellee, a grocer, to whom he was delivering bags of sugar. He had placed three bags upon it, weighing 100 pounds each, and, as he dumped a fourth, of the same weight, upon it, it suddenly gave way, and dropped to the cellar. He had used this elevator nearly every week for two or three years before the accident in delivering goods to the appellee, and, on the day it gave way, it was apparently in the same condition it had been

in during that entire period. He had at times put on it 1,500 pounds. When it dropped, the weight on it was that of his own body and the 400 pounds of sugar. This was the whole of plaintiff's case when he closed. There was nothing before the jury to explain the cause of the fall of the elevator. There was no evidence of any negligence on the part of the defendant. The only thing that the jury knew was that an accident had happened, and a motion for a nonsuit was very properly made. The only reasonable explanation for its withdrawal by the learned counsel who made it is that he wished to affirmatively prove what he was not called upon to do,—that his client had not only not been negligent, but had done everything he ought to have done to make the elevator safe.

One of the first things shown by the defendant was the cause of the fall of the elevator. It was due to the breaking of a bolt, 14 or 15 inches in length, running through a wooden crossbeam on the top of the ele-

McAvoy v. Pennsylvania Woolen Co. 140 Pa. 1, 21 Atl. 246 (worm-eaten handle to fork used in dyeing vat); Fordyce v. Yarrow, 1 Tex. Civ. App. 260, 21 S. W. 421 (defective drawhead to car); Quintana v. Consolidated Kansas City Smelting & Ref. Co. 14 Tex. Civ. App. 347, 37 S. W. 369 (defective cable hook); The Oriental v. Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117, Sustained on subsequent appeal in 17 Tex. Civ. App. 692, 41 S. W. 130, which was reversed on question of procedure in 93 Tex. 425, 55 S. W. 1111 (latently defective elevator); Skidmore v. West Virginia & P. R. Co. 41 W. Va. 293, 23 S. E. 713 (latent break in car); Ballou v. Chicago, M. & St. P. R. Co. 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559 (attachment of ladder to car latently defective); Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. 837 (defective locomotive); The Flowergate, 31 Fed. 762 (defective eyebolt on vessel); Reilly v. Campbell, 8 C. C. A. 438, 20 U. S. App. 334, 59 Fed. 990 (ladle used in carrying molten metal); Erskine v. Chino Valley Beet-Sugar Co. 71 Fed. 270 (rope used in tackle); Killman v. Robert Palmer & Son Shipbuilding & Marine R. Co. 42 C. C. A. 281, 102 Fed. 224 (eyebolt to guy); Shankweiler v. Baltimore & O. R. Co. 78 C. C. A. 353, 148 Fed. 195 (defective brake rod on car); Cryder v. Chicago, R. I. & P. R. Co. 81 C. C. A. 559, 152 Fed. 417 (defective ladder on freight car); Hanrahan v. Ardnamult S. S. Co. Ir. L. R. 22 C. L. 55 (defective bolt in derrick); Brown v. Accrington Cotton Spinning & Mfg. Co. 3 Hurlst. & C. 511 (defectively constructed mill). See also Welfare v. London & B. R. Co. L. R. 4 Q. B. 696 (latently defective roof); Priestley v. Fowler, 3 Mees. & W. 1 (defective wagon); and Potts v. 17 L.R.A. (N.S.)

Plunkett, 9 Ir. C. L. Rep. 290 (defective flagging).

And in the following cases it was held that, where a most careful inspection would not have discovered a latent defect by reason of which an employee was injured, the master was not liable: Louisville & N. R. Co. v. Campbell, 97 Ala. 147, 12 So. 574 (brake rod); Southern Car & Foundry Co. v. Jennings, 137 Ala. 247, 34 So. 1002 (lifting crane); Louisville & N. R. Co. v. Allen, 78 Ala. 494 (boiler to engine); McCall v. Pacific Mail S. S. Co. 123 Cal. 42, 55 Pac. 706 (tackle used in loading and unloading ship); Wells v. Coe, 9 Colo. 159, 11 Pac. 50 (brake rod and belt); Atlantic & B. R. Co. v. Reynolds, 117 Ga. 47, 43 S. E. 456 (telephone pole not set proper depth in ground); Chicago & N. W. R. Co. v. Scheuring, 4 Ill. App. 533 (knot in plank not noticeable because of coal dust and dirt); Sanden v. Bannon, 85 Ill. App. 17 (concealed knot in timber, causing scaffold to fall); Chicago & A. R. Co. v. Merriman, 95 Ill. App. 628 (crack in crank pin to locomotive); Chestnut v. Southern Indiana R. Co. 157 Ind. 509, 62 N. E. 32 (flaw in shaft to brake handle); Louisville & N. R. Co. v. Hinder, 16 Ky. L. Rep. 841, 30 S. W. 399 (latent defect in handle to hand car); Hull v. Hall, 78 Me. 114, 3 Atl. 38 (defective machinery in sawmill); Nason v. West, 78 Me. 253, 3 Atl. 911 (defectively constructed brick oven); Ladd v. New Bedford R. Co. 119 Mass. 412, 20 Am. Rep. 331 (defective switch); Spicer v. South Boston Iron Co. 138 Mass. 426 (defective hook in oven door raising apparatus); Roughan v. Boston & L. Block Co. 161 Mass. 24, 36 N. E. 461 (hidden flaw in hoisting block); Saxe v. Walworth Mfg. Co. 191 Mass. 338, 114 Am. St. Rep. 613, 77 N. E. 883 (defective emery wheel); Mulligan v.

vator, to which the cables were attached. This bolt had broken at about the middle, where it was entirely concealed by the wood. Upon an examination of the broken parts, after the accident, the breaking was found to be due to a latent defect which could not have been known to the defendant. This defect, according to the testimony of the man at whose factory the bolt had been made, was an imperfect weld, caused by some foreign substance which had adhered to the inside of the iron. He further testified that it was most unusual to find such a defect. The bolt had been furnished to an elevator company by the factory, in which a machine blacksmith of thirty years' experience had it made. About a month before the accident the elevator was repaired by this elevator company, which had been in business for eight or nine years. A member of it, with fourteen years' experience in the business, made the repairs and inserted the bolt. After the repairs had been made the elevator was inspected and passed by a casualty

company and by the department of public safety of the city of Philadelphia, which issued a certificate to the elevator company that "the repairs and additions recently completed by you on a hand elevator in premises northeast corner of Thirteenth and Girard avenue have been inspected and found to comply with the law. Said repairs and additions are hereby approved." After this approval of the repairs made to the elevator, it was put in operation, carrying, as stated, as high as 1,500 pounds. Under this uncontradicted state of facts, the defendant was cleared of even the suspicion of negligence.

On this appeal a reason given why there should be a recovery is that the defect, which the defendant discovered after the accident, was a structural one, and therefore he is presumed to have had notice of it in this action by one who, at the time of the accident, must be regarded as an employee. In support of this, there is quoted, with printed emphasis, what we said in *Finnerty*

Montana Union R. Co. 19 Mont. 135, 47 Pac. 795 (boiler to locomotive); *Howard v. Missouri P. R. Co.* 173 Mo. 524, 73 S. W. 467 (defective handle to hand car); *Goransson v. Riter-Conley Mfg. Co.* 186 Mo. 300, 85 S. W. 338 (driving pin used as wedge); *Essex County Electric Co. v. Kelly*, 57 N. J. L. 100, 29 Atl. 427 (pole broke with lineman); *De Graff v. New York C. & H. R. R. Co.* 76 N. Y. 125 (defective brake chain); *Painton v. Northern C. R. Co.* 83 N. Y. 7 (imperfect weld in eyebolt to brake rod); *Doyle v. White*, 9 App. Div. 521, 41 N. Y. Supp. 628, Affirmed on prevailing opinion below in 159 N. Y. 548, 54 N. E. 1090 (defective weld in eyebolt holding wire); *Smith v. New York C. & H. R. R. Co.* 164 N. Y. 491, 58 N. E. 655 (ring used in hoisting weight); *Stackpole v. Wray*, 74 App. Div. 310, 77 N. Y. Supp. 633, Sustained on subsequent appeal in 99 App. Div. 262, 90 N. Y. Supp. 1045 (latently defective bolt in elevator apparatus); *Racine v. New York C. & H. R. R. Co.* 70 Hun, 453, 24 N. Y. Supp. 388 (boiler to locomotive); *Martin v. Highland Park Mfg. Co.* 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876 (flaw in hammer).

And in *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 153, 5 N. E. 187, it was held that, in case defective premises, buildings, machinery, or appliances caused injury to a servant, such servant must allege and prove that the defect or unfitness which caused the injury was known to the master, or was such as, with reasonable diligence and attention to his business, he ought to have known. And the following are to the same effect: *Eagle & P. Mills v. Johnson* (Ga.) 61 S. E. 990 (defective elevator); *Chicago, C. & St. L. R. Co. v. Dixon*, 49 Ill. App. 292 (insufficient coupler on car); *Clippard v. St. Louis Transit Co.* 202 Mo. 432, 101 S. W. 44 (defective bearings in

car); *Glasscock v. Swafford Bros. Dry Goods Co.* 106 Mo. App. 657, 80 S. W. 364 (defective elevator appliance); *Krooss v. Lehmaier*, 107 N. Y. Supp. 218 (defect in metal pressing machine); *Griffiths v. London & St. K. Docks Co. L. R.* 12 Q. B. Div. 493, Affirmed in L. R. 13 Q. B. Div. 259 (defective hinge to iron door).

But, if the master constructs the article which causes the injury to the servant by reason of a latent defect, it is not necessary to allege that he had notice of such defect, where he could, by the reasonable exercise of care, have learned of such defect during construction. *Standard Oil Co. v. Bowker*, 141 Ind. 12, 40 N. E. 128 (step-ladder—use of too small nails).

And the master is liable for all latent defects which an inspection by an expert would disclose. *Finnerty v. Burnham*, 205 Pa. 305, 54 Atl. 996 (defective chain).

In *Hysell v. Swift & Co.* 78 Mo. App. 39, it was held that a master must keep pace with scientific development as it affects his business, and keep informed of latent danger, even though it is scientific information, if it is readily obtainable.

And in *Smith v. Oxford Iron Co.* 42 N. J. L. 467, 36 Am. Rep. 535, it was held that it was the duty of the master to ascertain and make known the properties and mode of use of giant powder before furnishing it to a servant who had customarily been furnished common black powder.

With respect to the liability of a master for injuries due to latent defects in common tools, see case note to *Vanderpool v. Partridge*, 13 L.R.A. (N.S.) 668.

As to the servant's assumption of risk from latent danger or defects, see case note to *Burnside v. Peterson*, ante, 76.

v. Burnham, 205 Pa. 305, 54 Atl. 996: "Where the defect through which the injury occurs is in the original construction of the appliance or instrumentality, notice thereof to the master is unnecessary. In case of structural defects, knowledge thereof by the master will be inferred." The rule of constructive notice to an employer was applied in that case because the facts called for it; the defect having been a patent one. The case was submitted to the jury under instructions that the plaintiff could not recover unless he had shown that the chain "was defective when it was applied; and, further, that the defect was apparent when it was supplied." In affirming the judgment on the verdict we did so because the jury had found that the chain, the breaking of which had caused the death of plaintiff's husband, "was defective in its original construction, and that the defect was apparent when it was purchased by the defendants." And so in the late case of *Stine v. S. Morgan Smith Co.* 219 Pa. 145, 67 Atl. 990, the rule of constructive notice to the employer was applied because the defect was a patent one. To a latent defect, such as the one in this case, from which, as from all other latent defects, the defendant was fully justified in believing his elevator was free, after its repair by competent workmen and its inspection by a casualty company and official inspectors, the rule can have no application. The case ought to have been taken from the jury, and the assignments of error, complaining of what was said in submitting it to them, are all overruled.

Judgment affirmed.

UTAH SUPREME COURT.

RE ESTATE OF BRANCH YOUNG, Deceased.

(33 Utah, 382, 94 Pac. 731.)

Witness — attorney — privilege — will contest.

1. The privilege with respect to communications to an attorney does not attach to statements made by him or testator during the preparation of a will, in a proceeding to contest the will on the ground of coercion, duress, and undue influence, either at common law, or under a statute merely declaratory of the common-law privileges.

Same — former will.

2. Evidence of the provision of a former will is not immaterial in a will contest on the ground of undue influence, unless it is made clear beyond a reasonable doubt that the changes made in preparing the later

will would in no event affect the result of the contest.

Same — exclusion — error.

3. The exclusion in a will contest of testimony as to the contents of a former will is not rendered harmless by the fact that the testimony was not made to appear relevant or material, where nothing could be ascertained as to its character because of the rulings of the court.

(March 5, 1908.)

Case Note. — Privilege of communications to attorney during preparation of will.

It may be laid down as a general rule of law, gathered from all the authorities, that, unless provided otherwise by statute, communications by a client to the attorney who drafted his will, in respect to that document, and all transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a suit between the testator's devisees and heirs at law, or other parties who all claim under him. The reason for such an exception to the general rule excluding confidential professional communications is that the rule is designed for the protection of the client, and it cannot be said to be for the interest of a testator, in a controversy between parties all of whom claim under him, to have those declarations and transactions excluded which are necessary to the proper fulfilment of his will.

Thus, in *Doherty v. O'Callaghan*, 157 Mass. 90, 17 L.R.A. 188, 34 Am. St. Rep. 258, 31 N. E. 726, testimony of a lawyer as to the directions given by a deceased person before drawing his will, offered to show whether an instrument presented for probate was or was not the will of the deceased, was held not to be within the rule of privileged communications. The court said that when a will was presented for probate it could see no reason why, as a matter of public policy, the attorney who drafted it should not be allowed to testify what directions were given him by the testator, so that it might appear whether the instrument in question was or was not the will of the deceased.

So, in *Re Layman*, 40 Minn. 372, 42 N. W. 286, which was also an action to contest a will, and in which the principal question was the mental capacity of the deceased when he executed the instrument in question, it was held that neither the heirs at law, nor his devisees, could invoke the rule of privileged communications to exclude the testimony of the attorney who drew the will, offered for the purpose of laying the foundation for the admission of his opinion as a nonexpert as to the testator's soundness of mind, as to transactions and communications between them while the witness was acting as the deceased's legal adviser,

A PPEAL by contestant from a judgment of the District Court for Utah County sustaining the alleged will of Branch Young, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Samuel A. King and William H. King for appellant.

Messrs. Grant C. Bagley and Thurman, Wedgewood, & Irvin for respondents.

Frick, J., delivered the opinion of the court:

This proceeding was begun in the district court of Utah county to establish a writing purporting to be the last will and testament of Branch Young, deceased. Objections were filed to the allowance of the proposed will by some of the children of the deceased upon

some of which were not connected with the preparation of the will. It was said that such rule "should not be so perverted by a strict adherence to it as to render it inconsistent with its object, and thus bring it into direct conflict with the reason upon which it is founded. . . . The object of the rule, so far as it relates to this class of communications, being the protection of the estate, there remains no reason for continuing it when the very foundation upon which it proceeds is wanting."

So, in *O'Brien v. Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202, 31 S. E. 100, which was also a will contest, it was held that a statutory provision that no attorney should be competent or compellable to testify "for or against his client" did not apply to testimony by the attorney who drafted the will, as to its execution by the deceased, as to her mental capacity to make a will, and as to what passed between them when he read it over to her and explained to her its meaning. The court said that in such a controversy it could not be said that such witness was called upon to testify "for or against" his client's estate.

This principle was also asserted in *Graham v. O'Fallon*, 4 Mo. 338, which was an action to establish a lost will; and it was held that the attorney who drafted the will, who was present at the time of its execution, who saw the will, after the death of the testator, in the possession of the testator's family, and who had read and recalled its principal provisions, was a competent witness to prove these facts; and his testimony was not subject to the objection that it disclosed confidential communications of his client.

So, in *Russell v. Jackson*, 9 Hare, 387, which was an action by a testator's next of kin challenging a residuary gift to the executors upon the ground that it was made on a secret trust, Vice Chancellor Turner held that the rule as to privileged communications between an attorney and client did not apply in cases of testamentary dispositions by the client, in actions between parties all of whom claimed under the latter, upon the ground that in such cases the

the ground that it was made under coercion, duress, and undue influence, which were alleged to have been exerted upon the mind of the deceased by his wife, who was a beneficiary named in the will; and that such undue influence was exerted at a time when the testator was old, infirm, and of feeble mind.

On the hearing of the contest before the court the protestants called as a witness one A. B. Morgan, an attorney at law, who prepared the proposed will under the directions of the deceased. The witness testified that while the will was being prepared he had several conversations with the deceased and his wife concerning the provisions contained therein; that the deceased, at the time, presented to the witness a former will

very foundation upon which the rule proceeded seemed to be wanting, as the disclosure, under such circumstances, could affect no right or interest of the client.

This principle finds support, also, in *Re Dominici*, 151 Cal. 181, 90 Pac. 448, which was an appeal from a judicial order distributing a decedent's estate, and in the following cases all of which were will contests: *Olmstead v. Webb*, 5 App. D. C. 38; *Kern v. Kern*, 154 Ind. 29, 55 N. E. 1004; *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *Thompson v. Ish*, 99 Mo. 177, 17 Am. St. Rep. 552, 12 S. W. 510 (where the specific question at issue was the competence of the testator's physician); *Re Downing*, 118 Wis. 581, 95 N. W. 876 (in which the specific point decided was that an attorney who, in drawing a will, acted merely as a scrivener, his advice being neither asked nor given, was competent to testify).

There are three cases in which the rule that statements made by a testator to the attorney who drafted his will are not privileged after his death, in cases between parties claiming under him, has been justified upon the ground that the testator, by consulting with his attorney in regard to his will, has thereby impliedly waived the seal of secrecy placed by the law upon confidential professional communications. But this reason for the rule seems to be ignored by most of the authorities.

The earliest of these cases is *Blackburn v. Crawford*, 3 Wall. 175, 18 L. ed. 186, which was an action for the recovery of lands, in which plaintiff claimed through the nephew and nieces of the decedent last seized, and in which the sole question was marriage *vel non* between their mother and father. The defendant offered in evidence the will of the man whose marriage was questioned, and offered to prove by the attorney who drafted the will declarations made by the testator at the time of his consultation of such witness touching the illegitimacy of such children. It was held that such communications were not privileged. After review of authorities establishing this proposition, the court went on to say that there was another ground on

which had not been formally executed; that there was some change made in the bequests by the new will; that the witness had prepared several wills at the request of the deceased immediately preceding his death, and that his wife, one of the principal beneficiaries of the proposed will, was present and took part in a number of conversations between the witness and the deceased with respect to the proposed will. The protestants then propounded some questions to the witness in which they asked him to state how many wills he had prepared for the deceased; what was said by the deceased with respect to the changes that were made in the proposed will as compared with the former one; and to state what was said by the witness, the deceased,

and the wife of the deceased with regard to the proposed will. The witness refused to answer upon the ground that all the matters inquired about were privileged. The court sustained the witness with regard to all statements made by the witness and the deceased, both with respect to the former and the proposed will, and denied the request of the proponents to require the witness to answer, except as to statements the wife may have made. The witness, however, said that he could not select from the conversations all the matters stated by the wife without also disclosing some things said by the deceased, and refused to answer, over the protestants' objections. The court did not compel the witness to answer, but, in effect, permitted him to determine for him-

which it preferred to base its decision, and made use of the following language: "The client may waive the protection of the rule. The waiver may be express or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related." This apparently based the waiver upon the mere fact of consultation with the draftsman of the will, as there is nothing in the opinion to show any other basis therefor. Mr. Justice Clifford, in his dissenting opinion, however, declared that the suggestion of waiver was "utterly without foundation or just pretense."

The language quoted from the prevailing opinion in the case last cited was quoted, apparently with approval, by the same court in *Glover v. Patten*, 165 U. S. 394, 41 L. ed. 760, 17 Sup. Ct. Rep. 411, though the instrument sued on was not a will.

And the doctrine in question was justified upon the same ground in *Re Nelson*, 132 Cal. 182, 64 Pac. 294, which was an action for the revocation of the probate of a will and codicil, on the grounds that, at the time they were executed, the deceased was not of sound and disposing mind, and that they were made under duress and undue influence of certain parties benefited thereby. In arriving at the conclusion that the attorney who drew the codicil could testify as to the communications made to him by the testator in regard to such instrument, the court said that, by requesting the attorney to draw his will, the client impliedly asked him to do and say whatever might at any time and place be requisite for the purpose of establishing the integrity of the will, thereby waiving the protection of privileged communications and releasing the attorney from the obligation of secrecy as fully as if the attorney had become a subscribing witness to the will.

In the following cases no objection upon the ground that they were privileged seems to have been made to the testimony of the 17 L.R.A. (N.S.)

attorney who drew the will in question, as to communications made to him by the testator during the preparation of the same: *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837, which was an action to set aside a will upon the alleged ground of mental incapacity and undue influence, and in which the testimony of the attorney who drafted the will, and who was also a subscribing witness thereto, that he had observed no indication of undue influence, was held to be properly received; *Nourse v. Finch*, 1 Ves. Jr. 344, where the question was whether the executors were trustees for the next of kin of an undisposed-of residue of the testator's estate, and in which the attorney who drew the will was permitted to testify as to what was said and done by the testator at the time the witness was consulted, about its making; *Stewart v. Walker*, 6 Ont. L. Rep. 495, in which a lost will was established largely upon the testimony of the plaintiff himself, who was the solicitor who had drafted the will, and who was, under the will, the sole executor and the devisee of the greater part of the estate.

There is a line of cases which, without specifically passing upon the question here under discussion, have held that, where a testator has requested the attorney who drafted his will, and with whom he has consulted in regard thereto, to sign the will as an attesting witness, he has in effect consented that, whenever the will should be offered for probate, the attorney might be called as a witness and testify to any facts within his knowledge, necessary to establish the validity of the will; in other words, that this is a waiver, by the testator, of the pledge of secrecy imposed by the rule as to privileged communications. The cases referred to are: *Re Wax*, 106 Cal. 343, 39 Pac. 624; *Re Mullin*, 110 Cal. 252, 42 Pac. 645; *Pence v. Waugh*, 135 Ind. 143, 34 N. E. 860; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149.

Attention may here be called to *Elliott v. Elliott*, 3 Neb. (Unof.) 832, 92 N. W. 1006, which was an action to contest a will;

self when any statement made by the wife could or could not be answered without violating the privilege. During the hearing it was also made to appear that the former will was either lost or destroyed, and that the witness had read it and knew in a general way at least the contents thereof. For the purpose of showing that some changes had been made in the proposed will in some of the bequests, and what those changes were, the proponents asked the witness to state the contents of the former will in that regard. This testimony sought to be elicited was excluded by the court as privileged, to which rulings of the court contestants duly excepted. Judgment was entered sustaining the will, from which the contestants have appealed, and now present the fore-

going, among other matters, for review. The contestants contend that the matters inquired about were not privileged, and assign the rulings of the court as error.

One question presented for review is, To what extent does the privilege between attorney and client prevail where the question arises in a will contest after the death of the client? Is the privilege the same in such a case as it is between an attorney and client with respect to all other matters arising before or after the death of the client? Subdivision 2 of § 3414, Rev. Stat. 1898, so far as material to the present inquiry, provides as follows: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given therein

though the rule of law under discussion was not applied. There the attorney who drew the will, and who attested the same at the testator's request, was permitted to testify as to statements made to him by the testator as to his reasons for disposing of the property as he did, upon the ground that they were not confidential communications, as they appeared to have been made for the most part in the presence of others, and under no injunction of secrecy.

But, when the action in which it is sought to have the attorney who drafted the will testify as to the declarations of the testator during the preparation of the will arises between the testator's representatives and strangers not claiming under him, this exception to the general rule of privileged communications does not apply. Such was the conclusion reached in *Chew v. Farmers' Bank*, 2 Md. Ch. 231, which was an action originally begun by a widow to assert certain claims against lands owned by her husband at the time of his death, but which the devisees under his will had conveyed to strangers. During the litigation the widow died, and her executor was admitted as complainant in her stead, and the action revived. She had left a will; and, upon objection by her executor, the attorney who drew her will was not permitted to testify as to the provisions therein relative to the claims in question, or as to the reasons assigned by her for making such provisions, or as to anything which occurred in the conversation between her and the witness upon the subject. The court declared that, if anything was said in the course of that conversation between the deceased and her attorney,—they standing towards each other in the relation of legal adviser and client,—which could, if revealed by the witness, operate to her prejudice, the rule prohibiting such revelations applied with stringent force.

So, in *Bennett's Estate*, 13 Phila. 331, the court refused to permit a claim against a decedent's estate to be established by the testimony of the attorney who drew the decedent's will, as to statements made by the decedent to him while consulting him 17 L.R.A. (N.S.)

in regard to the preparation of the will, upon the ground that such communications were privileged.

Upon the same principle, in *Sweet v. Owens*, 109 Mo. 1, 18 S. W. 923, which was an action to reform a deed on the ground of mistake, so as to convey thereby the whole of a certain tract of land instead of a third of it, the attorney who, some time after the execution of the deed, had drawn the will of the grantor, was not permitted to testify that the grantor stated to him that he had, by such deed, conveyed the whole of the tract in question as security for money due the grantee.

And this proposition that the exception to the general rule of privileged communications, here under discussion, does not apply in actions between the testator's representatives and strangers claiming adversely to his estate, finds support, also, in the following cases: *Scott v. Harris*, 113 Ill. 447; *Re Layman*, 40 Minn. 372, 42 N. W. 286; *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *Re Downing*, 118 Wis. 581, 95 N. W. 876; *Russell v. Jackson*, 9 Hare, 387.

Of course, as long as the testator lives the transactions and communications between him and the attorney who drafted the will are privileged. *Re Dominici*, 151 Cal. 181, 90 Pac. 448; *O'Brien v. Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202, 31 S. E. 100; *Kern v. Kern*, 154 Ind. 29, 55 N. E. 1004; *Doherty v. O'Callaghan*, 157 Mass. 90, 17 L.R.A. 188, 34 Am. St. Rep. 258, 31 N. E. 726; *Re Downing* and *Russell v. Jackson*, *supra*.

But the rule that, as between parties claiming under the testator, his statements to the attorney who drew his will, and the transactions between them in regard to its preparation, are not privileged where all parties claim under, and not adversely to, the testator, is not in force in New York state, since the Code of Civil Procedure provides that an attorney shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment, unless expressly waived upon trial. Accordingly, it was held in *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874, that, under this

in the course of professional employment." It will be observed that, under the foregoing provision, the privilege therein given, as at common law, is purely personal, and belongs to the client. If the client waives the privilege, neither the attorney, nor anyone else, may invoke it. It is likewise apparent that the privilege given by the statute is simply declaratory of that existing at common law. Without this statute, therefore, in view of § 2488, Rev. Stat. 1898, in which the common law of England is adopted, the privilege would exist and be in force in this state. The mere fact that the common-law privilege is declared in statutory form does not extend the scope of its operation. The material question, therefore, is, Did the privilege at common law extend to will contests between heirs of the deceased ancestor, where the issues of duress, undue influence, or insanity are involved?

Professor Wigmore, in his work on Evidence, vol. 4, § 2314, in concluding a discussion of the question of privilege, as applicable to an attorney and client in cases of will contests, states the rule as follows: "But for wills a special consideration comes into play. Here it can hardly be doubted that the execution, and especially the contents, are impliedly desired by the client to be kept secret during his lifetime, and are

accordingly a part of his confidential communication. It must be assumed that during that period the attorney ought not to be called upon to disclose even the fact of a will's execution, much less its tenor. But, on the other hand, this confidence is intended to be temporary only. That there may be such a qualification to the privilege is plain. That it appropriately explains the client's relation with an attorney drafting a will seems almost equally clear. It follows, therefore, that after the testator's death the attorney is at liberty to disclose all that affects the execution and tenor of the will. The only question could be as to communications tending to show the invalidity of the will, i. e., from which a circumstantial inference could be drawn that the testator was insane, or was unduly influenced. It may be conceded that the testator would not wish the attorney to assist in any way the overthrow of the will. But the answer is that such utterances were obviously not confidentially made with reference to the secrecy of the fact of insanity or undue influence, for the testator, of course, did not believe those facts to exist, and therefore could not possibly be said to have communicated them. As to the tenor and execution of the will, it seems hardly open to dispute that they are the very facts which the testator expected and intended to

statute, a lawyer was prohibited from testifying as to communications between himself and his client as to the client's will; and that this was so even though the attorney asked no questions, and gave no advice, and did nothing more than reduce the instructions of the testator to writing.

And this interpretation of the statute was assented to in *Re Coleman*, 111 N. Y. 220, 19 N. E. 71, in which it was declared that conversations between the attorney who drew the will and the testator, at the time the latter gave instructions to the former as to the will, were had in pursuance, and under the sanction, of professional employment, and were clearly within the protection of the statute, though the specific point decided was that the pledge of secrecy imposed by the statute was expressly waived by the client, in requesting the attorney to become a witness to the will; which ruling as to attorneys as attesting witnesses, it may be said in passing, was afterwards incorporated in the statute.

The two cases last cited were followed in *Mason v. Williams*, 53 Hun, 398, 6 N. Y. Supp. 479; *Re McCarthy*, 38 N. Y. S. R. 124, 14 N. Y. Supp. 2; *Re McCarthy*, 48 N. Y. S. R. 315, 20 N. Y. Supp. 581; *Pearsall v. Elmer*, 5 Redf. 181,—in all of which the declarations of the testator to the attorney who drew the will, during the preparation of the same, were held to be privileged under the statute; while the holding in *Re Coleman*, supra, that the testator waived the privi-

lege by asking the draftsman to become an attesting witness to the will, was followed in *Re Gagan*, 47 N. Y. S. R. 444, 20 N. Y. Supp. 426, Affirmed in 49 N. Y. S. R. 366, 21 N. Y. Supp. 350; and in *Re Lamb*, 21 N. Y. Civ. Proc. Rep. 324, 18 N. Y. Supp. 173.

This New York statute was also passed upon in *Butler v. Fayerweather*, 33 C. C. A. 627, 63 U. S. App. 120, 91 Fed. 460, in which it was held that an attorney who had prepared a codicil alleged to have been executed and published by the client, and to have been afterwards destroyed by a third person, could not be required to disclose its contents, or to testify whether it was signed in the presence of attesting witnesses so as to constitute a valid publication, where the attorney was not an attesting witness. This proceeding was upon a writ of error to review an order committing the attorney for contempt for not answering these questions in an equity case in the circuit court, the exact character of which does not appear. That court, in *Fayerweather v. Ritch*, 90 Fed. 15, had held that the attorney must answer the questions, and, on his continued refusal, issued the order complained of.

It would seem to be the established rule, however, that such communications, to come within the protection of the statute, must be in fact confidential, and not made in the presence of third parties. Such was the conclusion reached in *Re McCarthy*, 55 Hun, 7, 8 N. Y. Supp. 578; *Re McCarthy*, 38 N. Y.

be disclosed after his death; and, with this general intention covering the whole transaction, it is impossible to select a circumstance here or there (such as the absence of one witness in another room) and argue that the testator would have wanted it kept secret if he had known that it would tend to defeat his intended act. The confidence is not apportionable by a reference to what the testator might have intended had he known or reflected on certain facts which now bear against the will."

The supreme court of Iowa, in a well-considered case, entitled *Winters v. Winters*, 102 Iowa, in speaking of the privilege, at page 57, 63 Am. St. Rep. 430, 71 N. W. 185, says: "At common law, confidential communications to a physician were not privileged, and they are only so made by statute. Those to an attorney, however, were privileged; and it was held that the attorney might not divulge without the consent of the client while living, but that, after his death, in a contest between a stranger and an heir, devisee, or personal representative, the latter might waive the privilege and examine the attorney concerning the confidential communications, though the stranger was not permitted to do so; and, in a controversy between heirs at law, devisees, and personal representatives, the claim that the communication was privileged could not be

urged, because, in such a case, the proceedings were not adverse to the estate, and the interest of the deceased, as well as of the estate, was that the truth be ascertained."

In the following cases the doctrine of privilege between an attorney and client is discussed, and it is held that communications or statements made by the deceased to the attorney preparing the will with respect to the subject-matter thereof and what the attorney heard or saw with respect thereto do not fall within the privilege: *Scott v. Harris*, 113 Ill. 447; *Doherty v. O'Callaghan*, 157 Mass. 90, 17 L.R.A. 188, 34 Am. St. Rep. 258, 31 N. E. 726; *Glover v. Patten*, 165 U. S. 394, 41 L. ed. 760, 17 Sup. Ct. Rep. 411; *O'Brien v. Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202, 31 S. E. 100; *Graham v. O'Fallon*, 4 Mo. 338; *Coates v. Semper*, 82 Minn. 400, 85 N. W. 217; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149; *Blackburn v. Crawford*, 3 Wall. 175, 18 L. ed. 186; 3 Jones, Ev. § 773; 2 Rice, Ev. pp. 649-651; *Re Layman*, 40 Minn. 371, 42 N. W. 286. In some of the cases a distinction is sought to be made between a proponent and a contestant of a will, and it is accordingly held that the privilege does not apply when the attorney is called in support of a will. Such cases, however, are not numerous, and the reason for the holding is fairly

S. R. 124, 14 N. Y. Supp. 2; *Re Smith*, 61 Hun. 101, 15 N. Y. Supp. 425; *Re Eckler*, 110 N. Y. Supp. 650; and *Re Sears*, 33 Misc. 141, 68 N. Y. Supp. 363; though in *Re O'Neil*, 26 N. Y. S. R. 242, 7 N. Y. Supp. 197, in which it was held that any act or word of the testator to his attorney on the subject of his will, or its execution, could not be proved by the testimony of the attorney, the court made use of the following language: "Practically, all that a man may say to an attorney who is employed by him to draw his will and to superintend its execution, upon that subject, and all he may say to anybody else in the attorney's presence and hearing at the time, cannot be lawfully disclosed by the attorney."

In *Re Cornell*, 80 App. Div. 412, 85 N. Y. Supp. 920, it was held that the lawyer who prepared a codicil to a will, in an action contesting the same, was competent to testify as to what took place at the time of its execution, when called to the stand by the proponent, the sole executor of the testator, upon the authority of *Holcomb v. Harris*, 166 N. Y. 257, 59 N. E. 820, in which it was held that the legal representatives of a deceased person could waive the protection of the statute as to disclosures of professional information on the part of a physician.

Before the decisions in *Loder v. Whelpley* and *Re Coleman*, supra, it was declared to be the rule of law in the following cases that the communications made by a

testator to his attorney in regard to the preparation of his will were not privileged,—at least between devisees and heirs at law of the testator or other parties claiming through him: *Sanford v. Sanford*, 5 Lans. 486; *Sheridan v. Houghton*, 6 Abb. N. C. 234, Affirmed without regard to this question in 84 N. Y. 643; *Re Chase*, 41 Hun. 203; *Re Austin*, 42 Hun. 516, Appeal Dismissed in 121 N. Y. 664, 24 N. E. 1093; *Re Boury*, 8 N. Y. S. R. 809.

In *Re Chapman*, 27 Hun. 573, however, also decided before *Loder v. Whelpley* and *Re Coleman*, supra, the court, while admitting that the death of a party would not, as a general rule, remove the seal fixed by law on confidential communications to attorneys, nevertheless held that, on an allegation of fraud, forgery, or mistake in the making of a will, instructions received by an attorney in preparing the same were not privileged communications.

Another case which was decided before *Loder v. Whelpley* and *Re Coleman*, supra, is *Re Elston*, 5 Dem. 154, in which it was held that the attorney who drew the will, and who was also an attesting witness to the same, was competent to testify as to communications made to him by the testator during the preparation of the will, upon the ground that the testator had, by requesting him to sign the will as a witness, placed himself and his attorney in another relation than that of attorney and client.

stated in the case of *Re Nelson*, 132 Cal. 182, 64 Pac. 294. Where the grounds of contest are duress, undue influence, or incapacity, we cannot perceive upon what reason such a distinction can arise. The privilege belongs to the client, and he may waive it or enforce it as to him may seem proper. The policy upon which the privilege rests is humane in purpose, practical in its application, and salutary in its results when applied as it was intended it should be under the rules of the common law. The sole purpose of the privilege was to protect the client's interest. Under it, he could freely communicate to the attorney all matters relating to a controversy between himself and another without fear of having such matter divulged by his attorney. In this way the client could obtain the benefit of the advice and counsel of one learned in the law without being exposed to the danger of having his statements turned into a weapon against him. If such were not the law, no man could safely seek or obtain advice and counsel from an attorney, and the very purpose for which such advice is usually sought would be frustrated. But do these reasons apply to will contests where capacity or undue influence are in issue? What is the purpose of such a contest? It can have but one purpose, namely, to determine whether or not the document presented as the last will and testament of such a deceased person is really such. Can it be contended upon any reasonable ground that the testator had any interest in or desire to conceal his real intentions in such a matter when such intentions are called in question after his death? Did he not know when he had the will prepared that it would have to be made public and established as his will in a proper court before it could become effective? If, therefore, the document produced is not actually his will, but rather that of another who induced him by undue influence over him to make it, can it be said that the deceased wants such a will established as his own? Would not the law, in holding to such a policy, foster that which it abhors, namely, deceit and fraud? In this regard, who may raise the question? Certainly not strangers to the estate, but only those who are either heirs at law of the deceased, or those who are beneficiaries of his bounty and made so by the will. If a particular beneficiary obtained the bequest through duress, deceit, or undue influence over the mind of the testator, should such beneficiary be permitted to invoke this most salutary privilege against the real heir, and thus, perhaps, be enabled to conceal the very thing the law abhors, and for which it wisely requires the probate of all wills? Moreover, is the right to invoke the privilege to

be given to one heir who proposes the will, and denied to the other who opposes it?

The authorities cited above make it reasonably clear that the right to invoke the privilege was withheld from both at common law when the issues involved affected the integrity of the will. If this be so, why should not the attorney who prepared the will be required to disclose all that he knows concerning the real state of mind of the testator? The attorney may know by whom and to what extent the testator was influenced. Again, he may know that the testator was not influenced at all, and may further know the very reasons that controlled him in doing what he did in making the will. In the first instance should the person causing the will to be made be protected by the privilege? And in the latter case should the one who claims undue influence be permitted to invoke it, and thus make certain circumstances to which he points, and which may be easily explained, to stand as the real truth? The privilege was not extended to will contests at common law, and, as our statute is no broader than the common law upon the subject, we have no right, even if we were inclined to do so, to extend the privilege to will contests.

It is urged that the case of *Re Van Alstine*, 26 Utah, 193, 72 Pac. 942, is decisive of the question here presented; that in that case this court held that, where the insanity of the testator was involved, the attending physician was incompetent to testify concerning the testator's mental condition; and that no distinction with regard to the privilege can be made between an attorney who is professionally consulted in preparing a will and an attending physician. It is true that in that case this court held that the contestants could invoke the privilege against the attending physician. The question, however, was not discussed; and the decision was based upon the authority of *Munz v. Salt Lake City R. Co.* 25 Utah, 220, 70 Pac. 852. The later case referred to was an action for personal injury, and the doctor was called to testify against the injured person whom he had treated for the injury. At common law the privilege did not extend to physicians, and the statute upon which the *Munz* Case is based was enacted to protect the patient in just such cases. All the other cases, except *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320, cited in support of the decision in the *Van Alstine* Case, are cases involving the question involved in the *Munz* Case. In all the cases cited the doctor was called to testify against the patient, and the privilege was invoked and allowed in favor of the patient in a case in which he was

a personal actor. The case in 103 N. Y. was a will contest, and the decision was based upon a special statute which provided that the inhibition of the doctor to testify would apply to every examination, unless the inhibition was expressly waived by the patient. In *Loder v. Whelpley*, 111 N. Y. 248, 18 N. E. 877, the same rule was extended to an attorney who prepared the will, and this was likewise done in view of the New York statute. The statute upon which this rule is based is as follows: "An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment." N. Y. Code Civ. Proc. § 835. This is a positive inhibition enjoined upon the attorney, and he is prohibited from disclosing any communication made by the client to him in a professional capacity. At least, this is the view the New York court took of it. The client being dead, and not present to waive the privilege, if it were no more than that, the court held it could not be waived at all in such a case. The case in 111 N. Y. is referred to in *Doherty v. O'Callaghan*, 157 Mass. 90, 17 L.R.A. 188, 34 Am. St. Rep. 258, 31 N. E. 726, and it is there pointed out that the New York decision must rest upon the New York statute alone, since the rule adopted in the New York case was not the rule at common law. It was likewise held in *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279, that the deceased's physician could not testify in a will contest respecting the deceased's mental condition. This decision also rests upon the Indiana statute. The supreme court of that state subsequently held, however, in *Morris v. Morris*, 119 Ind. 341, 21 N. E. 918, that the privilege could be waived by the personal representative of the deceased in a will contest, and that it was so waived by calling the physician as a witness. As we have pointed out, however, the distinction of permitting one side of a will contest to waive the privilege while denying such right to the other, is purely arbitrary and without sound reason, and the weight of authority is against it.

In this connection, it should not be overlooked that the courts whose decisions are cited in the *Van Alstine Case* utterly repudiate the doctrine announced in that case when applied to will contests. As an instance of this, we need only refer to the Iowa and Missouri cases cited in the *Van Alstine Case*. The courts of both those states are uncompromisingly opposed to the doctrine announced in the *Van Alstine Case*, as is evidenced in *Winters v. Winters*, 102 Iowa, 58, 63 Am. St. Rep. 428, 71 N. W. 184, and *Graham v. O'Fallon*, 4 Mo. 338. 17 L.R.A. (N.S.)

The courts last referred to, however, are in thorough accord with the doctrine of privilege as applied in the *Munz Case* and cases of that character. They, however, make and maintain a distinction between will contests and other cases, and we think such a distinction is sound and should be enforced. Whether there is, or should be, a distinction with regard to the privilege between a physician who attends a patient in his last sickness and an attorney who prepares his client's last will in testifying to the mental condition or state of mind of the testator, or in disclosing other matters that may affect the integrity of the will, is not directly before us, and need not be determined. As we have shown, the privilege with regard to physicians is a creature of the statute, while as to attorneys it is a part of the common law. If it is found in a statute, and the statute is declaratory of the common law merely, as in this state, the statute should be applied under the rule in force at common law. If, therefore, the privilege as to attorneys did not apply at common law in the land of its birth, and the authorities we have cited clearly show that it did not, it should not be declared to be the law in any state where the common law has been adopted, and we are not disposed to do so. The rules of evidence as evolved by the courts never were intended to be so applied as to conceal the truth. Under modern jurisprudence, the privilege extended to clients never can have that effect where the client is living and personally interested. He may be called as a witness at any time and place, and must, like every other witness, make full disclosure of all the relevant facts within his knowledge, whether for or against his interests. In will contests, however, where such contest is based upon the grounds of duress or undue influence, the influence usually consists of secret acts of another which speak only through the acts of the testator. If the testator made any disclosure of such acts, either by word or conduct, to the attorney preparing the will, no privilege is invaded, and no possible harm can come to anyone, by compelling the attorney to testify concerning them. We are constrained to hold, therefore, that, as between heirs or beneficiaries of a deceased person in a will contest, where undue influence or want of capacity is in issue, neither side can invoke the privilege as against the testimony of an attorney who prepared the will under the direction of the deceased; and the attorney should be required to disclose all matters relevant to such issues the same as any other person cognizant of the facts would be.

The proponents also offered to prove by the attorney the contents of a former will.

This was objected to upon two grounds, namely, that it was immaterial and privileged. The court sustained the objection on both grounds. We do not think, for the reasons above stated, that the matter was privileged. Nor was it necessarily immaterial. Where a contest is based upon duress, fraud, or undue influence, the provisions contained in a former will may become very important. If it can be shown that the bequests in favor of the person who is charged with having exerted the undue influence are the same, or substantially so, in the later will as they were in the former one, and that the influence was not present when the former will was made, it may be a conclusive answer to the charge of undue influence. If, however, it should appear that the bequests in favor of the person charged with having exerted undue influence are enlarged in the later will, and no reason for this is made to appear, while the surrounding conditions and circumstances are such as would make it probable that the person charged did exert undue influence over the mind of the testator, then, again, such facts may become very material in determining the issue. In this connection, it should not be overlooked that any person not only has the legal right to make a will, but he has likewise the right to make as many different ones as he chooses, and to make them in accordance with the dictates of his own conscience and judgment. The mere fact that a change is made in a later will, of itself, may be no evidence whatever that the testator was unduly influenced to make such a change. But the triers of the facts should be placed in possession of all of the facts and circumstances, as they may have affected the testator, and from them all determine the ultimate fact sought to be reached in such a contest. In this regard much may depend upon the length of time that elapsed between the prior and later will. The changes in the conditions as they may have affected the beneficiaries of the deceased's bounty; their conduct and demeanor towards him; the services or kindnesses they may have rendered or shown him in the later years of his life; and, in short, all the circumstances that may affect a person of feeble health or mind.—should be considered. Changes made in a later will may therefore be of some probative force, and should not be excluded from consideration, unless it is made clear beyond a reasonable doubt by all the evidence and circumstances that the changes could in no event affect the result of the contest. Such changes, if any exist, merely go to the intention of the testator, and, like other declarations which in some way manifest these

intentions, always are admissible if not too remote.

In 1 Underhill on Wills, § 134, the rule is well stated in the following language: "The testator may at any time revoke his will; and the fact that he does so arbitrarily and without giving his reason for so doing raises no presumption that a new will, executed to revoke the former or to take the place of it, was unduly procured. The force of proof of a change of testamentary disposition depends wholly upon the circumstances of the particular case. If the earlier will was a natural one, according to the circumstances surrounding its execution, the execution of a later instrument of a character directly contrary is material. And if the testator, at the time of the execution of the later will, which is not only unnatural, but directly contrary to his previous fixed and declared intention, is in feeble health, and is surrounded by those who are favored by the later will, a suspicion of undue influence, to say the least, is created. It would certainly be proper for the court, under such circumstances, to scrutinize all the evidence very closely to ascertain if the later will is the result of coercion or fraud, or if it was freely and voluntarily executed." Upon this subject, Mr. Justice Campbell, in the case of *Beaubien v. Cicotte*, 12 Mich. 488, says: "It is true, of course, that making one will does not, of itself, render it at all unlikely that another will may be substituted; but previous preferences and plans may have a plain bearing upon an issue, where the question arises whether the testator has understandingly, and of his own free will, changed his settled views. No case has been cited holding such proof inadmissible. It is of very frequent occurrence in the cases reported." In support of this, he cites a number of both English and American cases. The doctrine is also supported by the following authorities: *Bulger v. Ross*, 98 Ala. 272, 12 So. 803; *Re Selleck*, 125 Iowa, 678, 101 N. W. 453; *Doherty v. O'Callaghan*, 157 Mass. 90, 17 L.R.A. 188, 34 Am. St. Rep. 258, 31 N. E. 726; *Schouler, Wills*, § 242.

In some of the foregoing cases the question was squarely presented as to whether the attorney who prepared the later will should be required to testify to the contents of a former will; and it is held that it was not a matter of privilege at common law, and that he should be required to testify. It is argued, however, that the pro-
testants, in this connection, made certain offers of proof respecting the contents of the prior will, and that it was made to appear what the changes were, and hence the proof offered was immaterial. In this connection, the general rule is invoked that the

evidence offered must appear to be relevant and material, or no error can be predicated upon the ruling excluding it. It must be remembered that, in connection with the changes in the last will, the protestants also offered to prove the declarations of the deceased made by him at the time the changes were made. All this was excluded. It is true that, as the offer stands, nothing seems very material, except, perhaps, the declarations of the testator, made in connection with the last will. Nor are we inclined to depart from the general rule that, unless it appears from the offer the evidence is material, the ruling of the court will be upheld. The reason upon which the rule rests is that the party offering the testimony must know what it is, and if, upon his statement, it is not material, no error can be committed by its exclusion. But offers of proof need not be made in all cases, nor should they control in all cases where the attorney chooses to make them. This case affords a practical illustration that the exception is as well founded as is the rule itself. The witness in this case refused to disclose to anyone what the testator said at any time concerning the will. He so refused upon the ground that it would be against the law and unprofessional to do so. How could the protestants, therefore, know that which was rigorously concealed from them? The best they could do was to hazard a guess as to what the attorney would testify to. This counsel undertook to do in making the offer. The mere fact that the offer included some matters that were not material, in view of the situation that confronted counsel, should not have precluded them from proving that which appeared material. The witness was determined not to disclose anything that was said or transpired between him and the deceased, and was of that state of mind all the time. Counsel plied him with numerous questions, but with no avail. The court upheld the witness in his attitude in so far as the questions related to anything the deceased said or did. Whether anything the deceased said or did with regard to the will, or the changes therein, as compared with the former one, would have affected the result, we cannot say; nor could the trial court say, because he refused to hear it. What, if any, effect shall be given it, can only be determined after it is disclosed and weighed, compared, and reconciled with all the other evidence in the case. The protestants were not permitted to present their whole case, and the court did not hear it. This, as we have heretofore held in *Re Miller*, 31 Utah, 415, 88 Pac. 338, it was the duty of the trial court to hear and pass upon. We cannot say in advance what, if any,

effect the excluded evidence should be given. From the record it is manifest that the witness should have answered the questions with respect to what passed between him and the deceased in the preparation of the last will, and he should also have disclosed the contents of the former will so far as he knew them, for the purpose of bringing them before the court; and he should likewise have stated all that was said and done by the wife of the deceased, which he did not do.

The judgment is therefore reversed, with directions to the lower court to grant the motion for a new trial, and to proceed with the case in accordance with the views herein expressed; appellants to recover costs of this appeal.

McCarty, Ch. J., and Straup, J., concur.

VIRGINIA SUPREME COURT OF APPEALS.

NORFOLK & PORTSMOUTH TRACTION COMPANY, Plff. in Err.,

v.

A. C. ELLINGTON, Admr., etc., of John T. Ellington, Deceased.

(— Va. —, 61 S. E. 779.)

Street railway — negligence — absence of equipment.

1. A street railway company is not negligent in operating a cross-over between two tracks without a trolley wire, so as to render it liable for the death of a motorman killed while trying to run his car over it, where it had been in constant use without accident, and the only evidence that such

Case Note. — Is a street or interurban railway affected by abrogation of fellow-servant rule as to "railroads?"

It is generally held that such statutes do not apply to street railways for the reason that the hazards and dangers incident to the operation of ordinary steam or commercial railroads, over which long and heavy trains, not easily controlled, are run at a high rate of speed by ponderous locomotives, are not present in the operation of street railways; and that it was these hazards from which the legislature intended to protect the employees. Another reason frequently advanced is that the courts will construe common words according to popular usage, and, according to popular usage, the word "railroad," without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads used for the transportation of both passengers and freight; and, whenever street railroads are referred to, the word "street" is prefixed.

In *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608,

wire was practicable was the opinion of one who had formerly served as conductor and motorman on electric cars.

Witness — expert — experience.

2. One who has served as motorman and conductor on electric cars, but has had no experience in superintending the construction of the trolley wires for cross-over tracks is not qualified to express his opinion as to the practicability of such device.

Master — rules — absence.

3. A charge of negligence against a street car company in failing to promulgate adequate rules for the use of a cross-over track is not supported by evidence merely that employees were instructed to look out when using the cross-over, and see that there was nothing approaching.

Railway — street railways.

4. A street railway company is not within the operation of a constitutional provision abolishing the fellow-servant rules as to employees of a "railroad company," where the language of the provision deals with signal points, locomotive engines, switches, despatches, and telegraphic orders, which is not applicable to street railways.

(June 11, 1908.)

ERROR to the Circuit Court for Norfolk County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

63 N. W. 1099, it was held that a statute which provided that "every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this state," was not applicable to a street-railway corporation operating its line by a cable. The court gave the reasons mentioned in the preceding paragraph for so holding, and, as an additional reason, stated that the legislature, by using the words "when sustained within this state," evidently aimed at railroads operated by steam, whose lines might extend across the state boundary; and that street railways could not have been intended, since these do not usually run beyond the city limits, and none run beyond the state boundary.

Without discussion, the preceding case was followed in *Lundquist v. Duluth Street R. Co.* 65 Minn. 387, 67 N. W. 1006, where it appeared that the street railway was operated by electric power.

In *Sams v. St. Louis & M. River R. Co.* 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686, it was held that a street railroad operated by electricity was not within the provisions of a statute making railroad corporations owning or operating railroads liable for injuries to one servant by the negligence of another while engaged in the work of op-

erating such railroads; and the fact that the street railway company was incorporated as an ordinary railroad under the general railroad law, and had unsuccessfully asserted in court the right of eminent domain, did not bring it within the terms of the statute where the company was in fact operating only a street railroad.

Statement by Whittle, J.:
The plaintiff in error seeks to reverse a judgment of the circuit court of Norfolk county in an action brought against it by the defendant in error to recover damages for the death of his intestate, John T. Ellington, a motorman on one of its electric cars.

The accident in which Ellington lost his life occurred about half past 11 o'clock on the night of August 21, 1906, and was the result of a collision between two of the company's cars in a suburb of the city of Norfolk, on a cross-over, or latch, connecting the company's double tracks with its car barn. Ellington's car, which he was attempting to convey from the western track across the eastern track to the car barn to be housed for the night, was run into by another car on the eastern track and derailed; the effect of the impact being that Ellington was thrown from his car to the ground and fatally injured.

The scene of the accident is well described in the petition for a writ of error as follows: "Church street, just outside of the corporate limits of the city of Norfolk, runs nearly north and south. At the point where the accident occurred on this street, the Norfolk & Portsmouth Traction Company has two tracks, the easternmost of which is used by cars going northwardly to the City Park, while the westernmost track is

Following the *Sams* Case, it was held in *Stocks v. St. Louis Transit Co.* 106 Mo. App. 129, 79 S. W. 1176, and in *Godfrey v. St. Louis Transit Co.* 107 Mo. App. 193, 81 S. W. 1230, that the statute was not applicable to electric street railways.

In *Johnson v. Metropolitan Street R. Co.* 104 Mo. App. 588, 76 S. W. 275, it was held that the statute was not applicable to a street railway operated by cable in a city and between that city and a suburb, though the city and the suburb were separated by the state line, where the two were in fact one continuous urban population.

In *McLeod v. Chicago & N. W. R. Co.* 125 Iowa, 270, 101 N. W. 77, it was held that a statute abrogating the fellow-servant rule as to the employees of "every corporation operating a railway" did not extend to electric street railways, although, by an amendment, the word "railway" had been made to include interurban railways. In this case it appeared that the same amendment expressly provided that interurban railways, while being operated within the corporate limits of any city or town,

used by cars going southwardly toward Main street in Norfolk. . . . At a short distance south of C street, which runs east and west and comes into Church street, there is a cross-over or latch, connecting the two tracks with the car barn of the company, situated on the east side of Church street, a little north of C street."

There was no overhead trolley wire over the cross-over, and, in order to effect a crossing, it is necessary to stop the car at a point south of the switch on the west track. The motorman then takes the controller handle off the controller on the northern end of the car, and transfers it to the controller on the southern end, while the conductor reverses the trolley; and, upon his giving the bell signal to go ahead, it becomes the duty of the motorman to put the car in motion at a sufficient rate of speed to carry it across the latch by its own momentum. When the trolley wheel leaves the overhead wire, the electric current is shut off, and the car passes over the latch in darkness.

Among other matters, which sufficiently appear from the opinion of the court, the case involves the determination of the question whether § 162, art. 12, Va. Const. (Code 1904, p. CCLIX.), abolishes the fellow-servant doctrine among employees of street railway companies. The section is here inserted in full:

"The doctrine of fellow servant, so far as

it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is, to the extent hereinafter stated, abolished as to every employee of a railroad company, engaged in the physical construction, repair, or maintenance of its roadway, track, or any of the structures connected therewith, or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine, or switch, or in any service requiring his presence upon a train, car, or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master, that a servant would have (at the time when this Constitution goes into effect), if such acts or omissions were those of the master himself in the performance of a nonassignable duty: Provided, that the injury so suffered by such railroad employee result from the negligence of an officer or agent of the company of a higher grade of service than himself, or from that of a person, employed by the company, having the right, or charged with the duty, to control or direct the general services or the immediate work of the party injured, or the general services or the immediate work of the coemployee through or by whose act or omission he is injured;

should be deemed street railways and subject to the laws governing street railways, thus clearly indicating that the prior legislation had no application to street railways.

In *Indianapolis & G. Rapid Transit Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145, it was held that an electric car carrying passengers and freight upon an interurban railway did not come within the meaning of the terms "locomotive engine" or "train upon a railway," as used in the Indiana act abrogating the fellow-servant rule. Whether the servant was injured within or without the city limits does not appear.

In *Edge v. Southwest Missouri Electric R. Co.* 206 Mo. 471, 104 S. W. 90, it was held that the Missouri fellow-servant act mentioned in the *Sams Case*, supra, was applicable to an interurban electric railway operating a line 30 or 35 miles in length between two cities in adjoining states, and passing through some 12 or 15 towns or stations, with but little track inside the city limits, merely passing through as any railroad does. In this case the injury was received outside the city limits.

In *Austin Rapid Transit R. Co. v. Groethe* (Tex. Civ. App.) 31 S. W. 197, it was held that an act defining who are and who are not fellow servants of "railway corporations" was applicable to street railways. But the supreme court, in 88 Tex. 262, 31 S. W. 196, in affirming this case upon other grounds, said: "We seriously doubt 17 L.R.A. (N.S.)

if this be a correct construction of the statute." And in *Riley v. Galveston City R. Co.* 13 Tex. Civ. App. 247, 35 S. W. 826, the court, following the intimation of the supreme court, held that the act was not applicable to street railways.

In *Savannah, T. & I. of H. R. Co. v. Williams*, 117 Ga. 414, 61 L.R.A. 249, 43 S. E. 751, it was held that a chartered street railway was within the meaning of the Georgia Code, abrogating the fellow-servant rule as to the employees of "railroads." This decision was grounded upon the fact that the courts of that state, prior to the adoption of the Code, had impliedly and expressly held that the word "railroad," unless the context showed that a particular kind of railroad was intended, included street railways, and that it was to be presumed that the legislature had knowledge of these decisions and was satisfied with the construction which had been placed upon the meaning of the word.

Fallon v. West End Street R. Co. 171 Mass. 249, 50 N. E. 536, in point upon this question, is sufficiently set out in *NORFOLK & P. TRACTION Co. v. ELLINGTON*.

As to the applicability to private railroads of an enactment abrogating the fellow-servant rule as to the employees of "railroads," see case note to *Ed H. Cunningham & Co. v. Neal*, 15 L.R.A. (N.S.) 479.

or that it results from the negligence of a coemployee engaged in another department of labor, or engaged upon, or in charge of, any car upon which, or upon the train of which it is a part, the injured employee is not at the time of receiving the injury, or who is in charge of any switch, signal point, or locomotive engine, or is charged with dispatching trains or transmitting telegraphic or telephonic orders therefor; and whether such negligence be in the performance of an assignable or nonassignable duty. The physical construction, repair, or maintenance of the roadway, track, or any of the structures connected therewith, and the physical construction, repair, maintenance, cleaning, or operation of trains, cars, or engines, shall be regarded as different departments of labor, within the meaning of this section. Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances, or structures, shall be no defense to an action for injury caused thereby. When death, whether instantaneous or not, results to such an employee from any injury for which he could have recovered, under the above provisions, had death not occurred, then his legal or personal representative, surviving consort, and relatives (and any trustee, curator, committee, or guardian of such consort or relatives) shall, respectively, have the same rights and remedies with respect thereto as if his death had been caused by the negligence of a coemployee while in the performance, as vice principal, of a nonassignable duty of the master. Every contract or agreement, express or implied, made by an employee, to waive the benefit of this section, shall be null and void. This section shall not be construed to deprive any employee, or his legal or personal representative, surviving consort or relatives (or any trustee, curator, committee, or guardian of such consort or relatives), of any rights or remedies that he or they may have by the law of the land at the time this Constitution goes into effect. Nothing contained in this section shall restrict the power of the general assembly to further enlarge, for the above-named class of employees, the rights and remedies hereinbefore provided for, or to extend such rights and remedies to, or otherwise enlarge the present rights and remedies of, any other class of employees of railroads, or of employees of any person, firm, or corporation."

Messrs. H. W. Anderson and Williams & Tunstall for plaintiff in error.

Messrs. R. Randolph Hicks and Smith, 17 L.R.A. (N.S.)

Moncure, & Gordon, for defendant in error:

The witness called to express an opinion as to the character of the device used by the defendant was competent for that purpose.

Bird v. Com. 21 Gratt. 808; *Richmond Locomotive & Mach. Works v. Ford*, 94 Va. 641, 27 S. E. 509.

The true question for the jury is whether the master omitted any precaution which a prudent and careful man would or ought to have taken.

1 Labatt, Mast. & S. pp. 85, 86; *Stringham v. Hilton* (*Stringham v. Stewart*) 111 N. Y. 188, 1 L.R.A. 483, 18 N. E. 870; *Kern v. De Castro & D. Sugar Ref. Co.* 125 N. Y. 50, 25 N. E. 1071; *Norfolk & W. R. Co. v. Cromer*, 99 Va. 787, 40 S. E. 54, 101 Va. 671, 44 S. E. 898; 1 Shearm. & Redf. Neg. 5th ed. § 53; *Texas & P. R. Co. v. Behymer*, 189 U. S. 470, 47 L. ed. 906, 23 Sup. Ct. Rep. 622.

The court will take judicial notice of the fact—it being a matter of common knowledge—that the absence of a trolley wire under the circumstances and conditions related was a dangerous defect in the defendant's system.

Southern R. Co. v. Blanford, 105 Va. 378, 54 S. E. 1; *Richmond Union Pass. R. Co. v. Richmond, F. & P. R. Co.* 96 Va. 670, 32 S. E. 787; *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461, 18 Am. Rep. 630; 2 Shearm. & Redf. Neg. 5th ed. § 408.

The plaintiff, having submitted evidence from which the jury could reasonably infer that there was no adequate rule, and that this omission was the proximate cause of the plaintiff's death, cast upon the defendant the burden of showing that it had proper rules.

2 Labatt, Mast. & S. pp. 444, 2320; *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341; 1 Shearm. & Redf. Neg. § 58.

The fellow-servant provision of the Virginia Constitution applies to electric railways.

Virginia & S. W. R. Co. v. Clower, 102 Va. 867, 47 S. E. 1004; *Savannah, T. & I. of H. R. Co. v. Williams*, 117 Ga. 414, 61 L.R.A. 249, 43 S. E. 751; 2 Labatt, Mast. & S. §§ 603, 702, 707.

Whittle, J., delivered the opinion of the court:

There are four counts in the declaration. The first count alleges that the defendant was guilty of negligence in not having an overhead trolley wire over the cross-over. The second count charges the defendant with negligence in failing to adopt adequate rules for the protection of employees using the

cross-over. The third count charges negligence on the part of employees in charge of the colliding car. And the fourth count attributes negligence to Fricheit, the conductor on Ellington's car.

The first and second assignments of error are to the refusal of the circuit court to instruct the jury to disregard the first and second counts of the declaration, because there was no evidence to support them.

Both assignments are well taken. With regard to the first assignment, the doctrine is settled in this state, by an unbroken line of decisions, that the law only imposes upon the master the duty of using ordinary care to provide the servant with reasonably safe and suitable appliances and instrumentalities for the work to be done; but the right of selection among reasonably adequate and safe methods and instrumentalities rests wholly with the master, and, moreover, he is not required to furnish the servant with the newest and best appliances. These principles have been iterated and reiterated by this court until they have attained the dignity of established principles in the jurisprudence of the state.

The rule is clearly stated in *Bertha Zinc Co. v. Martin*, 93 Va. 791, 807, 70 L.R.A. 999, 22 S. E. 869, 873, where, quoting from *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618, 626, 20 Am. St. Rep. 944, 20 Atl. 517, it is said: "All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is a test of the latter; for, in regard to the style of the implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in the employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set a standard which shall, in effect, dictate the customs or control the business of the 17 L.R.A. (N.S.)

community." See also *McDonald v. Norfolk & W. R. Co.* 95 Va. 98, 105, 27 S. E. 821; *Riverside Cotton Mills v. Green*, 98 Va. 58, 34 S. E. 963; *Norfolk & W. R. Co. v. Cromer*, 101 Va. 667, 671, 44 S. E. 898; *Truckers' Mfg. & Supply Co. v. White* (Va.) 60 S. E. 630.

The burden was upon the plaintiff to prove the negligence of the company, and this he attempted to do, not by showing that the method used by the company was not a reasonably safe method, but that in the opinion of a witness, who had been a conductor and motorman on electric cars off and on for eight years, a cross-over trolley would be a simple and inexpensive device for promoting the safety and convenience of the company and its employees. The witness admitted that he had never had any experience in superintending the construction of such work; and, while he did not consider himself an expert in those matters, he believed that with a little experience he could do the work, "but could not jump into it on the street."

It appeared that, every night, from about 11:30 until about 12:30 o'clock, an average of a car a minute crossed this latch; and there was no evidence tending to show that any such accident had ever happened before at that point, or elsewhere, from the use of such contrivance. Under these circumstances, the unreasonableness of condemning a method which experience had shown to be reasonably safe, and fixing negligence upon the company for its employment on the bare opinion of an alleged expert witness, the foundation of whose special knowledge was that he had formerly served in the capacities of motorman and conductor on electric cars, must be manifest.

The testimony of the witness was objected to on the ground that he was not qualified to give an expert opinion on the matter under investigation. The objection was well taken, and ought to have been sustained.

In *McKelvey v. Chesapeake & O. R. Co.* 35 W. Va. 500, 14 S. E. 261, it was held that a locomotive engineer, without experience in the construction and repair of boilers, was not an expert as to the effect of broken stay bolts in the boiler. The court, in that connection, observes: "Everyone may, it is true, have an opinion from observation, but it is an untrustworthy opinion. not ranking in reliability as that of one proficient in the art of its construction. This witness had simply used engines as an engineer, and had, perhaps, become acquainted with the practical working of some of their parts, but that is all. He shows himself that he is not expert."

Says Wigmore: "It is desirable to appreciate that expert capacity is a matter

on similar enactments, and, if they had intended that section to embrace street railways, they would have declared that intention in unmistakable language.

The comparative inherent dangers of the respective businesses of railroad companies proper and street railway companies is well illustrated by the following statistics, taken from reports of the State Corporation Commission: In 1903, on steam railroads, out of a total of 2,789 persons killed or injured by accidents, 2,319 were employees. On electric railways out of a total of 493 persons killed or injured by accidents, 9 were employees. In 1904, on steam railroads, out of a total of 2,781 persons killed or injured by accidents, 2,264 were employees. On electric railways, out of a total of 206 persons killed or injured by accidents, 9 were employees. In 1905, on steam railroads, out of a total of 1,812 killed or injured by accidents, 1,353 were employees. On electric railways out of a total of 230 persons killed or injured by accidents, 19 were employees. And in 1906, on steam railroads, out of a total of 2,277 persons killed or injured by accidents, 1,775 were employees. On electric railways, out of a total of 203 persons killed or injured by accidents, 27 were employees.

It is also worthy of notice that, while the dockets of this court abound with fellow-servant cases occurring on steam railroads, we recall but one instance of the kind in connection with electric railways.

It would seem, therefore, that the danger is infinitely greater proportionately to employees of steam railroad companies than to employees of electric railway companies; that consideration may have been a dominant factor with the constitutional convention in including the one class and excluding the other class of employees from the operation of § 162, as was unquestionably the case with the Mississippi convention.

It may well be that the growing tendency of electric railway companies to extend their lines, not infrequently many miles, out in the country for utilization in the transportation of lighter forms of freight, including all kinds of farm products, as well as of passengers, will necessitate similar classification of such companies with other commercial railroads. Should the exigency arise, the last paragraph of § 162 leaves the legislature freehanded to deal with the situation. But in the present state of the law there is no escape from the conclusion that, under the Virginia Constitution, the common-law fellow-servant doctrine still obtains with respect to employees of street railway companies.

Our rulings on the preceding assignments of error will necessitate a new trial of the case along such essentially different lines as 17 L.R.A. (N.S.)

to render notice of the remaining assignments unnecessary.

The judgment of the trial court must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had therein, not in conflict with this opinion.

Petition for rehearing denied.

VIRGINIA SUPREME COURT OF APPEALS.

ST. GEORGE R. FITZHUGH, Admr., etc.,
of C. E. Hunter, Deceased, Plff. in Err.,
v.

CHESAPEAKE & OHIO RAILWAY COMPANY.

(107 Va. 158, 59 S. E. 415.)

Eminent domain — damages — injury to business.

1. The owner of land is not entitled to compensation for injury to the business conducted on property all of which is taken for public use, caused by loss of profits during its removal, under a constitutional provision requiring the making of just compensation for property taken for public use.

Same — award — impeachment.

2. Testimony by commissioners, who fixed the damages for land taken by right of eminent domain, five years after the award, aided by memoranda furnished by one of them, that they allowed a certain amount for interruption of business, is not sufficient to reduce the award by that amount, where there was evidence before them that the market value of the land was more than the sum awarded.

(June 13, 1907.)

Case Note. — *Loss of profits from suspension of business while moving, as an element of damage in eminent domain.*

In a note to *Hamilton v. Pittsburg, B. & L. E. R. Co.* 51 L.R.A. 319, the earlier cases upon this subject are collected and discussed. As is there stated, there is considerable conflict of opinion as to whether profits that might have been made during the period required for moving to another situation are to be allowed as an element of damage in eminent domain. The cases holding that such loss of profits is to be considered as an element of damage are based upon the theory that such loss would be taken into consideration by a voluntary seller in fixing the price of his property, and therefore should be considered where the property is taken for public use. On the other hand, the cases taking the contrary view treat such injuries as too remote and speculative to be considered. It would appear that such loss of profits could not be considered

ERROR to the Hustings Court of Richmond to review a judgment reducing an award made for property taken for railway purposes. Reversed.

The facts, with the exception of the instructions given by the court to the commissioners, sufficiently appear in the opinion. The instructions were as follows:

"The commissioners, acting under this order, are to inquire and ascertain what is just compensation to the owner of the property, C. E. Hunter,—that is to say, its fair cash market value; and, in making up their award, they are to consider:

"(1) The fact that this is an old and established place of business, where a large and profitable business was transacted for more than half a century.

"(2) They are to consider that this building was erected and is adapted especially for the purposes for which it is used.

"(3) That this stand is so arranged as to give peculiar facilities for receiving and handling heavy machinery and agricultural implements, owing to the peculiar formation of the alley.

"(4) They are to consider the nearness to railroad depots and wharves.

"(5) They are to consider the expense of moving the large stock of goods carried by Mr. Hunter.

"(6) They are to consider that Mr. Hunter is entitled to just compensation for his property. He is entitled to its full equivalent; and the value of the property in this case should be determined by its productiveness, the profit which its use brings to the owner; but the commissioners are not to consider the profits of the business conducted

by the defendant, except in so far as they go toward showing that the defendant carried on a large and lucrative business.

"(7) They are to consider the adaptability of this property for railroad purposes, having reference to the topography of the city and any other use to which this property is plainly adapted."

Messrs. A. W. Patterson and St. George R. Fitzhugh for plaintiff in error.

Messrs. H. T. Wickham and H. Taylor, Jr., for defendant in error.

Cardwell, J., delivered the opinion of the court:

This writ of error is to a final judgment of the hustings court of the city of Richmond in a proceeding instituted by the defendant in error, the Chesapeake & Ohio Railway Company, against plaintiff in error's intestate, C. E. Hunter, to acquire title, by condemnation, to a certain parcel of real estate situated on Main street between Fifteenth and Seventeenth streets, in the city of Richmond, owned by Hunter, and upon which for many years prior a large and profitable business had been conducted in receiving, handling, and selling heavy machinery, agricultural implements, etc.; the premises being peculiarly adapted by reason of location and otherwise to the purposes for which they had been used.

The whole of the premises being considered necessary, and therefore demanded, for the purposes of the railway company, commissioners, as provided by statute, were appointed to view the property, and, upon hearing such proper evidence as either party might offer, to report what would be a just

as an element of damage where the statute provides for compensation for taking only, as distinguished from taking and injury to the property.

The recent cases are not numerous, and are generally to the effect that such loss of profits cannot be considered in estimating the compensation to be paid.

Thus, in *New York, N. H. & H. R. Co. v. Blacker*, 178 Mass. 386, 59 N. E. 1020, in a proceeding to assess damages for loss caused by the abolition of a grade crossing, it was held that the petitioners were not entitled to recover damages for loss caused by the necessary interruption of their business. The court said that this was a general principle, and did not depend upon the particular phraseology of the particular statute under consideration.

And in *Chicago, M. & St. P. R. Co. v. Hock*, 118 Ill. 587, 9 N. E. 205, although the court did not directly pass upon the question, nevertheless it intimated that evidence of the loss of profits sustained by the interruption of the business should not be taken into consideration in assessing damages.

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In *Cox v. Philadelphia, H. & P. R. Co.* 215 Pa. 506, 114 Am. St. Rep. 979, 64 Atl. 729, the court said that it was a settled rule, which had been recognized and enforced for more than three quarters of a century in that state, that a landowner could not have the profits of his business considered in determining the value of the property which was affected or injured by the taking.

In *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327, where the property sought to be taken had been used for greenhouses, it was held that evidence of the value of the plants, flowers, and potted soil of the petitioner, and the amount of business done by him, was properly admitted as bearing upon the question of the capacity of the real estate for use, where the jury were expressly told that no damages could be allowed for the good will or for injury to the business.

Upon the question of injury to, or expense in removing, personality, as an element of damage for taking real estate, see case note to *Blincoe v. Choctaw, O. & W. R. Co.* 4 L.R.A. (N.S.) 890.

compensation to Hunter. These commissioners filed their report on the 28th of October, 1899, ascertaining the compensation to be paid Hunter at \$15,000, but, upon exceptions taken by Hunter, the court, by its order entered April 30, 1900, set aside the award; and, by a further order entered May 7, 1900, new commissioners were appointed, the court giving to them minute instructions in writing to guide them in the discharge of their duties. To the giving of these instructions defendant in error objected, and tendered another instruction in lieu thereof, which was refused.

Three of these new commissioners acted, and filed on the 22d day of May, 1900, their award, ascertaining that a just compensation to Hunter for the property in question would be the sum of \$22,900, and stating that, as the whole of the property was required for the purposes of the defendant in error, there was no question of damages as to residue of the tract, etc. To this report the defendant in error excepted on four grounds, stated in writing, and moved that the report be set aside.

After the filing of this report, Hunter departed this life, and, his death being suggested, the court, by its order entered on the 26th day of July, 1900, made plaintiff in error, St. George R. Fitzhugh, administrator of Hunter, deceased, and Hunter's widow and children, parties defendant to these proceedings, and directed that they thereafter proceed in the name of these defendants.

No action was taken on the report of the commissioners bearing date May 22, 1900, until March 22, 1905, when defendant in error introduced the three commissioners who made the report and examined them as to how they arrived at the amount awarded Hunter. They had not furnished the court any information as to how they arrived at the amount awarded, and, when examined as witnesses, about five years afterwards, it appears from their testimony that, while they could not, with any degree of certainty, give the grounds of the award made, they were positive that they had followed the minute instructions of the court as they were understood at the time. Testifying from memory, aided only by some loose memoranda kept, they further say, in effect, that in making up the amount of the award of \$22,900 the sum of \$5,000 was included for injury to the business of Hunter. In other words, according to their memory as to what occurred five years before, \$5,000 was allowed for damage, interruption, etc., of Hunter's business,—i. e., for "taking a man's business away from him,"—whereupon the court entered its order to which this writ of error was awarded, reducing

the amount of the award from \$22,900 to \$17,900.

The ruling of the court setting aside the award of the first commissioners was assigned by counsel for defendant in error as cross error under rule 9 of this court (106 Va. vii., 57 S. E. xv.), but the assignment was waived as the evidence upon which the award was made is not properly a part of the record brought before us.

The first question for our determination is: What was the true rule under the constitutional and statutory inhibition, that private property shall not be taken for public uses without just compensation, governing in ascertaining the damages to Hunter when his property was taken?

It is most earnestly and ingeniously argued by counsel for plaintiff in error that, as the Constitution forbade the taking of any private property whatever without just compensation being made to the owner thereof, in construing our statute in relation to the exercise of the power of eminent domain by a private corporation, the court should give to the language employed in the Constitution and the statute a meaning sufficiently broad to enable the owner of property to demand and receive just compensation for not only the property taken, but for any property rights sacrificed or impaired by the taking, which would include injury to the business theretofore conducted on the property, and the consequential costs incurred in changing the locality of the business. In other words, the business conducted by Hunter on the property taken was a property right—private property—coming within the protection afforded by the Constitution and the statute, which could not be interrupted or damaged without just compensation.

Of the numerous decisions of other states cited in the petition for this writ of error, we need only say that they do not support the contention of counsel when the whole of the decision is read, or else were rendered under Constitutions and statutes different from the Constitution and statutes controlling in the decision of this case, or are cases where part of a tract was taken and damage to the residue was the point considered, or cases of temporary suspension of business where the loss was capable of being estimated. It is a matter of course that, where the Constitution and statutes of a state provide, not only for just compensation for property taken, but for all damages that the owner may suffer by reason of the taking, the rule governing in ascertaining the amount of damages to be awarded the owner would be very different from the rule so long established in this state, and followed by the lower court in this case,

where the whole property is taken and no question arises as to damages beyond the fair market value of the property.

In a note to *Hamilton v. Pittsburg, B. & L. E. R. Co.* 51 L.R.A. 330, reviewing the decisions of other states on the subject, it is said: "Some of the cases have permitted evidence of and a recovery for profits lost by the suspension of business where it has to be moved, during the time required for obtaining another situation, and for moving. This allowance is based upon the theory that, as the loss of profits from the suspension of business while moving would enter into the consideration of the price to be charged by an owner voluntarily selling, it should also be considered in determining the market value in case of a compulsory sale under eminent domain proceedings."

Those cases are authority for the proposition that, where property is taken for a public use, requiring a removal of a business conducted on it theretofore, the owner, apart from the value of his property taken, the expenses incurred in moving, etc., is entitled to recover for loss of profits from the suspension of business while moving; but this rule of law finds no sanction in our own decisions, nor is it regarded as the established rule by the weight of authority in this country.

We are called upon, also, to consider a line of decided cases supporting the proposition that the owner of property is entitled by law to the undisturbed and exclusive enjoyment of his estate, and to keep out all trespassers, this being a part of his property in his estate; but clearly they do not apply, as defendant in error was in no sense a trespasser upon the property of Hunter or his property rights, when proceeding by authority of law to acquire title to his property by condemnation for a public use.

Citation of another line of cases is also made in support of the contention that the quiet use and enjoyment of property is to be separated and distinguished from the property itself, so as to entitle the owner to just compensation for both when the property is taken in the exercise of the power of eminent domain; but, again, we have to say that these cases do not apply to this case. The leading case in that line of cases is *Baltimore & P. R. Co. v. First Baptist Church*, 108 U. S. 331, 27 L. ed. 739, 2 Sup. Ct. Rep. 719. In that case the judgment of the lower court in favor of the church was upheld on the ground that the engine house and repair shop, as they were conducted by the railroad company, were a nuisance in every sense of the term, and for the annoyance and discomfort of the congregation in the enjoyment of their church edifice for re-

ligious exercises, prayer, and worship courts of law would afford redress by giving damages against the wrongdoer, and, when the causes of annoyance and discomfort are continuous, courts of equity would interfere and restrain the nuisance. That is by no means the case we have before us.

With respect to our own decisions, we are told in the argument that, while the measure of damages in many cases may be the market value of the property condemned, in ascertaining that value, it is competent to prove any use—the highest and best use—for which it is adapted; but the most enlightened courts have never held that the market value is the only standard, and that cases may not and do not arise where a proper observance of the constitutional provision, that private property shall not be taken for public use without just compensation, may require the award of damages actually sustained other than those measured by the market value of the property taken.

By an unbroken line of decisions of this court, in harmony with the text writers and the decisions of other states having a constitutional provision similar to our own, the rule governing in ascertaining the damages to the owner of property taken as in this case is that he shall be paid the fair market value of the property at the time of its taking; but no effort has ever been made to fix beforehand all of the things which may go to make up the market value of property, while it has not been so difficult to say that a particular element of damage or loss does not enter into the market value and should not be included. In other words, what elements properly enter into consideration in determining the market value of property is necessarily an open question in every case of this character; but it is not necessary to consider that question at length in this case.

The authorities agree that loss of profits in a business destroyed or damaged, where property is taken in the exercise of the power of eminent domain, is not an element for consideration in determining the market value, because a matter of speculation and conjecture, while the profits earned in a business conducted on the property taken are proper to be considered in determining the market value of the property. If "the cost of reproduction is the very lowest amount which should be awarded a person whose business is taken away from him by the strong arm of the law," and this amount should be increased by other considerations, such as the disturbance of business, incidental expense in storing merchandise, etc., as is contended by the learned counsel for plaintiff in error, the question naturally presents itself: Why did not the framers of

ages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts, or by the apparent weight of evidence, but may give their own conclusions." See also the recent case of *Tidewater R. Co. v. Cowan*, 106 Va. 817, 56 S. E. 819.

While, on the face of the report in this case, which was borne out by the evidence returned therewith, there appears nothing going to show that any improper elements of damage entered into the award, these commissioners, long after the award and when the whole matter had gone entirely out of their minds, each undertakes to speak for himself as to what elements of value were considered, although each of them had signed the report at the time it was made. We find nothing in the instructions of the court to justify the conclusion that the commissioners were misled to take into their consideration improper elements of damage.

When testifying from memory, confessedly uncertain by reason of the lapse of time, they, in effect, agree that \$5,000 of the award was "for taking a man's business from him," but whether this and other like considerations had influenced them only in agreeing upon the fair market value of Hunter's property, or had induced them to allow \$5,000 for taking Hunter's business from him in addition to the fair market value of his land and buildings taken, does not clearly and satisfactorily appear, and, under the conditions then existing, no reasonably fair test could be made as to whether the market value of the property of Hunter taken was or not as much as the amount awarded him, considering only proper elements of damage in such cases, as every vestige of Hunter's property, except the land itself, had been removed, and the land occupied by buildings or other structures of the defendant in error. The record shows that these commissioners were capable and upright men of business experience, and with large business interests requiring their constant attention, and doubtless, when they had discharged the duties required of them by the court's order, signed and filed their report, the whole matter was discarded from their minds, so that, when called on to testify touching the considerations that influenced their award, it was quite natural that they could not, upon their oath, be positive as to anything, except that they had followed the instructions of the court in reaching their conclusion. Upon the face of the report there appears no infirmity, and, as has been stated, there was evidence taken which, besides the view of the property by the commissioners, would have justified them in fixing the market value of

Hunter's property at the amount of their award.

The established rule that the finding of the commissioners is entitled to great weight, and is not to be disturbed unless it is shown to be erroneous by clear proof, is not to be disregarded or even affected by the mere fact that the evidence relied on to show that the finding is erroneous is given by the commissioners themselves. The question in such a case is whether or not the proof can be considered as sufficiently clear and satisfactory to warrant the setting aside of the award of the commissioners made upon evidence before them at the time, aided, and greatly aided in the majority of cases, by the evidence of their own senses, they having the advantage of seeing the property itself which is taken, and judging as to its value. In view of the facts and circumstances which have been narrated, we do not consider that the proof relied on as justifying the lower court in striking from the award made by the commissioners of \$22,900 as the value of Hunter's property taken in these proceedings the sum of \$5,000, because improperly included in the award for damages to business, etc., is that clear and satisfactory proof which the established rules of law require. Therefore the judgment of the lower court will be reversed and annulled, and the cause remanded to that court to be further proceeded with in accordance with this opinion.

Petition for rehearing denied November 30, 1907.

MARYLAND COURT OF APPEALS.

PRISCILLA J. WHALEN et al., Appts.,
v.
BALTIMORE & OHIO RAILROAD COMPANY.

(— Md. —, 69 Atl. 390.)

Railroad — contract to maintain siding.

1. A contract by a railroad company to maintain a siding for private use, and to run trains to and from it, is not against public policy.

Covenant — running with land.

2. A covenant by a railroad company with one, his heirs and assigns, to construct

Case Note. — Validity as affected by public policy of contract by railroad company to maintain private sidings.

The contract of a railroad company to construct and maintain a side track or switch for the benefit of a private person is not against public policy when the inter-

and maintain a siding on his property, and to run trains to and from it, runs with the land.

Same — personal.

3. A covenant by a railroad company to leave at a siding on property of the covenantee any car in which articles weighing a certain amount shall be laden for him, and on which the charges for transportation are paid, does not run with the land.

Pleading — demurrer — admission — duty of railroad.

4. Whether or not it would be reasonable to require a railroad company to run trains over the abandoned route after change of its location is a question for the determination of the court, and an allegation of reasonableness in the complaint is not admitted by a demurrer.

Injunction — breach of covenant.

5. A railroad company will not be enjoined from breaking its covenant to run freight and passenger trains to and from the property of the covenantee after it has, for the public welfare, changed its route, where the burden would be wholly out of proportion to the benefit which would accrue to the covenantee.

(April 1, 1908.)

A PPEAL by complainants from a decree in equity of the Circuit Court for Howard County sustaining a demurrer to a bill filed to enjoin defendant from breaking its covenant to run cars to and from complainants' property. Affirmed.

The material part of the indenture mentioned in the opinion was as follows: "And this indenture further witnesseth that the said parties of the second part '(The B. &

ests of the public are not thereby injuriously affected. Taylor v. Florida East Coast R. Co. 54 Fla. 636, 16 L.R.A.(N.S.) 307, 45 So. 574; Butler v. Tifton, T. & G. R. Co. 121 Ga. 817, 49 S. E. 763; Scholten v. St. Louis & S. F. R. Co. 101 Mo. App. 516, 73 S. W. 915.

In Scholten v. St. Louis & S. F. R. Co. supra, in answer to the contention that such contract was against public policy, the court said: "The principal is undoubtedly well established that the first duty of a railroad company in the location and operation of its tracks and switches is toward the public, and such corporations cannot lawfully enter into any agreements disabling them from performing such obligations. . . . Where no public interest is affected or concerned, a railroad company may lawfully bind itself to establish and maintain a switch at any designated point for the accommodation and convenience of patrons in the vicinity, shippers or consignees of freight; and the policy of the law above cited does not condemn such agreements."

But a contract of a railroad company with a coal dealer, over whose land a switch is 17 L.R.A.(N.S.).

O. R. R.)' do hereby covenant and agree in consideration of the premises, to and with the said parties of the first part, their heirs and assigns, to construct and maintain a turn-out and siding at Dorsey's Run on the main stem of said railroad; to take up and set down at said siding by the passenger cars of said company all persons going to and from the farm now occupied by the said parties of the first part; and to leave at said siding, to be unloaded, any car in which any article or articles weighing at least 3,000 pounds shall be laden for the said parties of the first part, and on which the cost of transportation shall have been paid at the place of beginning."

Further facts appear in the opinion.

Messrs. Bernard Carter and Edward M. Hammond, for appellants:

The agreement and covenant was one which ran with the land.

Glenn v. Canby, 24 Md. 130; Spencer's Case, 5 Coke, 16.

The true interpretation of the contract is that the parties intended that the rights thereunder should continue until voluntarily released by the grantors, their heirs or assigns, or until it would cease to be practicable to operate that part of the railroad upon which the turn-out and siding was situated even to the extent of maintaining the turn-out and siding for the purposes mentioned in the deed.

Lydick v. Baltimore & O. R. Co. 17 W. Va. 427; Gilmer v. Mobile & M. R. Co. 79 Ala. 569, 58 Am. Rep. 623; Greene v. West Cheshire R. Co. L. R. 13 Eq. 44; Rigby v. Great Western R. Co. 10 Jur. 488; Lawrence v. Saratoga Lake R. Co. 36 Hun, 467;

laid, not to haul coal for any other person, is void as against public policy. Louisville & N. R. Co. v. Pittsburg & K. Coal Co. 111 Ky. 960, 55 L.R.A. 601, 98 Am. St. Rep. 447, 64 S. W. 969. The court said that such corporation had no right to contract to give exclusive rights to transfer any commodity over any part of its line, as the power of condemnation for right of way for switch tracks and its obligation to the public forbid that it should acquire such right of way under any circumstances and conditions which render it impossible for it impartially to serve all its customers; and for the purpose of saving the expense of condemnation proceedings, the railroad company could not make such contract.

So a railroad company's covenant that a switch should be built for one person, and that no other switch should be constructed at a certain point, is void as against public policy,—especially where the statute permits the owners of mills, mines, and factories to connect private switch tracks and sidings with adjacent railroad tracks. Reeser v. Philadelphia & R. R. Co. 215 Pa. 136, 64 Atl. 376.

Aikin v. Albany V. & C. R. Co. 26 Barb. 289; *Hubbard v. Kansas City, St. J. & C. B. R. Co.* 63 Mo. 68.

Messrs. **James A. C. Bond** and **Francis Neal Parke**, for appellee:

The contracting parties must have intended that the duration of the covenant was to be so long as the railroad company should maintain its main stem on the old route.

Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Texas & P. R. Co. v. Scott*, 37 L.R.A. 94, 23 C. C. A. 424, 41 U. S. App. 624, 77 Fed. 726; *Jones v. Newport News & M. Valley Co.* 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736; *Mead v. Ballard*, 7 Wall. 290, 19 L. ed. 180; *Eckington & Soldiers' Home R. Co. v. McDevitt*, 191 U. S. 103, 48 L. ed. 112, 24 Sup. Ct. Rep. 36.

When the demands of public service exact a change in location of the road, any contract whose enforcement would prevent this change is injurious to the public good, and must give way as being against public policy.

Doane v. Chicago City R. Co. 160 Ill. 22, 35 L.R.A. 588, 45 N. E. 507; *Marsh v. Fairbury, P. & N. W. R. Co.* 64 Ill. 414, 16 Am. Rep. 564; *Florida, C. & P. R. Co. v. State*, 31 Fla. 482, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103; *Sapp v. Northern C. R. Co.* 51 Md. 124.

The remedy is at law, and not in equity.

Maryland Teleph. & Teleg. Co. v. Chas. Simons Sons Co. 103 Md. 140, 115 Am. St. Rep. 346, 63 Atl. 314; *Texas & P. R. Co. v. Marshall*, supra; 3 Page, Contr. § 1633; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Blackett v. Bates*, L. R. 1 Ch. 117; *Jacquelin v. Erie R. Co.* 69 N. J. Eq. 432, 61 Atl. 18; *Conger v. New York, W. S. & B. R. Co.* 129 N. Y. 29, 23 N. E. 983; *Willson v. Winchester & P. R. Co.* 41 C. C. A. 215, 99 Fed. 642; *Wilson v. Ohio & M. R. Co.* 64 Ill. 542, 16 Am. Rep. 565; *London & S. W. R. Co. v. Gomm*, L. R. 20 Ch. Div. 562; *Powell Duffryn Steam Coal Co. v. Taff Vale R. Co.* L. R. 9 Ch. 331; *Wilson v. Northampton & B. Junction R. Co.* L. R. 9 Ch. 279.

Worthington, J., delivered the opinion of the court:

The appeal in this case was taken from an order of the circuit court for Howard county, sitting as a court of equity, sustaining a demurrer to a bill of complaint filed in that court by the appellants against the appellee, for the purpose of obtaining an injunction to restrain the appellee from neglecting and refusing to properly maintain a turn-out and siding at Dorsey's Run, in Howard county; and from neglecting and

refusing to maintain and run a reasonable train service of passenger and freight by or over said Dorsey's Run siding; and from neglecting and refusing to take up and set down at said siding by the passenger cars of defendant company all persons going to and from the farm of the plaintiffs; and from refusing or neglecting to leave at said siding, to be unloaded, any car in which any article or articles weighing at least 2,000 pounds shall be laden for the plaintiffs, and on which the cost of transportation shall have been paid at the place of beginning. The bill was filed June 17, 1907, and sets forth, as the grounds for its prayer for this relief, that on May 5, 1848, the defendant entered into an indenture with a certain Thomas Beale Dorsey, formerly for many years a member of this court, and Milcah Dorsey, his wife, wherein the defendant covenanted and agreed with the said Dorsey and wife, and with their heirs and assigns, to construct and maintain a turn-out and siding at Dorsey's Run on the main stem of said railroad, and also to do certain other things which in the prayer of said bill it is prayed the defendant may be enjoined and restrained from neglecting and refusing to do. The bill further alleges: That the plaintiffs have become, by mesne conveyances, enfeoffed and seised of a large part of the land owned by said Dorsey and wife at the time of the execution of said indenture, and that they are, as the assigns of said Dorsey and wife, entitled to enjoy the fruits of the covenant therein before recited; the said covenant, as is alleged, being a covenant running with the land. That the defendant was then at the time of the filing of the bill of complaint constructing a cut-off on the main stem of its railroad, over which it would, when completed, run its passenger and freight trains, and thus divert all passenger and freight trains from that part of its line which theretofore had passed Dorsey's Run at the siding and turn-out, which up to that time had been maintained and operated by said railroad company under the provisions of said covenant. That the plaintiffs, being advised of the intended abandonment of the Dorsey's Run turn-out and siding, communicated with the defendant, and called its attention to the covenants in said indenture contained, to which communication the defendant replied that it would abandon said turn-out and siding, but would hold itself in no way liable for a breach of said covenants, because, as it claimed, it was immune from liability for a breach thereof. The bill further alleges that, by the change of the location of the roadbed of said defendant company, there would be no turn-out or siding on the property of the complainants at Dor-

sey's Run, and that they would be entirely without the passenger or freight service from said defendant, which the defendant has covenanted to give the complainants as assignees of said Dorsey; that, when the complainants purchased the property mentioned, the fact of having a station on their property at which the freight and passenger trains of the defendant stopped was an inducement and a consideration for them to purchase the said property, and that they were advised at the time of said purchase that said covenant was one running with the land, and could not be broken by said defendant company; that the complainants were advised, and therefore charge, that no monetary compensation could recompense them should the defendant be allowed to violate its said covenants, and that a breach thereof would work a great depreciation in the value of the land belonging to them, for which they would have no adequate remedy at law; that it was not unreasonable to ask the railroad company to run and maintain a certain number of trains, passenger and freight, over its right of way passing by said Dorsey's Run, and to maintain the turn-out and siding covenanted by the defendant company to be maintained there, nor would such request be impossible of performance. The bill further alleges that the defendant has not abandoned the property of the complainants entirely, but that its tracks are still on the property of the complainants for a considerable distance; that, should the defendant be permitted to violate its covenants, the nearest station to the complainants would be Hollofields, which was distant 3 miles, whereas from the residence and property of the complainants to Dorsey's Run turn-out and siding was but $\frac{1}{4}$ of a mile. The bill also alleges, in its sixteenth paragraph, "that from the nature of the topography of the ground, and situation whereon the new line of railroad would run, it would be impossible to construct and maintain a turn-out and siding which would be accessible to the complainants." The prayer of the bill for specific relief is substantially as herein before set out, and there is also the usual prayer for general relief. With the bill was filed a copy of the deed to Priscilla J. Whalen, one of the complainants, for 567 acres, being a part of 2,200 acres of land owned by Judge Dorsey at the time of the execution of the above-mentioned indenture; also a plat of the whole tract showing the location of Dorsey's Run station, and of the so-called new "cut-off" of the railroad, and also a copy of the indenture entered into between the railroad company and Judge Dorsey in 1848.

The indenture is set out in the report of 17 L.R.A. (N.S.)

this case preceding this opinion. The legal principles involved in this appeal, all of which were elaborately argued by able counsel on both sides, and all of which are sufficiently involved in the case to require careful consideration, may be appropriately considered under three heads: First. Was the covenant, or, rather, were the covenants (for, while one in form, the covenant involved in this proceeding embraces several undertakings), contained in the indenture of May 5, 1848, originally valid and binding on the defendant, or void as against public policy? Second. If originally valid as between the parties, are they such covenants as run with the land in favor of the plaintiffs as assignees of Dorsey? Third. If valid, and if they inure to the benefit of the plaintiffs, are the plaintiffs entitled to have the agreement specifically enforced?

1. As to the first proposition, we think the covenants were valid and binding on the defendant at the time they were entered into, and capable then of being specifically enforced so far as the facts are disclosed by the record. In *Greene v. West Cheshire R. Co.* L. R. 13 Eq. 44, a contract by the defendant railroad company to construct a siding upon plaintiff's land alongside the railroad tracks was specifically enforced. In *Lydick v. Baltimore & O. R. Co.* 17 W. Va. 427, a right of way through land was granted to the railroad company, and a verbal agreement was made by which the railroad company promised to put in a switch at a certain mill, and stop its trains at the switch. The court held because the agreement was verbal it did not run with the land, but distinctly stated that, if it had been in writing under seal, it would then be a covenant running with the land, and capable of being specifically enforced in equity. In *Aikin v. Albany, V. & C. R. Co.* 26 Barb. 289, the railroad was required to construct and maintain crossings over or under its tracks for the benefit of the farm land on each side, in pursuance of an agreement to that effect in a deed from the landowners to the railroad company. See also *Murray v. Northwestern R. Co.* 64 S. C. 520, 42 S. E. 617, and *Lawrence v. Saratoga Lake R. Co.* 36 Hun, 467; *Pittsburgh, Ft. W. & C. R. Co. v. Reno*, 123 Ill. 273, 14 N. E. 195. The case of *Sapp v. Northern C. R. Co.* 51 Md. 124, cited by appellee, is distinguishable from these. In this latter case the court was dealing with a question involving the right or power of a railroad corporation to grant or create an easement for persons to walk along its tracks or by the side of them. As the exercise of such a power, if permitted, would be subversive of the very purpose of the railroad's creation, it was held that the corporation possessed no such power. In the case

at bar we find nothing unreasonable or impracticable for the railroad to perform contained in the covenant as originally entered into, and nothing on the ground of public policy to forbid or prevent its execution at the time. We think there is a manifest distinction to be made between covenants to establish and maintain stations for the public convenience and those to establish and maintain sidings, turn-outs, crossings, and the like for private use merely. The former are generally condemned as against public policy, while the latter are to be governed by the circumstances of each particular case. *Fuller v. Dame*, 18 Pick. 472; *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Texas & P. R. Co. v. Scott*, 37 L.R.A. 94-98, 23 C. C. A. 424, 41 U. S. App. 624, 77 Fed. 726; *Marsh v. Fairbury*, P. & N. W. R. Co. 64 Ill. 414, 16 Am. Rep. 564; *Northern P. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; *Lydick v. Baltimore & O. R. Co.* 17 W. Va. 427; *Aikin v. Albany, V. & C. R. Co.* 26 Barb. 289; *Greene v. West Cheshire R. Co.* supra; *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569, 58 Am. Rep. 623.

2. The next question is: Do the covenants run with the land in favor of the plaintiffs in this case? By referring to the covenant, it will be seen that the railroad company agreed to "construct and maintain" a turn-out and siding at Dorsey's Run on the main stem of said railroad, and to do certain other things connected therewith; and the agreement is made, not only with the original grantors, but also with "their heirs and assigns." In *Spencer's Case*, reported in 5 Coke, 16, and also found in 1 Smith, Lead. Cas. 9th ed. p. 174, the question as to what covenants run with the land and what do not was fully considered by the whole court, and it was resolved in that case that, when the warranty is made to one, his heirs and assigns, by express words, the assignee shall take the benefit of it, even though the covenant extend to something not then *in esse*, provided the thing to be done touch and concern the land. The action in *Spencer's Case* was between a lessor and the assignee of the lessee, but the principles enunciated therein have been held applicable to covenants between grantor and grantee, and their assigns, in very many modern cases. In *Glenn v. Canby*, 24 Md. 127, the court said: "The established doctrine is that a covenant to run with the land must extend to the land, so that the thing required to be done will affect the quality, value, or mode of enjoying the estate conveyed, and thus constitute a condition annexed or appurtenant to it; there must also be a privity of estate between the contracting parties, and the covenant must 17 L.R.A. (N.S.)

be consistent with the estate to which it adheres, and of such a character that the estate will not be defeated or changed by a performance of it." In all cases covenants conferring benefits will run with the land where the rights conferred are of such a character as to attach to the land and pass as incidents thereto. 11 Cyc. Law & Proc. p. 1089. The question as to whether the covenant runs with the land does not depend on its being performed on the land itself, but its performance must touch and concern the land, or some right or easement annexed or appurtenant thereto, and tend necessarily to enhance its value, or render it more convenient or beneficial to the owners or occupants. 11 Cyc. Law & Proc. p. 1081. A covenant which does not touch and concern the land, as above indicated, is called a personal covenant, and binds only the covenantor, and can be taken advantage of only by the covenantee. 2 Bl. Com. 304. *Bouvier's Law Dict.* title "Personal Covenant." In the deed from Judge Dorsey and wife the railroad company expressly covenants to do three things, which are involved in this controversy: (1) To construct and maintain a turn-out and siding at Dorsey's Run. (2) To take up and set down at said siding by the passenger cars of said company all persons going to and from the farm then occupied by the grantors. (3) To leave at said siding, to be unloaded, any car in which any article or articles weighing at least 3,000 pounds should be laden for the grantors, and on which the cost of transportation has been paid at the place of loading. Tested by the foregoing general principles, the third covenant seems to us to be a personal one, while the first and second are covenants real, and inure to the benefit of the plaintiffs as assignees of Dorsey and wife.

We come, then, to the third general head into which the consideration of the case has been divided; that is: Are the plaintiffs entitled to have the covenants which run with the land and inure to their benefit specifically enforced? There can be no doubt as to the right of the railroad company to change, for the purpose of carrying out the object of its creation, the location of its main stem. A railroad is in many essential respects a public highway, and the rules of law applicable to one are generally applicable to the other. *Fuller v. Dame*, 18 Pick. 472. The counsel for the appellee very well say in their brief "that a railroad company is a public-service corporation, and is obliged to use its powers and privileges for the benefit of the public, and in aid of the public good. It must, therefore, from time to time, conform to the requirements of public travel and commerce, and adjust its grades, its

route, and its curvatures to these needs. No contract on its face can interfere with these public duties. To compel a railroad company to maintain its main stem on the old location forever is to render it impossible for the corporation to ever make, in conformity with its own needs and the public's interests, any change in its transportation route." It appears from the blueprint filed with the record in this case that the main stem of the defendant company where it passed through the lands of Judge Dorsey was, at the time of the execution of the indenture in question, located along the south side of the Patapsco river. This river, which flows a generally easterly course, at that part of it which passes nearest to the mansion house, and former residence of the late Judge Dorsey, takes a short turn to the south, and then, after flowing a short distance, turns again to the north and east, forming at this point a loop or curve very much in shape of the letter "U," with the open part of the letter toward the north. Judge Dorsey's late residence is located about $\frac{1}{4}$ of a mile south of the river at this point, and Dorsey's Run and siding was located on the line of the old railroad near the south bend of the U-shaped curve above mentioned. For the purpose of straightening its line and bettering its roadbed and train service, a cut-off was made across the upper part of the U-shaped curve in the river, crossing the river twice; and the main stem of the railroad was re-located along this cut-off, thus eliminating the sharp curve in the road at Dorsey's Run, and leaving the turn-out and siding formerly established about $\frac{1}{4}$ of a mile to the south, and on the opposite side of the river. The bill of complaint alleges "that from the nature and topography of the ground, and situation whereon the new line of railroad will run, it is impossible to construct and maintain a turn-out and siding which will be accessible" to the complainants. The bill also avers that it is not impossible of performance or unreasonable to ask the defendant still to run a certain number of passenger and freight trains daily over its old line passing by Dorsey's Run, and still to maintain the turn-out and siding at that place, as a reasonable compliance by the defendant with the terms of the covenant. Whether it would be a reasonable requirement to compel the defendant to still run a certain number of trains daily, both passenger and freight, over the old abandoned route passing Dorsey's Run, in addition to the train service required over its main stem as now located, is a question for the court to determine from all the circumstances of the case, and is not to be taken as admitted by the defendant's demurrer. 17 L.R.A. (N.S.)

The demurrer admits the truth of the facts alleged in the bill so far only as they are relevant and well pleaded. Conclusions of law deduced by the pleader, and theories as to the effect of the facts, are not admitted by the demurrer. *Miller, Eq. § 133; Felix v. Patrick, 145 U. S. 333, 36 L. ed. 726, 12 Sup. Ct. Rep. 862.* There can be no doubt of the right and power of the directors of the railroad company to make the cut-off and change the location of its main line as indicated on the blueprint, for the purpose of straightening its lines and reducing its grades, and thus improving its service to meet its obligations to the public, and also to increase its earning capacity for the benefit of its stockholders. As was said in *New Central Coal Co. v. George's Creek Coal & I. Co. 37 Md. 564*: "The managers or directors of the corporation are made the sole judges of what is proper or convenient, as well with reference to location, as to the execution of all other powers granted, as means of attaining the objects of the charter." The injunction prayed for in this case would, if granted, accomplish all that a decree for specific performance could effect, and therefore all the principles which apply to the case of a bill for specific performance apply with equal force to the case of a bill for perpetual injunction, when that injunction accomplishes all the objects which could be accomplished by a successful prosecution of a formal bill for specific execution. *Maryland Teleph. & Teleg. Co. v. Chas. Simons Sons Co. 103 Md. 141, 115 Am. St. Rep. 346, 63 Atl. 314.* Specific performance is not a matter of absolute right in the party, but of sound discretion in the court; and it will not be granted, but the party will be left to his remedy at law, when the performance has become impossible, or the decree would be inequitable under all the circumstances of the case.

Bearing in mind these general principles, and considering all the allegations of the bill of complaint which are well pleaded and which by the demurrer are admitted to be true together, we think that to require the defendant to still maintain a train service over its now abandoned line past Dorsey's Run as is sought to be accomplished by the prayer of the bill would impose upon the defendant an unreasonable burden wholly out of proportion to any benefit that would thereby accrue to the complainants. The railroad company appears to have faithfully complied with its covenant for nearly sixty years, and, so long as its main line remained on the former location, it could perhaps have been compelled to comply therewith, but the very purposes of its creation forbid that it should be tied to the same location forever. Whether the plain-

tiffs are entitled to compensation in damages for the abandonment by the defendant of the turn-out and siding, and train service, so long maintained by the appellee at that place, this court is not called upon now to determine, but we are all of the opinion that the relief prayed for in the bill of complaint must be denied, and that the appellants must be left to seek redress for any injury which they may have sustained by such abandonment in a court of law. The order appealed from will be affirmed, and the bill dismissed without prejudice to the plaintiffs' right to sue at law.

Order affirmed and bill dismissed, with costs to the appellee.

OKLAHOMA SUPREME COURT.

HENRY FAUROT, by Next Friend, Plff. in Err.,
v.

OKLAHOMA WHOLESALE GROCERY COMPANY.

(— Okla. —, 95 Pac. 463.)

Negligence — unguarded elevator — injury to minor.

A person injured, although an infant, by falling down an elevator shaft in a wholesale grocery, which was left unguarded, in order to recover, must show the owner of the premises was under obligations to protect him from the injury; and the owner of such premises is liable for an injury occurring therein through his negligence only when the injured person comes upon them by invitation, express or implied, of the owner.

(May 13, 1908.)

ERROR to the District Court for Oklahoma County to review a judgment in defendant's favor in an action brought to recover damages for personal injuries, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Fred S. Caldwell for plaintiff in error.

Messrs. Shartel, Keaton, & Wells, for defendant in error:

The owner or occupier of real property stands under the same duty towards children who are expressly or impliedly invited to come upon his premises, in respect of

Headnote by KANE, J.

Note. — As to the liability of an owner of an elevator for injuries to trespassers or licensees, see case note to *Davis v. Ohio Valley Bkg. & T. Co.* 15 L.R.A. (N.S.) 402. 17 L.R.A. (N.S.)

keeping such premises safe to the end that they will not be injured in so coming, under which he stands towards adult persons.

1 Thomp. Neg. §§ 945-947, 1024, 1025.

The owner or occupier of buildings is not bound to keep them in a safe condition for the protection of trespassers, intruders, and bare licensees.

Turner v. Klekr, 27 Ill. App. 391; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Hargreaves v. Deacon*, 25 Mich. 1; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Trask v. Shotwell*, 41 Minn. 66, 42 N. W. 698; *Lackat v. Lutz*, 94 Ky. 287, 22 S. W. 218; *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028; *Thiele v. McManus*, 3 Ind. App. 132, 28 N. E. 327; *South Bend Iron Works v. Larger*, 11 Ind. App. 367, 39 N. E. 209; *Pelton v. Schmidt*, 97 Mich. 231, 56 N. W. 689.

Kane, J., delivered the opinion of the court:

This was an action for damages for personal injuries alleged to have been sustained by plaintiff in error, who, for convenience, will hereafter be called the plaintiff, by reason of the negligence of the defendant in error, who, for convenience, will hereafter be called the defendant, in leaving unguarded an elevator shaft on the premises occupied by it in Oklahoma City where it conducts a wholesale grocery business. In the court below a demurrer to the evidence of the plaintiff was interposed by the defendant and sustained by the court, and judgment entered for the defendant. To this ruling of the court below plaintiff duly excepted, and the cause is now in this court on appeal.

The defendant raises some objections to the court going into the merits of the cause on account of alleged defects in the record; but we prefer to pass over these objections without deciding them, and try the case on its merits.

The facts, as shown by the evidence, were substantially as follows: At the time of the accident the defendant, a corporation, was occupying, and had under its care and control, and was conducting its business of a wholesale grocery in, a certain brick building in Oklahoma City. In the rear of the building there was a platform where goods were loaded and unloaded. The plaintiff was a boy about nine and one-half years old at the time of the accident, and his father was conducting the meat department of a retail grocery store in Oklahoma City known as "Brown's C. O. D." Plaintiff's father frequently required him, when not in school, to come to said store and deliver meat orders that came in too late to be delivered by the grocery wagon. On the day of the accident

plaintiff was so required to be at said store. The said Brown's C. O. D. was one of defendant's retail customers in Oklahoma City, and at about the time of the accident the defendant had purchased a load of empty boxes from Eli Brown, the proprietor of Brown's C. O. D., promising to send its own team for them. Before the defendant sent for the boxes Brown, without any instructions from the defendant in error to do so, the boxes being in his way, delivered them to the defendant. This delivery of the boxes to defendant on the part of Brown was made by one of Brown's employees named Baker. The plaintiff accompanied Baker to the defendant's place of business at the request of one of Brown's clerks to show the driver where the wholesale house was. When the boy and the driver came to defendant's place of business they drove in the west side and to the rear of the building, this being the proper place to make delivery of said boxes. The rear door being fastened, and there being no person there to receive the boxes, plaintiff, by said Baker's direction, went to the front of the building, passed around on the west side thereof, and entered defendant's place of business through the large double door in the front entrance thereof, for the purpose of finding some person to receive the boxes. Upon entering said building plaintiff saw some persons working in the light of some electric lights burning in the rear part of the building. He walked down a passageway, having boxes of goods, etc., piled high on either side. In proceeding down said passageway he walked into defendant's elevator shaft, which was open and without any railing or guard of any sort, and received injuries of a serious nature.

The foregoing are, in substance, the facts upon which counsel for plaintiff claims his right to recover. He insists that his client comes within the rule laid down in *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; "The owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation." The facts in the United States Supreme Court case above cited are: That the plaintiff was injured while passing over the customary and only available and convenient route for persons passing from the railway depot to the steamboat landing. That the custom of travelers to use such

passageway as a footway was not only a necessary one, but was known to and permitted by the company. There was no safe and convenient way except the one pursued by the plaintiff, and he was injured while going to the steamboat for the purpose of prosecuting his journey. The difference between the facts in this case and the case at bar is too obvious to need extended discussion. There the plaintiff was on business with the defendant, and was traveling the only convenient and available route, and the passage of passengers over such route was known to, and permitted by, the company. Here the plaintiff was acting for the accommodation of a third person without the knowledge or consent of the defendant, and was injured while upon the premises of the defendant without an invitation, express or implied. In *Toledo, W. & W. R. Co. v. Grush*, 67 Ill. 262, 10 Am. Rep. 618, another case cited by plaintiff, Grush brought suit against the railroad company to recover for an injury received in stepping through a hole in the platform at the railroad company's station. Grush obtained judgment in the lower court, and the appellate court in sustaining the judgment of the trial court speaks as follows: "In the case under consideration the plaintiff lawfully entered upon the platform, by the direction of his employer, to see that certain freight belonging to the latter, and which had arrived at the station by appellant's road, was properly taken care of, and while upon the platform, between 5 and 6 o'clock P. M., for that purpose, and looking for the agent, he accidentally stepped through a hole in the platform, causing a severe internal injury." The Grush Case is clearly distinguishable from this one. The plaintiff there was upon a depot platform where the railroad company impliedly invited people having business with it. Here the plaintiff was upon the premises without invitation. Other cases are cited; but none are stronger in favor of plaintiff than the foregoing, and clearly his case does not fall within the rule laid down in them.

By no rule of interpretation could the plaintiff's presence on the premises of the defendant be construed to be by invitation, express or implied. The nature of defendant's business was not such as to be an implied invitation to the general public to enter its place of business, nor is it pretended that Mr. Brown was acting at the request of defendant in delivering the boxes, nor that the defendant was in any way responsible for the presence of plaintiff on the premises. The evidence shows that the defendant was going to deliver the boxes itself, but that Brown voluntarily delivered them because they were in

his way, and the boy went along by request of Brown's clerk to show Brown's driver the way to the defendant's premises. We have very carefully examined the authorities cited by plaintiff, and do not find among them a single case where a recovery has been had under a statement of facts similar to the facts in the case at bar.

In the case at bar it does not appear from the evidence that there existed any obligation or duty towards the party injured which the defendant had left undischarged or unfulfilled. "In every case involving actionable negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient." *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028. Another Indiana case states the rule thus: "A person entering a warehouse as a licensee merely, and falling down an unprotected elevator shaft to his injury, has no cause of action against the owner of such warehouse. It is only when the injured party comes upon the premises of the owner or proprietor by invitation, express or implied, that the latter assumes the obligation of providing safe and suitable means of ingress and egress, and of moving about the premises." *South Bend Iron Works v. Langer*, 11 Ind. App. 367, 39 N. E. 209. The case of *Hargreaves v. Deacon*, 25 Mich. 1, is strongly in point here. It is in point not only on the propositions of law involved, but the person injured in that case was also a child of tender years, making the language of Mr. Justice Campbell particularly applicable to the case at bar: "The plaintiff below sued as administrator of his son, a child of tender years, who was killed by falling into a cistern on the premises of plaintiffs in error, which had been, as was claimed, left uncovered. . . . There is some danger in dealing with these questions of confounding legal obligations with those sentiments which are independent of the law, and rest merely on grounds of feeling or moral considerations. We feel, usually, more indignation at wrongs done to children than at wrongs done to others. But the law has not usually given them civil remedies on any such basis. Nor does it usually, if ever, impose any duties on strangers towards them, resting entirely on the fact that they are children. . . . If, for example, a grown person coming upon the 17 L.R.A. (N.S.)

premises simply by the permission of the occupants had fallen into this cistern, without any negligence, by stepping where there was no apparent danger, he would in law have stood just where this child did. The injury might have happened, as in *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422, from the insecurity of an apparently safe covering. We have searched diligently, and perhaps a little anxiously, to find legal support for a distinction, but there is no foundation for any in law, and we think there is none in any reason which should govern the action of courts of justice. . . . We express no opinion concerning cases where the nature of the business is such as to present peculiar attraction to children beyond other kinds of occupation. A person incurs no duties towards persons by not warning or driving them from his premises, and they go there, if mere volunteers and without invitation, at their own risk."

From the foregoing authorities it is deducible that a person injured, although an infant, by falling down an elevator shaft in a wholesale grocery, which was left unguarded, in order to recover must show the owner of the premises was under obligation to protect him from the injury; and the owner of such premises is liable for an injury occurring therein through his negligence only where the injured person comes upon them by invitation, express or implied, of the owner.

We express no opinion concerning cases where the nature of the business is such as to present peculiar attraction to children, as that question is not in this case.

No matter how much we may regret the accident to the plaintiff, it seems clear that it is one of those for which the law entitles him to no relief against the defendant. He was upon the premises of the defendant without invitation, under such circumstances that the defendant owed him no duty to protect him from the injury of which he complains. This being so, it follows that the demurrer to the evidence was properly sustained, and the judgment of the court below must be affirmed.

All the Justices concur.

MISSISSIPPI SUPREME COURT.

WIRT ADAMS, State Revenue Agent, Appt.,

v.

COLONIAL & UNITED STATES MORTGAGE COMPANY, Limited.

(Two Cases.)

(82 Miss. 263, 34 So. 482.)

Tax — loan — foreign owner.

1. Where a nonresident lender of money has no place of business or location or agent

in the state, and accomplishes the loan beyond the limits of the state, the facts that negotiations for the loan were made by persons in the state, and it was secured by a mortgage on property there located, do not subject his interest in the loan to local taxation.

Same — contract — locus.

2. The mere insertion in a trust deed of a clause that the contract shall be construed according to the laws of the place where the land is located "where the same is made" does not localize the debt there, so as to subject it to taxation, if the facts show that the contract was made in another state.

Same — fixing situs.

3. The board of supervisors of a county cannot, by an order, fix the situs of a debt for the purpose of taxation.

Same — mortgagee's interest.

4. A mortgagee has no interest or estate in the land mortgaged which is subject to taxation where the land is located.

Same — express enactment.

5. It seems that a mortgagee has sufficient interest in the land mortgaged to enable the legislature to tax it, by express enactment, where the land is located, although the mortgagee does not reside within the state.

(April 20, 1903.)

APPEAL by plaintiff for a judgment of the Circuit Court for Coahoma County in favor of defendant in an attachment suit to enforce payment of taxes on mortgages as solvent credits. Affirmed.

The Coahoma county case, which was No. 10,771 on the docket, was heard on an agreed statement of facts, which was as follows:

The defendant is a foreign corporation organized under the laws of Great Britain, and has its domicile at Hull, England; that the trustee in all of the trust deeds is a resident of Hull, England; that defendant has an agency in Memphis, Tennessee, but has no office or place of business in Mississippi; that J. A. Glover, an attorney at Clarksdale, Mississippi, has been for years advertising that he was prepared to make loans, and that a considerable portion of the loans made by defendant to borrowers in Coahoma county, and secured by deeds of trust on lands in that county, were made upon applications in writing which came to defendant's office in Memphis, Tennessee, through said Glover, on forms furnished him by defendant, in which the lands offered as security were described; that these forms

could be obtained by anyone who desired to make use of them, and that some of said loans now in force in Coahoma county were made to the borrower upon applications which came from other attorneys or the borrower direct; that, upon receiving the applications, the lands are inspected by an inspector employed by defendant in Memphis for that purpose; that if, upon the inspector's report, it is decided to make the loan, the applicant is notified that if, upon investigation, his title is good, the loan will be made; that the applicant is requested to furnish an abstract of his title, and, if this is satisfactory, deeds are prepared by defendant in Memphis, Tennessee, and forwarded to the applicant for execution, with notice that when they are executed, and the trust deed recorded, and the papers returned to defendant's office in Memphis, the amount of the loan will be paid, and the money is paid by sending the borrower a check, or paying a sight draft attached to the papers when returned; that, when the trust deeds are received by defendant's agent in Memphis, they are at once sent to defendant's home office in Hull, England, where they remain until they mature, when they are returned to the agent of defendant at Memphis, Tennessee, for collection. The notes are all signed and dated in Coahoma county, Mississippi, and are made payable in Memphis, Tennessee. The value of the lands upon which security is taken always exceeds the amount of money loaned. When the loan is consummated, defendant pays Glover, or the party from whom the application came, a commission upon the amount loaned.

In the Copiah county case, which was No. 10,772, the bill alleged that defendant owned certain property in Copiah county which had escaped taxation, but a demurrer was sustained to the bill.

The further facts appear in the opinion.

Mr. R. N. Miller, for appellant:

For the purpose of taxation, the estate of the mortgagee is property. Because of the fact that a mortgage is regarded as of a dual character, a conveyance of an estate in land and a security for a debt, bearing one character in a court of law and another in a court of equity, a mortgage at the present day, in the absence of statutes providing otherwise, vests the legal title to the mortgaged property in the mortgagee, — at any rate after condition broken.

20 Am. & Eng. Enc. Law, pp. 900, 974; Miss. Code 1892, § 2449; Leigh v. Harrison, 69 Miss. 923, 18 L.R.A. 49, 11 So. 604; 3 Pom. Eq. Jur. p. 1187, note; Harmon v. Short, 8 Smedes & M. 433; Hill v. Robertson, 24 Miss. 368; Buckley v. Daley, 45 Miss. 338; Carpenter v. Bowen, 42 Miss.

Note. — The question as to when a debt may have a situs for the purpose of taxation, apart from the domicile of the creditor, is considered in case notes to *Monongahela River Consol. Coal & Coke Co. v. Board of Assessors*, 2 L.R.A. (N.S.) 637, and *Johnson County v. Hewitt*, 14 L.R.A. (N.S.) 493. 17 L.R.A. (N.S.)

28; *Buck v. Payne*, 52 Miss. 271; *Clark v. Wilson*, 53 Miss. 129; *Clark v. Reyburn*, 8 Wall. 322, 19 L. ed. 354; *Beverly v. Barnitz*, 55 Kan. 482, 31 L.R.A. 74, 49 Am. St. Rep. 257, 42 Pac. 725.

For the purposes of taxation, the mortgagee's interest in the land is realty, and may be taxed where the lands lie, regardless of the domicile of the owner.

Savings & L. Soc. v. Multnomah County, 169 U. S. 429, 42 L. ed. 806, 18 Sup. Ct. Rep. 392; *New Orleans v. Stempel*, 175 U. S. 321, 44 L. ed. 180, 20 Sup. Ct. Rep. 110; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 578; *Colbert v. Leake County*, 60 Miss. 142; *Allen v. National State Bank*, 92 Md. 509, 52 L.R.A. 760, 84 Am. St. Rep. 517, 48 Atl. 78; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 74, 43 L. ed. 901, 19 Sup. Ct. Rep. 599.

The situs of personal property does not follow the domicile of its owner for the purposes of taxation.

New Albany v. Meekin, 3 Ind. 481, 56 Am. Dec. 522; *Cooley*, Taxn. §§ 14, 15; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339; *Tazewell County v. Davenport*, 40 Ill. 197; *Finley v. Philadelphia*, 32 Pa. 381; *Green v. Van Buskirk*, 7 Wall. 139, 150, 19 L. ed. 109, 113.

If a man living beyond the jurisdiction of Mississippi has a mortgage on lands in Mississippi, and is indebted to a citizen of this state, certainly it cannot be denied that the citizen can at least call upon a court of equity to subject this interest of the foreign mortgagee to the payment of the debt by sale of his interest in the mortgage.

Serviss v. Washtenaw Circuit Judge, 110 Mich. 101, 72 Am. St. Rep. 507, 74 N. W. 310; *National Bank v. Furtick*, 2 Marv. (Del.) 35, 44 L.R.A. 115, 69 Am. St. Rep. 99, 42 Atl. 479.

If this interest is property, for the purpose of taxation, its situs must be here where the mortgage is.

Mumford v. Sewall, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; *Savings & L. Soc. v. Multnomah County* and *Allen v. National State Bank*, supra.

It would not be double taxation, or, at all events, such double taxation as would be illegal taxation, to tax both the interest of the mortgagor and that of the mortgagee. All double taxation is not illegal.

Fox v. Pearl River Lumber Co. 80 Miss. 1, 31 So. 583.

It is one of the maxims of the law of taxation that the state has the right to tax all persons and all property of every kind within its jurisdiction.

McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.
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Section 112 of the Constitution of the state of Mississippi provides "that taxation shall be uniform and equal throughout the state." Section 3744, Code 1892, subjects to taxation all "property" in this state, except the specific property enumerated as exempt. Section 3755, Code 1892, in the last paragraph thereof, provides: "And the assessor shall also assess the value of the [property] of all nonresident taxpayers of his county." Section 3757, Code 1892, provides: "Every person, resident or nonresident, whether corporate or otherwise, and the agent of such nonresident, having money loaned at interest in this state, or employed in the purchase or discount of bonds, notes, bills, checks, or other securities for money, or employed in any kind of trade or business shall be taxable," etc.

Here is the legislative intent of this state, to tax all property, whether owned by residents or nonresidents. In its broadest sense and its legal sense, property necessarily means anything of value which belongs to a man, and this must include any legal right which he could assert to anything he owns.

Miss. Code 1892, §§ 1513, 1514; *Mumford v. Sewall* and *Allen v. National State Bank*, supra; *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392.

From the fact that the right to collect the debt is dependent upon the laws of the taxing state, where the debtor lives; and, inasmuch as the groundwork of the right to tax is dependent upon the protection afforded by the laws for the enforcement of the debt,—the state has the right, by act of legislature, to localize the debt and tax it where the debtor lives, rather than where the creditor lives.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Re Houdayer*, 150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718; *Re Romaine*, 127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759; *Savings & L. Soc. v. Multnomah County*, supra; *Bristol v. Washington County*, 177 U. S. 139, 44 L. ed. 703, 20 Sup. Ct. Rep. 585.

Mr. D. A. Scott, also for appellant:

The state of Mississippi has the power to tax the nonresident grantees and owners of the notes secured by the trust deeds sought to be taxed in this action.

The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it.

McCulloch v. Maryland, 4 Wheat. 428, 4 L. ed. 579.

The principle of taxation as the correlative of protection, perfectly just in itself, is

as applicable to a nonresident as to the resident owner, because civil government is essential to give value to any form of property, without regard to the ownership, and taxation is indispensable to civil government.

Maltby v. Reading & C. R. Co. 52 Pa. 140; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Hood's Estate*, 21 Pa. 114; *West Chester School Dist. v. Darlington*, 38 Pa. 157.

The fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fiction, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances, the truth, and not the fiction, affords, as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice.

People ex rel. Hoyt v. Tax & A. Comrs. 23 N. Y. 224.

Personal property may be taxed where it is permanently located.

Mills v. Thornton, 26 Ill. 300, 79 Am. Dec. 377; *Com. v. Gaines*, 80 Ky. 489; *Detroit v. Board of Assessors (Detroit v. Rentz)* 91 Mich. 78, 16 L.R.A. 59, 51 N. W. 787.

The state can tax all that is within its bounds, or which receives protection from its laws, unless exempt by the Constitution of the United States or of the state itself.

Easton Bridge v. County, 9 Pa. 415; *Pittsburg, Ft. W. & C. R. Co. v. Com.* 66 Pa. 73, 5 Am. Rep. 344; *Redfield v. Genesee County*, Clarke, Ch. 43; *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; *McCulloch v. Maryland*, 4 Wheat. 428, 4 L. ed. 579; *Harrison v. Willis*, 7 Heisk. 35, 19 Am. Rep. 604.

If an act taxing mortgages impairs the obligation of the contract, it impairs such obligation in every case of mortgage, irrespective of the residence of the parties to it.

Mumford v. Sewall, 11 Or. 69, 50 Am. Rep. 462, 4 Pac. 585.

The state may tax a nonresident creditor.

Buck v. Miller, 147 Ind. 589, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; *Colbert v. Leake County*, 60 Miss. 142; *Finch v. York County*, 19 Neb. 52, 56 Am. Rep. 741, 26 N. W. 589; *Griffith v. Carter*, 8 Kan. 565; *People ex rel. Hoyt v. Tax & A. Comrs.* 23 N. Y. 224; *Goldgart v. People*, 106 Ill. 25.

If a nonresident creditor, owning mortgages and holding notes secured by deeds of trust and other evidences of indebtedness, should die at his foreign domicile, his estate in Mississippi would be administered by an ancillary administrator, appointed and residing in Mississippi; and according to the laws of that jurisdiction property in the hands of such administrator in Mississippi could, undoubtedly, be taxed, although be-
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longing to the estate of a foreigner. Should the corporation owning such property go into the hands of a receiver, an ancillary receiver in the state of Mississippi would be appointed, and all property in such ancillary receiver's hands would be taxed by the state of Mississippi.

Minor, Conf. L. § 105; *Reynolds v. Stockton*, 140 U. S. 254, 257, 35 L. ed. 464, 465, 11 Sup. Ct. Rep. 773; *Rockwell v. Bradshaw*, 67 Conn. 9, 34 Atl. 758.

The state of Mississippi has taxed this character of property.

Miss. Anno. Code 1892, § 3757; *Bank of United States v. State*, 12 Smedes & M. 458; *Redmond v. Rutherford*, 87 N. C. 122; *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107; *Poppleton v. Yamhill County*, 8 Or. 337.

That this property is liable to taxation at the residence of the creditor is immaterial. Double taxation can only spring from the act of one municipality and sovereign power.

Com. v. Gloucester Ferry Co. 98 Pa. 105; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Nashville v. Thomas*, 5 Coldw. 600; *Worth v. Ashe County*, 90 N. C. 409; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *Faxton v. McCosh*, 12 Iowa, 527; *American Coal Co. v. Allegany County*, 59 Md. 185.

All exemptions must be affirmatively shown.

Yazoo & M. Valley R. Co. v. Thomas, 65 Miss. 553, 5 So. 108; *Greenville Ice & Coal Co. v. Greenville*, 69 Miss. 86, 10 So. 574; *State v. Simmons*, 70 Miss. 485, 12 So. 477.

Money loaned or employed in the state of Mississippi where the person resides or has his place of business or location, or any agent in the state, is taxable.

State v. Smith, 68 Miss. 79, 8 So. 204.

The clause, "the contract embodied in this conveyance, and the notes secured thereby, shall be construed according to the laws of the state of Mississippi, wherein the same is made," localizes and domesticates the debt therein secured, and subjects the same to taxation in this state.

Minor, Conf. L. § 181, pp. 141, 142, 441; *Warren v. Lynch*, 5 Johns. 239; *Strawbridge v. Robinson*, 10 Ill. 470, 50 Am. Dec. 420; *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589; *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620; *Robinson v. Queen*, 37 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38; *Odell v. Gray*, 15 Mo. 337, 55 Am. Dec. 147; *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205; *Mason v. Dousay*, 35 Ill. 424, 85 Am. Dec. 368; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Grun-*

even in the concrete form, when the notes and lands are actually kept in the possession of the nonresident owner, is beyond the power of the state. *Bristol v. Washington County* modifies that doctrine to the extent of holding that the nonresident owner may retain possession of the notes, yet still localize his business in the state; but localizing must be done by the establishment and maintenance of a permanent course of business, including the making of the notes themselves payable at the place where said business is carried on, and the appointment of a regular agent, with power to renew, collect, and reinvest, and all on his own judgment.

The loans were made under, and manifestly because of, the holding of this court, in the case of *State v. Smith*, 68 Miss. 79, 8 So. 294, which was a construction of the very statutes now existing.

Yazoo & M. Valley S. Co. v. Adams, 81 Miss. 90, 32 So. 937.

Mr. James H. Watson, also for appellee:

The general doctrine is that debts have their situs at the domicile of the creditor, and the state has no greater power or jurisdiction to tax debts due to nonresident creditors than it has to tax any other personal property of such nonresident which is not situated in the state.

State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; *Meyer v. Pleasant*, 41 La. Ann. 645, 6 So. 258; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L.R.A. 56, 11 So. 91; *Grundy County v. Tennessee Coal, Iron & R. Co.* 94 Tenn. 295, 29 S. W. 116; *Worthington v. Sebastian*, 25 Ohio St. 1; *Barber v. Farr*, 54 Iowa, 57, 6 N. W. 134.

The nature of a mortgage is the same in Mississippi as it is in Pennsylvania.

Beckett v. Dean, 57 Miss. 236; *Freeman v. Cunningham*, 57 Miss. 67; *Strickland v. Kirk*, 51 Miss. 799.

The decision in *State Tax on Foreign-held Bonds*, 15 Wall. 323, 324, 21 L. ed. 187, 188, is applicable.

New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

In *Kansas*, *New York*, *Missouri*, *California*, *South Dakota*, *Minnesota*, *Oregon*, *North Carolina*, and *Nebraska* it has been repeatedly held that the state has no power to tax a citizen on money due him in another state, when the evidences of indebtedness were in the hands of an agent for collection in the state of the domicile of the debtor. Because they have an independent situs, they may be taxed where they are situated.

Wilcox v. Ellis, 14 Kan. 588, 19 Am. Rep. 107; *Fisher v. Rush County*, 19 Kan. 414; *Blain v. Irby*, 25 Kan. 499; *People ex rel.* 17 L.R.A. (N.S.)

Jefferson v. Smith, 88 N. Y. 576; *State ex rel. Taylor v. St. Louis County Ct.* 47 Mo. 594; *People v. Home Ins. Co.* 29 Cal. 533; *Billinghurst v. Spink County*, 5 S. D. 84, 58 N. W. 272; *Re Jefferson*, 35 Minn. 215, 28 N. W. 256; *Poppleton v. Yamhill County*, 18 Or. 377, 7 L.R.A. 449, 23 Pac. 253; *Redmond v. Rutherford*, 87 N. C. 122; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589.

The nonresident lender exacts a stipulation binding the mortgagor, not only to pay the taxes assessed upon the land itself or his estate therein, but also such as might be levied on the mortgage debt or the interest of the mortgagee. *Detroit v. Board of Assessors (Detroit v. Rentz)* 91 Mich. 78, 16 L.R.A. 59, 51 N. W. 787; *Banks v. McClellan*, 24 Md. 62, 87 Am. Dec. 594; *Hammond v. Lovell*, 136 Mass. 184.

Mr. H. R. Boyd, also for appellee:

There is no law or statutory provision in the state of Mississippi for the collection of taxes in cases of this kind.

State v. Smith, 68 Miss. 79, 8 So. 294; *Yazoo & M. Valley R. Co. v. Adams*, 81 Miss. 90, 32 So. 937.

A personal-property tax cannot be assessed against a nonresident, neither can the property of a nonresident be taxed, unless it has an actual situs within the state; and, that the situs of a credit is the domicile of the owner has been so frequently discussed and passed upon by the courts of the country, both state and Federal, that it would seem almost idle to raise the question again under the laws of the state of Mississippi as they exist.

Graham v. St. Joseph Twp. 67 Mich. 652, 35 N. W. 808; *Davenport v. Mississippi & M. R. Co.* 12 Iowa, 539; *Arapahoe County v. Cutter*, 3 Colo. 349; *State Taxes on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Worthington v. Sebastian*, 25 Ohio St. 10; *Grant v. Jones*, 39 Ohio St. 506; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Goldgart v. People*, 106 Ill. 25; *Gallatin County v. Beattie*, 3 Mont. 173; *Barber v. Farr*, 54 Iowa, 57, 6 N. W. 134; *Hunter v. Board of Suprs.* 33 Iowa, 376, 11 Am. Rep. 132; *St. Louis v. Wiggins Ferry Co.* 40 Mo. 580; *Latrobe v. Baltimore*, 19 Md. 15; *People ex rel. Jefferson v. Smith*, 88 N. Y. 576; *Senour v. Ruth*, 140 Ind. 318, 39 N. E. 946; *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87; *Boyd v. Selma*, 96 Ala. 144, 16 L.R.A. 729, 11 So. 393; *Kingman County v. Leonard*, 57 Kan. 531, 34 L.R.A. 810, 57 Am. St. Rep. 347, 46 Pac. 960; *Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042.

In Mississippi, upon a breach of the condition of the mortgage, the legal title becomes absolute in the mortgagee, who there-

upon becomes entitled to the possession of the property as an incident of the title.

Hill v. Robertson, 24 Miss. 368; Harmon v. Short, 8 Smedes & M. 433.

The Code now provides that, before a sale under a mortgage or deed of trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed, except as against the mortgagee and his assigns, or the trustee after breach of the condition of the mortgage or deed.

Code 1880, § 1204; Carpenter v. Bowen, 42 Miss. 28; Code 1892, § 2449.

The debt is considered as the principal, and the mortgage as an incident only. The mortgagee, notwithstanding the form of the conveyance, has but a security. The principles long established in chancery have, under the Code, become naturalized in the courts of common law, so that, until foreclosure, the mortgagee is regarded as having a chattel interest only. Even after the mortgagee has taken possession, the mortgaged estate is regarded as a pledge only.

Buckley v. Daley, 45 Miss. 338.

As respects third persons, and the mortgagee, also, until after the forfeiture the mortgagor is the owner of the legal estate, and the mortgagee has only a security for the debt. "The legal title," says Chief Justice Simrall, in *Buck v. Payne*, 52 Miss. 271, "may be asserted by the mortgagee, but only for the protection of his debt, and to make the security available for its payment."

1 Jones, *Mortg.* 4th ed. § 38.

If the state of Mississippi had attempted by legislative enactment to tax notes, mortgages, and other credits owned by nonresidents of the state, such legislation would be contrary to the provisions of the Constitution of the United States as depriving the defendants of their property without due process of law.

Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. ed. 595; *State Tax on Foreign-held Bonds*, supra; *New Orleans v. Steudel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

Messrs. Smith, Hirsh, and Landau also for appellee.

Mr. J. P. George, having clients interested in the solution of the questions involved, filed a brief by permission:

Money cannot be successfully taxed so as to reach the owner or lender.

There can be no perfect system of taxation devised by human minds, as carried into practice by human exertion. If a local money lender will hide his earnings, and no longer make them available for commercial uses, and the nonresident capitalist will be driven from our borders by discriminating

or unjust taxation, how can we expect the state to thrive or prosper?

San Francisco v. Mackey, 21 Fed. 539.

A large portion of the money loaned in this state was invested here with the assurance and belief that, by virtue of the principle announced in *State v. Smith*, 68 Miss. 79, 8 So. 294, an immunity from taxation would be enjoyed. Prior to the rendition of the opinion in *State v. Smith*, an organization engaged in the business of loaning money on mortgage, before entering this state, applied to the renowned jurist, the late Chief Justice James Z. George, for his opinion concerning the taxability of nonresidents for money loaned in this state. General George, in an elaborate opinion, dated Jackson, April 26, 1887, held that money loaned in this state by such a nonresident mortgage company was not taxable. We append herewith a copy of certain portions of said opinion.*

*I am asked: "How and to what extent will § 497 of the Revised Code of Mississippi of 1880 affect such loans made in the state of Mississippi?" And the request is made to have the question discussed in all its bearings in a written opinion for the guidance of the company. "Every person, resident or non-resident, whether corporate or otherwise, and the agent of such nonresident, having money loaned at interest in this state, or employed in the purchase or discount of bonds, notes, bills, checks, or other securities for money, or employed in any kind of trade or business, shall be taxable for the same in the county where such person may reside or have a place of business, or be temporarily located, at the time of the assessment; and if any such person shall fail or refuse to give in such money on oath, or if the assessor shall have cause to believe that such person has not rendered a true account of all such money, he shall assess to such person such an amount as he shall have reason to believe correct, according to the best information he can procure," etc. The section then proceeds to make provision to secure a return to the assessor of the amount of money so loaned or employed in business, and to impose penalties enforceable by civil suit for failure to make proper return. The state Constitution provided, in § 20, art. 12, that "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Said § 497 is a part of the chapter in the Code regulating the assessment and collection of all state or county taxes, and providing, also, for the imposition of taxes on certain kinds of business, for the carrying on of which licenses are required. These are called "privilege taxes," and they are imposed on a great number of callings, trades, etc., among which are merchandising, selling by auction, peddling, cotton brokers, coal yards, inns and taverns, boarding houses, photograph galleries, transient vendors of horses or mules, banks of deposit and of discount, insurance agents, real estate agents, etc. Section 481, being a part of the same chapter, provides for a list of his taxable property, to be made out by each taxpayer, with the valuation of each item. This is done in pursuance of the section of the Constitution before quoted, so

Individuals and corporations would distrust as to the future if a decision like *State v. Smith*, supra, carefully considered, construing the general law and which law was re-enacted after the rendition of said decision, and on the faith of which appellee has invested its money, should be overruled, and rights of property should be thus destroyed.

Adams v. Tombigbee Mills, 78 Miss. 693, 29 So. 470.

This court could not, without violating the Federal Constitution and the Constitution of this state, hold liable for taxation non-resident taxpayers who sent money into the state to be loaned under the faith of the decision in *State v. Smith*, supra.

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that taxes should be levied on "all property" according to its value, to be ascertained according to law. In this list are the following (among other) items: "Amount of capital employed in merchandise or manufacturing. Amount of money on hand, or on deposit, or loaned. Amount of indebtedness to the party assessed, which he regards as probably collectible. Amount of all other personal property not otherwise estimated." A uniform tax is imposed on all property so valued and assessed, as the Constitution requires. Taxes on business, or privilege taxes, not being taxes on property, are levied in the discretion of the legislature; the amount of tax in each case being specified in the chapter thus: "On each hotel or tavern, . . . \$40." The above seems to be all of the state statutes on taxation necessary to be considered in examining said § 497. Before proceeding to consider the statute, it is well to set forth the general principles on which the power of taxation is to be regulated, so far as relates to nonresidents of the state imposing taxes.

In the case of *State Tax on Foreign-held Bonds*, 15 Wall., on page 319, 21 L. ed. 186, the Supreme Court of the United States says: "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. . . . It is not possible to conceive of any other [subject], though, as applied to them, the taxation may be exercised in a great variety of ways. . . . Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction. . . . To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations [or of any debtors], belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due." Again, on pages 323, 324, 15 Wall., 21 L. ed. 188, the court says: "It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will in many cases determine the state in which it may be taxed. The same thing is true of public securities, consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions. The former by general usage 17 L.R.A. (N.S.)

U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251.

Whitfield, Ch. J., delivered the opinion of the court:

One of these cases is here from the circuit court of Coahoma county; the other from the chancery court of Copiah county. The one from Copiah county presents the question whether the interest of a mortgagee is such an interest in the land itself, covered by the mortgage, as renders it liable to taxation. The one from Coahoma county presents the question whether the notes and mortgages, as "solvent credits," have a "business situs" in that county. There is a distinct line of decisions holding with our case (*Jahier v.*

have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of the debt, are not separated from the possession of the owners." And on this reasoning the Supreme Court of the United States decided a tax levied by the state of Pennsylvania on a debt created and due by a railroad company in that state to a foreign creditor was beyond the power of the state to tax, though secured by a mortgage on real estate in that state.

The same court, in *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558, affirmed the same principle, and held, also, that a debt held by a citizen of Connecticut, contracted in and secured by mortgage in the state of Illinois, was taxable in and had its situs at the domicile of the owner in Connecticut, stating that the bond (for the debt), wherever actually held or deposited, is only evidence of the debt, and, if destroyed, the debt, the right to demand payment of the money loaned, with stipulated interest, remains. And Judge Cooley, in his work on Taxation (pp. 14 and 15), says: "But a personal tax cannot be assessed against a nonresident. Neither can the property of a nonresident be taxed, unless it has an actual situs within the state, so as to be under the protection of its laws. The mere right of a foreign creditor to receive from his debtors within the state the payment of his demand cannot be subjected to taxation within the state. 'It is a right that is personal to the creditor where he resides, and the residence or place of business of his debtor is immaterial.'" Burroughs takes the same view. See his work on Taxation, p. 41. The supreme court of Mississippi, in *Horne v. Green*, 52 Miss. 454, affirmed the same principle, in holding that a debt due a citizen of Mississippi by a nonresident was taxable here, saying that the situs of the debt follows the domicile of the owner, and consequently is taxable in this state. There seems to be no doubt of the correctness of this principle. In the light of this, I will proceed to examine § 497.

The first observation to be made in reference to this section is that it provides solely for a tax on property, and in no way relates to the taxation of business, or of "privileges,"

Rascoe, 62 Miss. 699) that wherever a money lender has a local agent in another state, and permits that agent to control the evidences of a debt and the mortgages securing them, and to continue, for a long course of dealing, the business of lending, collecting, and relending money in the state of the agent's residence, such evidences of debt and the mortgages securing them have what has come to be known as a "business situs" for purposes of taxation and for other purposes. This principle is thus expressed in *Jahier v. Rascoe*: "Wherever it appears that the debt arose as an incident to a business conducted in this state," etc. However phrased, the principle is this: That wherever the money of a lender in one state is by the principal intrusted to the control of

an agent in another state for the purpose of being kept in the latter state, and loaned out, collected, and reloaned, or habitually kept on deposit, for safety merely, as held in *Re Romaine*, 127 N. Y. 80, 12 L.R.A. at page 408, 27 N. E. 759, so as thus to remain, through a course of dealing, so long as to become localized as a part of the whole mass of personal property in the latter state, such money acquires what is known as a "business situs" for the purpose of taxation, as well as for certain other purposes not necessary to be dealt with here.

The statement of facts in the Coahoma county case does not contain any stipulation that Mr. Glover was the agent of the appellee. But the facts as to his agency are practically the same with those as to the agency

as they are called, all of which last are provided for in subsequent sections of the same act, commencing at § 585. The taxation which § 497 provides for is a taxation on valuation of property,—a certain per cent on the dollar's worth. This is so clear and manifest that argument in support of it is not needed. I now proceed to consider the meaning of § 497, and its legal effect, conceding it to be constitutional. It proposes to tax all exactly alike, whether "resident or nonresident," having money loaned at interest in this state or employed in any kind of business here. This section is singularly inaccurate, not to say absurd, if construed according to its literal meaning; for it will be noted that it taxes "money loaned," and not the debt created by the act of lending or the security therefor. This inaccuracy exists, also, in § 481, before partially set out, where the taxpayer is required to return in one item the amount of money he has "on hand, on deposit, or loaned," for taxation on the amount so stated, and in another distinct item he is required to return, in addition, "the amount of indebtedness due to him which he regards as probably collectible," also for taxation. Both of those provisions seem to proceed on the idea that "money loaned," exactly as "money on hand or on [special] deposit," remains the property of the lender. And this view is strengthened by the provision, before quoted, that, in addition to the taxation of money loaned, the party is also taxed on the value of all the "indebtedness due him which is probably collectible." Under this view, the "money loaned" is treated as a bailment of the kind called *commodatum* in the civil law, where the thing lent remains the property of the lender, and is to be returned, if it be money, in the identical bills and coins lent. Probably a lending of money in that way was never seriously and in good faith made. I never heard of but one such transaction, and that was when, during our "flush times" in 1837, the same kegs of silver, after being examined by the state examiners in one bank and counted as a part of its assets, were transported to another bank, to be there examined and counted as the property of that bank, and so through the whole number, and finally, after performing their office of deceiving the examiners, were returned to the owner. Certainly that is not the way in which money is loaned in this day. There is nothing of the idea of a bailment in the lending of money at interest. If lent without interest or reward or hire, it might be a bailment called a *mutuum*; but in that kind of a bailment the

title to and property of the thing lent passes to the borrower. So that "money loaned" is always the property of the borrower, and, if taxable at all as money, must be taxed against him. No person can be taxed for the property of another, when he stands in no fiduciary relation to it; and, if he does, he is treated as, and is in law, the owner. If this be the meaning of the statute, it is unconstitutional, for the reason just stated; i. e., that it attempts to tax one person, the lender, for the property of another, the borrower. But we are not to attribute a meaning to a statute which would make it absurd or unconstitutional, if any other is possible. So we must conclude that the statute means to tax the property of the lender, which is, and can only be, the debt due him for the money he has loaned to the borrower.

Having reached this conclusion, we next inquire whether the meaning of the statute is that all debts due by debtors in this state to nonresident creditors, where the consideration is money loaned, whether the transaction of lending took place in this state or outside of it, are to be taxed. This seems to be the meaning of the language. We have already shown that the tax is not on the "money loaned," but on the debt due by the borrower of the money. That being so, it follows that the phrase in the statute, "having money loaned at interest in this state," means exactly, and no more or less than, "having a debt due by a debtor in this state on account of money lent." Under that heading the taxation would be on all nonresidents who had debts due by debtors residing in Mississippi, whenever and wherever such debts were created, if only they were for money loaned. If we limit, as to nonresidents, the meaning of the statute, so as to embrace only debts created by a lending in this state, then we must make the same limitations as to residents; for the language is the same—not similar only, but identical—as applied to both, viz.: "Every person, resident or nonresident, . . . having money loaned in this state." Under this limited meaning, we would have a statute raising revenue for the state which exempted its citizens from taxation on debts created for loaned money, where the citizens would go out of the state to make their loans, but taxing them when the transaction of lending took place in this state. So absurd a result is not to be attributed in a statute; and no state is to be presumed to offer a premium for its citizens to go out of the state to transact a business entirely legitimate, and even

of Powell in the Smith Case, 68 Miss. 79, 8 So. 294, and it was there held, rightly or wrongly, that Powell was the agent of the borrower. The lender (the appellee) has its place of residence in England. It has a local agency in Memphis, Tennessee; but it is expressly agreed that it has no office or place of business in this state. The agreement does not set out that Mr. Glover secured all the loans. On the contrary, it was expressly agreed that loans were secured by other attorneys than Mr. Glover, and sometimes by the borrowers direct. It is further agreed that the notes and the trust deeds were prepared by the appellee in Memphis, and forwarded to the applicant or his attorney for execution, and that the securities, when signed and acknowledged by the borrower,

were delivered to his attorney, with the understanding that he was to transmit them to the appellee's office at Memphis. It is further agreed that the trust deeds and notes are immediately sent, after the contracts are consummated, to the appellee's home office in Hull, England, where they remain until they mature, when they are returned to the agent of the appellee at Memphis for collection. It is further agreed that David Houghton, the trustee in all the instruments involved, is a resident of Hull, England. It is further agreed that the applications sent to Mr. Glover were sent at his request, and that they would be sent to anyone who would desire to make use of them, and that some of these very loans were made upon applications that came from other attorneys or

avored by the laws and policy of the state. It is thus shown that the true meaning of the statute is to tax all debts due by citizens and residents of this state to nonresidents, when the consideration is "for money loaned," whenever and wherever contracted, whether contracted in the state or outside of it, and beyond the power of the state, as has been shown.

But it may be insisted that, to avoid this conclusion, the meaning of the statute can be restrained, so as to embrace only loans made in the state. I deny, if such restriction would make the statute constitutional, it would be allowable. When the language of the statute is plain, and not subject to doubt, its unconstitutional effect in its true reading cannot be evaded by limiting its language and making the statute mean different from what was plainly intended by the legislature. The legislature has determined to tax all these debts alike, whether contracted within the state or out of it, and to put the lenders in both cases on the same footing; and we cannot change this by giving to the statute an effect which would work inequality. We cannot say that the legislature would enact the law at all, unless it would have effect as they intended it. See *United States v. Reese*, 92 U. S. 220, 221, 23 L. ed. 565. But, suppose we construe the statute to mean only that debts due by citizens of the state for money loaned in the state are taxable; this does not help the matter as to debts due to nonresidents. It must be noted that the statute imposes taxes, or attempts to impose taxes, on property, and not on business. It taxes property, and property alone. The debt thus taxed is the property of the nonresident. Its situs is the domicile of the nonresident. It is taxable there, and nowhere else. It makes no difference when personal property was created or acquired; for, being removable, it may, and often is, carried, in this commercial age, to a different jurisdiction, and it is taxable only in the place of its locality. The place of its origin has nothing to do with its taxability. This is determined alone by its situs. As above remarked, the situs is the domicile of the owner. See *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179. So, under that construction, § 497 is unconstitutional in attempting to impose taxes on property outside of the state. This would seem to end the case.

But, as I am requested to discuss the question in all its bearings, I proceed to notice some other views which possibly may be taken. It may be argued, in order to escape the un-
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constitutionality charged, that the true meaning of the statute is that any person, resident or nonresident, having money in this state, which he afterwards loans in this state to a resident herein, shall be taxable. This is manifestly not the meaning of the statute, as has been shown. But, in addition to that, such a construction would exempt all residents from the tax, if only they kept their money out of the state and then loaned it. Such an intention should not be attributed to the legislature, unless plainly expressed; and I have shown the plain meaning is not that. But suppose, after all, this is the meaning to be adopted. On this construction I submit the following:

First. It is undoubtedly in the power of the state to tax money actually in its borders. Money, including gold and silver, and even bank bills, has its situs where it happens to be, and is subject to the jurisdiction of that place. Mississippi may tax money in its jurisdiction belonging to nonresidents, where not merely *in transitu*, but engaged in business here. But this is subject to the following qualifications and limitations: Treasury notes of the United States are not taxable at all by any state, nor are national bank notes. So that money in either Treasury notes or bank notes, if within the state as property of a nonresident, is not taxable in that form; and, if he loans them, then a debt is created due to a nonresident, and that, as has been shown, is not taxable. The transaction would be such that, the instant he ceases to be the owner of that kind of money, which is not taxable in its nature, he becomes the owner of a debt which is not taxable except in the place of his residence. If the company brings this kind of money here, and lends it, the company is not liable to taxation, either for being the owner of the money, or for the debts created by lending it. It could only be taxable for the transaction of converting the money into the debt, and, as we have seen, the statute does not attempt to tax that.

Second. If the money brought here were gold and silver, and it were loaned for five or ten years, then the tax could only be levied once, viz., on the money and in that place. For the subsequent years there would be no money, but only the choses in action,—debts belonging to a nonresident.

Third. It would be necessary to taxation, even in the last case, that the money, the gold and silver, should have an actual situs in Mississippi as the property of the non-

from the borrowers direct. The agreed statement (which the reporter will set out in full) further expressly provides that this case "is to be tried in all the courts to which the same may come, by appeal or otherwise, upon the facts set out in the agreement, and none other."

We think on this statement of facts we are concluded by the case of *State v. Smith*, 68 Miss. 79, 8 So. 294, as to the Coahoma county case. This court said in that case: "There can be no doubt that, where an agency is created in this state for the loaning of money, and the business of loaning it is carried on here,—this state being the locality in which the transaction is begun and completed,—and the debt acquires a situs here, from the course of dealing between lender

and borrower, through the agency established here, it is taxable; but where the nonresident lender has no place of business or location or agent in this state, and accomplishes the loan beyond the limits of the state, the fact that negotiations for the loan were made by persons in this state, and it was secured by mortgage on property in this state, does not subject it to taxation here. . . . In the case before us the creditor . . . has no agent in this state, and no place of business here. The money was sent here to be loaned. The evidence of debt was not here. The business of lending was not conducted in this state. The debt was secured by a mortgage on property in this state, and the loan was obtained by the

resident before he could be taxed. It is only taxable here because of a transfer here, and its consequent subjection to the laws, and jurisdiction of the state, and the right of its owner to claim protection for it from the state against theft and robbery here. It therefore follows that, if a nonresident lend money to a citizen of a state, and should deliver it to him outside of it, or should give a check or draft for it, payable in another state, there could be no taxation of the nonresident on that. The money could not be taxed, because it was not in the state; and the check or draft, though drawn in the state, could not be taxed, because it is not the property of the nonresident, but is only a debt due by him. It would only be property of the borrower. It might be taxed in the hands of the latter as his property, just as the money realized from it might be taxed when brought into the state by him, or by any person to whom he may have paid it. But with this sort of taxation your company has no concern, and, besides, such taxation is not provided for in the section we are considering.

So far our way is clear and plain. I consider now the subsequent clauses of the section, "having money employed in the purchase or discount of bonds, notes, checks, or other securities for money, or employed in any kind of trade or business." This part of the section evidently refers to the case of money in the business referred to and carried on in the state. This refers to the capital stock of money so employed. This capital is supposed to consist of a certain amount of money used in the state, which may be from time to time invested and collected, and invested and collected again. This operation may take place many times in the year, going out from and returning to the owner from day to day, or week to week. So the tax is levied on the money, capital so employed, and not on its proceeds—all checks, bills, etc. The clause under consideration therefore, clearly means a taxation of the money, and implies necessarily that the money so taxed shall be subject to and within the jurisdiction of the state, and, of course, according to the principles heretofore established, would be taxable because its situs is here.

This might be sufficient to answer the inquiries propounded; but, in view of the fact that the company proposes to loan money here, it may be well to present the following considerations:

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First. Your company, being a corporation, has no right to do business here, except by permission of the state, which permission is presumed, unless there be some statutes to the contrary. But neither this statute, nor any, shows any intention to prohibit such business.

Second. It is true that the state has the power to prescribe the terms and conditions on which alone your company can do business here, and can tax that business in its discretion. But the right has not been exercised, and no tax has been levied on the business. This has been heretofore fully shown. The state, so far as your company is concerned, undertakes to exercise a power it does not possess. That, therefore, fails. This failure does not give to the executive and fiscal officers of the state the power to levy other tributes upon you entirely different from the taxation attempted by the legislature. I will notice some authorities which, under certain circumstances, hold that debts to non-residents are taxable in the state where the debtor lives. These are collected and referred to in *Burroughs, Tax. § 42*. In the Vermont case, the money was sent to the state, and placed in the hands of an agent resident there, who collected it and reloaned it as a permanent business. In that case, both the money first loaned and the proceeds of the loans, when collected, were kept in Vermont and re-invested. The securities of the money were also kept there. In the New York case, the securities for the money lent were kept in New York, and so in the Illinois and Kansas cases. In the North Carolina case the case applied to tangible personal property; the court holding that the doctrine of situs for personal property was a fiction, not applicable to revenue and taxation. All these cases, even if they are good law to the extent laid down in some of them, which I deny, are based on the idea that the security for the debt is within the jurisdiction of the state; the security being but the mere evidence of the debt, as was seen in *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558, but not the debt itself, that being but the personal right of the debtor to demand payment. In *Mississippi*, in *Jahler v. Rascoe*, 62 Miss. 703, a decision has been made which ought to be noticed. There, for the purpose of distributing a dead person's estate, hotels and money actually in the state were subjected to the laws of the state. It will be noted (1) that the money loaned was always in the state; that it was loaned here, collected, and reloaned by an

application of persons in this state transmitted to persons beyond its limits, who forwarded the money from without the state. It was not embraced by § 497 of the Code [of 1880]."

The section of the Code of 1892 under which this tax is sought to be imposed is the same with § 497 of the Code of 1880. *State v. Smith*, *supra*, is conclusive of this Coahoma county case. It has been too long recognized as the law, and business investments have been too long made upon the faith of it, to permit it to be questioned. The remedy is with the legislature, not with the courts. Counsel for appellant earnestly insist that the clause in the trust deeds, to wit: "The contract embodied in this conveyance and the notes secured hereby shall be construed according to the laws of Mississippi, where the same is made,"—localizes and domesticates the debts therein, and subjects the same to taxation in this state. The facts show where a contract is made, and the court held in the *Smith* Case that, although the negotiations were concluded in this state, and the contract made, as shown by the facts in that case,—substantially identical with the facts here,—yet it was not a contract "made" here, and that Powell was the agent of the borrower. As to the last propositions, dealt with in a very summary way in the *Smith* Case, we say nothing; but as to its interpretation of § 497, Code 1880, it seems to us sound. Whether one is an agent depends, not on paper recitals, but on the facts.

We are unable to see any difference between that case and this as to how the business of lending was conducted, and feel bound by that decision. The object of the clause in the contract that it should be construed according to the laws of Mississippi undoubtedly was to enable this grasping corporation to secure the abnormally high rate of interest allowed in this state, 10 per cent. The point made in the last brief filed for appellant—that the order of the

board of supervisors is conclusive—is untenable. The board cannot fix situs by an order; the facts determine situs.

As to the Copiah county case, it has been too long settled in this state to admit of further debate that a mortgagee has no interest or estate in the land mortgaged. *Buckley v. Daley*, 45 Miss. 338; *Freeman v. Cunningham*, 57 Miss. 67; *Beckett v. Dean*, 57 Miss. 232. In *Buckley v. Daley*, *supra*, the court says: "The estate in the land is the same thing as the money due upon it." Under our decisions the extent of the mortgagee's right is to sell the property for the purpose of realizing his debt,—a mere right to resort to the security for the payment of the debt. He has no title which is vendible under execution. It is held that, after breach of condition, he may maintain ejectment; but this he can do only as a means to the end of enforcing his security. It is expressly said that "his estate is neither legal nor equitable," and that he has no "interest in the property, or right to it, except as an incident to the chose in action secured by it." These decisions are conclusive in favor of appellee in the case from Copiah county; for the effort in that case is solely to tax the mortgages as if they were land, or, to phrase it a little differently, to tax the mortgagee's interest as real estate. This has not yet been done in this state; on the contrary, the very language of § 3757 in the Code of 1892, "shall be taxable for the same in the county in which such person may reside, or have a place of business, or be temporarily located at the time of the assessment," indicates clearly that the legislature, in this section, dealt with loans of this sort as following, according to the general rule of law, the person of the creditor, and as being taxable at his domicile. At the time of the enactment of this statute the learned commissioners who framed this section, and the legislature which adopted it, must be presumed to have known of the rule announced in the *Smith*

agent, who took the notes payable to the non-resident or his agent; that, for the purpose of distribution, the fund being in the possession of a Mississippi court, the court held it subject to our laws. It will be noticed, as to all these cases, they were state decisions; and the Case of the Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179, was also a state decision, and was reversed by the Supreme Court of the United States.

I have gone into the details in the argument beyond what is ordinarily required in the mere giving of an opinion as professional advice. But, as my opinion was asked through the counsel of the company, and I was expressly requested to discuss the matter in all its details, I have deemed that I was expected to present the statute in all its various possible aspects, and to give the reasoning on which my conclusions were based. 17 L.R.A. (N.S.)

On the whole, I am of the opinion that the company may safely invest its money in real-estate mortgages in this state, in the mode and by the instrumentalities approved in the foregoing opinion, without incurring any liability for taxation under our laws. I have made no special reference to the mortgage as a security for the loans, since it was well settled here that the mortgage is a mere security for the debt, and therefore makes no change in the rules I have laid down. Of course, the land mortgaged would be liable to taxation according to its value in the hands of the mortgagor; and, on his default in payment thereof, the company would be bound to advance the money to pay the taxes. But this obligation is only to itself, to protect its own interest, and could not be enforced against it by the state.

Case, *supra*, and of the maxim or legal fiction, *Mobilia sequuntur personam*, which we have referred to, and of the three cases which we have referred to, as to the quality of the mortgagee's interest in the land mortgaged, and hence to have intended, in re-enacting this section in the very words in which it had been enacted in the Code of 1880, § 497, and substantially in article 23, p. 76, of the Code of 1857 and in the Code of 1871, § 1682, to preserve and perpetuate the rule that loans of this character, unlocalized in this state, are to be taxed to the owner at his domicile. That is the interpretation of this section in the Smith Case, and many sessions of the legislature have been held since with no change in the section.

There are other questions in these cases, upon which we desire to remark. First, it is beyond controversy that the interest of a mortgagee in the lands mortgaged, whether it be, as here, a mere right to sell land to pay the debt,—a chose in action only,—or whether it be, as held by the United States Supreme Court and many state courts, an actual estate in the lands itself, is in either case a sufficient interest therein, in constitutional law, to empower the legislature to tax it, by express enactment, as an estate in land. This is conclusively settled by the United States Supreme Court in the Multnomah County Case, 169 U. S. 429, 42 L. ed. 805, 18 Sup. Ct. Rep. 392, and in New Orleans v. Stempel, 175 U. S. 321, 44 L. ed. 180, 20 Sup. Ct. Rep. 110. See also *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585, and the *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; and *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576, opinion by Judge Taft; and *Howell v. Gordan*, 127 Mich. 517, 86 N. W. 1042; and *Allen v. National State Bank*, 92 Md. 509, 52 L.R.A. 760, 84 Am. St. Rep. 517, 48 Atl. 78. In the Multnomah County Case the United States Supreme Court thus expressed it: "The state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property to be taxed, like other choses in action, to the creditor at his domicile, or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs." The legislature of this state, therefore, has the undoubted power to pass a law subjecting the interest of every mortgagee in land in

this state, though a nonresident of the state, to taxation here, legislatively fixing the situs of that interest in this state for the purpose of taxation by this state, which protects the mortgagee, and furnishes him the sole forum for enforcing his claim. And we wish to add, with all the emphasis which we can command, that the next legislature of this state ought to pass just such an act promptly. The record in these cases discloses the great necessity for such legislation. Strong insistence is placed by counsel for appellee on the proposition that it is not good public policy to enact such a law, for the reason that, in the absence of such taxation, the rate of interest will be made less to our people; and yet what are the facts shown by this record? First, that this mortgagee has charged the highest rate of interest allowed by our law,—a rate so high as to be rarely allowed anywhere else in the United States; second, whilst doing this, it has not paid the state one cent in the way of taxes. In other words, it has charged the highest rate of interest, and paid no taxes here; and it may be safely assumed, from the history of such organizations, that it will always charge the highest rate of interest allowed by any state, whether it is required to pay any taxes or not. The proposition of counsel, therefore, does not fit in with the facts of the case. But this is not all this record shows. It shows, third, that this mortgagee has not only paid no taxes here, whilst charging the highest rate of interest allowed, but has actually put into these mortgages a stipulation (a) that the mortgagor should pay all taxes on the land, and (b) should also pay all taxes which the law of the state might, in the future, compel the mortgagee to pay on the mortgage debt. Surely, the legislature will need no further argument than these three propositions to convince it of the necessity and the propriety of compelling these foreign lenders of money to pay, just as all other citizens pay, their proper share of taxes for the protection afforded them by this state.

It is strongly urged that the Smith Case, 68 Miss. 79, 8 So. 294, is "antiquated and obsolete, and in plain conflict with the modern decisions" on the subject of taxation, especially the cases cited from the United States Supreme Court, relied on. We think the trouble is not so much with that decision—at least, as to its interpretation of the statute—as with the statute itself. Originating in 1857, at a time in this state when agriculture was everything, and commercial interests of slight comparative importance, the failure of the legislature to follow the advanced statutes of other states on the subject of choses in action, including

mortgage debts, is to be attributed to the conditions, until quite recently obtaining in Mississippi, as to agriculture and commerce.

We have read critically all the cases cited from other state supreme courts and the United States Supreme Court, and the doctrine of those, the latest cases, on the power and propriety of the legislature's compelling the owners of the mortgage debts and other choses in action to pay taxes on the same in the state where they must be enforced or collected, and, to that end, of giving them all a "business situs" there, or, as to mortgages, of legislatively declaring the interest of the mortgagee to be an estate in the land for the purpose of taxation, and fixing its situs in the state where the land lies, is by us most emphatically approved. We quote, to give it our special approval, the following from the masterly opinion of Mr. Justice Holmes in *Blackstone v. Miller*, 188 U. S. 180, 47 L. ed. 439, 23 Sup. Ct. Rep. 277: "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we are, nevertheless, subject to the criminal law, and it affords one of the motives for our conduct. So, again, what enables any other than the very creditor, in proper person, to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of its legislation, and extend to debts the rule still applied to slander, that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone. Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on the debts owed by its citizens than upon tangible chattels found within the state at the time of death. The maxim, *Mobilia sequuntur personam*, has no more truth in the one case than in the other. When logic and the policy of a state conflict with a fiction, due to historical tradition, the fiction must give way." And also the following from the able opinion of the Maryland supreme court in *Allen v. National State Bank*, 92 Md. 509, 52 L.R.A. 760, 84 Am. St. Rep. 517, 48 Atl. 78: "Conceding, for the present, that the interest of the mortgagee is in the nature of a chose in action, the general rule that its situs for taxation is the residence of the owner is a mere fiction of law, and 'yields, whenever it is necessary, for the purpose of justice, that the actual situs of the thing should be examined, and whenever the legislative intent is manifested that this legal fiction should not operate.'"

pose of justice, that the actual situs of the thing should be examined, and whenever the legislative intent is manifested that this legal fiction should not operate."

We also call special attention to the following well-considered statements of the law, one from the supreme court of Pennsylvania and the other from the court of appeals of New York. Says the former in *Maltby v. Reading & C. R. Co.* 52 Pa. 140: "The principle of taxation as the correlative of protection, perfectly just in itself, is as applicable to a nonresident as to a resident owner, because civil government is essential to give value to any form of property without regard to the ownership, and taxation is indispensable to civil government. . . . Is it not apparent that the intrinsic and ultimate value of the loan, as an investment, rests on state authority—that it is the state which made it property, and preserves it as property? Then it would seem that this kind of property, more than any other, ought to contribute to the support of the state government. And I suppose it is upon this ground that the legislature discriminates between corporation loans and private debts as objects of taxation. The artificial debtor, itself a creature of the legislative power, and all its functions derived from legislative grant, is so dependent upon the government—it lives and moves and has its being so entirely by the favor of the government—that not only what it owns, but what it owes, also is thought fit to be taxed." Says the court of appeals of New York, in *People ex rel. Holt v. Tax & A. Comrs.* 23 N. Y. 224: "The fiction or maxim, *Mobilia personam sequuntur*, is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances, the truth, and not the fiction, affords, as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice. . . . 'No fiction,' says Blackstone, 'shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience which might result from the general rule of law.' So, Judge Story, referring to the situs of goods and chattels, observes: 'The general doctrine is not controverted, and although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary, for the purpose of justice, that the actual situs of the thing should be examined.' He adds, quite pertinently, I think, to the present question: 'A nation within whose territory any personal property is actually situated has an entire dominion over it while there-

in, in point of sovereignty and jurisdiction, as it has over immovable property situated there.' . . . I can think of no more just and appropriate exercise of the sovereignty [and jurisdiction] of a state or nation, over property situated within it, and protected by its laws, than to compel it to contribute towards the maintenance of government and law."

It is earnestly insisted that these foreign money-lending corporations have many millions of money loaned in this state on mortgages on land, and that they pay no taxes in return for the protection they get from the state whose courts and laws alone make their securities available. This is, beyond all controversy, a great wrong to the people of this state, whether such money lenders be nonresident persons or nonresident corporations. The Constitution of the state makes it the duty of the legislature to tax all property not legally exempt; and when the present defect in the law, in this regard, is brought to its attention, it is not to be doubted that the legislature will promptly rectify the situation.

We make a closing observation: The Multnomah County Case is not applicable here because it was in construction of the act of Oregon authorizing such taxation. The case in 92 Md. 509, 52 L.R.A. 760, 84 Am. St. Rep. 517, 48 Atl. 78, has no application for the reason that in that state the statute of 1896 fixed the situs of the mortgagee's interest for taxation in the county where the land was located, and for the further reason that in Maryland the mortgagee's interest is more than a mere lien. And it will be found, upon examination, that the other cases cited by learned counsel for plaintiff, in Oregon, in California, in Missouri, in Michigan, in Indiana, in Massachusetts, in New York, and in New Jersey, all depend, either upon express statutory, or constitutional provision. Indeed, in Missouri, in *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849, the supreme court of Missouri actually held the 3d Amendment to the Constitution of Missouri, adopted in 1890, which was taken literally from the Constitution of California, to be itself unconstitutional because of its discriminating against corporation mortgages. See, as showing that these cases rest on statutory or constitutional provisions, *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; Constitution of California adopted in 1879, art. 13, § 4; *Detroit v. Board of Assessors* (*Detroit v. Rentz*) 91 Mich. 78, 16 L.R.A. 59, 51 N. W. 787; *Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042; *Allen v. National State Bank*, 92 Md. 509, 52 L.R.A. 760, 84 Am. St. Rep. 517, 48 Atl. 78; *Fireman's F. Ins. Co. v. Com.* 137 Mass. 80; 17 L.R.A. (N.S.)

State, Vanatta, Prosecutor, v. Runyon, 41 N. J. L. 98; and *Re Blackstone*, 171 N. Y. 682, 64 N. E. 1118; *Blackstone v. Miller*, 188 U. S. 203, 47 L. ed. 444, 23 Sup. Ct. Rep. 277. This last was a succession-tax case, where the tax "was upon the transfer, not upon the deposit," and so not in point.

The case of *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, will be seen, upon proper analysis, to fall within the principle of those cases defining what "a business situs" for mortgages of this sort is. The Supreme Court of the United States in that case says, as pointed out by counsel for appellee: "First, that the property in question was clearly property arising from business done in Louisiana, being property of the deceased, a resident of New Orleans; second, that the same had never been out of the state, but that the money was still on deposit in New Orleans banks, and the notes and mortgages were still in New Orleans in the hands of the agent of the plaintiff; and, third, that undeniably the moneys were to be kept in the state for reinvestment or other use, and that the credits were in the hands of a local agent for the same purpose;" and all that the court held was that under those circumstances they were taxable under the Louisiana statute, which statute provided, amongst other things, that "all bills receivable, obligations, or credits arising from business done in this state, are hereby declared assessable within this state."

We have given these cases the most painstaking consideration, and our conclusions are: First, that the legislature has the power to fix the situs of a mortgagee's interest in land, whether it be an estate in the land or a mere chose in action, in this state for the purpose of taxation, such legislation having been declared in the Multnomah County Case "not a deprivation of property without due process of law," and not a denial of "the equal protection of the laws;" second, that the legislature of this state has not yet passed such a statute; and, third, that we commend to the earnest consideration of the legislature, at its next session, the prompt passage of a duplicate of the Oregon law. The provisions of this statute tax the interest of the mortgagee to him as land, and the rest to the mortgagor, thus avoiding double taxation, and, having been upheld by the Supreme Court of the United States, will be unassailable.

We acknowledge ourselves greatly indebted to the very able briefs of counsel on both sides, and we direct the reporter to set them out in full.

Affirmed.

TEXAS SUPREME COURT.

JOSIAH CREAMER et al., Plffs. in Err.,
v.
J. D. BRISCOE et al.

(— Tex. —, 109 S. W. 911.)

Homestead — community — remarriage.

A homestead donation entered by a man and wife, the title to which is finally secured by his performance of the legal requirements, is the community estate of such persons, although before expiration of the time required for perfecting the title the wife dies and the man remarries.

(April 15, 1908.)

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to

Case Note. — Character of property as community or separate where title is initiated before, but not completed until after, death of one spouse.

In a case note to *Cunningham v. Krutz*, 7 L.R.A.(N.S.) 967, the cases involving the effect of the contracting or dissolution of marriage after the initiation, but before the completion, of title under a homestead entry, are collected and discussed. As is there pointed out, that question is finally determined by the decision in *McCune v. Essig*, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78, which holds that, by the Federal statute relating to homestead entries, the surviving spouse, upon the death of the other after the initiation but before the completion of the right to the homestead, acquires the absolute title, free from any community interests under the laws of the state, which might pass by the will of the deceased spouse. Cases involving property acquired under the Federal homestead act have, therefore, been omitted from this note; and it is confined to cases in which the title has been acquired under the laws of the state.

The question presented in the foregoing case is whether property, the act of acquiring which was initiated before the death of one spouse, but consummated thereafter by the survivor, becomes the separate property of the latter or falls into the community, so that the heirs of the deceased spouse will inherit his or her share. The accidental feature of the remarriage of the survivor in no wise influences the determination of the question. If the character of the property is fixed as community property by the incipency of the act by which the title is to be acquired, then, of course, no act of the survivor can deprive the heirs of the deceased of their interests; and if the character of the property is determined by the completion of the act after the death of one spouse, then it will not be community property, as that only is community property which is acquired during the continuance of the marriage relation; and the subsequent remar-

riage will in no wise affect the result. It may be well to note, however, the question most frequently arises where there has been a remarriage, the dispute usually being between the heirs of the deceased spouse and those of the second spouse.

The facts are stated in the opinion.

Messrs. Snodgrass & Djbrell, and George E. Smith, for plaintiffs in error:

The fact that the wife dies and the husband marries a second time during the first three years that he occupies the land, does not affect the character of the title.

Welder v. Lambert, 91 Tex. 510, 44 S. W. 285; *Mills v. Brown*, 69 Tex. 244, 6 S. W. 613; *Palmer v. Bennett*, 81 Tex. 451, 19 S. W. 304; *Wise County Coal Co. v. Phillips*, 21 Tex. Civ. App. 293, 51 S. W. 332; *Johnson v. Townsend*, 77 Tex. 639, 14 S. W. 234;

riage will in no wise affect the result. It may be well to note, however, the question most frequently arises where there has been a remarriage, the dispute usually being between the heirs of the deceased spouse and those of the second spouse.

As is suggested in the foregoing case, there is some difference of opinion upon the subject, but the general rule seems to be that followed by *CREAMER v. BRISCOE*, viz., that the character of title to property as separate or community depends upon the existence or nonexistence of the marriage at the time of the incipency of the right by virtue of which the title is finally extended, and the title when so extended relates back to that time. In addition to the cases set out in the opinion, numerous others may be noted.

Thus, in *Hasseldenz v. Doffemyre* (Tex. Civ. App.) 45 S. W. 830, it was held that a certificate of certain lands was community property, where although not issued until after the husband's death and the remarriage of the widow, it was given to the heirs of the deceased by reason of his being a married man and settling within the state; and the sale of the certificate by the widow and her second husband was void so far as the interests of the children of the first marriage were concerned.

So, also, in *Porter v. Chronister*, 58 Tex. 53, it was held that public lands received by reason of settlement thereon by a man with his wife and family was community property, although the act granting the land for such settlement was not passed until after the death of the wife.

And in *Norton v. Cantagrel*, 60 Tex. 538, a colonist settled with his wife and child upon some land afterward granted to him; during his absence from the state his wife and child died; he came back to the colony and thereafter married again, but, in his application for the grant under the colonization act, he claimed a settlement of the land from the time of his first entry thereon. In holding that the children of the second marriage inherited no interest in the land from their mother, the court

Marlin v. Kosmyroski (Tex. Civ. App.) 27 S. W. 1043.

The land was community property of Josiah Creamer and his first wife, and plaintiffs acquired no interest from their mother, the second wife.

Mills v. Brown; *Palmer v. Bennett*; and *Wise County Coal Co. v. Phillips*,—*supra*; *Manchaca v. Field*, 62 Tex. 139; *Marlin v. Kosmyroski* (Tex. Civ. App.) 27 S. W. 1042; *Welder v. Lambert and Johnson v. Townsend*, *supra*; *Busk v. Lowrie*, 86 Tex. 128, 28 S. W. 984; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 88; *Porter v. Chronister*, 58 Tex. 54.

Messrs. Goodson & Goodson, for defendants in error:

Neither Josiah Creamer nor his first wife had any vested right in the vacant public

domain located upon, by their settlement and file, until the three years' occupancy had elapsed; and Malinda Creamer had no title and could transmit none to her heirs.

Votaw v. Pettigrew, 15 Tex. Civ. App. 87, 38 S. W. 215; *Roberts v. Trout*, 13 Tex. Civ. App. 70, 35 S. W. 323; *Mitchell v. Nix*, 1 Posey, Unrep. Cas. (Tex.) 140.

At the time of the death of the first wife there was nothing giving a right in law, either to her or to her heirs, to demand the title that subsequently issued, and on which at that time an equity could have been predicated, in favor of her or her heirs, that would have attached to the land; and it had no status as "property;" and there was not "acquisition" of the same as "property."

Buford v. Bostick, 58 Tex. 70; *Richard v.*

said: "His application for the land is based upon his immigration and settlement with his first wife and child, and the fact that he has still remained a settler in the colony. It makes no allusion whatever to his second wife, and sets up no claim by reason of any service she had performed; and upon this application his patent was issued. Under such circumstances we cannot see any reason for allowing to the heirs of the second marriage any interest whatever in the land thus granted. It could not be the community estate of Coombs and both his wives; but the wife's interest must be given to her who furnished the consideration which gave to the husband a married man's allowance instead of the smaller amount granted to single men. All this consideration was furnished by the first wife, and the second only enjoyed the benefits derived from her acts and services in this respect."

So, also, in *Auerbach v. Wylie*, 84 Tex. 615, 19 S. W. 856, 20 S. W. 776, it was held that a certificate of entry issued to the heirs of the entry man, who died shortly after his settlement upon the land, was community property, which the surviving wife, after a second marriage, had no power to convey as against the rights of the children of the first marriage.

And in *Manchaca v. Field*, 62 Tex. 135, it was held that a wife had such a community interest in a concession issued to her and her husband under the colonization law of 1825 as to entitle her heirs to claim the land selected, and granted to her husband after her death.

So, also, there are other cases which hold that property is community property where the act of acquiring it was initiated before the death of one spouse, but completed thereafter. *Yates v. Houston*, 3 Tex. 433; *Wilkinson v. Wilkinson*, 20 Tex. 237; *Cannon v. Murphy*, 31 Tex. 405; *Wright v. McGinty*, 37 Tex. 733; *Carter v. Wise*, 39 Tex. 273; *Hodge v. Donald*, 55 Tex. 344; *Rudd v. Johnson*, 60 Tex. 91; *Barrett v. Spence*, 28 Tex. Civ. App. 344, 67 S. W. 921.

17 L.R.A. (N.S.)

Where a man and his wife entered into a contract whereby they were to occupy and improve a large tract of land in consideration of receiving as their own a certain portion thereof, and upon the man's death before the completion of the period the wife completed the contract, it was held in *Marlin v. Kosmyroski* (Tex. Civ. App.) 27 S. W. 1042, that the land so received became community property, and the children inherited an interest therein from their father as distinct from the mother's interests.

As was suggested above, there are some cases which hold to the contrary.

Thus, the wife of a pre-emptor of public lands, who died before the issuance of a patent, was held in *Votaw v. Pettigrew*, 15 Tex. Civ. App. 87, 38 S. W. 215, to have no title to the land at the time of her death, but only a prospective interest dependent upon a compliance with the law, and to be unable to transmit a title by inheritance to her children.

And in *Webb v. Webb*, 15 Tex. 274, where a wife died shortly after the settlement upon the land in controversy, the subsequent grant to the husband was held to be his separate property, and not community.

Where a man and wife settled upon lands belonging to the United States, and after the death of the husband the Federal government granted lands, of which the tract in question was a part, to the parties in "bona fide actual possession" thereof at the time of the passage of the act, it was held in *Baker v. Brickell*, 87 Cal. 329, 25 Pac. 489, 1067, that the land was the separate property of the wife, and that the purchaser from her and her second husband took the property free of any trust in favor of the children of the first marriage. And to the same effect was the decision in *Whelan v. Brickell* (Cal.) 33 Pac. 397, which arose out of the same state of facts. The decision in *Labish v. Hardy*, 77 Cal. 327, 19 Pac. 531, is also to the same effect.

Moore, 110 La. 435, 34 So. 593; Ahern v. Ahern, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023; Kromer v. Friday, 10 Wash. 621, 32 L.R.A. 691, 39 Pac. 229; Speer, Married Women, § 199.

Williams, J., delivered the opinion of the court:

This action was brought by defendants in error, as heirs of Mrs. Sarah Creamer, the second wife of Josiah Creamer, to establish their title to interests in the land in controversy alleged by them to have been the community property of Josiah Creamer and their ancestress. The plaintiffs in error, the defendants below, claim the whole of the property as belonging to the community estate of Josiah Creamer and his first wife. Creamer and his first wife settled upon the land in 1871, in order to acquire it as a homestead donation under the laws then in force, and did everything necessary to that end, except to complete the three years' occupancy. After they had occupied the land for more than a year, Mrs. Creamer died, and Josiah Creamer, thereafter and during the three years, married his second wife, and with her completed the occupancy and obtained a patent. We are of the opinion that the case of *Mills v. Brown*, 69 Tex. 246, 6 S. W. 612, sustains the contention of plaintiffs in error that the facts stated show the land to belong to the community estate of the first marriage. In that case a widow, who was the head of a family, made application for a survey of a piece of public land for a homestead, and paid the surveyor's fees. Without having done anything more, she married, and she and her husband settled and resided together upon the land for less than three years, when she died. Thereafter the husband completed the necessary occupancy, and a patent issued to her heirs. The question was whether the land was community property of the two, or the separate property of the wife. The court held both that it was not her separate property and that it was community property, and the land was divided equally between the claimants under the two.

If the contention of the defendants in error were sound, the land involved in that case would have been the separate property of the husband; such contention being that homesteads of this character are only acquired, in the sense of the statute defining separate and community property after the occupancy has been completed. *Mills v. Brown* fully recognizes as applicable to such cases the principle, more fully discussed afterwards in the case of *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281, that the character of title to property as separate or community depends upon the existence or nonexistence

of the marriage at the time of the incipency of the right in virtue of which the title is finally extended, and that the title, when extended, relates back to that time. And *Mills v. Brown* expressly holds that the right to such homestead donations has its incipency in the actual settlement upon the land. It is true that the claimant under the husband in *Mills v. Brown* claimed only half of the land, on the ground that the whole was the common property of the husband and wife, and did not assert that it became the separate property of the husband by his completion of the occupancy after his wife's death. He was merely resisting the contention that the land belonged to the wife in her separate right, because of the steps taken by her before the marriage and settlement. Both parties were contending for the principle above stated, and differing upon the question as to what step or steps constituted the inception of the right which merged in and gave character to the title; and it was this question which the court decided, holding in no uncertain language, and upon reasoning with which we are entirely satisfied, that the initial step in which the right originated was the settlement.

The decisions by which the court of civil appeals felt constrained to hold in this case that the land in question belonged to the community estate of the second marriage are *Buford v. Bostick*, 58 Tex. 63; *Roberts v. Trout*, 13 Tex. Civ. App. 70, 35 S. W. 323; *Votaw v. Pettigrew*, 15 Tex. Civ. App. 87, 38 S. W. 215, and *Richard v. Moore*, 110 La. 435, 34 So. 593. In *Buford v. Bostick* the question was one of three years' limitation, depending upon the further question whether or not the claim to a homestead donation of land, which was not vacant, but was owned by the plaintiff in that action, constituted color of title before the settlers had held for three years. The decision was based mainly upon the language of the statute regulating the action of trespass to try title and the limitations applicable to it, but in the course of the opinion this language is used: "A pre-emption claim, until perfected, is not a title defeasible upon the nonperformance of conditions subsequent, but is a mere inchoate right, which may ripen into a perfect title upon the performance of certain conditions precedent. Neither is it an already existing and certain demand for land, issued by the government upon an executed consideration, as a certificate of head right, land warrant, or land scrip, but is a mere privilege or right of possession, sufficient under the statute, as against all but those holding under a superior right or title, to maintain trespass to try title, but not sufficient to defeat this superior right or title by limitations." This

characterization of the right of a homestead or pre-emption claimant as against the state may be correct enough, and the question whether or not such a claim to land is title or color of title under the statute of limitations may depend upon its legal standing as between the claimant and the state. But, when the question is one between the husband and wife as to their respective rights, other considerations should control, and are made to control by the reasoning in *Mills v. Brown*.

It is not correct to say that a husband and wife, who have settled upon public lands under the law giving them the right to occupy and improve it, and eventually to obtain title by such occupancy and improvement, acquire no right prior to the running of the prescribed time. It is true that they do not acquire a complete title, legal or equitable, until they have possessed for such time; but it does not follow that they do not acquire a right in the land which afterwards merges in and determines the character of the title. From the time of the initial step,—the settlement,—they have the right to hold and use the land as owners against anyone but the state, and against the state at least so long as they comply with the law and it remains unchanged. They are authorized to sell their claim, and the purchaser becomes entitled to take possession to complete the occupancy and to acquire the title. It would hardly be contended that the price of such a sale would not be community property; and, perhaps, we hazard nothing in saying that, if it should become necessary for a court, upon separation of the husband and wife, to partition their property between them before the expiration of the three years, the land held by them under such a settlement would have to be taken into account as their joint property, and their rights with respect to it adjusted in some appropriate way. It is evident, therefore, that they do acquire rights of property in or with respect to land so held, even before they have entitled themselves to a patent from the state. It would seem that, as between themselves and as against all persons but the state, they are to be treated as having title to the property, subject to be lost by noncompliance with the condition of continued occupancy. Certainly they have rights of property in the land, and this is enough to make applicable the principle, laid down in *Welder v. Lambert*, that the status of title, as belonging to one estate or the other, is determined by the status of the original right, subsequently matured into full title. The authorities which hold otherwise reach their conclusions by considering merely the relation of the settler to the state under an incomplete occupancy (*Richard v. Moore*, supra), while the opinion in *Mills v. Brown* regards as de-

cisive the rights which exist as between the parties themselves; and this, we think, is the true test. The original property right, having been "acquired" during the marriage, is community, and the title which completes that right relates back to its origin and takes character from it.

Of the other decisions in this state relied on by defendants in error, that of *Votaw v. Pettigrew*, supra, alone sustains them. The very question was involved in that case, and was decided by the court of civil appeals. Another point, equally decisive, was there involved, and upon it the refusal of a writ of error by this court may be sustained. The claim of title of the heir of the deceased wife was an equitable one, and the purchasers under the husband were not shown to have had any character of notice of it. In *Roberts v. Trout* the husband conveyed the land, and he and his wife actually left it without having occupied it for three years. The purchaser completed the occupancy and received the patent. We do not find that this court passed on that case. The point decided was that the husband could make such a sale without the assent of the wife, which is a very different question from that before us. The same conclusion was reached in *Mitchell v. Nix*, 1 Posey, Unrep. Cas. (Tex.) 126; and, while the question is not in this case, we are not to be understood as intimating a different opinion. In *Bishop v. Lusk*, 8 Tex. Civ. App. 30, 27 S. W. 306, it was held by the court of civil appeals that, when a husband and wife entered upon land of another, and held adverse possession for a time less than that required to give title by limitation, when the wife died, and thereafter the husband married again, and completed the adverse holding for the term required to bar the true owner, the property did not belong to the community estate of the husband and the first wife. That case was never brought to this court, and is easily distinguishable from this. It holds that a trespasser upon the land of another acquires no right whatever until title is given by the statute of limitations after the lapse of the prescribed time. We have endeavored to show that this cannot justly be said of a settler upon public land, complying with the laws giving him the right to do so.

It follows, from what we have said, that the character of the property in controversy had been fixed, as belonging to the community estate of the first marriage, when Creamer last married, and that such character could not be affected by that marriage. The last wife merely came into the family and resided on the homestead in use, the title to which was no more changed thereby than if it had been Creamer's separate property. Plaintiffs having no title upon which to re-

cover, the judgments below will be reversed, and judgment will be rendered that they take nothing, etc.

WISCONSIN SUPREME COURT.

WILLIAM MILLER, Admr., etc., of Charles Antisdel, Deceased, Appt.,
v.

CHICAGO, ST. PAUL, MINNEAPOLIS, &
OMAHA RAILWAY COMPANY, Resp't.

(— Wis. —, 115 N. W. 794.)

Carrier — riding on platform — negligence.
Freedom from contributory negligence

Case Note. — Riding on platform as affecting right to recover for injury through accident to train or car.

This note will not concern itself with cases in which the injury was to a passenger temporarily upon a car platform for a purpose other than that of riding there.

It is our purpose here to collate those cases only in which there was some accident to the train, in which accident a passenger riding on the car platform was injured, and without which accident such passenger would probably not have been injured, and to eliminate all cases where the accident was not to the train, but solely to the person riding on the platform. In many of the cases no such distinction is made, and the one class of cases is cited in support of the other.

In *Thane v. Scranton Traction Co.* 191 Pa. 249, 71 Am. St. Rep. 707, 43 Atl. 130, the court said that the distinction sought to be made between injury from ordinary risks of the road, and from a collision the result of the negligence of the carrier, is not sound; that a passenger riding upon the platform takes upon himself the risk of his position from any cause; that by going inside he puts himself under the protection of the highest care possible; but, if he chooses not to avail himself of this protection, he must take his chances in the other place.

In *Woods v. Southern P. Co.* 9 Utah, 146, 33 Pac. 628, it was said, however, that the distinction between the two classes of cases is very marked; that where there has been no collision, derailment, or other accident to the train, and the injury could not have occurred but for the negligent position of the passenger, then the injury is traceable proximately to the injured party's own fault; but when the passenger is injured in an accident to the train, due to the negligent acts or omissions of the company, and the injury might have occurred to the passenger no matter where he had been on the car at the time of the wreck, then it is traceable proximately to the company's fault.

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cannot be declared as matter of law where a passenger injured by a train going into a washout voluntarily rode on the platform of the fast-moving train when there was room inside the car, in the nighttime, in the midst of or soon after a severe rain storm, and no one inside the car was injured.

(March 31, 1908.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Juneau County in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

Statement by Marshall, J.:

Action to recover compensation for the death of plaintiff's intestate.

In *Kansas & A. Valley R. Co. v. White.* 14 C. C. A. 483, 32 U. S. App. 192, 67 Fed. 481, the accident which resulted in the death of plaintiff's husband while riding on the platform was brought about by a mistake in making a flying switch, causing a collision with such force and violence that the car was thrown over and more or less broken up. The court said: "It is now well settled that a passenger on a railroad train, who is injured by the negligence of the railroad company, is not debarred from the right to a recovery because he was, at the time he received the injury, negligently riding on the platform of the car . . . if such action on his part did not contribute in any degree to the accident or to his injury. If the accident which occasioned the injury would have happened, and would have been attended with the same results to the passenger, if he had been in his proper place on the train, then his negligence is not 'contributory negligence' in a sense that would preclude a recovery, because it in no manner or degree contributed to the injury, and is therefore wanting in the element of proximate cause essential to constitute contributory negligence that will bar a recovery."

In *Colegrove v. New York & H. R. Co.* 6 Duer, 382, it was held that the negligence of a passenger in getting upon one car rather than another, and standing upon the platform, when the car was full inside and was put under motion before he had time to seek for a seat elsewhere, was not alone such negligence as to bar his right to recover for an injury in a collision with the train of another company, due to the negligence of both companies. The court said: "The collision was the proximate, direct, immediate, and sole cause of the injury. It is true, if the plaintiff had not been within the reach of its influence he would not have been injured. But, on the facts as found, he was in no sense in fault, as between him and either defendant, in being where he was. He was not, as to either of them, wrongfully there. He owed no duty to either of them which required him to be elsewhere. If he had been off of the train the collision would have occurred. His being

The issues are sufficiently indicated by the following: A jury was waived and the case submitted to the court on the evidence and agreed facts. These are such facts: September 12, 1903, plaintiff's intestate was a passenger on one of defendant's passenger trains. It negligently ran such train into a washout caused by a severe rain storm. Plaintiff's intestate, at that time, from his own choice, was riding on one of the car platforms which was not vestibuled. There was ample opportunity for him to have occupied a seat in the car. The end of the car upon which he was riding and the adjoining end of the next car, because of the train going into the washout, were crushed together, imprisoning and injuring the intestate, in consequence of which he died shortly after

being released. No one riding inside the car was killed.

The deceased was a married man, forty-five years of age, and left a widow and several children who were dependent upon him for support. If plaintiff is entitled to recover at all, damages should be assessed at \$5,000.

There was undisputed evidence of a notice being in the car in a conspicuous place, warning passengers not to ride on the platform.

The court found in accordance with the foregoing, and found further, as a fact, that the deceased, in standing upon the platform, as he did at the time of the accident, was guilty of negligence which contributed proximately to cause his death. It found as a

where he was was, not being wrongful as to either defendant, nor a failure to perform any duty which he owed to either of them, it is no defense to an action brought to recover damages caused by their negligence, that the position, in the event of such negligence,—a negligence which no one could foresee or had the slightest reason to anticipate,—was one of more danger than a seat in one of the cars, and that, if he had been seated, he might not have been injured." This case was affirmed in 20 N. Y. 492, 75 Am. Dec. 418.

And so it has been held that a passenger riding on the rear platform of a street car assumed the risk of such injuries as might naturally or reasonably be expected to happen to him while the car was being run upon the track, but not of injuries produced by the negligent management of the car, by reason of which negligence it ran off the track, across the street, and against the curbstone (*Lake v. Cincinnati Inclined Plane R. Co.* 13 Ohio C. C. 494); or by reason of which another car was allowed to collide with the platform on which the passenger was riding (*Thirteenth & F. Street Pass. R. Co. v. Boudrou*, 92 Pa. 475, 37 Am. Rep. 707; *Bailey v. Tacoma Traction Co.* 16 Wash. 48, 47 Pac. 241) thereby causing the injury to the passenger. These cases take the view that his being on the platform was merely a condition, and not a cause of the accident or the proximate cause of the injury received by him.

In *Zemp v. Wilmington & M. R. Co.* 9 Rich. L. 84, 64 Am. Dec. 763, it appeared that plaintiff was standing on the front platform of the rear passenger car at the time of his injury, which was occasioned by the overturning of the locomotive when the train was moving from 5 to 8 miles an hour, and that none of the passengers inside the cars was materially injured. The court said that plaintiff's position at the moment of the accident was wrong, but that the proximate cause of the injury was the overturning of the engine; and that his being on the platform did not necessarily subject him to injury in the overturn any more than if he had been in the car.

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In *Goodloe v. Metropolitan Street R. Co.* 120 Mo. App. 194, 96 S. W. 482, it was held that, where the rules of the company forbade spitting on the floor, and tobacco users were impliedly invited to stand upon the rear platform, such a passenger was not guilty of contributory negligence in choosing to stand in the rear vestibule, and he could recover for being thrown violently into the car by a head-on collision with another car, due to the negligence of the motorman.

In *Jackson v. Natchez & W. R. Co.* 114 La. 982, 70 L.R.A. 294, 108 Am. St. Rep. 366, 38 So. 701, it was held that if, owing to the crowded condition of the only train bringing back an excursion party at night from the open country during a rain, a passenger can secure no safer position than on the platform, it is not negligence on his part to ride thereon; and, if he is injured by the breaking down of a bridge, such breakdown is the proximate cause of the injury.

In *Thane v. Scranton Traction Co.* 191 Pa. 249, 71 Am. St. Rep. 767, 43 Atl. 136, it was held that, where there was room to be seated inside in the passenger's proper place, and no special or sufficient reason was shown why he did not avail himself of it, the passenger remaining on the platform of a moving electric car could not recover for an injury in a collision caused by the negligence of the company.

In *Chicago G. W. R. Co. v. Mohaupt* (C. C. A.) 162 Fed. 665, it appeared that deceased, just before reaching his destination, went out upon the platform, and was riding there when the train collided with the rear end of another train standing at the station, crushing and killing deceased; that both the car in front and the car behind the platform on which he was standing contained many vacant seats, in any one of which he could comfortably and conveniently have ridden into the station; that no person inside the car was seriously hurt by the collision. It was held that decedent contributed to his injury, and that the trial court should have instructed the jury that no recovery could be had on account of it.

conclusion of law that defendant was entitled to judgment dismissing the action with costs. Judgment was rendered accordingly.

Messrs. Dunwiddle & Wheeler, for appellant:

The deceased assumed only the visible risks incident to his taking position on the platform.

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In Cincinnati, L. & A. Electric Street R. Co. v. Lohme, 68 Ohio St. 101, 67 L.R.A. 637, 67 N. E. 161, it was held that there could be no recovery for the death of a passenger riding on the platform of an interurban car which, when going around a curve outside a municipality, became derailed and overturned, where a rule of the company, posted on the platform, prohibited passengers from riding thereon, and, after his attention was called to the notice and he was requested to enter the car by the conductor, he refused; there being vacant seats, and others in the car were not injured, except one man, whose leg was slightly injured.

Upon the second trial of the preceding case as reported in 27 Ohio C. C. 138, the evidence was conflicting as to whether standing room in the car was reasonably available or could have been conveniently obtained by the deceased; as to whether the conductor requested him to go inside; and as to whether he saw the posted notice or knew of the rule against riding on the platform,—all of which issues were found in favor of the plaintiff by the jury; and it also appeared that others inside the car were badly shaken up and some injured, and a lady subsequently died of her injuries. Upon this state of facts the court refused to disturb the jury's finding that the fact that the deceased was upon the platform was not the proximate cause of his death.

In Pike v. Boston Elev. R. Co. 192 Mass. 426, 78 N. E. 497, it was held that plaintiff, injured in a collision of an electric street car with a repair wagon of the company, could not recover where, at the time, he was riding on the front platform of the car, and there was room for him inside the car; he having read and understood a notice that passengers riding on the front platform did so at their own risk, and there being no contention that he would have been injured if inside the car.

In Memphis & L. R. R. Co. v. Salinger, 46 Ark. 528, where a train broke through a rotten trestle and the cars turned over, killing a passenger, it was held that there could be no recovery for his death, if, at the time, he was riding on the car platform after having been warned by the conductor that it was dangerous to ride there, and there were vacant seats inside, and no one inside was killed or seriously injured.

In Hickey v. Boston & L. R. Co. 14 Allen. 429, where a passenger, while riding on the platform, was killed in a collision caused

Hun, 590, 12 N. Y. Supp. 683; Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 442; Dewire v. Boston & M. R. Co. 148 Mass. 343, 2 L.R.A. 166, 19 N. E. 523.

Whether the deceased would not have been as badly hurt if he had been inside the car is conjectural.

Zemp v. Wilmington & M. R. Co. 9 Rich. L. 84, 64 Am. Dec. 763; Dewire v. Boston & M. R. Co. supra.

by the negligence of the railroad company, it was held immaterial that the train men did not object to his riding there, this being a mere license so to ride at his own risk; and that there could be no recovery, there being no evidence that there were no vacant seats inside the car.

In Higgins v. New York & H. R. Co. 2 Bosw. 133, where it appeared that a statute provided that railroad companies should not be liable for injuries to persons riding on the car platform if they furnished room inside the cars sufficient for the proper accommodation of the passengers, and posted notices in the cars that they must not stand on the platform, it was held that the mere fact that the conductor did not object to a passenger's standing on the platform would not justify the presumption that the company assented to waive the protection given to it by the statute, with which it had fully complied.

A number of cases have held that whether a passenger riding on the platform of a car was guilty of such negligence as proximately contributed to his injury was a proper question for the jury to determine, where he was injured in an accident to the train or car. Birmingham R. Light & P. Co. v. Bynum, 139 Ala. 389, 36 So. 736; Taft v. Brooklyn Heights R. Co. 14 Misc. 390, 35 N. Y. Supp. 1042; Goodrich v. Pennsylvania & N. Y. Canal & R. Co. 29 Hun, 50; Zemp v. Wilmington & M. R. Co. 9 Rich. L. 84, 64 Am. Dec. 763; Ft. Worth & D. C. R. Co. v. Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61; Woods v. Southern P. Co. 9 Utah, 146, 33 Pac. 628.

In Prescott & N. R. Co. v. Smith, 70 Ark. 179, 67 S. W. 865, it was held to be a question for the jury whether an eighteen-years-old passenger was guilty of contributory negligence by riding on the platform of a caboose, where it appeared that he was the only occupant of the caboose; that the train was running backward at considerable speed on a down grade, and was approaching a sharp curve; that the caboose left the track and he was killed; and the evidence tended to show that he feared that the train might be derailed and the caboose crushed by the heavy cars behind, and that, if he remained in the caboose, he would be unable to escape in time to avoid injury.

As to riding on the platform of a street car as negligence, see case note to Capital Traction Co. v. Brown, 12 L.R.A.(N.S.) 831.

The presence of the deceased on the platform was not contributory negligence as a matter of law.

Costikyan v. Rome, W. & O. R. Co. supra; Morgan v. Lake Shore & M. S. R. Co. 138 Mich. 626, 70 L.R.A. 609, 101 N. W. 836; *Goodrich v. Pennsylvania & N. Y. Canal & R. Co.* 29 Hun, 50; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345; *Werle v. Long Island R. Co.* 98 N. Y. 650; *Willis v. Long Island R. Co.* 34 N. Y. 670.

Mr. Thomas Wilson, with Messrs. James B. Sheean and Carl C. Pope, for respondent.

Marshall, J., delivered the opinion of the court:

There seems to be some misunderstanding on the part of counsel as to what was submitted to the trial court for adjudication. Appellant's counsel contend that the sole question submitted was whether on the agreed facts, plaintiff was entitled to recover, depending on whether, as matter of law, the deceased was guilty of contributory negligence. They support the affirmative by authorities holding that it is not inconsistent with ordinary care for a person to ride upon the platform of a rapidly moving railroad car while he is, with reasonable diligence, in quest of an opportunity to occupy a seat inside (*Dewire v. Boston & M. R. Co.* 148 Mass. 343, 2 L.R.A. 166, 19 N. E. 523), or where the car is so crowded that no such accommodation is readily obtainable (*Ward v. Chicago, M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442), or for one to leave the car and go upon the platform because of being sick (*Morgan v. Lake Shore & M. S. R. Co.* 138 Mich. 626, 70 L.R.A. 609, 101 N. W. 836), or go, according to custom, to and from a smoking car (*Costikyan v. Rome, W. & O. R. Co.* 58 Hun, 590, 12 N. Y. Supp. 683),—none of which apply to a case of riding from mere choice in such a position, under the peculiar facts of this case. For further support, counsel refer to cases ruled by the doctrine of comparative negligence, overlooking, it seems, that the rule has long prevailed here in harmony with that of the Supreme Court of the United States and the judicial policy in most of the states, that, if a person is injured, his own want of ordinary care contributing to any extent to produce it, he is remediless. *Bolin v. Chicago, St. P. M. & O. R. Co.* 108 Wis. 333-346, 81 Am. St. Rep. 911, 84 N. W. 446.

In short, the support for counsel's position goes no further than that the question whether appellant was guilty of contributory negligence on the occasion in question was one which, had there been a jury, should have been submitted to it for solution.

tion; and there being none, it should have been, as it was, passed upon by the court.

Counsel for respondent contend that the question of law and the one of fact above indicated were within the submission to the trial court; and, in support of the affirmative as to the former, refer to numerous cases holding that, if a person unnecessarily, and for his own pleasure, rides in an exposed position, as the deceased did, and is injured because of his so riding, neither such person nor his personal representative can recover compensation therefor. The following are the authorities relied on, and others of the same character: *Ward v. Chicago, M. & St. P. R. Co. supra; Cincinnati, L. & A. Electric Street R. Co. v. Lohe*, 68 Ohio St. 101, 67 L.R.A. 637, 67 N. E. 161; *Hickey v. Boston & L. R. Co.* 14 Allen, 429-432; *Gavett v. Manchester & L. R. Co.* 16 Gray, 501, 77 Am. Dec. 422; *Fletcher v. Boston & M. R. Co.* 187 Mass. 463, 105 Am. St. Rep. 414, 73 N. E. 552; *Pike v. Boston Elev. R. Co.* 192 Mass. 426, 78 N. E. 497; *Scheiber v. Chicago, St. P. M. & O. R. Co.* 61 Minn. 499, 63 N. W. 1034; *Thane v. Scranton Traction Co.* 191 Pa. 249, 71 Am. St. Rep. 707, 43 Atl. 136; *Bumbear v. United Traction Co.* 198 Pa. 198, 47 Atl. 961; *Woodroffe v. Roxborough, C. H. & N. R. Co.* 201 Pa. 521, 88 Am. St. Rep. 827, 51 Atl. 324; *Burns v. Johnstown Pass. R. Co.* 213 Pa. 143, 2 L.R.A. (N.S.) 1191, 62 Atl. 564; *McDade v. Philadelphia Rapid Transit Co.* 215 Pa. 105, 64 Atl. 327; *State use of Miller v. Western Maryland R. Co.* 105 Md. 30, 65 Atl. 635; *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 34 L.R.A. 141, 44 N. E. 1106; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L.R.A. 326, 23 Atl. 590; *Goodwin v. Boston & M. R. Co.* 84 Me. 203, 24 Atl. 816.

These quotations indicate the trend of such cases and the distinction therein recognized between such a situation as the one in hand and those dealt with in the cases mainly referred to on behalf of appellant:

"When a passenger rides on the side steps, with the knowledge and consent of the conductor and from necessity, from the want of room to sit or stand inside the car, he is entitled to the same degree of diligence as other passengers to protect him from known and avoidable dangers. But a passenger who rides on a side step when it is reasonably practicable for him to sit or stand inside the car takes upon himself the risk of his position from any cause." *Woodroffe v. Roxborough, C. H. & N. R. Co. supra.*

"For an injury received by a passenger on a steam railroad by reason of a collision or derailment while standing upon the platform, in violation of the known rules of the

company, there being vacant seats in the car, there can be no recovery against the railroad company." *Cincinnati, L. & A. Electric Street R. Co. v. Lohe*, supra.

"The injury he received . . . was the direct consequence of his position, and would not have been received had he been inside. Whether he would have received some other injury, equal or greater, is conjectural and irrelevant. If he is to recover at all it must be for injuries received, not for what he might have received under different circumstances. . . . What the passenger took upon himself was the risk of his position from any cause." *Thane v. Scranton Traction Co.* supra.

"There is but one reasonable inference to be deduced from the facts relative to the acts of appellee's ward, . . . and that is to the effect that his own negligence contributed to said injuries. . . . While it is true that it was a duty incumbent upon the railroad company to furnish a seat within its car for each passenger taken aboard of its train, and not merely standing room in the isle of the car, the mere fact, however, that he was compelled to accept standing room, would not justify him to voluntarily leave a place of safety and go to one of peril." *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, supra.

Whether the principle thus declared necessarily rules this case, we do not need to and do not decide. The trial court adopted the view most favorable to appellant, to wit: That there was room in the conceded facts for conflicting reasonable inferences; that, under all the circumstances,—particularly that it was in the nighttime; that a severe rain storm was either in progress or had very recently occurred; that the train was running very fast; and that no one inside the car was killed,—it could not be held, as matter of law, that the deceased was not guilty of want of ordinary care, contributing to his death. We concur in that view. The decision of the trial court on the question of fact, under a familiar rule, cannot be disturbed unless contrary to the clear preponderance of the evidence. It is considered that the question in that regard must be answered in respondent's favor.

The judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EDWARD T. REYNOLDS et al.

v.

GEORGE H. E. DAVIS et al., Appts.

(198 Mass. 294, 84 N. E. 457.)

Strike — illegal combination.

1. A combination of employees to com-
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pel the employer to permit representatives of a union to adjust all differences between employer and employees, and to enforce compliance with the decision by a strike on the part of all, is illegal.

Same — strike benefits — unfair list.

2. Members of a labor union may be enjoined from combining together to further a strike for an illegal purpose and from doing any acts whatever, peaceful or otherwise, in furtherance thereof, including the payment of strike benefits or putting their employers on the unfair list.

Injunction — parties — labor union.

3. Unincorporated labor unions are not proper parties to a suit to enjoin a strike by their members.

Same — representative defendants.

4. Members of an unincorporated labor union who are too numerous to be made individually parties to a suit to enjoin a strike may be brought before the court by joining as parties defendant persons who are and who are alleged to be proper representatives of the class, describing it, to which the members belong.

(Knowlton, Ch. J., dissents.)

(April 2, 1908.)

Case Note. — Controversy over "open" or "closed" shop as justification for means employed to aid strike.

It is not intended in this note to consider the question of the legality of "strikes," whether that term be used to denote simply the concerted ceasing of labor by a body of employees or to denote a combined effort on the part of employees to prevent an employer from conducting his business until he complies with certain demands upon him by his employees; neither is it intended to consider the question as to whether the concerted ceasing of labor by a body of employees is such an interference with the business or other property rights of an employer as to require the act to be justified by showing that it was to effectuate some lawful purpose or to gain a lawful object, except as it may be involved in the question here under consideration; viz., whether an attempt by an employer to establish an "open shop," or an attempt by the employees to establish a "closed shop," is a lawful object and therefore justifies the use of different means by the employees and their sympathizers to bring to a successful conclusion an inaugurated strike. The question necessarily assumes that the means used would be unlawful unless used to gain a lawful object, but, if so used, would be lawful. At the threshold of the discussion one is met with much difficulty in determining what cases come within its scope, as the term "open shop" has no well-defined, certain meaning. Generally it may be said to denote the operation of a manufacturing or other business by the owners without an agreement or understanding with labor unions of which its employees are members as to the manner in

APPPEAL by defendants from a decree of the Superior Court for Essex County enjoining defendants from interfering with complainants' business. Modified.

The facts are stated in the opinions.

Mr. Frederick W. Mansfield, for appellants:

Trades unions and workmen have the right to strike, and it is immaterial whether the strike is ordered or not.

Pickett v. Walsh, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753; Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547.

If a union man does not care to work in

a shop with nonunion men, he has a right to leave, and so have his fellow workmen, either singly or in a body.

Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Arthur v. Oakes and Longshore Printing Co. v. Howell, supra; Lyons v. Wilkins, 65 L. J. Ch. N. S. 601; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Walker v. Cronin, 107 Mass. 555.

Employees have a right to use all peaceful and lawful means to persuade workmen to leave their employment.

Plant v. Woods, supra; Bowen v. Matheson, 14 Allen, 499; Mogul S. S. Co. v. McGregor [1892] A. C. 25; Rogers v. Evarts, 17 N. Y. Supp. 264; Johnston Harvester Co.

which the business shall be conducted, the persons to be employed, the terms of employment, or the mode of adjusting difficulties and grievances which may arise between employer and employee. It is in this sense that the term will be used in this note, and only such cases as involve the defense of the "open shop," as thus defined, whether that term be used or not, as a justification of the means used by a labor union to aid a strike, will be included herein.

In REYNOLDS v. DAVIS, the difficulty between employer and employee was one involving the "open shop," although the exact grounds upon which this assumption is based are not entirely clear, as the difficulty was brought about by the employer posting certain open-shop rules, to be thereafter enforced as between himself and his employees, the most important of which was No. 5, —to the effect that grievances would thereafter be settled between himself and the employees involved. While these rules were not in accord with the rules of the labor unions of which the employees involved were members, yet the strike seems to have been caused by the insistence upon the part of the employer that the rules posted, including the one providing in substance that grievances should thereafter be settled between the employer and the employee involved, should thereafter be enforced, rather than a demand upon the part of either a labor union or the employees that the rules of the labor union relating to grievances or other matters should apply between employer and employee. It would seem therefore that what the court really held was that the employer might require his employees to consent that all grievances between them should be decided by the parties involved, and this requirement or insistence upon the part of the employer would not justify the employees in inaugurating a strike or resorting to peaceable means to bring it to a successful termination. Doubt is thrown upon the intention of the court to so hold, however, by an express disclaimer of an intention to decide that a labor union cannot combine to support a committee to take up individual grievances in behalf of 17 L.R.A. (N.S.)

several members, the court limiting its present decision to the point that it is illegal for a labor union to combine and insist that grievances between an individual member of a union and his employer which are not common to the union members as a class shall be decided by the employees. If the strike was occasioned by the employees insisting that thereafter all grievances of every character should be submitted to a committee, the decision of the court would be clear. The difficulty is that the strike was apparently occasioned, as already stated, by the employer insisting that thereafter all grievances should be decided between the parties immediately involved. The decision therefore seems to be inconsistent, as it would appear that the strike was inaugurated by the employees because of their objection to the promulgation of a rule that the court apparently recognizes would be a sufficient justification for any peaceable action by the employee. It will be noted that in this case the injunction was issued by the court to restrain the exercise of any means whatever, peaceable or otherwise, by the employees, to bring to a successful issue the strike inaugurated by them, the court going so far as to restrain the payment by the employees of a strike benefit fund which had been accumulated by them to use in the event of a strike. In these respects the case goes farther to restrict individual liberty than any other reported case involving industrial disputes since the decision of Jenkins, J., in Farmers' Loan & T. Co. v. Northern P. R. Co. 25 L.R.A. 414, note, 4 Inters. Com. Rep. 744, note, 60 Fed. 803, which raised a storm of protest, both in this country and England, and which was reversed in the circuit court of appeals. 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310.

In REYNOLDS v. DAVIS, the decision is apparently based upon the former decision of the Massachusetts court in Pickett v. Walsh, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753. These two cases represent two distinct propositions, and so clearly illustrate a proposition recognized in many cases, but not clearly brought out,

v. Meinhardt, 9 Abb. N. C. 393, Affirmed in 24 Hun, 489; Reg. v. Shepherd, 11 Cox C. C. 325.

Picketing, when conducted in an orderly and peaceable manner, is lawful.

Lyons v. Wilkins, *supra*; High, Inj. § 1415c; Eddy, Combinations, § 537.

To entitle the complainants to relief by injunction against unlawful interference with their businesses, whether it be in the form of picketing, boycotting, or otherwise, positive and substantial injury must be shown.

Longshore Printing Co. v. Howell and Johnston Harvester Co. v. Meinhardt, *supra*; Sweeny v. Torrence, 11 Pa. Co. Ct. 497.

Messrs. J. J. Feely and Roger Clapp, for appellees:

The master's report discloses a combination and conspiracy, and the injunction was properly issued.

Sherry v. Perkins, 147 Mass. 212, 9 Am.

St. Rep. 689, 17 N. E. 307; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077.

The strike, intended to create a "closed" instead of an "open" shop, was illegal.

Berry v. Donovan, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; Pickett v. Walsh, 192 Mass. 573, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753; Lucke v. Clothing Cutters & T. Assembly No. 7507, K. L. 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607.

The strike, being for the purpose of forcing the employers to submit their griev-

that it is believed that a comparison of the two cases will be of value in emphasizing the point. The first question presented to a court when an injunction is sought to restrain some action of a labor union or its employees, or both, is whether or not there is any unlawful interference with the business of another. Secondly, if there is an unlawful interference, does the object sought justify the interference? It is in this respect that REYNOLDS v. DAVIS differs from Pickett v. Walsh. In the REYNOLD CASE, unless the doctrine enunciated by Jenkins, J., in the case already mentioned, be again asserted, the employer had no ground upon which to base his claim for an injunction because of any interference by his employees or the other defendants, officers of the union with which they were affiliated, with his business or the manner of conducting the same, so far as the opinion shows. Upon the employer prescribing certain rules under which his employees were to labor, and which were unsatisfactory to them, the employees exercised a right that no court other than in the case mentioned, wherein Jenkins, J., handed down his decision, has denied, and, by concerted action, ceased to labor further for their employer. This action was characterized by the court as unlawful; at least, to the extent that the exercise of even peaceable means or the use by the employees of a strike fund accumulated by them for their support while they were idle was restrained because used to effectuate an unlawful object. Pickett v. Walsh presents an entirely different state of facts and involves an entirely different principle. In that case the action for injunction was not by the employer, but was by certain laborers whose business and right to earn a livelihood were being interfered with by the action of certain labor unions causing their discharge by whomsoever employed, by threatening the employers with pecuniary injury and damage unless the de-

mand for the discharge of complainants was complied with. Here were presented all the elements of a wrongful conspiracy. Here there was active interference with the property rights and business of another which would require some justification upon the part of those guilty of the interference. The court held, not that the object sought to be accomplished was unlawful, but that the means used, even if it were to gain a lawful object, were unlawful. (It is not the purpose of this note to discuss that question; it will be found discussed in a note to that case in 6 L.R.A. (N.S.) 1067, and in a note to Purvis v. Local No. 500, U. B. C. & J. 12 L.R.A. (N.S.) 642. Pickett v. Walsh, therefore, presented a case of the actual wrongful interference by a combination of men with the rights of another,—an element not present in REYNOLDS v. DAVIS.

The question as to just what extent employees or labor unions with which they are affiliated may require an employer to submit to their dictation in the operation of his business is one as to which the courts are very much in conflict, and this conflict is occasioned in part by the different views as to the lawfulness of the different means used by the employees to bring to a successful termination a strike already inaugurated, or by confusing cases wherein the action of a labor union or employees in refusing to labor with nonunion laborers is attacked by the employer, and those where it is attacked by nonunion laborers whose discharge has been procured by the threat of the union employees to cease to labor with them. Where the action is by the employer, the conduct of the union members presents no such interference with his business as to entitle him to any relief, while in an action by a discharged nonunion employee, there is unquestionably present the element of interference with his business which would be unlawful unless justified on the ground of competition. The decision

ances for settlement to employees, was illegal.

Miles v. Schmidt, 168 Mass. 339, 47 N. E. 115; *Rowe v. Williams*, 97 Mass. 163; *Strong v. Strong*, 9 Cush. 573; *Rand v. Redington*, 13 N. H. 72, 38 Am. Dec. 475; *Woodworth v. McGovern*, 52 Vt. 318; *Brown v. Leavitt*, 26 Me. 251; *Conrad v. Massasoit Ins. Co.* 4 Allen, 20; *Noyes v. Gould*, 57 N. H. 20; *State ex rel. Kennedy v. Union Merchants' Exchange*, 2 Mo. App. 96.

Loring, J., delivered the opinion of the court:

This is a bill brought apparently by the members of 9 firms and 35 individuals, and purports to be brought against 7 unincorporated associations (a building trades council and six local trade unions) and 28 individuals. The relief sought is an injunction restraining the defendants from interfering with the business respectively car-

ried on by the several plaintiffs. The place of business of each and all the plaintiffs and defendants is in the city of Lynn.

The case was sent to a master and came on for hearing in the superior court on the master's report, to which no exceptions had been taken. A final decree was entered, directing that the bill be dismissed as to three of the plaintiffs named, on a motion to that effect made by them, and as to one defendant, on the merits, and restraining the remaining defendants in certain particulars therein set forth. From this decree the defendants who were enjoined took an appeal which is now before us.

The principal contention of the defendants is that, on the facts set forth in the master's report, the bill should have been dismissed.

It appears from the master's report that prior to May 1, 1906, "although some of them [the plaintiffs] had been running what was practically an 'open shop,' yet many of

of the court in an action by the employer would therefore not ordinarily be an authority in a case where the action was by the employee, neither would a decision in the latter case ordinarily be an authority in the former. This proposition is, of course, based on the assumption that the means used by employees or labor unions to bring to a successful termination an inaugurated strike would not be unlawful if the object sought is a lawful object, and would exclude the question where the means used were unlawful without reference to the object sought to be gained thereby.

The right of employees to refuse to work with nonunion employees, where that right is attacked by the employer, is sustained by the weight of authority, applying the general doctrine that the mere ceasing of labor on the part of employees, individually or in a body, is not such an interference with the employer's business as to require the employee to justify his action by showing that the same was to effectuate a lawful object or purpose. *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Searle Mfg. Co. v. Terry*, 56 Misc. 265, 106 N. Y. Supp. 438; *Atchison, T. & S. F. R. Co. v. Gee*, 140 Fed. 153; *Everett Waddey Co. v. Richmond Typographical Union No. 90*, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 273; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230.

Where, however, there has been some active interference with the property rights or business of another, the courts may protect an employer against such interference, unless the object sought by the employee is a lawful one, in which event it will justify the exercise of peaceable means to effectuate it. As to whether or not an attempt to gain a "closed shop" or prevent the establishment of an "open shop" is such an object, the courts differ. The question was considered by the court in *Wabash R. 17 L.R.A.(N.S.)*

Co. v. Hannahan, 121 Fed. 563, wherein an employer (complainant) sought an injunction to restrain what he claimed was an interference with his business by his employees, who had gone on a strike, on the ground that the employees and the labor organizations with which they were affiliated had "unlawfully and maliciously conspired, combined, and confederated together for the purpose of forcing your orator to recognize said organizations as representing and controlling said employees in all their relations with your orator, and compelling its said lines of railroad within the United States to become and be operated as exclusively union or brotherhood roads, and thus prevent your orator, through its officers and agents, from dealing with its employees in respect to any difference or controversy between it and such employees, and from adjusting any such difference or controversy directly with its employees, as heretofore, and compelling your orator to discharge and discriminate against and keep out of its employ all persons not members of such organizations, and retain and employ in its service only such persons as are members of said organizations." It seemed to be recognized that the securing merely of the recognition of a union with which the employees were affiliated would not be a lawful object, justifying interference with another's business, but the court held that there was a dissatisfaction on the part of the employees, both as to their wages and the manner of their service, including the right to have individual grievances redressed by a committee rather than by the individuals immediately concerned, and accordingly dissolved the injunction against the employees and the unions with which they were affiliated, which had been granted on the *ex parte* application of the employer. In considering the rights of the employee, the court said: "It is the privilege and right of employees to impose any conditions upon

the complainants had at least some sort of verbal understanding, if not an actual agreement with the various unions respecting hours, wages, apprentices, and the employment of nonunion help, which would expire on that date."

At some time not fixed by the master the plaintiffs (with the exception of Keyes, Eastman, and Swan), acting with others, signed and issued the following advertisement, which was headed, "Lynn Open Shops:"

The following firms propose in the future to do a free and unrestricted business under the following open-shop rules, which will enable us to pay our employees according to their merits, and insure to the public a fair

their service deemed wise or prudent by them, and to demand such compensation therefor as they deem reasonable; and, on failure to secure the concessions insisted upon by them, to retire from the service of the employer. It is shown by the proof that no strikes can lawfully occur by employees who are members of either of the brotherhoods in question without the sanction of the grand master and general grievance committees of the order. To enjoin them, therefore, from ordering or otherwise causing a strike, is, in substance and effect, an injunction against resort to a strike by employees who may be members of the orders for the redress of asserted grievances. This, under well-settled law, cannot be done." As to the redress of grievances, the court said: "If it had been insisted upon by the defendants, the question of the right of the employee or body of employees to appear, by agent or committee, before their employer, for the assertion of rights or redress of wrongs, being a matter more of business policy than anything else, could not, in and of itself, be the basis of a charge of malicious conspiracy."

In *Delaware, L. & W. R. Co. v. Switchmen's Union*, 158 Fed. 541, the court denied the petition by an employer of labor for an injunction to restrain a strike by employees, which was in violation of a contract entered into by them, and which was for the purpose of compelling the inauguration of the closed shop. The injunction was, however, not denied on the theory that the closed shop was a lawful object, but rather on the theory, already stated, that the concerted ceasing of labor of employees was not such an interference with the business or property rights of their employer as to justify the court in inquiring into the motives actuating the employees in a petition for an injunction, it not appearing that the third parties, being officers of the union of which the employees were members, were inciting the threatened strike. The court held that, whenever a conspiracy was alleged, it must be shown that it is the intention of the conspirators, acting together, to inflict a wrong upon the complainant; 17 L.R.A. (N.S.)

and honest return for their money, which cannot be done under the closed shop.

Open-Shop Rules.

1. There shall be no discrimination for or against any workmen on account of membership or nonmembership in any organization.

2. There shall be no restriction as to the number of apprentices to be employed when of proper age, or as to the nature of the work which workmen of any class shall do.

3. That eight (8) hours shall constitute a day's work.

4. Overtime shall not be permitted except when absolutely necessary, and under no circumstances to be continued, all overtime to

and said that, in such a case, the court would, by its injunction, interfere. Here it appeared that the employees, upon their individual responsibility, desired to break their contract with their employer and quit their employment. In such case the court said that equity would not interfere, whether the object be to secure redress for alleged grievances or for any other reason. On this subject the court said: "The only justification for the preliminary injunction is the allegation that the defendants incited or coerced the members of the union employed by complainant to violate their contract and incited them to stop work in a body. The rule is conceded by counsel for complainant that the switchmen can strike singly or collectively as the result of their individual action, though such action may have been induced by co-operation and lawful persuasion. The law does not prohibit workmen from holding conferences and discussing their grievances, with the object and purpose of striking or ceasing work at a preconcerted time, and it is only when such action by employees is accompanied by acts of violence, threats, undue persuasion, or intimidation, or such wrongful method as will irreparably injure the aggrieved party that resort may be had to a court of equity for redress. The workmen are not forbidden by law from seeking, taking, or following the advice of the officers of their union or labor organization."

In *Longshore Printing Co. v. Howell*, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547, it was held that an attempt by employees to compel an employer to submit to the laws, rules, and regulations of a labor union was not contrary to public policy. This case recognizes the right of employees, by concerted action, to cease their labors for their employer. On this subject, the court said: "Conspiracy, at common law, was a combination between two or more persons to do an unlawful thing or to do a lawful thing by unlawful means. Where not under special contract for a definite time, a simultaneous severance of the relations between employer and employees, at the instance of the employees, and where

be paid for as regular time. Sundays and legal holidays, or the days on which the same are celebrated, are to be paid for as double time.

5. Grievances arising among the workmen will be settled in conference between the employer and the workmen already involved.

This advertisement was signed by 29 master carpenters and builders, 8 master painters and paper hangers, 1 machinist and millwright, 6 plumbers, steam fitters, and tin-smiths, 4 stairbuilders and dealers in building supplies, 1 dealer in lumber and "builders' finish," and 3 carrying on the business of "gas and electrical construction."

The six trade unions named as defendants are unions of (1) carpenters, (2) lathers,

(3) painters, decorators, and paper hangers, (4) plumbers, (5) sheet metal workers, and (6) steam fitters and helpers.

On May 1, 1906, these "Open-Shop Rules" were posted by the plaintiffs in their several shops, and thereupon the union men members of the unions named as defendants left work with "some" exceptions; in these instances the union men "remained at work after the open-shop rules were posted and until a nonunion man was put at work on the same job with themselves, when they immediately left. In one or two cases the union men returned when the nonunion men ceased working."

Without going into details it is manifest that the strike here in question was a strike against the open shop, as the plaintiffs pro-

there was no preconceived action of such employees, was never considered unlawful. Coming to the means employed, it is not unlawful for several or many employees to agree between themselves to quit their employer. As we have seen, at one time it was held to be an unlawful conspiracy for laborers to combine for the purpose of quitting simultaneously, with the ultimate purpose of raising their wages, or inducing their employer to confine his employment to certain kinds of labor or the like; but this is not now the law, the principle underlying which having long since been discarded as inconsistent with liberty and the spirit of our free institutions. After workmen have thus combined, it is still not unlawful for them, by the use of fair means, to communicate the reasons for their design, and to signify their intention of quitting to their employer. . . . Within these limits, a perfectly legitimate strike may be inaugurated and maintained, the object being to better the condition of workmen. Such an object is not only legitimate and lawful, but is just and praiseworthy."

An attempt to obtain an advance in wages, a shorter work day, and to require the employer to furnish a scale of prices to be paid to pieceworkers, was held, in *Karges Furniture Co. v. Amalgamated Woodworkers Local Union*, No. 131, 165 Ind. 421, 2 L.R.A. (N.S.) 788, 75 N. E. 877, to be a lawful object. The doctrine was enunciated that employees under no contractual restraint may lawfully combine by prearrangement to quit their employment in a body for the purpose of securing from their employer an advance in wages, shorter hours, or any other legitimate benefit, even though they know at the time that such action will be attended with injury and damage to the business of their employer, provided the strike is carried on in a lawful manner,—that is, in a manner free from force, intimidation, and false representation.

The right of members of a labor union, by means of threats to cease labor, or by other peaceable means, to secure the enforcement of the reasonable rules of the union with which they 17 L.R.A. (N.S.)

are affiliated, relating to their employment, was also declared in *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969, 43 So. 590. On this subject the court said: "Before the courts can punish or prevent a conspiracy, either the act conspired or the manner of its doing must be unlawful. Are not both alternatives absent in the case of a simple strike? It is certainly lawful to attempt, by negotiation or other peaceable, legitimate ways, to get higher pay for one's labor, and, if the demand is not met, to go elsewhere with one's labor, or to sit idle, if needs be, until satisfactory arrangements are made. Labor unions, in and of themselves, cannot be said to be unlawful, and yet one of the prime objects of their existence is, by combinations of the supply, to regulate the demand. Some of the cases, particularly the English cases, stress the motive underlying the strike, and apparently hold that, if the strike is to better the condition of the workman, it is lawful; but, if it be to punish the employer, it is unlawful. If this be the correct delimitation, this case comes up to the rule."

In *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769, employees were held not guilty of criminal conspiracy for threatening to strike because the employer refused to enter into an agreement with the labor union of which the employees were members, by which the employer was to submit to the dictation of the union to a certain extent as to the manner of conducting his business. One of the clauses of the agreement referred to the adjustment of grievances and was similar in substance to the one involved in *REYNOLDS v. DAVIS*. It was alleged that the defendants maliciously conspired to compel the employers to sign the agreement, but it was not alleged that it was intended directly to threaten them for that purpose, neither did it appear that they were directly threatened; but it was alleged, in effect, that, unless the agreement was signed, the workmen threatened by concerted action to leave the employment of their employers. In holding such a strike lawful, the court said: "Such a strike may be lawful, or it

posed to carry on an open shop, and for the closed shop as it had previously been carried on by many of the plaintiffs and by the defendants.

It is settled in this commonwealth that the legality of a combination not to work for an employer, that is to say, of a strike, depends (in case the strikers are not under contract to work for him) upon the purpose for which the combination is formed,—the purpose for which the employees strike.

We have excluded all cases where the employees are under contract to work for their employer, because it is now settled in this commonwealth, at least, that competition and similar defenses are not a justification for inducing an employee or other person to commit a breach of a contract and thereby

interfering with the business of the employer. *Beekman v. Marsters*, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 80 N. E. 817. From that it would seem to follow necessarily that, in case of persons under a contract to work, a strike or combination not to work, in violation of that contract, to secure something not due to them under that contract, would be a combination interfering, without justification, with the employer's business. See, in this connection, *Aberthaw Constr. Co. v. Cameron*, 194 Mass. 208, 80 N. E. 478.

Instances of strikes where the purpose sought to be obtained by the strike has been held to make the combination not to work an illegal one are to be found in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Plant v. Woods*, 176 Mass. 492, 51 L.R.A.

may be unlawful and criminal. Whether it is lawful or not depends upon its object and the manner in which it is conducted. A combination to cause a strike for the purpose of injuring and destroying the business and property of another, or of depriving another of his liberty or property without just cause, is both unlawful and criminal. . . . Workmen may lawfully combine to accomplish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction of the hours of labor, or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner, and not under such circumstances as to wantonly or maliciously inflict injury to person or property."

In *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. 169, and *Everett Waddey Co. v. Richmond Typographical Union*, No. 90, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 273, it was apparently assumed by the court that a strike by employees to compel their employer to submit, in certain respects, to the dictation of their union in the manner of their employment and the hours of labor, etc., and those to be employed, was a lawful object, provided the means used to effectuate it were lawful. In each case the court refused an injunction restraining the use of certain means that are not important to the subject now under consideration, for the purpose of bringing to a successful termination the strike inaugurated to secure the object named.

The right of employees to dictate to their employer as to what labor should be employed was also expressly declared by the court in *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Davis v. United Portable Hoisting Engineers*, 28 App. Div. 396, 51 N. Y. Supp. 180.

In *Barnes v. Chicago Typographical Union* No. 16, 232 Ill. 424, 14 L.R.A.(N.S.) 1018, 83 N. E. 940, a "closed shop" was defined as being one from which all employees not 17 L.R.A.(N.S.)

belonging to a certain union were excluded, while one in which the employer has the right of employing whom he pleases is denominated an "open shop;" and an attempt by a labor union to secure a closed shop by resorting to different means to bring to a successful termination a strike inaugurated for that purpose was restrained, not, however, on the theory that the strike, in the first instance, was unlawful, but rather on the theory that the object was unlawful, because the defendants were not in competition with either the complainant or his employees, as, prior to the time of the planting of the suit, they had ceased to work for the complainant, the court saying: "It is true that competition in business justifies action for the benefit of one of the competing parties which results in injury to the other, and a reason frequently given is that the general public benefits outweigh occasional individual losses. One who is seeking employment for himself may offer to work on any terms that he may choose, and the exercise of his legal right may result in the discharge of another laborer. But that rule does not apply to this case. It is not very clear what is meant by competition for the purpose of promoting the welfare of the union and its members; but it is clear that the union and its members were not in competition with the complainants in respect to labor or anything else. The members of the union had left the service of the complainants; and their purpose was to prevent the complainants from carrying on their business. They were endeavoring to compel the complainants to submit to their dictation by depriving the complainants of their legal right to employ such laborers as they might choose. If there is a combination to injure a person because he refuses to comply with some demand where he has a legal right to refuse, there is no way of classifying acts in furtherance of such purpose as competition. The acts alleged in the bill were directed primarily against the complainants for the purpose of doing them harm, and that sort of action is not lawful competition."

It will be noted that in this case the complainants sought an injunction to restrain

339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753; *Aberthaw Constr. Co. v. Cameron*, *supra*.

What, then, on the facts found in the master's report, was the purpose of the strike here in question?

The question of the purpose of the strike does not seem to have been directly in the master's mind in framing his report, and, for that reason, his findings of fact are not directed to this issue. But, in our opinion, the facts were abundantly proved which made the strike here in question an illegal combination,—that is to say, an interference with the business which each plaintiff

was conducting, for which interference there was not a justification.

The occasion of the strike, as we have said, was the posting of the open-shop rules. The strike was manifestly a strike against working under those rules. To understand the significance of the defendants' combination not to work under these open-shop rules it is necessary to state what was proved to have been the condition under which many of the plaintiffs had been conducting their business before these rules were posted.

Most all the plaintiffs had been conducting their business under an oral understanding, if not an actual agreement, with the defendant local unions.

It appears that the defendant local unions were affiliated with the Building Trades

the defendant's employees from interfering with their business and trying to persuade their employees to quit their employment; in this respect the case presents an entirely different principle from that presented in *REYNOLDS v. DAVIS*.

Actions by laborers whose discharge was procured by labor unions.

In *Allen v. Flood* [1898] A. C. 1, the right of employees to dictate to their employer as to the labor he should employ by threatening to cease labor unless their demand were complied with was recognized. It is here said by Lord Herschell: "The object which the defendant and those whom he represented had in view throughout was what they believed to be the interest of the class to which they belonged: the step taken was a means to that end. The act which caused the damage to the plaintiffs was that of the iron company in refusing to employ them. The company would not subordinate their own interests to the plaintiffs. It is conceded that they could take this course with impunity. Why, then, should the defendant be liable because he did not subordinate the interests of those he represented to the plaintiffs? Self-interest dictated alike the act of those who caused the damage and the act which is found to have induced them to cause it." It will be noted that this case was an action by a discharged employee to recover damages from the members of the labor union who procured his discharge by threatening to cease work. The same doctrine was applied under a similar state of facts in *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Mills v. United States Printing Co.* 99 App. Div. 605, 91 N. Y. Supp. 185; *Perrault v. Gauthier*, 28 Can. S. C. 241.

In *National Protective Asso. v. Cumming*, *supra*, the court said, as to the reasons assigned by a body of men who have organized for purposes beneficial to themselves, for refusing to work: "Their reasons may seem inadequate to others, but, if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal 17 L.R.A. (N.S.)

right to stop. The reason may no more be demanded, as a right, of the organization, than of an individual; but, if they elect to state the reason, their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society. And, if the conduct of the members of an organization is legal in itself, it does not become illegal because the organization directs one of its members to state the reason for its conduct."

Considering the same subject, the court, in *Mills v. United States Printing Co.* *supra*, said: "Independent of the obligation of contract, the workman may quit employment, and the master may discharge the workman, beyond the interference of the courts. If the employer can compel the employee to work, against the latter's will, this is servitude. If the employee can compel the employer to give him work against the employer's will, this is oppression. If the courts sit to prevent discharges of workmen, or to require the workmen to remain at service, they exercise a paternal and visitatorial function, beyond my ideas of their province. It would be a step far in advance were the courts to sit in scrutiny of the reasons for the acts of either employee or employer. It would be intolerable if every discharge or every quittance of work must receive the *visé* of a court only when the respective grounds thereof appealed to its judgment. The court is neither employer nor employee and cannot stand in the shoes of either one." (This case involved the right of an employee to restrain by injunction his discharge by his employer.)

But, in *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890, and in *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649, it was held that members of a labor union were guilty of criminal conspiracy for forcing the discharge of nonunion members by threatening to go on a strike unless their demand were complied with.

In *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 490, 74 N. E. 603, members of a labor union who had procured the discharge of employees by threatening to cease their labor unless their

Council of Lynn and Vicinity, also named as a party defendant. The Building Trades Council of Lynn and Vicinity appears to be an unincorporated association made up of delegated from the local unions with which it is "affiliated," including the six local unions named here as defendants.

By the working and trade rules of this council every grievance which a member of a local union affiliated with the council has against his employer is to be investigated by the executive board of the council, and, if the employer does not comply with the decision of the executive board, he is reported to the council as "unfair," and, upon being declared "unfair" by the council, the executive board is "to again interview" the employer, and, if the employer continues in his refusal to comply with the demands of the council, the board "shall at once remove all union men" from his employ, and "no union man shall be allowed to go to work" for him until he is "again placed upon the fair list by the . . . council."

In other words, the members of the defendant unions, by the terms of their own rules, undertook to decide each case of an individual grievance between a single employee and his employer, to decide what should be done by the employer as well as by the employee, and to enforce compliance with its decision by threatening and instituting a strike in which all members were bound to join. What we mean by an individual grievance is (for example) the discharge by his employer of a member of the union for drunkenness or inefficiency.

This statement of the make-up of the defendant unions and the trades council with which they are affiliated makes plain what the plaintiffs were aiming at in the open-shop rules. And it also makes plain what was the main or one of the main purposes for which the strike in question was instituted by the individual defendants.

The strike in question was a combination for the purpose of making the trades council, composed of delegates from the unions of which the individual defendants are members, the arbiter of all questions between individual employees and their employers.

demand were complied with were held liable to the discharged employee for damages suffered by him by reason of his discharge.

And in *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 342, 79 Am. St. Rep. 330, 57 N. E. 1011; *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; *Walsby v. Andey*, 7 Jur. N. S. 465; and *Giblan v. National Amalgamated Labourers' Union* [1903] 2 K. B. 600, the right of a labor union or members thereof to seek to drive nonunion members into the union by procuring their discharge by threats to cease 17 L.R.A. (N.S.)

It purports to include questions arising under contracts still in existence between the two. To force the employer to submit to a delegate body of employees his rights under an existing contract by a combination for that purpose is not a justifiable interference with their employer's business.

And, in cases arising outside existing contracts, it is an attempt to force compliance on the part of employers with the decision of this delegate body of employees as to whether a single employee is or is not to work for the employer, which decision is to be enforced by a strike. Such a strike would be a strike in the nature of a sympathetic strike,—that is to say, it is a strike, not to forward the common interests of the strikers, but to forward the interests of an individual employee in respect to a grievance between him and his employer where no contract of employment exists.

We do not mean to say that a labor union cannot combine to support a committee to take up individual grievances in behalf of the several members. What we now decide to be illegal is a combination that such grievances (that is to say, grievances between an individual member of a union and his employer which are not common to the union members as a class) shall be decided by the employees and that decision enforced by a strike on the part of all. In this respect this case comes within the principle upon which the second point in *Pickett v. Walsh*, supra, was decided. See pages 587 et seq. of 192 Mass.

It follows that the plaintiffs were entitled to an injunction restraining the defendants from combining together to further the strike in question, and from doing any acts whatever, peaceful or otherwise, in furtherance thereof, including the payment of strike benefits and putting the plaintiffs on an unfair list.

The Building Trades Council and the six unions were not properly joined as parties defendant as unincorporated associations (*Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753), and they should be stricken from the title of the cause. The pleader seems to

labor, to strike, or other means of intimidation, was denied. In each case the nonunion laborers were the parties claiming to be injured.

Other cases involving much the same question as that herein discussed will be found gathered in a note to *Pickett v. Walsh*, 6 L.R.A. (N.S.) 1067. Many of the cases therein considered are in point on the proposition now under consideration, but they are not cited herein, or, if cited, are not commented on, because fully commented on in that note.

have thought that the reason why all the members of these unincorporated associations need not be joined as defendants is because their names "are to your complainants unknown," and he has undertaken to make them parties by an allegation" that John Doe and Richard Roe and sundry other persons whose names and whose several residences or places of business are to your complainants unknown, are the remaining members of said respondent unions and the respondent Building Trades Council, and are participants in the unlawful acts hereinafter set forth." The rule of equity pleading which dispenses with the joinder of all members of an unincorporated association depends upon their being members of a class who have a common interest and are too numerous to be made individually parties defendant even if their names are known to the plaintiff. The proper way of bringing them before the court is to join as parties defendant persons who are alleged to be and are proper representatives of the class, describing the class, to which the members belong, and stating that the members are too numerous to be joined as parties defendant. See *Pickett v. Walsh*, supra.

No objection has been made to the joinder as parties plaintiff in this suit of the 9 firms and 35 individuals, each carrying on a separate business.

It is manifest that the decree entered is not so sweeping as that to which the plaintiffs were entitled. No appeal, however, was taken by the plaintiffs, and of this the defendants do not complain.

But the bill must be amended as to the parties defendant. Upon the bill being amended within 60 days, the decree may be modified as hereinbefore set forth, and, on being so modified, affirmed. Otherwise the entry must be, bill dismissed.

So ordered.

Knowlton, Ch. J., dissenting:

The opinion agreed to by a majority of the court in this case seems to me erroneous in the grounds on which it purports to rest, and, if it should pass without comment, it would be, in my judgment, misleading. To most of the doctrines stated in it I heartily agree. With the final disposition of the case I am satisfied. If the decision were put on the ground that the strike was for a closed shop in the sense that the shop should be closed arbitrarily to all workmen not members of the union, not because such workmen were personally objectionable in any particular, nor because there was not work enough for all the members of the union if nonunion men were employed, but to compel all workmen to join the union for the purpose of creating a monopoly in the labor

market, whereby to be able to contend successfully with employers whenever a controversy should arise, I should cheerfully concur in it. A strike to compel a closed shop, merely to accomplish such a purpose, would not be justifiable on principles of competition, either as against nonunion workmen or as against the employer, but would be unlawful for reasons stated in *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603; *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; and *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753.

This opinion enters a field which has not been very much traversed by the courts. It holds this strike unlawful because of the rules and by-laws of the labor union. Rules and by-laws of labor unions have not commonly received the animadversion of the courts, because, as regulations for the internal administration of the affairs of organizations established for a lawful purpose, they are usually designed, in a reasonable way, to promote the objects of the organization.

It is held universally in law, and is conceded generally in public opinion, that a labor union, established for the promotion of the interests of its members in a reasonable way, is a justifiable and commendable organization.

It is right that all the members of such a union should unite for the protection of the interests of every individual member. If the feeblest of its members has a just grievance as an employee against their common employer, it is proper that the whole combination should act together to obtain redress of the wrong. The most effectual way of enforcing the right of every member to just treatment from his employer, in reference to wages, hours of labor, and other things affecting his interests, is by withholding the labor of the union until justice is done. To make this a potent inducement the union must be able to act as one body, and to hold every member to the performance of his duties to his fellow members, so that all may be a united force. Of course, there must be a method of determining what action, if any, shall be taken by the union in any case of an alleged grievance. Such a determination cannot properly be made without an investigation of the facts. Such an investigation ordinarily would involve conferences with the employer, and negotiations to see whether he would consent to an improvement of the conditions, if they should appear to be unjust to the employee. Such conferences and negotiations, without which ordinarily no labor union would be

justified in striking, call for a representative or representatives of the union to present its side of the controversy to the employer, and to act for the union in the maintenance of its interests against the opposite party. In such cases the employer and employee often come together as adverse parties, each contending for that which seems for his advantage. The final determination of the position to be taken by the union may be by a vote of its members. It may be by the action of a board of officers to whom the union intrusts this duty. In favor of the latter method is the fact that, in times of excitement, assemblies of men and women often act hastily under a misapprehension of the facts, and under an impulse of passion aroused by inflammatory appeals to their feelings. But, in one way or another, such determinations must be made, and must be treated as finally settling the position which the union is to take for itself, as a party dealing with an adverse party in reference to its supposed rights. Of course, if the employer takes a different view, neither is bound by the action of the other, and each may make any lawful effort to prevail in the contest with the other.

In the opinion the present strike is condemned because of the rules which govern the union. Under these, every grievance is to be investigated by the executive board of the council. Surely this is right and proper. If the employer refuses to do that which the executive board thinks he ought to do, the facts are reported by the board to the next meeting of the Building Trades Council, with a recommendation that he be declared unfair. If he is then declared unfair by the Building Trades Council, that is equivalent to a decision that he is in the wrong. It is then the duty of the executive board to again interview the employer, and, if he fails to comply with the conditions that the Building Trades Council deems just, a strike is to be declared and maintained by the union until he complies with these conditions.

It is to be noticed that this course of proceeding is entirely for the guidance of the members of the union. The employer takes such measures and acts upon such principles as he chooses for his own guidance. If the result is a failure to agree, then each stands upon his rights, and it is a question which can force the other to yield, or how they can afterwards reach a compromise. The trades council is no more the arbiter of questions between individual employees and their employers than the employer is. The trades council, as a representative official board, decides for one party and determines its action, and the employer decides for the other party and determines his action. Neither 17 L.R.A. (N.S.)

assumes to determine anything for the other, but the action of each is governed by his or its own determination.

I do not see how any rule can be more just and proper for the guidance of a labor union when a dispute arises between its members, or any one of its members, and the employer. Suppose the case is a reduction of wages by the employer which the members of the union deem unjust. What more fair or equitable method of dealing with such a supposed injustice could be devised? To say that a strike founded on such a reduction is illegal because of a rule providing this method of dealing with the grievance is, in my judgment, equivalent to saying that no labor union shall be permitted to do anything to promote the proper objects of its organization.

It is objected that the rule does not exclude questions arising under contracts subsisting between the employer and individual members of the union. Why should it exclude any question which arises under a complaint of an alleged grievance? Every member of the union is entitled to the support of his fellow members in regard to any question directly affecting his rights as an employee, if he is in the right and his employer is in the wrong. How can the union ascertain whether action should be taken in his behalf without an investigation? If the investigation should show that the aid which he seeks is to enable him to break a contract with his employer, it is to be assumed that the council would immediately decline to help him. If a strike should be ordered to compel an employer to submit to a breach of contract by one of his employees, such a strike would be illegal because it would be for an illegal object, not because of the method prescribed by the rules of the union for investigating the matter, or for declaring a strike. It must be assumed that these rules were adopted to be properly applied in proper cases. They do not purport to authorize the trades council to declare a strike for an illegal object. It is to be presumed that the council would refuse to declare a strike in any case in which the investigation showed that the desired object was illegal. In the present case there is no testimony nor suggestion that one of the purposes of the strike was to compel submission by an employer to a breach of his contract by an employee.

In framing rules for a labor union, it would be unreasonable and impracticable to mention expressly all possible cases in which a strike ought not to be ordered, and, in terms, to forbid action in all such cases.

I find nothing in this part of the rules and by-laws except that which I should expect to find in those of any well-organized

labor union. I discover nothing in the master's report or the evidence to indicate that these rules were intended to be used for the unlawful promotion of a purely sympathetic strike, or that they ever were so used. I have endeavored to show that, if any member of a union should have a grievance as an employee against his employer, even if it were not common to members of the union as a class, it would be the duty of his fellow members, in accordance with fundamental principles of labor unionism, to unite for the redress of the grievance, even by striking, if that should be necessary.

So far as appears, the posting and publication of the open-shop rules, and the employment or attempt at employment of non-union men, which were the only matters complained of by the defendants, had a relation to members of each of the local unions before the court, as direct as it had to any other union men. Members of these unions were employed in the shops of the plaintiffs. If the ground of complaint had been a proper subject for adverse action by an individual workman, it would have been a proper subject for investigation and action by the union of which he was a member.

Because the opinion in this case makes the decision turn upon the rules and by-laws to which I have referred, I do not agree with it.

ARIZONA SUPREME COURT.

RE ESTATE OF P. J. DELEHANTY, Deceased.

(— Ariz. —, 95 Pac. 109.)

Decedent's estate — foreign assignment.

1. A foreign involuntary assignment in bankruptcy will be given precedence over the claim of the assignor to share as next of kin in the personal estate of a decedent. Same — real estate.

2. Real estate cannot be transferred by a foreign involuntary assignment in bankruptcy which does not comply with the provisions of the statute as to the conveyance of real estate.

(March 27, 1908.)

APPEAL by petitioners from a judgment of the District Court for Cochise County denying their claims as assignees in bankruptcy of Walter Delehanty to share in the estate of P. J. Delehanty, deceased. Reversed.

The facts are stated in the opinion.

Mr. O. Gibson, for appellants:

An instrument is admissible in evidence as against the grantor, whether duly acknowledged or not.

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Ariz. Rev. Stat. title 12, § 725; Abbott, Trial Ev. p. 624; Borst v. Empie, 5 N. Y. 33; Westhafer v. Patterson, 120 Ind. 459, 16 Am. St. Rep. 330, 22 N. E. 414; Charauleau v. Woffenden, 1 Ariz. 243, 25 Pac. 652; Randall v. Dusenbury, 7 Jones & S. 177.

The objection or defense to a deed, that it was obtained by compulsion or other unlawful means, is one which must be set up affirmatively by the grantor if he would avoid his deed.

United States v. Bradley, 10 Pet. 358, 9 L. ed. 454; United States v. Hodson, 10 Wall. 395, 19 L. ed. 937; United States v. Mora, 97 U. S. 413, 24 L. ed. 1013.

Even though the assignment were an involuntary instrument, it was still sufficient to transfer the interest of the bankrupt in the personal property of the estate, and to entitle the assignees to a distribution of the same.

Oakey v. Bennett, 11 How. 33, 13 L. ed. 593; Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 444.

Mr. Benjamin Goodrich, for appellees: Paragraph 725 of the Revised Statutes of Arizona, 1901, necessarily makes the acknowledgment a part of the deed.

1 Cyc. Law & Proc. pp. 513, 514; Smith v. Hunt, 13 Ohio, 260, 42 Am. Dec. 201; Lewis v. Herrera (Ariz.) 85 Pac. 245, Affirmed in 208 U. S. 309, 52 L. ed. 506, 28 Sup. Ct. Rep. 412.

A bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States.

Harrison v. Sterry, 5 Cranch, 302, 3 L. ed. 107; Ogden v. Saunders, 12 Wheat. 360, 6 L. ed. 656; Booth v. Clark, 17 How. 336, 15 L. ed. 169; Oakey v. Bennett, 11 How. 33, 13 L. ed. 593; Barnett v. Pool, 23 Tex.

Case Note. — *Effect of foreign bankruptcy or insolvency assignment on personal property where no rights of creditors are involved.*

An examination of the cases cited in the notes to Long v. Forrest, 23 L.R.A. 42, et seq., and Smead v. Chandler, 65 L.R.A. 366, et seq., upon the general subject of foreign assignments in insolvency or bankruptcy, will corroborate the statement in the foregoing opinion that most of the cases which have considered the question as to the effect of such an assignment on personal property have involved the rights of attaching creditors; and that is true of practically all the cases that have refused to recognize the rights of the foreign assignee to such assets, — excluding cases subsequently referred to, which, because of technical rules of practice, have denied the right of such foreign assignee to maintain an action at law. The position taken in RE DELEHANTY, that the right of the foreign assignee to personal as-

520; *Moseby v. Burrow*, 52 Tex. 403; *Moselman v. Caen*, 34 Barb. 66; *Willitts v. Waite*, 25 N. Y. 577; *Johnson v. Hunt*, 23 Wend. 87; *Baldwin v. Hale*, 1 Wall. 228, 17 L. ed. 532; *Clarke v. Clarke*, 178 U. S. 194, 44 L. ed. 1032, 20 Sup. Ct. Rep. 873.

Campbell, J., delivered the opinion of the court:

It appears from the petition filed in this case that in July, 1904, P. J. Delehanty died intestate in Cochise county, leaving an estate of real and personal property. His heirs at law and next of kin are a sister, Mary Power, and a brother, Walter Delehanty. The sister was appointed administratrix of the estate. On October 5, 1904, the brother, then a resident of Ireland, was, upon a petition of his creditors, adjudicated a bankrupt by the high court of justice in Ireland,

sets at the forum may be recognized if no rights of creditors are involved, does not rest entirely upon negative authority, but is also sustained by positive and affirmative authority. The principles governing this subject and the distinction between cases involving the rights of creditors, whether residents or nonresidents of the forum, and those which merely involve the respective rights of the foreign assignee and the bankrupt, or of such assignee and one who is in possession of property belonging to the bankrupt or is indebted to him, are clearly set forth in the opinion of the New York court of appeals in *Re Waite*, 99 N. Y. 433, 2 N. E. 440. That opinion, after a thorough consideration and review of the subject, lays down the following propositions: (1) that the statutory title of a foreign assignee in bankruptcy can have no recognition in New York solely by virtue of the foreign statute; (2) that, as a matter of comity, the titles of foreign assignees are recognized and enforced in New York when they can be without injustice to the citizens of that state, and without prejudice to the rights of creditors pursuing their remedies there, provided that such titles are not in conflict with the laws or public policy of New York; (3) that such foreign assignees may appear, and, subject to the conditions above mentioned, maintain suits in the courts of New York against debtors of the bankrupt whom they represent, and against others who have interfered with or withheld the property of the bankrupt. The precise point decided in this case was that a foreign assignee in bankruptcy of a firm was entitled to appear upon an accounting in New York by an assignee for creditors of one indebted to the firm, and demand the dividend apportionable to the firm's claim, and object to the assignee, who was also one of the members of the bankrupt firm, crediting the same to himself or claiming that it should be paid over to him, it appearing that all of the American creditors of the bankrupt firm had been paid out of other assets. The opinion carefully reviewed the earlier decisions in New York, 17 L.R.A. (N.S.)

King's bench division, in bankruptcy. By choice of the creditors, John Arthur Maconchy and Alexander Knox McIntire were appointed official assignees in bankruptcy. On October 25, 1904, the bankrupt executed an instrument in writing by which he undertook to assign to the said official assignees in bankruptcy all his share in the real and personal estate of P. J. Delehanty, upon trust, to be held by them as such assignees, and to be dealt with by them as a part of the assets of the bankrupt, and applied according to the course of the court in such case made and provided. In July, 1906, and after more than one year had elapsed from the issuing of letters of administration upon the estate of P. J. Delehanty, the official assignees filed their petition in the probate court of Cochise county, alleging that they, by reason of the assignment, have become and are

and declared that the case of *Plestor v. Abraham*, 1 Paige, 236, sometimes supposed to be opposed to the view taken in the *Waite Case*, was not, in fact, authority against that view. It is also to be noted, as pointed out in the opinion in the *Waite Case*, that Chancellor Kent, in *Holmes v. Remsen*, 4 Johns. Ch. 460, 8 Am. Dec. 581, took the view that the title of a foreign assignee in bankruptcy was good even as against subsequent attaching creditors; and that, while *Platt, J.*, in *Holmes v. Remsen*, 20 Johns. 229, 11 Am. Dec. 269, held, contrary to that view, that the foreign assignee's rights would not be recognized to the prejudices of domestic creditors pursuing their remedy by attachment, even he admitted that such an assignee could, upon principles of comity, come to New York and institute suits in its courts to recover the property of the bankrupt if no rights of creditors were brought in question. The view that the rights of domestic creditors will prevail over those of the foreign assignee has been adopted by the later cases in New York; and, indeed, as shown in the notes already referred to, very generally prevails, and is extended in some states, including New York, so as to protect attaching creditors who are nonresidents. See *Barth v. Backus*, 140 N. Y. 230, 23 L.R.A. 47, 37 Am. St. Rep. 545, 35 N. E. 425. It will be observed, however, that the latter case, while extending the doctrine so as to protect attaching creditors who are nonresidents of New York, contains no intimation that the title of the assignee will not prevail if the question arises merely between him and the insolvent, or a debtor of the latter. Indeed, the very discussion of the question whether the local policy which protects domestic creditors against the claims of foreign assignees should be extended to the protection of nonresident creditors seems to presuppose and imply that the rights of the foreign assignee would be recognized and enforced if there were no rights of creditors at all involved. This implication is, of course, stronger in the cases which re-

entitled to distribution to them of one half of the entire estate of the deceased after the debts of said deceased have first been paid and the expenses of administration deducted, and prayed that the court ascertain and declare the rights of all persons to the estate and all interests therein, and to whom distribution thereof should be made. This proceeding is provided for in paragraphs 1891, 1892, 1893, and 1894 of the Revised Statutes of 1901. Walter Delehanty and Mary Power, as heirs and next of kin, disputed the rights of the assignees upon the ground that the assignment was a proceeding in foreign involuntary bankruptcy, and did not operate to convey title to property in this country. Upon a hearing had in the probate court the claim of the assignees to the share of Walter Delehanty was rejected. Appeal was thereupon taken to the

district court. At the trial before a jury in the district court an objection to the offer in evidence of the assignment was sustained, and a verdict in favor of Walter Delehanty directed. From the judgment entered upon such verdict, and from the order denying a new trial, this appeal is brought.

The trial court sustained the objection to the admission in evidence of the assignment upon the ground that it appeared therefrom that it was an involuntary assignment in bankruptcy, made under the laws of a foreign country, and therefore did not operate to convey title to real and personal property in this territory. While the assignees claim that neither from the instrument itself nor by the pleadings is it made to appear that it was not voluntarily executed, we shall, for the purposes of this opinion,

fuse to extend the protection to nonresident creditors, or, at least, to nonresident creditors who are residents of the state or country where the bankruptcy or insolvency proceedings were instituted.

In *Hunt v. Jackson*, 5 Blatchf. 340, Fed. Cas. No. 6,893, which was decided long before the *Waite Case*, the court recognized as the rule in New York that, if neither the rights of domestic nor foreign creditors proceeding against the property are involved, a foreign assignee in bankruptcy may, upon principles of national comity, be permitted to sue in the courts of New York for the benefit of all the creditors. The rule was applied in this case by holding that the foreign assignee might maintain an action in New York to recover property of the bankrupt which had been consigned to the defendants.

So, in *Merrick's Estate*, 5 Watts & S. 19, the court said that it was definitively settled that a foreign assignee in bankruptcy may sue in the courts of Pennsylvania in the name of the bankrupt for the assets of the estate, and recover them, unless as against the rights of an American creditor.

Chief Justice Marshall, sitting at circuit, held in *Blane v. Drummond*, 1 Brock. 62, Fed. Cas. No. 1,531, that foreign assignees in bankruptcy could not maintain an action at law in their own names against a debtor of the bankrupt in Virginia, and that consequently such an action might be maintained in the name of the bankrupt himself. This decision, however, was because of a technical rule of practice prevailing in Virginia (*lex fori*), which permitted an assignee of a chose in action to maintain an action in his own name only in case the assignment was the act of the party himself, the rule not extending to assignments by operation of law. The opinion clearly implies that the equitable right of the assignee in bankruptcy would be recognized in a proper proceeding for that purpose.

Upon the same ground it was held in *Kirkland v. Lowe*, 33 Miss. 423, 69 Am. Dec. 17 L.R.A. (N.S.).

355, and *Tully v. Herrin*, 44 Miss. 620, that a suit could not be maintained in his own name in the common-law courts of Mississippi by a syndic appointed under the insolvent laws of Louisiana to recover upon an open account belonging to the estate of his insolvent; but that, in such a case, the legal title to the account still remained in the insolvent, and the suit must be brought in his name. These cases clearly recognize the equitable interest of the syndic, and, in the last case, the syndic was permitted to cure the objection by amending his declaration, so as to make the bankrupt a nominal plaintiff.

In *Re Blithman*, L. R. 2 Eq. 23, where a person having a vested reversionary interest in a trust fund of personal property in England became insolvent in South Australia and died after the trust property had fallen into possession, but before it had been paid over, it was held that, if his domicile was Australian, the assignees in insolvency were entitled to the payment of the fund; but that, if the domicile was English, the executrix, who had proved in England, was entitled; and an inquiry was directed to determine the domicile. That the court, however did not mean to pass upon the ultimate rights as between the assignee and executrix, even upon the hypothesis that the domicile was English, is apparent from the statement that, upon that hypothesis, the money ought to be paid to the executrix, and that it would be for the assignee to take such steps as he might think fit for the purpose of asserting his claim.

In *Re Davidson's Settlement*, L. R. 15 Eq. 383, in a controversy between the widow of an insolvent, who had been appointed to represent his estate, and an assignee in insolvency, appointed in Australia, it was held that the latter was entitled to a fund in court to the credit of the insolvent. The court said that it was immaterial whether the domicile of the insolvent was English or colonial, since he voluntarily submitted himself to the Australian insolvency court.

treat it as having been made under an order of the foreign bankruptcy court, and hence involuntary. Therefore the matter for our determination is the effect we will give to a foreign involuntary assignment in bankruptcy upon property in this territory. The question is one that has been before the courts of this country in many cases and from almost the beginning of our national existence. The English rule is to give full effect to such transfers of personal property; but, as early as 1809, Chief Justice Marshall, in *Harrison v. Sterry*, 5 Cranch, 289, 3 L. ed. 104, held that the bankrupt law of a foreign country could not operate a legal transfer of property in this country. Chancellor Kent, in *Holmes v. Remsen*, 4 Johns. Ch. 460, 8 Am. Dec. 581, followed the English rule, holding the assignment valid, even as against domestic creditors. *Holmes v. Remsen* was disapproved in *Abraham v. Ples-toro*, 3 Wend. 538, 20 Am. Dec. 742, and in *Willitts v. Waite*, 25 N. Y. 577, and it has been the almost universal holding of the courts that, *ex proprio vigore*, the assignment has no extraterritorial effect. The most recent expression on the subject by the Supreme Court of the United States is in *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545, where, after a discussion as to the effect to be given to voluntary or common-law assignments, it is said: "But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that state, and that, with respect to property in other states, it is given only such effect as the laws of such state permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the state where the property is actually situated."

In nearly all of the cases in which the question has arisen, the rights of attaching creditors have been involved. Here no such rights are involved. The contest is entirely between the bankrupt and his assignees. No case has been brought to our attention in which effect has been refused the assignment of personal property where it did not deprive creditors pursuing their rights in the local forum of a security, or violate the public policy of the state. Where effect is given, it is not upon the theory that the assignment operates to convey the title, but is given under the general rule of comity. *Oakey v. Bennett*, 11 How. 33, 13 L. ed. 17 L.R.A. (N.S.)

593; *Willitts v. Waite*, supra; *Happy v. Prickett*, 24 Wash. 290, 64 Pac. 528. Professor Minor, in his recent work on *Conflict of Laws*, at page 322, thus states the principle: "But it does not follow, because, *ex proprio vigore*, the assignment has no extraterritorial effect, that no such effect is, under any circumstances, to be accorded it. On the contrary, except with respect to land, the general rule of comity is to recognize the title conferred by the *lex domicilii* upon the assignee in every state where the insolvent's property may be located, save only where the interests of the forum or of creditors require that it shall be disregarded. Hence, if the case does not affect creditors in the forum, but merely relates to the title of the assignee and his right to collect and sue for debts due the insolvent, the transfer to the assignee under the *lex domicilii* is sustained." According to all the authorities, however, comity, will not prevail to the extent of giving effect to a foreign statutory conveyance of real estate. We need not pursue the reasons for this here, because the instrument before us, even if it was voluntarily executed, does not operate to convey real estate, since it is not acknowledged as provided by our statute. *Lewis v. Herrera* (Ariz.) 85 Pac. 245. Affirmed on appeal by the Supreme Court of the United States in 208 U. S. 309, 52 L. ed. 506, 28 Sup. Ct. Rep. 412. Paragraph 1904, Rev. Stat. 1901, authorizes the probate court to assign shares of real estate only to the heirs, or to persons to whom they have "conveyed;" and that court has no authority to assign the share of an heir to another who does not hold a valid conveyance of the title. *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459; *Re Ryder*, 141 Cal. 371, 74 Pac. 993.

While no effect can be given the assignment so far as the real estate is concerned, we see no reason why effect should not be given to it so far as it relates to the distributive share of personalty. There are no local creditors to be protected. No policy of this territory will thus be violated. On the contrary, we think such action will conform to the present policy of the country, since, by the national bankruptcy act, our citizens, upon being adjudged bankrupts, are required to execute to their trustees transfers of all their property in foreign countries (clause 5, § 7, act July 1, 1898, chap. 541, 30 Stat. at L. 548, U. S. Comp. Stat. 1901, p. 3425); and we thus seek, through the comity of foreign nations, to secure for the creditors of our bankrupts the rights asked by the assignees here.

We think, for the foregoing reasons, that the trial court erred in refusing to admit the assignment in evidence, and in denying

the motion for a new trial. The judgment is therefore reversed, and the cause remanded for a new trial.

Kent, Ch. J., and Sloan and Nave, JJ., concur.

Petition for rehearing denied May 18, 1908.

MICHIGAN SUPREME COURT.

ALBERT G. LAIRD.

v.

MICHIGAN LUBRICATOR COMPANY,
Plff. in Err.

(— Mich. —, 116 N. W. 534.)

Corporation — officer — implied authority.

The secretary-treasurer of a corporation, who is also its manager, has no implied authority to contract for the services of an employee for a term extending beyond not only the term of his own office, but that of the board of directors, in the absence of custom or his being held out by the directors as having such authority.

(May 26, 1908.)

Case Note. — Time for which contracts of employment may be made on behalf of corporation by its officers, directors, and agents.

The reported cases on this subject prior to 1899 are collected in a note appended to *Carney v. New York L. Ins. Co.* 49 L.R.A. 471. The cases there cited would seem to indicate that by the great weight of authority, an officer, director, or agent for a corporation has no implied power to make contracts of employment for life on behalf of its company; and the later cases sustain this doctrine.

Thus, in *Nephew v. Michigan C. R. Co.* 128 Mich. 599, 87 N. W. 753, plaintiff sued for damages for defendant's breach of an alleged contract of employment entered into on behalf of defendant by its general attorney, whose sole duty was to furnish legal advice and settle suits. By this contract the plaintiff, who had been disabled while in the company's service, was to be employed for life; but the court held such contract void because the general legal adviser of a railway company has no authority to make such contract of employment. The court cites with apparent approval *Carney v. New York L. Ins. Co.* supra, to which the earlier note on this subject is appended.

In *Usher v. New York C. & H. R. R. Co.* 76 App. Div. 422, 78 N. Y. Supp. 508. (Affirmed without opinion in 179 N. Y. 544, 71 N. E. 1141), however, a contract of employment entered into between a railway superintendent on behalf of the company, 17 L.R.A. (N.S.)

ERROR to the Circuit Court for Wayne County to review a judgment in plaintiff's favor in an action brought to recover damages for breach of an employment contract. Reversed.

The facts are stated in the opinion.

Mr. Paul B. Moody, with Messrs. Corliss, Leete, & Joslyn, for plaintiff in error:

Express authority for the making of the contract, or ratification of it with full knowledge of the facts, must be shown, to render it valid.

Camacho v. Hamilton Bank Note & Engraving Co. 2 App. Div. 369, 37 N. Y. Supp. 725; *Nephew v. Michigan C. R. Co.* 128 Mich. 602, 87 N. W. 753; *Carney v. New York L. Ins. Co.* 162 N. Y. 453, 49 L.R.A. 471, 76 Am. St. Rep. 347, 57 N. E. 78; *Beers v. New York L. Ins. Co.* 66 Hun, 75, 20 N. Y. Supp. 788; *Maxson v. Michigan C. R. Co.* 117 Mich. 218, 75 N. W. 459; *Smith v. Co-operative Dress Asso.* 12 Daly, 304; *Missouri, K. & T. R. Co. v. Faulkner*, 88 Tex. 649, 32 S. W. 883.

Mr. A. J. Groesbeck, for defendant in error:

The making of the contract was within the scope of the authority of the secretary-treasurer and manager.

and an injured employee, whereby the latter was given a place for life in consideration of releasing the company from liability for damages, was upheld, since the company had retained the release and thereby accepted the benefit of the contract. The case of *Carney v. New York L. Ins. Co.* supra, was distinguished on the ground that in the *Carney* Case the contract, wholly executory on both sides, was unreasonable and void for want of authority, while in the case at bar the contract was a settlement and adjustment of a claim for damages, wholly executed on the part of the plaintiff.

The authority to make contracts for periods less than life seems to depend largely on the character of the officer making the contract, and the general authority conferred upon him by the by-laws. By the weight of authority, as indicated by the earlier note as well as the cases cited in the present one, the president and general manager have implied authority to make contracts of employment for one year.

In *Arkadelphia Lumber Co. v. Asman*, 85 Ark. 568, 107 S. W. 1171, it was contended that a by-law authorizing the president, who held his office for a year, to "direct and control the affairs of the company," did not authorize him to employ a managing salesman for a year; but the court held that, under this by-law, the president had such power, and allowed damages, as provided in the contract, for a discharge before the expiration of the year.

In *Caldwell v. Mutual Reserve Fund Life*

Ceeder v. H. M. Loud & Sons Lumber Co. 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Antrim Iron Co. v. Anderson*, 140 Mich. 702, 112 Am. St. Rep. 434, 104 N. W. 319.

Montgomery, J., delivered the opinion of the court:

The plaintiff brought an action to recover damages for the breach of a contract of employment covering the period of three years from the 1st day of February, 1904. The contract purported to be signed on the one part by the plaintiff, and, on the other, by George C. Morris, secretary-treasurer, on behalf of the defendant company, and provided compensation of \$1,500 per year for the term of three years. The plaintiff continued in the employment of the defendant during 1904 and until the 11th of March, 1905, when his employment was terminated. The president of the company, Mr. Corliss, had, in January, 1905, told him that his services would not be required, and that he had better seek other employment, and, when told by the plaintiff that he had a contract with the defendant, and upon the production of the contract signed by Mr. Morris, he was assured by the president of the company that the contract was not binding. He was allowed to continue, however, until the 11th of March, when his services were finally dispensed with. There was no testimony in the case offered by the plaintiff to show that other contracts of employment extending over a period of three years, or for any considerable period, had been made by Mr. Morris, nor was there any evidence that, prior to the time the contract was produced to the president, Mr. Corliss or the directors of the company had any knowledge that such a contract as that involved here had been made. The plaintiff was paid by the week, and received his compensation from the bookkeeper, giving receipts therefor. Mr. Morris became insane in 1904, and was suc-

ceeded by John B. Corliss, Jr., in the office of treasurer. The circuit judge directed a verdict for the plaintiff for the amount of salary stipulated from the time of his discharge up to the date of the commencement of the suit.

It is very obvious that there was no conclusive evidence of ratification, as, upon the first discovery of the existence of a contract by the defendant, its validity was questioned, and plaintiff very clearly understood that in his continued employment the company was not recognizing the validity of this contract. The plaintiff's case must rest upon the implied power which the circuit judge seems to have found arising from the fact that Mr. Morris was secretary-treasurer of the corporation and manager of its business under the direction of the board of directors, to justify a contract of employment for a term of three years. Section 7040 of the Compiled Laws provides: "Sec. 4. The stock, property, affairs, and business of every manufacturing or mercantile corporation shall be managed by not less than three directors, who shall be chosen annually by the stockholders at such time and place as shall be provided by the by-laws of said corporation, and who shall be stockholders, and shall hold their offices for one year and until others shall be chosen in their stead." Mr. Morris was elected as secretary-treasurer for the term of one year. It would seem clear that, in the absence of any evidence of custom, or any holding out as possessed of authority other than the bare fact that he was secretary-treasurer and manager, the authority to continue employment not only beyond his term of office, but beyond the period during which the entire management of the affairs of the company might be changed by the election of a new board of directors, would not be implied. A case very much in point is *Camacho v. Hamilton Bank Note & Engraving Co.* 2 App. Div. 369, 37 N. Y. Supp. 725, in which a contract made by the de-

Asso. 53 App. Div. 245, 65 N. Y. Supp. 826, plaintiff sought to recover certain fees and commissions which he claimed by virtue of a contract executed by the vice president, a member of the executive committee of said company, in its behalf, providing by its terms, as compensation for six months' service, his salary and certain fees and commissions which should be received by the company for the next ten years; but the court held that the vice president acted in excess of his power in creating such charge upon the corporation for ten years; as there was no evidence of ratification, the plaintiff could not recover.
17 L.R.A. (N.S.)

In *Ruppe v. D. H. Stuhr & Son Grain Co.* 126 Iowa, 632, 102 N. W. 509, it was contended that defendant's business manager, who was authorized to employ all necessary help, had no authority to employ plaintiff as grain solicitor for one year; but the court held, since it was the custom in that territory to hire grain solicitors for a year, the manager, who held his position for no definite time, was authorized to contract for plaintiff's services for one year. The court, however, recognized the general rule that a manager of a corporation cannot engage employees for a long future period without express authority.

defendant's vice president and general manager for a term of three years was under consideration. The court said: "But no presumption of law can be indulged in that, because a person acts as such a manager, he has the power to bind his principal to contracts of an extraordinary nature, and of such a character as would involve the corporation in enormous obligations and for long periods of time. If a general manager, simply by virtue of his being charged with the ordinary conduct of the business, would have the right to bind his principal to a contract for service for three years, involving the obligation to pay thousands of dollars of salary to an employee, why may not that power extend indefinitely, so that he may make contracts for all employees for indefinite periods, and thus assume to himself a power which it cannot be supposed was ever intended to be lodged in him?" The case is in all substantial respects on all fours with the present case. It is cited with approval by this court in *Nephew v. Michigan C. R. Co.* 128 Mich. 602, 87 N. W. 753. See, also, the cases collected in note to *Carney v. New York L. Ins. Co.* 49 L.R.A. 471. The case cited by plaintiff's counsel, *Ceeder v. H. M. Loud & Sons Lumber Co.* 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575, is not in conflict with the views here expressed. It was assumed in that case that the employment of a sawyer for the season was usual and necessary in the conduct of the business with which the president of the company was intrusted, and it was held that, as the primary intention of a corporation in employing an agent is that he shall be able to accomplish the purposes of the agency, the power to do whatever was essential to the accomplishment of that object was to be implied. The situation is quite different from that here, as it can hardly be contended that the employment of clerks or subordinates for a term of years is essential to the conduct of the business. Whether there was proof in that case that it was customary to employ sawyers by the season is not made very clear by the decision. But the court would almost take judicial notice that such is the fact. There was no such proof in the present case, and, if there is any presumption on the subject, it is quite the reverse as to the employment of clerks and subordinates in an office such as that of the defendant.

The court was in error in directing a verdict for the plaintiff; and the judgment will be reversed, with costs, and a new trial ordered.

17 L.R.A. (N.S.)

NORTH CAROLINA SUPREME COURT.

MARY B. SMITH, by Next Friend, Appt.,
v.

NORTH CAROLINA RAILROAD COMPANY.

(147 N. C. 448, 61 S. E. 286.)

Carrier — stopping train — cars on parallel tracks.

A railroad company is liable for injury to a passenger by the jerking of the train in starting, while he is standing on the platform, awaiting an opportunity to alight, after the train has stopped at his station, with cars standing and moving on parallel tracks so close to his train that any attempt to use the passageway between them is not unlikely to result in injury.

(April 22, 1908.)

APPEAL by plaintiff from a judgment of the Superior Court for Alamance Coun-

Case Note. — Stopping passenger train at point where trains are standing or moving on parallel, adjacent tracks.

The liability of a railroad company for injuries to passengers and others caused by running a train, engine, or car between a standing train and the station is treated in a case note to *Atchison, T. & S. F. R. Co. v. McElroy*, 13 L.R.A. (N.S.) 620.

But one case other than *SMITH v. NORTH CAROLINA R. Co.* has been found wherein it appeared that, at the time the passenger train was stopped for the purpose of letting off passengers, another train was standing or moving on an adjacent, parallel track on that side of the train where passengers might be expected to embark or disembark, so as to block the way. That is the case of *Louisville & N. R. Co. v. Keller*, 104 Ky. 768, 47 S. W. 1072, in which it appeared that, upon arrival of the train at plaintiff's destination, the way to the depot was blocked by a freight train standing on an adjacent track; that, while it was raining and hailing, plaintiff was assisted to the ground, and, not being able to get to the depot except by crawling under the freight train, or by going around it by walking between the two standing trains, she stood in the storm without protection, having no umbrella, until the freight train moved away, a period of time variously estimated at from two to ten minutes. It was held that, since a passenger is entitled to an open and unobstructed way between his train and the depot, especially in inclement weather, the carrier was guilty of gross negligence.

Upon the question of the liability of a railroad company for injury to an intending passenger, caused by blocking the way to the station or the train, see *Louisville & N. R. Co. v. Daugherty*, and case note therein in 15 L.R.A. (N.S.) 740.

ty in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Hoke, J.:

There was evidence on the part of plaintiff tending to show that, on or about June 7, 1906, the plaintiff and her sister were passengers on defendant's train, going from Hillsboro to Mebane, North Carolina, the last being a schedule stop of the train; that plaintiff entered the second-class car (the train being crowded in the first-class car) in company with her sister, and that she had a ticket to go to Mebane, North Carolina. The conductor on the train took up her ticket. That when the train stopped at Mebane, where she lived, and where she knew the locality, it did not stop at the place usually used for passengers to alight, but about 50 yards east thereof; that plaintiff, after the train had stopped, got up from the seat, and went with her sister to the platform of the car to alight, when she discovered that box cars were on a side track on the north side, and a train with engine attached was on the south side, of the car in which she had arrived; that the side tracks were close to the track on which was the car she was on,—one witness said about 6 feet between the rails; that no one of the train crew was there to assist her to alight, and that it was not the place to alight, as she was well acquainted with the ground; that passengers are usually received and discharged on the south side of the track where the depot is situated; that when she reached the platform the local train began to move east along by where she stood on the platform, and that she hesitated to attempt to alight there, and while she was standing there, not over half a minute, the train on which she was began to move slowly toward the station, and that she supposed it was going to pull up to the place to alight, and, instead, it increased in speed, and by jerking threw her and her sister off and injured them. At the close of the plaintiff's evidence, on motion made in apt time, a nonsuit was ordered, and plaintiff excepted and appealed.

Messrs. Long & Long for appellant.

Mr. James H. Pou, for appellee:

Plaintiff was negligent and was violating the rules of the road and the public law of the state when injured.

Lambeth v. North Carolina R. Co. 66 N. C. 494, 8 Am. Rep. 508; Burgin v. Richmond & D. R. Co. 115 N. C. 673, 20 S. E. 473; Neal v. Carolina C. R. Co. 126 N. C. 634, 49 L.R.A. 684, 36 S. E. 117; Johnson v. Atlantic & N. C. R. Co. 130 N. 17 L.R.A. (N.S.)

C. 488, 41 S. E. 794; Bessent v. Southern R. Co. 132 N. C. 934, 44 S. E. 648; Biles v. Seaboard Air Line R. Co. 139 N. C. 528, 52 S. E. 120; Revisal (1905) § 2628; Denny v. North Carolina R. Co. 132 N. C. 340, 43 S. E. 847; Shaw v. Seaboard Air Line R. Co. 143 N. C. 312, 55 S. E. 713.

Messrs. W. B. Rodman and Parker & Parker also for appellee.

Hoke, J., delivered the opinion of the court:

A common carrier is charged with the duty of carrying passengers to the point of their destination, and there affording them fair and reasonable opportunity to alight from the cars, and depart from the train yards or depot grounds in safety. In Hutchinson on Carriers, § 928, speaking of these obligations, the author says: "It is the duty of railway companies, as carriers of passengers, to provide platforms, waiting rooms, and other reasonable accommodations for such passengers at the stations upon such road at which they are in the habit of taking on and putting off passengers. Their public profession as such carriers is an invitation to the public to enter and to alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but that they are bound to make safe, for all persons who may come to such stations in order to become their passengers, or who may be put off there by them, all portions of their station grounds reasonably near to such platforms, and to which such persons may be likely to go; and, for not having provided such station accommodations and safeguards, railway companies have frequently been held liable for injuries to such persons." And in § 1117: "The passenger is entitled not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping." And, further, in § 1118: "When the conveyance has reached the destination of the passenger, the carrier must exercise the highest degree of practicable care, diligence, and skill in affording the passenger sufficient time and opportunity to alight; and, if the usual sufficient time be not given him to alight, and he is compelled to go on to the next station, or if a sudden start of the conveyance be made whilst he is in the act of alighting, and an injury is occasioned to him thereby, it will be negligence in the carrier, for the consequences of which he will be responsible." And Moore on Carriers states the same doctrine, as follows (§ 38, pp. 674, 676): "It is the duty of the servants of a carrier of passengers, especially when in charge of a rail-

road train, to stop it a reasonable time to allow passengers to board or alight with safety; and, in the absence of contributory negligence on the part of the passenger, the carrier is liable for injuries resulting from a failure to perform this duty. . . . The duty resting upon a carrier involves the obligation to deliver its passenger safely at his desired destination, and that involves the duty of observing whether he has actually alighted before the car is started again. If the conductor fails to attend to this duty and does not give the passenger time enough to get off before the car starts, it is necessarily this neglect of duty which is the primary and proximate cause of the accident, if injury be occasioned thereby to the passenger. It is not a duty due a person solely because he is in danger of being hurt, but it is a duty owed to a person whom the carrier had undertaken to deliver, and who was entitled to the delivery safely, by being allowed to alight without danger." As in other duties looking to the safety of their passengers, carriers are held to a high degree of care in respect to these obligations, and such duties are in no sense performed by stopping before they reach their usual place, nor in stopping before or at such place with cars on parallel tracks, so close together that, by the projection of the cars over the rails, passengers, in order to enter or alight from trains, are forced into a crowded passway, where the slightest motion of either train, or a rush of the passengers themselves, is not unlikely to result in painful, and at times serious, or even fatal, injuries.

An application of these principles to the facts presented gives clear indication that defendant was guilty of a negligent breach of duty in reference to plaintiff, a passenger on one of its trains, and there is no testimony to justify the ruling that, as a matter of law, plaintiff was guilty of contributory negligence. This is not a case which comes within the principle on which *Shaw v. Seaboard Air Line R. Co.* 143 N. C. 312, 55 S. E. 713, was made to rest, that a passenger who was injured, by reason of going out on a platform while the train was in motion, in violation of a rule of the company, posted in pursuance of the statute, was barred of recovery.^{*} In the case before us, the train had come to a stop, the only one it intended to make at the station, and the plaintiff having gone out on the platform, with a view of alighting, and, before she was given opportunity to do so, the train started, and, by reason of two sudden jerks, plaintiff was thrown from the train and injured. The facts bring the case more within the decision of *Darden v. Atlantic Coast Line R. Co.* 144 N. C. 1, 56 S. E. 17 L.R.A. (N.S.)

512, and must be determined on the principles of that well-considered opinion, as far as the same apply.

There was error in directing a nonsuit, and this will be certified, that a proper trial of the cause may be had.

Error.

VERMONT SUPREME COURT.

GEORGE D. GOODRICH, Exr., etc., of Cornelia D. Goodrich, Deceased,

v.

RUTLAND SAVINGS BANK.

H. ISABEL CREASER, Claimant.

(— Vt. —, 69 Atl. 651.)

Gift — savings-bank account.

1. A delivery sufficient to pass title to a savings-bank account is shown by the delivery to one having possession of the book as bailee for the owner of an order on the bank to pay the account to him, accompanying a parol gift of it, followed by a holding of the book by the donee as owner.

Same — reservation of interest — effect.

2. A valid gift of a savings-bank deposit is not prevented by a reservation by the donor of the right to the interest during life if needed.

(May 7, 1908.)

Case Note. — Delivery necessary to complete gift of a savings-bank account when the book is already in the possession of the donee.

Delivery of the pass book is usually held a sufficient delivery to validate the gift, either *inter vivos* or *causa mortis*, of a savings-bank account; but, when the pass book is already in the donee's possession for another purpose, something more than a mere verbal donation of the money represented by such book has been held essential to constitute a valid gift *causa mortis*.

Thus, in *Drew v. Hagerty*, 81 Me. 231, 3 L.R.A. 230, 10 Am. St. Rep. 255, 17 Atl. 63, where a husband gave to his wife certain money deposited to his account in a savings bank, but did not transfer the pass book, because it was already in the wife's possession, the court held that the gift of a savings-bank book from husband to wife, *causa mortis*, is not valid without delivery, although the book is already in her possession; and his saying to her "You may have it," or, "You may keep it, it is yours," is not sufficient to pass title.

And the doctrine announced in the *Drew Case* seems to have been adopted in *French v. Raymond*, 39 Vt. 623, which is fully discussed in *GOODRICH v. RUTLAND SAV. BANK*, although, in the *French Case*, it appeared that the pass book had always been in the hands of the donee, and there was no evi-

EXCEPTIONS by claimant to rulings of the Rutland County Court made during the trial of an action by the executor of Cornelia D. Goodrich, deceased, to recover a savings-bank deposit standing in her name, which resulted in a verdict in plaintiff's favor. Reversed.

The facts are stated in the opinion.

Messrs. Hunton and Stickney, for claimant:

The intention, perfected by a conveyance of the legal title, makes the gift irrevocable.

Kerrigan v. Rautigan, 43 Conn. 17; Wagoner's Estate, 174 Pa. 558, 32 L.R.A. 766, 52 Am. St. Rep. 828, 34 Atl. 114; Stephens v. Rinehart, 72 Pa. 434; Foster v. Mansfield, 3 Met. 414, 37 Am. Dec. 154; Hummel's Estate, 161 Pa. 215, 28 Atl. 1113; Candor's Appeal, 27 Pa. 119.

Reservation of interest did not invalidate the gift.

Davis v. Ney, 125 Mass. 590, 28 Am. Rep. 272; Smith v. Ossipee Valley Ten Cents Sav. Bank, 64 N. H. 228, 10 Am. St. Rep. 400, 9 Atl. 792; Green v. Tulane, 52 N. J. Eq. 172, 28 Atl. 9; Bennett v. Cook, 28 S. C. 353, 6 S. E. 28; Pope v. Burlington Sav. Bank, 56 Vt. 284, 48 Am. Rep. 781; Howard v. Windham County Sav. Bank, 40 Vt. 597.

Messrs. Butler & Moloney and Stickney, Sargent, & Skeels for plaintiff.

Watson, J., delivered the opinion of the court:

The only question is whether it was error to order a verdict for the plaintiff. It was contended by the claimant that her mother, the testatrix, gave her the money deposited in the Rutland Savings Bank, represented by deposit book No. 27,899, reserving a right to the interest thereon during her lifetime, if at any time she should need it. The evidence tended to show that the money was deposited in the bank some time in the year of 1891, and that, about the time of making the deposit, the deposit book was

given to the claimant by her mother, to take care of and keep for her; that on January 25, 1893, in the presence of the claimant's husband, the mother made out an order on the bank, directing it to pay to the claimant or bearer the amount of the deposit, and gave the order to the claimant "with the book," the mother at the same time saying "that she wanted the interest, if she needed it, that would accumulate at the bank," and that "when she got through with it the remainder should go to" the claimant; and that from that time the claimant always kept the deposit book. The evidence of what took place on the occasion last named may fairly be interpreted to mean that the testatrix then made out the order of that date, and gave it, together with the book, to the claimant, and, inferentially, that the testatrix at that precise time had the book in her possession and delivered it to the claimant. Thus construed, the case is within the well-settled law that a deposit in a savings bank may be the subject of a gift, and that the delivery of the deposit book by the donor to the donee is a sufficient consummation of the gift to vest in the latter the possession and title. Watson v. Watson, 69 Vt. 243, 39 Atl. 201; Hackett v. Moxley, 65 Vt. 71, 25 Atl. 898. It is said, however, that, when considered in connection with the evidence showing the deposit book previously in the claimant's hands to keep for her mother, the evidence tended to show that only the order was then delivered,—that the claimant already had possession of the book. Taking this version of the evidence, although there is some conflict of authority on the question, we think that, by the better view of the law, a delivery sufficient to answer all legal requirements may be found. Thus considered, the evidence tended to show that, while the claimant was holding the deposit book for her mother, the latter verbally gave the deposit to her, and, in connection therewith,

dence that the donor ever knew that there was such a book.

Delivery of the pass book has, however, been held unnecessary to validate a gift of savings-bank deposits *inter vivos*, where the book was already in the donee's possession.

Thus, in Providence Inst. for Sav. v. Taft, 14 R. I. 503, a gift of a savings-bank deposit was held valid as a gift *inter vivos* without delivery of the pass book, where the book was already in the hands of the donee for safe-keeping, and the donor, after having given the pass book to the donee, in recognition of past indebtedness, ratified the gift in various conversations with the donee prior to his death.

In Jacobs v. Jolley, 29 Ind. App. 25, 62 N. E. 1028, deceased, in her lifetime, gave to defendant a portion of her savings-bank de-

posit, delivering to her a written order on the savings bank as well as the pass book, the gift to take effect on the donor's death. Later, deceased gave the balance of the savings-bank deposit to defendant, saying to her: "You already have the bank book, and I give it all to you." It was held that a valid gift *inter vivos* was made of the whole deposit, it not being necessary for the donee to deliver the book to the donor, that it might be redelivered to the donee, for, "to make a gift of the deposit evidenced by a savings-bank book, an actual delivery of the book by the donor to the donee, at the time of making the gift, is not necessary, when the donee is already in possession of it, but the gift, if complete and unambiguous, may be effected by a simple, oral declaration."

made out and gave to her a written order, directing the bank to pay the amount of the deposit to her. Prior to that transaction the claimant held possession of the book as bailee. Afterwards, by virtue of what then took place, she held it in another capacity; that is, as owner. Here was a change of possession consequent on the verbal gift of the deposit and the manual delivery of the order, an acceptance of the gift, and a retention of possession by virtue thereof, in effect sufficient to complete a gift *inter vivos*. The mother relinquished all dominion and control over the subject of the gift, and recognized the claimant's possession thereof as in her own right. It was all the delivery the nature of the thing given was capable of without a surrender by the donee of the actual possession to her mother, in order that the latter might redeliver the same in execution of the gift,—a useless ceremony, not required by law. *Ross v. Draper*, 55 Vt. 404, 45 Am. Rep. 624; *Winter v. Winter*, 1 Best & S. 997; *Alderson v. Peel*, 64 L. T. N. S. 645; *Kilpin v. Ratley*, [1892] 1 Q. B. 582; *Tenbrook v. Brown*, 17 Ind. 410; *Wing v. Merchant*, 57 Me. 383; *Champney v. Blanchard*, 39 N. Y. 111; *Providence Inst. for Sav. v. Taft*, 14 R. I. 502; *Carradine v. Carradine*, 58 Miss. 286, 38 Am. Rep. 324; *Miller v. Neff* (Miller v. McMechen) 33 W. Va. 197, 6 L.R.A. 515, 10 S. E. 378.

Nor is the case of *French v. Raymond*, 39 Vt. 623, to which reference is made by the plaintiff, an authority to the contrary. There the alleged donor, on the death of her father and mother, went to live with her uncle, the defendant. Later she went to Massachusetts to work, and while there sent money to her uncle, to be put into the savings bank for her, and it was so deposited. The bank book was always kept by the uncle in a drawer with his papers, and always in his possession. After some years she returned to her uncle's house, and died there unmarried. The question was whether she so gave this money to the uncle, just before her decease, as to constitute a *donatio causa mortis*. It was held that evidence was entirely wanting to show one of the essentials of a gift of that character,—a delivery,—and thereon the court said: "There is not the slightest evidence tending to show that she delivered the book or anything else to the defendant, but, on the other hand, the evidence of the defendant shows that she never had the book, but that it always remained in the defendant's possession; and there is no evidence tending to show that she had any knowledge whatever of the existence of such a book." As far as the donor was concerned, the case stood the same as though, having money deposited in

a savings bank, but nothing issued to her representing it, she verbally, at her uncle's house, gave him "the money." In no sense was the gift made complete by a delivery or change of possession of the subject of the gift or anything representing it, and hence there was no surrender of dominion over it.

It is further urged that the evidence shows no intention on the part of the testator to pass the title to the deposit book absolutely and at once, but rather that it should remain under her control until her death. But a jury might reasonably understand the evidence to mean that, if the donor needed any of the interest which should accumulate at the bank, the donee was to let her have it, and that the remainder of the interest, like the principal, should belong to the donee. Indeed, the evidence tends to show that such was the intent of the donor; for, by giving the order directing the bank to pay the amount of the deposit to the donee, the latter, by presenting the order to the bank, together with the book, could at any time change the deposit to one in her own name, surrender the book, and take a new one direct to herself. Moreover, without such change, only the donee could draw the principal or interest, she being the owner and possessor of the deposit book. Article 17 of the by-laws of the bank reads: "When any person shall receive either principal or interest, the original deposit book or voucher shall be produced, that the payment may be entered thereon; but, in case of sickness or absence, the money may be paid to the written order of the depositor, accompanied by the book." And, since the donor could not produce the original deposit book, she was powerless at the bank, and whatever interest she received the donee must let her have. The reservation by the donor of the interest during her life, if she needed it, does not prevent the transaction from being a valid gift. The case of *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898, is full authority on this question. There one Abbie Hackett gave and delivered to the oratrix a note which the former held against a third person, subject to the condition that the donor should have the right to use such portion of the avails of the note as she might require during her lifetime. She, in fact, required none of them. It was held that the condition annexed to the gift did not nullify it, and that, by the donor's death, the gift was freed therefrom. See also *Blanchard v. Sheldon*, 43 Vt. 512.

The fact that some of the evidence was also subject to a different construction, or that other evidence tended to show that there was no perfected gift, did not affect the claimant's right to submit the case to the jury.

Judgment reversed, and cause remanded.

KANSAS SUPREME COURT.

HARRY T. SCOTT, Plff. in Err.,
v.

F. G. THRALL et al.

(— Kan. —, 95 Pac. 563.)

Will — execution and validity — probate.

1. In an action to contest a will, the probate thereof is prima facie evidence of the due attestation, execution, and validity of the will.

Same — erasure — explanation.

2. In such an action, the burden of proof to explain an erasure in a will is not upon

Headnotes by BENSON, J.

Case Note. — Burden of explaining erasures or alterations appearing on face of will.

But few cases have been found which discuss the effect of the probate of the will on the question as to the burden of proof or presumption with respect to erasures or alterations appearing on the face of the will; and those cases are in harmony with the decision in *SCOTT v. THRALL* on that point.

After probate.

Thus, in *Linnard's Appeal*, 93 Pa. 313, 39 Am. Rep. 753, the question arose as to when erasures and alterations in a will had been made,—whether before or after its execution,—while the court, following the earlier decisions of that court on the matter, said that the presumption was that the alterations and erasures were made at or before the time when the will was prepared for the final act; yet, the particular question of the effect of the probate of the will was also considered. On this subject, the court said: "Moreover, the probate of the will as we now find it was an adjudication of its due execution, including by necessary implication the republication of the instrument after the alteration in question was made. This established, prima facie at least, the validity of the legacy."

And in *Re Cruttenden*, 45 L. T. N. S. 465, 30 Week Rep. 57, the same conclusion was reached where the validity of erasures and interlineations in a will was raised after the lapse of considerable time following its probate. The contention was made that the presumption that was applied by the courts of England in such cases, that the interlineation was made after execution, should be applied, and the interlineation should therefore be disallowed. In denying this contention, Hall, V. C., said: "Considering that the proper court, many years ago, when the matter was capable of being inquired into and ascertained, was satisfied that the interlineation was made before the execution of the will, it is right that I should now give credit to the court as having done what it did do in a right and proper 17 L.R.A. (N.S.)

the defendant in the first instance, but is upon the plaintiff to overcome the evidence afforded by such probate, and to show its invalidity by a preponderance of all the evidence.

Same — question of fact.

3. Whether an erasure appearing upon a will duly admitted to probate was made before or after execution is a question of fact, to be determined by the court or jury trying the issue upon all the evidence, including the probate, aided by all reasonable presumptions and inferences.

Evidence — expert testimony — erasure.

4. It is not error to refuse to permit an expert in handwriting to testify, from an examination of a will and an erasure therein, that a person who wrote with a nervous hand was unable to make such an era-

manner. I must therefore consider that the interlineation was made rightly and properly."

Before probate.

As to instruments other than wills, influenced by the presumption of innocence until guilt is proved, and it being a crime to alter or change an executed paper, the courts have indulged in the presumption that all erasures or interlineations of instruments were made prior to execution. A distinction was, however, noted as to wills; and the courts at an early time, on the theory that it was not a crime for the testator to change his will, but, on the contrary, it was his right to do so at any time, so that it would correctly represent his desires as to the disposition of his property, said that the opposite presumption should obtain as to erasures and alterations in a will, and that, as to such an instrument, it would be presumed that the erasure or alteration was made subsequently to its execution (*Simmons v. Rudall*, 1 Sim. N. S. 115; *James's Goods*, 1 Swabey & T. 238); and that, in the absence of any explanatory proof, interlineations would not be admitted to probate (*Adamson's Goods*, L. R. 3 Prob. & Div. 253).

To the same effect, also, is *Moore v. Moore*, Ir. Rep. 6 Eq. 166, wherein it is said that alterations in a will, apparent upon its face and in the handwriting of the testator, cannot be presumed to have been made before execution, and will not, therefore, be admitted to probate without proof that they were, in fact, made before execution.

And in *Doe ex dem. Shallcross v. Palmer*, 15 Jur. 836, it was said that this presumption casts the burden of proof upon the party who seeks to derive an advantage from the alteration, to produce some evidence from which the jury may infer that the alteration was made prior to the execution of the will. This case cites with approval upon this point *Cooper v. Bockett*, 10 Jur. 931, wherein it was said that, where there is no evidence as to whether certain alterations or erasures appearing on the face of a will were made prior to its execution, the pre-

sure, although the witness might properly testify that the hand of the person who wrote the will was nervous and unsteady.

(April 11, 1908.)

ERROR to the District Court for Greenwood County to review a judgment in defendants' favor in an action brought to contest a will. Affirmed.

The facts are stated in the opinion.

Messrs. F. S. Jackson and W. L. Hug-gins, for plaintiff in error:

If the words erased were an interlineation, the presumption is that the erased clause was written in the will before it was executed.

sumption of law would be that they were made after its execution.

So, in *Greville v. Tylee*, 7 Moore, P. C. C. 320, the existence of obliterations, interlineations, and alterations in a will was said to cast the *onus probandi* upon the party who alleges that the alterations were made prior to execution, to prove by extrinsic evidence such fact, together with the further fact, if the alterations are not in the handwriting of the testator, that they were with his consent.

While recognizing this doctrine in *Hind-march's Goods*, L. R. 1 Prob. & Div. 307, it was said that, where the interlineations were trifling in character, the opinion of an expert that they were made at the time of the execution of the instrument was sufficient to remove the presumption. And in *Duffy's Goods*, Ir. Rep. 5 Eq. 506, as to interlineations appearing upon the face of a will, it was said that the presumption that such interlineations were made subsequently to its execution might be removed by slight evidence. So, where the attestation clause in a codicil of a will contained a declaration that certain alterations appearing upon the face of the codicil had been made before execution, it was said that the court might infer from this declaration, and from the appearance of the codicil, that alterations appearing upon the face of the codicil were made before its execution. *Doherty v. Dwyer*, Ir. L. R. 25 Eq. 297.

In *Re Cadge*, 16 Week Rep. 406, a distinction is drawn between interlineations and alterations, and interlineation to the extent, simply, of filling in words necessary to carry out the original intention will be presumed to have been made prior to the execution of the will.

The doctrine of the English courts was followed in *Van Buren v. Cockburn*, 14 Barb. 118, as to alterations in a holographic will. This case was cited and approved by the surrogate's court of New York county in *Wetmore v. Carryl*, 5 Redf. 544, as to alterations and erasures in a will, and, in *Re Carver*, 3 Misc. 567, 23 N. Y. Supp. 753, it was said that the generally recognized rule is that, where alterations appear upon the

1 Woerner, Am. Law. of Administration, p. 98; Jarman, Wills, *118; 2 Cyc. Law & Proc. p. 282.

The burden is on the defendants in error to explain the erasure, and show by whom it was done, and when.

2 Cyc. Law & Proc. p. 234; J. I. Case Threshing Mach. Co. v. Peterson, 51 Kan. 713, 33 Pac. 470; *Crossman v. Crossman*, 95 N. Y. 145; *Re Barber*, 92 Hun, 489, 37 N. Y. Supp. 235; 1 Jarman, Wills, *98; 1 Underhill, Wills, p. 252; *Van Buren v. Cockburn*, 14 Barb. 118; *Miles's Appeal*, 68 Conn. 237, 36 L.R.A. 176, 36 Atl. 39.

Messrs. W. S. Marlin and R. P. Kelly for defendants in error.

face of a testamentary disposition of the property, they are presumed to have been made after execution, rendering it necessary for those seeking to establish a will containing such apparent defects, to overcome such presumption by proof, direct or inferential.

To the same effect, also, are *Dyer v. Erving*, 2 Dem. 160, which follows *Wetmore v. Carryl*, supra and *Re Barber*, 92 Hun, 489, 37 N. Y. Supp. 235.

The doctrine of the foregoing New York cases, however, seems to be limited by the later cases passing upon the question. Thus, in *Re Dwyer*, 29 Misc. 382, 61 N. Y. Supp. 903, where words in a will had been erased by the use of chemicals, and others written in, which materially changed the will, the court said: "The rule as to an alteration or an erasure in a will is, I think, that, if it is material, and if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it was not noted at the bottom, then the presumption is that it was made after execution; but it is for the court to decide whether, under all the circumstances, it was made before or after." Continuing, the court said: "If, however, the alteration is fair upon the face of the instrument, there would seem to be no presumption that it was made after execution, although it be entirely unexplained."

Language to a similar effect was also used in *Crossman v. Crossman*, 95 N. Y. 145, wherein it was said: "Where an interlineation or erasure in a will is fair upon its face, and it is entirely unexplained, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but, if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it is not noted at the bottom, then these and all the other circumstances must be submitted as questions of

tary act of the said decedent. (2) They state that, if the fire which destroyed said barn was started by said Bindell, or if said barn was destroyed as a result of any act of said decedent, he was at the time temporarily insane and incapable of forming any wrongful or fraudulent design. They state that one of said defenses is true, but that they do not know which of them is true." The lower court sustained a demurrer to the second paragraph of this reply, and of this ruling appellants complain.

There is no clause in the policy of insurance providing that the company should not be liable if the property was destroyed by the insured. The absence, however, of such a stipulation would not render the company liable if the destruction of the property was caused by the voluntary, fraudulent, corrupt,

or wrongful act of the insured. The paragraph of the reply in question is not aptly pleaded. It would have been more in accordance with the rules of good pleading if it had stated that Bindell, if he burned the barn, did not at the time have mind enough to know the nature or quality of his act, and was laboring under such defect of reason as not to be responsible for his conduct, or that, as a result of mental unsoundness, he did not have sufficient will power to know right from wrong, or govern his actions. But, although technically defective, we are not prepared to say that the pleading was not sufficient, and will therefore treat the paragraph as if it averred in apt language the insanity of the insured at the time he burned the barn. We have not found any Kentucky case dealing with the

tion of one share, was owned by the president and one family. In a suit to recover upon a policy, the defense was set up that the president, who was also the manager of the business, had caused the fire by his direct and wilful act, with the knowledge of the owners, in order to defraud the insurer. It was held that evidence showing that the building was burned as alleged was properly admitted upon the facts of the case; and an instruction that, if the jury found the president had control, management, and power of disposition of the property the same as if he had the title, or that there was an understanding among the stockholders that he should burn the property in order that he might collect the insurance, and he wilfully burned it, they should find a verdict for the defendant, was held correct. The rule that the wilful burning of property by a stockholder of a corporation will not be a defense against the collection of the insurance, and also the holding that a corporation will not be prevented from collecting insurance because an agent wilfully sets fire to the property without participation or authority from the company,—were recognized, but held not to apply under the facts of this case; and the court said that, with the exception of *Kirkpatrick v. Allemannia F. Ins. Co.* 102 App. Div. 327, 92 N. Y. Supp. 466, Affirmed in 184 N. Y. 546, 76 N. E. 1098, no other reported case where a like question to that before them had arisen had been found; and neither had any case holding such a defense would not bar a recovery been disclosed.

The case of *Kirkpatrick v. Allemannia F. Ins. Co.*, above referred to, was one in which all of the stock, except enough to qualify a secretary, was owned by two persons. The jury found that the fire was of incendiary origin and produced with the knowledge and approval of the officers of the corporation; and the insurer was held not to be liable.

Where, however, the insured, at the time of destroying the property, is insane, the cases are unanimous in holding the insurer, in the absence of a provision excepting such 17 L.R.A. (N.S.)

a case, liable; since the party here is incapable of entertaining a fraudulent intent, or of having a conscious design to destroy the property.

Thus, in *Showalter v. Mutual F. Ins. Co.* 3 Pa. Super. Ct. 448, where the insured, while insane, burned his property, the insurer was held liable; and the court held a loss by such means to be one of the risks assumed, unless expressly excepted.

And in *Showalter v. Mutual F. Ins. Co.* 17 Pa. Co. Ct. 558, in denying a motion for a new trial of the above case, the court said: "If he was insane at the time the building was burned, and the jury has so found, then he could form no design, nor regulate his action by the power of his will. He had no will, but acted without a purpose, and was uninfluenced by any motive. He was not a free agent, and was incapable of intelligent voluntary action. An act committed by one without any design to injure, and incapable of controlling his reasoning powers, and hence unable to form a plan in advance, or comprehend its consequences, cannot be regarded as a voluntary act, or an act done for a fixed purpose." To the same effect is *Karrow v. Continental Ins. Co.* 57 Wis. 56, 46 Am. Rep. 17, 15 N. W. 27.

In *Williams v. Hays*, 143 N. Y. 453, 26 L.R.A. 153, 42 Am. St. Rep. 743, 38 N. E. 449 (for second appeal, see 157 N. Y. 541, 43 L.R.A. 253, 68 Am. St. Rep. 797, 52 N. E. 589), where the assignee of the insurer was attempting to recover for damage suffered through defendant's voluntarily allowing a vessel to go ashore, by reason of which the insurer was held liable, the defendant claimed the loss to have been caused through the insanity of the master, induced by exhaustion. The court said that it is an unquestioned rule of law that an insurance company cannot successfully defend an action upon its policy to recover for a loss by showing that the insured destroyed the property while insane, or that the destruction was caused by the carelessness of his agents or servants.

The same conclusion is reached where the

question here presented, although it has been often considered in life-insurance cases; and in such cases, where the policy exempted the company from liability if the insured should die by his own hand, it has been ruled that self-destruction did not avoid the policy when the insured who took his own life was at the time insane; in other words, to avoid the policy, the act of self-destruction must have been voluntary. *St. Louis Mut. L. Ins. Co. v. Graves*, 6 Bush, 268; *Manhattan L. Ins. Co. v. Beard*, 112 Ky. 455, 66 S. W. 35. A different rule has obtained where the policy contained a stipulation that, if the insured should take his own life while insane, or if his act be voluntary or involuntary while sane or insane. The cases construing these last-mentioned provisions may be found in *Manhattan L. Ins.*

Co. v. Beard, supra, and it is not necessary to further mention them here.

If Bindell, while insane, destroyed the insured property, the company cannot, under the conditions of this policy, escape liability for the loss upon this ground. Unless Bindell's act in destroying the property was fraudulent, voluntary, or intentional, the company is bound. It is well settled that, although the negligence or carelessness of the insured may cause or result in the destruction of his property, the company will be liable, unless the carelessness or negligence is of such a character as to amount to fraud or wilful misconduct on his part. *Ostrander Fire Ins. p. 192*; *1 Wood, Fire Ins. p. 274*. In 19 Cyc. Law & Proc. p. 831, the rule is thus stated: "In the absence of fraud or design on the part of the

property is destroyed by the insured's agent without his knowledge or consent.

Thus, in *Feibelman v. Manchester F. Assur. Co.* 108 Ala. 180, 19 So. 540, the insurer was held liable where the property was burned by the insured's agent without any participation therein by her, the policy containing no excluding clause for a loss sustained from such a cause.

And in *Henderson v. Western M. & F. Ins. Co.* 10 Rob. (La.) 164, 43 Am. Dec. 176, the insured was not prevented from recovering where his agent, who had procured insurance on property situated in the same building for himself as well as for the insured, set fire to the property, it appearing that the principal was in no way connected with such act.

The fact that the property was destroyed by the insured's wife or husband without his or her consent or knowledge does not preclude a recovery.

Thus, in *Gove v. Farmers' Mut. F. Ins. Co.* 48 N. H. 41, 2 Am. Rep. 168, 97 Am. Dec. 572, the insurer was held liable where the property was burned by insured's wife, who at the time was insane and in the husband's custody.

And in *Walker v. Phoenix Ins. Co.* 62 Mo. App. 209, where the property was burned by insured's wife, he was allowed to recover.

So, where the husband wilfully destroyed the wife's property, the insurer is liable if the wife was not a party to such burning. *Perry v. Mechanics' Mut. Ins. Co.* 11 Fed. 485; *Plinsky v. Germania F. & M. Ins. Co.* 32 Fed. 47; *Union Ins. Co. v. McCullough*, 2 Neb. (Unof.) 198, 96 N. W. 79.

In *Klopp v. Bernville Live Stock Ins. Co.* 1 Woodw. Dec. 445, the insurer of a horse which had contracted an incurable and infectious disease was held liable where the owner killed the horse in good faith and from necessity, with the advice of a veterinary surgeon.

The question whether a mortgagee can recover where the mortgagor destroys the property seems to depend upon whether the 17 L.R.A. (N.S.)

contract of insurance is considered as being between the insurer and the mortgagee, or between the insurer and the mortgagor. Where it is between the former, recovery is allowed; but, where it is treated as being between the latter, it has been held that no recovery can be had, unless the mortgagor himself could have maintained an action on the policy.

Thus, in *Hartford F. Ins. Co. v. Williams*, 11 C. C. A. 503, 27 U. S. App. 493, 63 Fed. 925, it was held that the wilful burning of mortgaged property by the mortgagor would not prevent the mortgagee from recovering, where the mortgage clause created a practically independent contract between the mortgagee and the insurer.

And in *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121, where a policy was issued in the name of a mortgagor and mortgagee, but was taken out by the mortgagee without the knowledge of the mortgagor, the loss being payable in the first instance as the mortgagee's interest might appear, it was held, where the mortgagor burned the property without the mortgagee's knowledge, that such act did not affect the mortgagee's right to recover.

But in *Hocking v. Virginia F. & M. Ins. Co.* 99 Tenn. 729, 39 L.R.A. 148, 63 Am. St. Rep. 862, 42 S. W. 451, where it was conceded that the mortgagor had no right to recover the insurance, having burned the property, it was held that the mortgagee could not recover, since he must recover on the right of the party insured, and here the policy was upon the goods of the mortgagor and taken out by him.

And in *Illinois Mut. F. Ins. Co. v. Fix*, 53 Ill. 151, 5 Am. Rep. 38, where a mortgagor assigned a policy to the mortgagee with the consent of the insurer, it was held competent, as against such assignee, to show that the assignor set the property on fire, since he took only the rights which the mortgagor had.

insured, or some stipulation in the policy, the insurer is not relieved from liability by mere negligence or carelessness of the insured or his servants, although directly causing or contributing to the loss; but, on the other hand, even in the absence of stipulations in the policy, the failure of the insured to take reasonable care to avoid loss, or the doing of wrongful acts directly calculated to bring about the loss, may be such as to defeat recovery under the policy." The text is supported by numerous authorities, including *Scottish Union & Nat. Ins. Co. v. Strain*, 24 Ky. L. Rep. 958, 70 S. W. 274, where this court said: "The law is well settled that insurance companies are responsible for losses occasioned by a risk insured against, notwithstanding such losses may be directly contributed to by the negligence or carelessness of the assured or its agent." There is no conflict in the authorities upon this proposition. It will thus be seen that to relieve the insurer from liability the destruction of the property must have been caused or brought about by the fraudulent design, voluntary act, or intentional misconduct of the insured. Accepting this doctrine as sound, it necessarily follows that, if the insured did not at the time have mind enough to know the nature or quality of his act, and was laboring under such a defect of reason as not to be responsible for his conduct, or, as a result of mental unsoundness, he did not have sufficient will power to know right from wrong or govern his actions, the destruction of the property by him would not relieve the company. Under the conditions stated, the act of the insured could not have been fraudulent because there can be no actual fraud in the absence of an intent to commit it. It could not be voluntary or intentional because he did not have sufficient mind and memory to do a voluntary or intentional act. The acts of an insane person are not voluntary or intentional in the sense that they impose responsibilities that ordinarily flow from the consequences of a voluntary or intentional act committed by a sane person; or, to put it in another way, assuming that Bindell destroyed the property, and at the time he was insane within the definition heretofore given, he was not capable of forming any judgment as to the consequences of his act, and hence the wrongful intent necessary to constitute a fraudulent purpose, a voluntary or wilful or an intentional act, was lacking. An insane person acts without design, has no will of his own, and is influenced by no motive. So an insane person can form no wrongful or fraudulent design in destroying his own property so far as the insurers are concerned, and the insurers are liable although the insured himself

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burns the property when insane. In *D'Au-tremont v. Fire Asso. of Philadelphia*, 65 Hun, 476, 20 N. Y. Supp. 344, in an action to recover on a fire-insurance policy, the insured while insane set fire to the building, and, upon this ground, the company resisted a recovery; but the court said: We are "unable to see that an insane person can form a fraudulent or wrongful design in the destruction of his own property, so as to defeat a policy of insurance thereon, any more than . . . he can form a criminal intent in the commission of crime." Mere negligence, however great the degree, is not sufficient to defeat a recovery, provided it does not reach the point of a wrongful or fraudulent purpose, or a wanton disregard of others. To the same effect is *Karow v. Continental Ins. Co.* 57 Wis. 56, 46 Am. Rep. 17, 15 N. W. 27. It has been suggested that, although an insane person is not criminally liable for his acts, and although a policy of fire insurance will not be avoided if the property is destroyed by the insured while insane, yet that insane persons are responsible to the extent of compensatory damages for any injury done by them; and hence, if Bindell damaged the insurance company by his own insane act, his estate should be required to compensate it for any loss sustained thereby. Generally speaking, a lunatic or insane person is liable for the actual damage resulting from his wrongful acts. *Cooley, Torts*, p. 99; *Williams v. Hays*, 143 N. Y. 442, 26 L.R.A. 153, 42 Am. St. Rep. 743, 38 N. E. 449. In 1 *Shearman & Redfield on Negligence*, § 121, it is said the liability of lunatics to a civil action for the damages caused by their torts rests, "not upon the usual principle of personal fault (for there may be none), but upon the broad ground that where one of two innocent persons must bear a loss, he must bear it whose act caused it." This question was fully considered by the Wisconsin court in the *Karow Case*, supra, and the conclusion reached that although, if the insured while insane had burned the house of another person, he would be liable for the value thereof, yet the fact that he burned his own house did not relieve the company from liability; and in support of this doctrine a number of cases are cited in the opinion. The reason for the distinction, which is not entirely satisfactory, is rested upon the ground that, as the company cannot escape liability upon the policy of insurance for the insane act of the insured, it would be, in effect, enabling it to do so if it could, in an independent action, require his estate to compensate it for the loss, or could set it up as defense to defeat an action brought to recover the amount of the policy. In short, the doctrine

seems to be that the company ought not to be allowed by this indirect means to defeat a recovery on the policy when it could not have succeeded solely upon the ground that the insured burned it, if, in fact, he was at the time insane. To permit the company to recover from the insured would be going through the idle ceremony or form of paying him the amount of the policy with one hand, and at the same time taking it away from him with the other. If insurance companies do not desire to be responsible in cases of this character, they should so stipulate in their policies.

For the error in sustaining the demurrer to the reply, the judgment must be reversed, with directions for a new trial not inconsistent with this opinion.

NORTH CAROLINA SUPREME COURT.

HAYNOR MANUFACTURING COMPANY

v.

E. L. DAVIS, Appt.

(147 N. C. 267, 61 S. E. 54.)

Intoxicating liquor — tax — liability of manufacturer.

1. A manufacturer of a beverage, whose agent, to make a sale, represents that it is nonalcoholic and not subject to license tax, and binds his employer to make good any sum which the purchaser is required to pay because of its alcoholic nature, must allow on the purchase price the amount paid by the purchaser as a tax because the beverage proves to be alcoholic.

Same — warranty.

2. A manufacturer of a beverage to be sold as a nonalcoholic drink impliedly warrants that it is not subject to tax as alcoholic.

Same — agent's representations.

3. A manufacturer of a beverage is responsible for the fraudulent representations of his agent, to secure a merchant to handle it, that it is not alcoholic.

(April 1, 1908.)

Note. — No other case has been found involving the question presented in *HAYNOR Mfg. Co. v. DAVIS*, as to whether a manufacturer selling an alcoholic beverage as nonalcoholic is liable to a purchaser for the payment of a license tax, which was specifically warranted by the manufacturer to be nonleviable. Following the established rule that such damages are recoverable as are the natural and direct consequence of a breach of warranty, the court here holds that payment of the tax by the purchaser is a direct result of the particular breach of warranty; and there would seem to be no doubt as to the correctness of this conclusion.

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A PPEAL by defendant from a judgment of the Superior Court for Nash County refusing to allow his counterclaim in an action for the purchase price of a beverage. Reversed.

The facts are stated in the opinion.

Messrs. Austin & Grantham, for appellant:

An agent authorized to sell is authorized to make a warranty.

Alpha Mills v. Watertown Steam Engine Co. 116 N. C. 802, 21 S. E. 917; Hunter v. Jameson, 28 N. C. (6 Ired. L.) 252; Davis v. Burnett, 49 N. C. (4 Jones, L.) 72, 67 Am. Dec. 263; Note to Rathbun v. Snow, 10 L.R.A. 355; Lane v. Dudley, 6 N. C. (2 Murph.) 119, 5 Am. Dec. 523.

The manufacturer, when selling, thereby warrants as to all latent defects, and that the article sold is merchantable and suitable for the use of purchasers.

McQuaid v. Ross, 85 Wis. 492, 22 L.R.A. 187, 39 Am. St. Rep. 864, 55 N. W. 705.

Mr. Jacob Battle, for appellee:

The agent is not intrusted with all the powers convenient for the purpose of inducing the purchaser to buy, to the extent of enabling him to make collateral contracts to that end.

Cooley v. Perrine, 41 N. J. L. 328, 32 Am. Rep. 210; 42 N. J. L. 623; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 636, 45 N. E. 856.

In case of a breach of warranty the measure of damages is the difference in value between that which is actual and that which was expressly or impliedly represented to exist.

Huyett & S. Mfg. Co. v. Gray, 126 N. C. 110, 35 S. E. 236, 129 N. C. 439, 57 L.R.A. 193, 40 S. E. 178.

Clark, Ch. J., delivered the opinion of the court:

Action begun before justice of the peace to recover value of goods sold. The defendant set up orally a counterclaim or payment, as follows, which presents the only question before us: "The defendant denied that he owed the plaintiff anything, and pleaded payment in full of all accounts, and set up as a reason, among other things, that the goods for which the account was made was in part 'Buchu Tonic,' and that at the time that he purchased it from the plaintiff the plaintiff's salesman, R. D. Guy, had represented the said 'Buchu Tonic' to the defendant as nonalcoholic and not subject to any privilege or license tax of any kind, either Federal or state, and guaranteed the defendant when he purchased the said 'Buchu Tonic' of the said salesman that, if defendant should ever be required to pay any taxes of any kind for the privilege of selling the

same in his store at South Rocky Mount, the plaintiff company would make good to the defendant any such license tax paid by him; that after having sold at retail the said 'Buchu Tonic,' relying upon the representations and warranties of the said Guy, general salesman for the said company, he had been called upon and required to pay a Federal license tax of \$37.50 because of the fact that the said 'Buchu Tonic' was a beverage and highly intoxicating, and contained about 32 per cent alcohol. The defendant contends that he is entitled to a credit in this transaction against the account of plaintiff for the \$37.50 paid as a Federal license tax, and that he, upon being required to pay such tax, returned to the plaintiff all the 'Buchu Tonic' which he had on hand, deducted the \$37.50 and sent the plaintiff a check for the excess of the account over and above the \$37.50 and demanded that he be credited with the \$37.50." On the trial in the superior court the defendant's testimony was to said purport. Mr. W. B. Allen, the pure food chemist for the state, testified that he had analyzed the "Buchu Tonic" manufactured by plaintiff on several occasions; that it usually ran about 32 per cent alcohol, and was highly intoxicating; and that license tax was collectible on beverages containing $\frac{1}{2}$ of 1 per cent alcohol or upwards. At the close of the evidence the court directed a verdict in favor of the plaintiff for \$37.50.

As this is equivalent to a nonsuit against the defendant upon his counterclaim, it is irrelevant to consider the evidence in reply introduced by the plaintiff. There was no controversy that the defendant owed plaintiff a balance of \$37.50, unless he were entitled to this counterclaim. The defendant was entitled to have his counterclaim submitted to the jury, and, if the facts were found in accordance with his testimony, it was a valid counterclaim.

1. There was the express warrant of the plaintiff company, through its agent to sell the goods. As a general rule an agent authorized to sell property, in the absence of express limitation of his powers, is authorized to bind his principal by warranty. 30 Am. & Eng. Enc. Law, 2d ed. p. 164. "An agent authorized to sell is authorized to make a warranty." Alpha Mills v. Watertown Steam Engine Co. 116 N. C. 802, 21 S. E. 917; Davis v. Burnett, 49 N. C. (4 Jones L.) 72, 67 Am. Dec. 263; Hunter v. Jameson, 28 N. C. (6 Ired. L.) 252. Even though such agent exceeds his authority, he binds his principal. Lane v. Dudley, 6 N. C. (2 Murph.) 119, 5 Am. Dec. 523.

2. There was an implied warranty arising because the manufacturer of the article knew that it was alcoholic and subject to

tax, and because, also, this was a latent quality which the defendant could not have detected by ordinary observation. Without reference to any authority in the agent to make an express warranty, the manufacturer, in selling through Guy, warranted against latent defects, that the article is merchantable, and can be lawfully sold by purchaser, if bought for resale. McQuaid v. Ross, 22 L.R.A., note at page 190 et seq.; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 800, 56 Am. St. Rep. 636, 45 N. E. 856. The plaintiff would be responsible for such damages as were the natural and direct consequence of the breach of such warranty; and what could be more direct than the license tax required by the government for the shortest period for which license is issued to sell said alcoholic beverage?

3. The plaintiff company is liable for the fraudulent representations of its salesman and agent which were made to defendant to induce the trade and acted upon by defendant to his injury. This would be so whether the agency of Guy were general or special. Huntley v. Mathias, 90 N. C. 105, 47 Am. Rep. 516; Peebles v. Patapsco Guano Co. 77 N. C. 233, 24 Am. Rep. 447; 1 Am. & Eng. Enc. Law, 2d ed. p. 1143. The president of the company testified that when the sale was reported he knew where defendant was and engaged in what business, and he must have known that a general merchant could not sell "highly intoxicating liquor, running usually 32 per cent alcohol" (for this evidence of the state chemist must be taken as true on the nonsuit); and subsequent thereto he shipped the "Buchu Tonic" to the defendant. The company, therefore, assumed full responsibility for the act of its agent; for the knowledge of the agent that the defendant bought and was induced to buy by his representations and promise that the company would pay the license tax, if liability therefor was incurred, was the knowledge of the company, and in its subsequent shipment it was fixed with such knowledge, even though it had not authorized the express warranty. Lane v. Dudley, supra.

Error.

PENNSYLVANIA SUPREME COURT.

HENRIETTA KENNEDY, Appt.,
v.

CITY OF PHILADELPHIA.

(220 Pa. 273, 69 Atl. 748.)

Sidewalk — inequality — contributory negligence.

A pedestrian is negligent, as matter of law, who, upon a clear day, with nothing

to obstruct her vision, stumbles over a place in the sidewalk where one paving stone is raised 4 inches above the adjoining one, which fact she is well acquainted with.

(March 2, 1908.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Eugene Raymond, for appellant:

The plaintiff was bound to exercise only ordinary care.

Bruch v. Philadelphia, 181 Pa. 588, 37

Atl. 818; Dougherty v. Philadelphia, 210 Pa. 591, 60 Atl. 261.

It was for the jury to determine whether the plaintiff had exercised the care required under the circumstances.

Easton v. Neff, 102 Pa. 474, 48 Am. Rep. 213; Cohen v. Philadelphia & R. R. Co. 211 Pa. 227, 60 Atl. 729; Merriman v. Phillipsburg, 158 Pa. 78, 28 Atl. 122; Callahan v. Philadelphia Traction Co. 184 Pa. 429, 39 Atl. 222; Armstrong v. Consolidated Traction Co. 216 Pa. 595, 66 Atl. 75; Bruch v. Philadelphia, supra.

Messrs. Thomas Raeburn White and J. Howard Gendell, for appellee:

It is the duty of a pedestrian walking along a sidewalk of the city to observe where he is going, and to avoid obvious defects.

Case Note. — Negligence in falling on uneven sidewalk.

This note is intended to include cases in which the unevenness is caused by raised bricks, paving blocks, planks, and the like, holes, however caused, loose boards, protruding nails, changes in level of walk caused by differences of grade, and generally all inequalities of the surface of the walk. It excludes all cases in which the nature of the defect is not stated; cases in which the defect consists in the accumulations of snow and ice, excavations of any depth, uncovered manholes, trapdoors, areas, and the like.

One traveling along a sidewalk must use ordinary care; that is, such care and prudence as the average prudent man would exercise under the like surroundings and in the like conditions. Robinson v. Wilmington, 8 Houst. (Del.) 409, 32 Atl. 347; District of Columbia v. Haller, 4 App. D. C. 405; Americus v. Johnson, 2 Ga. App. 378, 58 S. E. 518; Owen v. Chicago, 10 Ill. App. 465; Chicago v. Hickok, 16 Ill. App. 142; Wallace v. Farmington, 231 Ill. 232, 83 N. E. 180; Williamsport v. Lisk, 21 Ind. App. 414, 52 N. E. 628; Indianapolis v. Mitchell, 27 Ind. App. 589, 61 N. E. 947; Indianapolis v. Cook, 99 Ind. 10; Graham v. Oxford, 105 Iowa, 705, 75 N. W. 473; Rusch v. Dubuque, 116 Iowa, 402, 90 N. W. 80; Hill v. Glenwood, 124 Iowa, 479, 100 N. W. 522; Wiens v. Ebel, 69 Kan. 701, 77 Pac. 553; Jewell City v. Van Meter, 70 Kan. 887, 79 Pac. 149; Garnett v. Smith, 72 Kan. 664, 83 Pac. 615; Barton v. Springfield, 110 Mass. 131; Fuller v. Hyde Park, 162 Mass. 51, 37 N. E. 782; Belyea v. Port Huron, 136 Mich. 504, 99 N. W. 740; Erd v. St. Paul, 22 Minn. 443; Taylor v. Mankato, 81 Minn. 276, 83 N. W. 1084; Stern v. Bensieck, 161 Mo. 146, 61 S. W. 594; Perrette v. Kansas City, 162 Mo. 238, 62 S. W. 448; Beauvais v. St. Louis, 169 Mo. 500, 69 S. W. 1043; Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532; Bruch v. Philadelphia, 181 Pa. 588, 37 Atl. 818; Becker v. Philadelphia, 212 Pa. 379, 61 Atl. 942; Chambers v. Braddock, 34 Pa. Super. Ct. 407; Cowie v. Seattle, 22 Wash. 659, 62 Pac. 121.
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Whether one injured while using a defective sidewalk was in the exercise of ordinary care, and whether his negligence, if any, contributed to his injury, is generally a question of fact for the jury under proper instructions from the court. Mosheuvell v. District of Columbia, 191 U. S. 247, 48 L. ed. 170, 24 Sup. Ct. Rep. 57; Owen v. Chicago, supra; Streater v. Hamilton, 61 Ill. App. 509; McLeansboro v. Trammel, 109 Ill. App. 524; Jefferson v. Chapman, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33; Deland v. Cameron, 112 Mo. App. 704, 87 S. W. 597; Healy v. New York, 3 Hun, 708; Berg v. Milwaukee, 83 Wis. 599, 53 N. W. 890. The above-cited cases include only those in which it does not appear that the defect was known to the traveler; those in which the defect was known are given later in this note. This principle is also expressly or impliedly recognized in those cases given below where the question of negligence was submitted to the jury.

And it is only when all reasonable men must draw the same conclusion from the circumstances that the question of negligence is ever considered as one of law for the court. Scott v. New Orleans, 21 C. C. A. 402, 41 U. S. App. 498, 75 Fed. 373; Crites v. New Richmond, 98 Wis. 55, 73 N. W. 322.

In the following cases it was held that it was for the jury to say whether the traveler, under the circumstances, was guilty of a want of ordinary care: Scott v. New Orleans, supra, (falling on uneven walk, a portion being raised from 4 to 6 inches above the rest); Highlands v. Raine, 23 Colo. 295, 47 Pac. 283 (falling at night on slippery, sliding, uneven walk); Seward v. Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451 (falling on dark night in hole the width of walk, 10 inches wide and 10 inches deep); Rome v. Dodd, 58 Ga. 238 (falling in a hole in a bridge at night); Nokomis v. Salter, 61 Ill. App. 150 (momentarily averting head and failing to see loose board); Chicago v. McCrudden, 92 Ill. App. 257 (child fell into hole while momentarily walking backward while talking to playmates); Campbell v. Chicago, 100 Ill. App. 358 (hole caused by broken plank); Upper Alton v. Green, 112

Stackhouse v. Vendig, 166 Pa. 582, 31 Atl. 349; *Lumis v. Philadelphia Traction Co.* 181 Pa. 268, 37 Atl. 414; *Shallcross v. Philadelphia*, 187 Pa. 143, 40 Atl. 818; *Sickles v. Philadelphia*, 209 Pa. 113, 58 Atl. 128; *Easton v. Philadelphia*, 26 Pa. Super. Ct. 517.

Potter, J., delivered the opinion of the court:

In the present case the learned trial judge directed the jury to render a verdict for the defendant. The facts were not in dispute. They are, in substance, that the plaintiff, walking along the pavement on Broad street, Philadelphia, at about half past 10 o'clock in the morning of a bright sunshiny day, stumbled and fell over an obvious defect in

the sidewalk. The defect was caused by the roots of a tree growing under one block of cement, and raising it about 4 inches above the adjoining block. The plaintiff said she was going to take the car, and looked straight ahead of her, as the car was coming, and caught her toe where the cement—the ledge, as she called it—was raised about 4 inches above the level of the pavement, upon the side from which she was approaching. The plaintiff was familiar with the spot, and had often passed over it, and had noticed the break in the pavement where the roots of the tree had raised the cement. Her excuse for failing to observe the defect at the time was that the sun was shining so brightly that she did not see it. But it ap-

Ill. App. 439 (plank partly broken and bent down); *Chicago v. Harria*, 113 Ill. App. 633 (missing plank); *Aurora v. Hillman*, 90 Ill. 61 (boards loose and stringers rotten); *Wilmette v. Brachle*, 209 Ill. 621, 71 N. E. 41 (loose board flew up); *Bluffton v. McAfee* 23 Ind. App. 112, 53 N. E. 1058 (hole in walk when view obstructed); *Indianapolis v. Mitchell*, supra (14 inches difference in grade between cross streets); *Mishawaka v. Kirby*, 32 Ind. App. 233, 69 N. E. 481 (uneven temporary crossing); *Valparaiso v. Schwerdt*, 40 Ind. App. 608, 82 N. E. 923 (loose and missing bricks, and plaintiff's attention diverted); *Baxter v. Cedar Rapids*, 103 Iowa, 599, 72 N. W. 790 (stumbled at dusk, against end of plank raised an inch or two above level); *Rusch v. Dubuque*, supra (projecting spike); *Kaiser v. Hahn Bros.* 126 Iowa, 561, 102 N. W. 504 (stumbled over two planks laid on walk, while dazzled by sun); *Machacek v. Hall*, 131 Iowa, 412, 105 N. W. 690 (plank out, but defect partially concealed by dirt); *Ryan v. Foster (Iowa)* 109 N. W. 1108 (stumbled over billboard lying flat on walk; it was snowing, and wind blew in plaintiff's face); *Louisville v. Romer*, 29 Ky. L. Rep. 1301, 97 S. W. 348 (hole in walk); *Woods v. Boston*, 121 Mass. 337 (fell in hole in walk on bright day, while looking elsewhere); *Flynn v. Watertown*, 173 Mass. 108, 53 N. E. 147 (tripped over projecting end of cross walk while attention diverted); *Lamb v. Worcester*, 177 Mass. 82, 58 N. E. 474 (hinges of light bulkhead projected about $1\frac{1}{2}$ to $1\frac{11}{16}$ inches above walk); *Gallagher v. Watertown (Mass.)* 83 N. E. 1104 (hole in walk); *Finn v. Adrian*, 93 Mich. 504, 53 N. W. 614 (fell in hole in cross walk in the evening, plank being removed while undergoing repairs); *Graves v. Battle Creek*, 95 Mich. 266, 19 L.R.A. 641, 35 Am. St. Rep. 561, 54 N. W. 757 (stumbled over plank when attention distracted); *Mackie v. West Bay City*, 106 Mich. 242, 64 N. W. 25 (fell in hole caused by broken plank when defect plainly visible); *Hunter v. Durand*, 137 Mich. 53, 100 N. W. 191 (hole in walk); *Barker v. Kalamazoo*, 146 Mich. 257, 109 N. W. 427 (loose board in cross walk); *Wilston v. Flint*, 128 Mich. 156, 87 N. W. 86 17 L.R.A. (N.S.)

(fell into a hole in walk caused by boards warping, while walking rapidly in the darkness with his hands in his pockets); *Burrell v. Greenville*, 133 Mich. 235, 94 N. W. 732 (slipped on wet sidewalk into a hole, injured); *Coffey v. Carthage*, supra (plaintiff tripped in hole in side of stone walk while her attention was diverted and she was frightened); *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89 (stepped, at night, into hole caused by part of plank being missing); *Darrell v. St. Joseph*, 109 Mo. App. 168, 82 S. W. 1130 (fell off end of walk 18 inches above ground when attention diverted); *Hitt v. Kansas City*, 110 Mo. App. 713, 85 S. W. 669 (fell in hole in walk which could have been seen by the electric light had special attention been paid); *Lattimore v. Union Electric Light & Power Co.* 128 Mo. App. 37, 106 S. W. 543 (tripped on hose stretched tightly across the walk and of the same color); *Parcells v. Auburn*, 77 Hun, 137, 28 N. Y. Supp. 471 (stepped, at night, into hole in walk partly concealed by grass; knew walk had some defects, but did not know defect in question); *O'Brien v. Syracuse*, 31 App. Div. 328, 52 N. Y. Supp. 224 (stepped into hole in rotten plank at night, nearest light being some distance away and obscured); *Laverdure v. New York*, 28 App. Div. 65, 50 N. Y. Supp. 882 (stepped in hole in walk beside flagging concealed by grass); *Cummings v. New Rochelle*, 38 App. Div. 583, 56 N. Y. Supp. 701 (uneven projecting flagging on cross walk); *Gribben v. Metropolitan Street R. Co.* 84 N. Y. Supp. 196 (foot caught under rail of street railway company at cross walk); *Bartley v. New York*, 102 App. Div. 23, 92 N. Y. Supp. 82 (tripped in hole in stone walk 6 inches or more in depth, in the daytime while talking with friend); *Dickerman v. Weeks*, 108 App. Div. 257, 95 N. Y. Supp. 714 (tripped at night when no light on end of flagstone raised 6 inches); *Mayhood v. New York*, 119 App. Div. 100, 103 N. Y. Supp. 856 (foot caught in hole in flag walk); *Mullins v. Siegel-Cooper Co.* 183 N. Y. 129, 75 N. E. 1112 (foot caught at night against overlapping flagstone, 2 or 3 inches high); *Bruch v. Philadelphia*, 181 Pa. 588, 37 Atl. 818

peared that the sun was not shining in her face.

The measure of duty imposed by the law upon pedestrians on the streets was stated by the present chief justice, in *Robb v. Connellsville*, 137 Pa. 42, 20 Atl. 564, as follows: "That the reasonable care which the law exacts of all persons, in whatever they do involving risk of injury, requires travelers, even on the footways of public streets, to look where they are going, is a proposition so plain that it has not often called for formal adjudication. But it has been expressed, or manifestly implied, in enough of our own cases to constitute authority for those who need it. Thus, in *Barnes v. Sowden*, 119 Pa. 53, 12 Atl. 804, the court below instructed the jury that 'persons who

walk along the footways or cross the streets of our city are bound to use their own faculties. . . . The plaintiff was bound to use her eyes. Not that she was to keep her eyes constantly and at every moment upon the pavement, but she was bound to do what people walking along the streets ought to do as they walk the streets, in order to use them safely.' It was held that even this instruction was, under the evidence, too favorable for the plaintiff, that the obstruction was such as she was bound to see, and that her negligence was too clear to be left to the jury."

In the present case it is urged by counsel for appellant that the sunshine interfered with the plaintiff's vision. But how this could be is not apparent. The sun was not

(fell at night in hole in walk which could have been seen by close attention); *Glading v. Philadelphia*, 202 Pa. 324, 51 Atl. 886 (stepped in daytime into a hole filled with sweepings on crowded street); *Johnson v. Philadelphia*, 208 Pa. 182, 57 Atl. 363 (fell in hole in walk on dark night); *Becker v. Philadelphia*, 212 Pa. 379, 61 Atl. 942 (for jury to say whether plaintiff stepped in the hole in question, 19/18 inches, just while or immediately after emerging from crowd, in which case she may not have been negligent; or whether she fell after leaving the crowd and having an opportunity to see it by the use of ordinary care, in which case she was guilty of negligence); *Reynolds v. Philadelphia*, 221 Pa. 51, 70 Atl. 125 (small hole made by sunken water box); *Farrell v. Plymouth*, 26 Pa. Super. Ct. 183 (stepped in hole between fence and lot line, which was concealed by snow); *Brown v. Milligan*, 33 Pa. Super. Ct. 244 (plaintiff tripped in hole in front of defendant's store when leaving store and while view obstructed by a lady's dress); *Chambers v. Braddock*, 34 Pa. Super. Ct. 407 (loose board, no other convenient way); *March v. Phoenixville*, 221 Pa. 64, 70 Atl. 274 (fell at night because of hole in walk 4 to 8 inches deep); *Shenandoah v. Erdman*, 21 W. N. C. 553, 12 Atl. 814 (fell where change of level in walk of 1 foot, while running at night to catch team which had walked off because untied); *Ashley v. Aberdeen*, 46 Wash. 385, 90 Pac. 210 (fell on dark night in hole in walk around which a little lumber had been piled); *West v. Eau Claire*, 89 Wis. 31, 61 N. W. 313 (caught foot in hole in icy pavement while attention momentarily diverted); *Duncan v. Grand Rapids*, 121 Wis. 628, 99 N. W. 317 (tripped in hole in walk in daylight while engaged in conversation); *Pecor v. Oconto*, 125 Wis. 335, 104 N. W. 88 (stepped on board with no knowledge that it was weak and concealed a hole).

But in the following cases the court held that the facts were such as to show that the traveler was negligent as a matter of law: *Robb v. Connellsville*, 137 Pa. 42, 20 Atl. 564 (tripped while it was moderately light, where plank cross walk was raised 4 to 6

inches above sidewalk); *Shallcross v. Philadelphia*, 187 Pa. 143, 40 Atl. 818 (fell in daytime against paving stone raised 4 to 6 inches above level, and several loose bricks lying near); *Sickels v. Philadelphia*, 209 Pa. 113, 58 Atl. 128 (fell in daytime over ridge of wet clay 8 inches high across walk, when umbrella was up); *Lautenbacher v. Philadelphia*, 217 Pa. 318, 66 Atl. 549 (tripped in hole in walk while so carrying a couch that she could not see ahead); *Easton v. Philadelphia*, 26 Pa. Super. Ct. 517 (tripped in the daytime in hole caused by several displaced bricks).

A person traveling upon a sidewalk of a municipal corporation has a right to assume, in the absence of notice to the contrary, that it is in a safe and proper condition for public travel, and to govern himself accordingly. *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424; *Lord v. Mobile*, 113 Ala. 360, 21 So. 366; *Robinson v. Wilmington*, 8 Houst. (Del.) 409, 32 Atl. 347; *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451; *District of Columbia v. Haller*, 4 App. D. C. 405; *Chicago v. Hickok*, 16 Ill. App. 142; *Centralia v. Baker*, 36 Ill. App. 46; *Chicago v. McCrudden*, 92 Ill. App. 257; *Strehmann v. Chicago*, 93 Ill. App. 206; *Campbell v. Chicago*, 100 Ill. App. 358; *Chicago v. Gillett*, 108 Ill. App. 455; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Upper Alton v. Green*, 112 Ill. App. 439; *Chicago v. Harris*, 113 Ill. App. 633; *East Dubuque v. Burhyte*, 173 Ill. 553, 50 N. E. 1079; *Bluffton v. McAfee*, 23 Ind. App. 112, 53 N. E. 1068; *Indianapolis v. Mitchell*, 27 Ind. App. 589, 61 N. E. 947; *Valparaiso v. Schwerdt*, 40 Ind. App. 608, 82 N. E. 923; *Barnes v. Marcus*, 96 Iowa, 675, 65 N. W. 984; *Kaiser v. Hahn Bros.* 126 Iowa. 561, 102 N. W. 504; *Machacek v. Hall*, 131 Iowa 412, 105 N. W. 690; *Ryan v. Foster* (Iowa) 109 N. W. 1108; *Lamb v. Worcester*, 177 Mass. 82, 58 N. E. 474; *Campbell v. Boston*, 189 Mass. 7, 75 N. E. 96; *Finn v. Adrian*, 93 Mich. 504, 53 N. W. 614; *Roe v. Kansas*, 100 Mo. 190, 13 S. W. 404; *Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448; *Coffey v. Carthage*; *Holloway v. Kansas City*; and *Hitt v. Kansas City*,—*supra*; *Deland v.*

shining in her eyes. It was, as we understand the testimony, coming from over her shoulder, or from the side. Nor does it seem that the light was reflected in her face, as from some dazzling surface. The only conclusion that we can draw from her testimony, as a whole, is that she was not paying proper attention to the ground in front of her as she walked. It would seem that any reasonable inspection of the ground in front of her would have disclosed an irregularity so extensive as that complained of here. We agree with the court below that the evidence discloses a case where the plaintiff, a woman in full possession of her senses, walked along a street in which there had been for years an obvious defect, of which she knew. Under a clear sky, with no crowd around to disturb her, and nothing to distract her attention, or to hide the defect in the pavement from view, she stumbled over it, and was injured. We think the trial judge discharged a clear duty in ruling, as a matter of law, that, under the evidence, the plaintiff was negligent in failing to observe and avoid the defect in the pavement; and that she was not entitled to recover in this case.

The assignment of error is overruled, and the judgment is affirmed.

Cameron, 112 Mo. App. 704, 87 S. W. 597; O'Flynn v. Butte, 36 Mont. 493, 93 Pac. 643; Laverdure v. New York, and Gribben v. Metropolitan Street R. Co. supra; Ohliger v. Toledo, 20 Ohio C. C. 142; Stillwater v. Swisher, 16 Okla. 585, 85 Pac. 1110; March v. Phenixville, supra; Gallamore v. Olympia, 34 Wash. 379, 75 Pac. 978; Ashley v. Aberdeen, supra; Collins v. Janesville, 107 Wis. 436, 83 N. W. 695. *dictum*. Duncan v. Grand Rapids, 121 Wis. 626, 99 N. W. 317.

A traveler, having no notice of danger, need not keep a special lookout for defects and dangers, but may rely on the presumption that the walk is safe. Robinson v. Wilmington; District of Columbia v. Haller; Chicago v. McCrudden; McLeansboro v. Trammel; Upper Alton v. Green; Chicago v. Harris; and Valparaiso v. Schwerdt, supra; Barton v. Springfield, 110 Mass. 131; George v. Haverhill, 110 Mass. 506; Flynn v. Watertown, 173 Mass. 108, 53 N. E. 147; Hitt v. Kansas City, supra; Lattimore v. Union Electric Light & P. Co. 128 Mo. App. 37, 106 S. W. 545; Ohliger v. Toledo and Duncan v. Grand Rapids, supra.

But, if he has notice of a defect, or has reason to believe that a defect exists in the sidewalk, it is his duty to be on the lookout for it, and use reasonable care, commensurate with the known danger, to avoid an accident therefrom; Birmingham v. Starr, supra; Americus v. Johnson, 2 Ga. App. 378, 58 S. E. 518; Owen v. Chicago, 10 Ill. App. 465; Chicago v. Hickok, 16 Ill. App. 142; Noble v. Hanna, 74 Ill. App. 564; Frankfort v. Coleman, 19 Ind. App. 368, 49 N. E. 474; Huntingburgh v. First, 22 Ind. App. 66, 53 N. E. 246; Indianapolis v. Cook, 99 Ind. 10; Bedford v. Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815; Boswell v. Wakley, 149 Ind. 64, 48 N. E. 637; Emporia v. Schmidling, 33 Kan. 485, 6 Pac. 893; Wichita v. Coggeshall, 3 Kan. App. 540, 43 Pac. 842; Dittrich v. Detroit, 98 Mich. 245, 57 N. W. 125; Belyea v. Port Huron, 136 Mich. 504, 99 N. W. 740; Diamond v. Kansas City, 120 Mo. App. 185, 96 S. W. 492; Koch v. Edgewater, 14 Hun, 544; Neddo v. Ticonderoga, 77 Hun, 524, 28 N. Y. Supp. 887; Henry v. New York, 119 App. Div. 432, 104 N. Y. Supp. 440; Richardson v. Syracuse, 41 App. Div. 118, 58 N. Y. Supp. 487; Toledo v. Fuller, 27 Ohio C. C. 729; Pitt-17 L.R.A. (N.S.)

man v. El Reno, 4 Okla. 638, 46 Pac. 495; Hentz v. Somerset, 2 Pa. Super. Ct. 225; Shannon v. Tacoma, 41 Wash. 220, 83 Pac. 180; Moore v. Huntington, 31 W. Va. 842, 8 S. E. 512; Collins v. Janesville, supra.

The rule that a pedestrian on a public street has no right to assume that the walk is reasonably safe for travel, when he in fact knows that a certain place therein is defective, does not apply when he is there injured by a defect other than that known. Cassaday v. Kansas City, 119 Mo. App. 116, 95 S. W. 948; Holloway v. Kansas City, 184 Mo. 19, 29, 82 S. W. 89; Perrette v. Kansas City, 162 Mo. 238, 62 S. W. 448; Moore v. Huntington, supra.

The mere fact that a traveler voluntarily attempts to pass with knowledge of the defect is not ordinarily conclusive evidence of a want of due care. His right to recover depends upon whether he has exercised such care as the circumstances (including his knowledge of the defect) demand, and whether an ordinarily prudent person would attempt to pass under the circumstances. And ordinarily the question whether the traveler used due care in attempting to pass with knowledge of the defect is for the jury. Davis v. California Street Cable R. Co. 105 Cal. 131, 38 Pac. 647; Highlands v. Raine, 23 Colo. 295, 47 Pac. 283; Owen v. Chicago, supra; Morehouse v. Dixon, 39 Ill. App. 107; Mt. Carmel v. Blackburn, 53 Ill. App. 658; Noble v. Hanna, supra; Fulton v. Green, 103 Ill. App. 96; Flora v. Naney, 136 Ill. 45, 26 N. E. 645; Indianapolis v. Cook, 99 Ind. 10; Elkhart v. Witman, 122 Ind. 538, 23 N. E. 796; Columbus v. Strassner, 124 Ind. 482, 25 N. E. 65; Huntington v. Folk, 154 Ind. 91, 54 N. E. 759; Rice v. Des Moines, 40 Iowa, 638; McGinty v. Keokuk, 66 Iowa, 725, 24 N. W. 506; Evans v. Iowa City, 125 Iowa, 202, 100 N. W. 1112; Considine v. Dubuque, 126 Iowa, 283, 102 N. W. 102; Rea v. Sioux City, 127 Iowa, 615, 103 N. W. 949; Tuttle v. Clear Lake (Iowa) 102 N. W. 136; Idlett v. Atlanta, 123 Ga. 821, 51 S. E. 709; Garnett v. Smith, 72 Kan. 664, 83 Pac. 615; Beauvais v. St. Louis, 169 Mo. 500, 69 S. W. 1043; Diamond v. Kansas City, supra; Mayhood v. New York, 119 App. Div. 100, 103 N. Y. Supp. 856; Ohliger v. Toledo and Toledo v. Fuller, supra; Chilton v. Carbondale, 160 Pa. 463,

28 Atl. 833; *Nicholas v. Peck*, 20 R. I. 533, 40 Atl. 418; *Denison v. Sanford*, 2 Tex. Civ. App. 661, 21 S. W. 784; *Benson v. Hamilton*, 34 Wash. 201, 75 Pac. 805; *Shannon v. Tacoma*; *Moore v. Huntington*; and *Collins v. Janesville*,—*supra*; *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, 1087. This is also held, either expressly or impliedly, in those cases given below, where the question of negligence was submitted to the jury.

In the following cases it was held for the jury to say whether, under the circumstances, the traveler was justified in going ahead with knowledge of the defect, and whether he used due care under the circumstances: *Mosheuvel v. District of Columbia*, 191 U. S. 247, 48 L. ed. 170, 24 Sup. Ct. Rep. 57 (tripping over small, projecting, uncovered box when stepping from steps of residence to sidewalk); *Americus v. Johnson*, *supra* (stump in walk); *Carson v. Genesee*, 9 Idaho, 244, 108 Am. St. Rep. 127, 74 Pac. 862 (hole in walk caused by broken walk whose existence forgotten); *Springfield v. Rosenmeyer*, 52 Ill. App. 301 (failed to see warped plank projecting above walk at night); *Coffeen v. Lang*, 67 Ill. App. 359 (tripped over projecting nail and hole in rotten walk while attention diverted by care of child); *Waverly v. Henry*, 67 Ill. App. 407 (tripped over loose plank); *Chicago v. Fitzgerald*, 75 Ill. App. 174 (girl tripped in hole in plank at night); *East St. Louis v. Donahue*, 77 Ill. App. 574 (hole in walk); *Litchfield v. Anglim*, 83 Ill. App. 55 (fell in hole where plank out on dark night); *Harvard v. Wilson*, 100 Ill. App. 9 (loose board); *Dehlinger v. Chicago*, 100 Ill. App. 314 (falling into large hole while encumbered with bundles); *Lovenguth v. Bloomington*, 71 Ill. 238 (some planks out and others loose, and another safe way was convenient); *Aurora v. Dale*, 90 Ill. 46 (fell into hole while facing driving snowstorm and other roads equally unsafe); *Clayton v. Brooks*, 150 Ill. 97, 37 N. E. 574 (fell in hole in walk on dark night, but disputed whether plaintiff knew of another safe walk); *Cullom v. Justice*, 161 Ill. 372, 43 N. E. 1098 (fell in hole caused by broken board, at night); *Streator v. Chrisman*, 182 Ill. 215, 54 N. E. 997 (loose board); *Mattoon v. Faller*, 217 Ill. 273, 75 N. E. 387 (loose broken board); *Wallace v. Farmington*, 231 Ill. 232, 83 N. E. 180 (loose board); *Frankfort v. Coleman*, 19 Ind. App. 368, 49 N. E. 474 (holes in walk); *Williamsport v. Lisk*, 21 Ind. App. 414, 52 N. E. 628 (inclined plank from higher to lower grade); *Huntingburgh v. First*, 22 Ind. App. 66, 53 N. E. 246 (rotten stringer and unnailed board); *Ft. Wayne v. Breese*, 123 Ind. 581, 23 N. E. 1038 (loose board); *Poseyville v. Lewis*, 126 Ind. 80, 25 N. E. 593 (misplaced bricks and curbing gone); *Ross v. Davenport*, 66 Iowa, 548, 24 N. W. 47 (crossing defective cross walk at night); *Kendall v. Albia*, 73 Iowa, 241, 34 N. W. 833 (stepped into defect in walk when mind diverted, though another safe way); *Troxel*

v. Vinton, 77 Iowa, 90, 41 N. W. 580 (knew walk was teetery, but did not know of defect in question,—a loose board. The walk was the most convenient one); *Nichols v. Laurens*, 96 Iowa, 388, 65 N. W. 335 (depression in cross walk caused by plank being out); *Barnes v. Marcus*, 96 Iowa, 675, 65 N. W. 984 (sidewalk rotten and plank loose, and another way not convenient); *Graham v. Oxford*, 105 Iowa, 705, 75 N. W. 473 (loose plank across walk where there was a difference of grade, slipped on dark frosty night); *Sylvester v. Casey*, 110 Iowa, 256, 81 N. W. 451 (slipped on incline in walk after light snow); *Hoover v. Mapleton*, 110 Iowa, 571, 81 N. W. 776 (loose board); *Bailey v. Centerville*, 115 Iowa, 271, 88 N. W. 379 (loose board, no other convenient way); *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095 (rotten board, no other convenient way, plaintiff old and eyesight defective); *Brown v. Chillicothe*, 122 Iowa, 640, 98 N. W. 502 (hole in walk); *Houssman v. Belle Plaine*, 124 Iowa, 510, 100 N. W. 342 (stepped into hole in walk at night where brick missing, no other convenient road); *Clark v. Cedar Rapids*, 129 Iowa, 358, 105 N. W. 651 (stringers rotten, boards loose and broken); *Van Camp v. Keokuk*, 130 Iowa, 716, 107 N. W. 933 (stepped in hole in walk when attention diverted); *Cook v. Hedrick*, 135 Iowa, 23, 112 N. W. 157 (knew walk was generally defective, but did not know of particular defect which caused the injury,—a loose board); *Robertson v. Waukon (Iowa)* 115 N. W. 482 (knew walk was generally delapidated, but did not know of defect in question,—a split in a board); *Dempsey v. Rome*, 94 Ga. 420, 20 S. E. 335 (hole in cross walk observed two weeks before and forgotten); *Osage City v. Brown*, 27 Kan. 74 (stumbled on rise in walk of 4 inches on dark night when in hurry); *Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893 (loose board); *Wichita v. Coggs*, 3 Kan. App. 540, 43 Pac. 842 (hole in rotten board); *Wiens v. Ebel*, 69 Kan. 701, 77 Pac. 553 (stumbled on ditch across cinder sidewalk on dark night); *Ottawa v. Green*, 72 Kan. 214, 83 Pac. 616 (stumbled in the dark over curved plank in a cross walk); *Maysville v. Guilfoyle*, 110 Ky. 670, 62 S. W. 493 (stumbled in low place at night when going to see dying child); *Carlisle v. Secrest*, 25 Ky. L. Rep. 336, 75 S. W. 268 (stumbled on rough, uneven, slippery stone walk at night, when light was obscured); *Louisville v. Brewer*, 24 Ky. L. Rep. 1671, 72 S. W. 9 (stumbled over short post in cinder-path walk on dark night; defect was formerly known, but forgotten); *Brownsville v. Arbuckle*, 30 Ky. L. Rep. 414, 99 S. W. 239 (defective plank, which defect was formerly known, but forgotten); *Barton v. Springfield*, 110 Mass. 131 (fell in depression in earth sidewalk at night while frightened); *George v. Haverhill*, 110 Mass. 506 (fell when dark, over small piece of plank 2 inches thick by 4 inches wide, separating brick from gravel walk); *Campbell v. Boston*, 189 Mass. 7, 75

N. E. 96 (bricks gave way in depression in walk); Fuller v. Hyde Park, 162 Mass. 51, 37 N. E. 782 (stumbled over root on walk after being told that walk, which she knew had been defective, had been remedied); Dundas v. Lansing, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1011 (fell on stormy night in hole in cross walk caused by broken plank); Argus v. Sturgis, 86 Mich. 344, 48 N. W. 1085 (fell in hole in walk on dark night); Sias v. Reed City, 103 Mich. 312, 61 N. W. 502 (fell in hole in walk on dark, stormy night); Germaine v. Muskegon, 105 Mich. 213, 63 N. W. 78 (fell in hole in walk where plank out in the evening of rainy day. Defect had been noted long prior to accident, but forgotten); Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616 (boy fell in hole in walk while running with other boys); Schwingschlegl v. Monroe, 113 Mich. 683, 72 N. W. 7 (fell over loose boards at night); Urtel v. Flint, 122 Mich. 65, 80 N. W. 991 (hole caused by broken plank); Vergin v. Saginaw, 125 Mich. 499, 84 N. W. 1075 (hole concealed by snow and slush and its existence temporarily forgotten); Belyea v. Port Huron, 136 Mich. 504, 99 N. W. 740 (fell unexpectedly where section of sidewalk was removed, owing to darkness); Kopelka v. Bay City, 125 Mich. 625, 84 N. W. 1106 (small hole in walk filled with leaves and dirt, electric light, if burning, 300 feet away); Oesterreich v. Detroit, 137 Mich. 415, 100 N. W. 593 (tripped on loose board at night while carrying small child and a parcel and paying attention to walk); Erd v. St. Paul, 22 Minn. 443 (plaintiff tripped at night on unnailed board in walk over catch basin being built, other ways not being free from danger); McKenzie v. Northfield, 30 Minn. 456, 16 N. W. 264 (rotten plank broke on part of sidewalk thought safe); Maloy v. St. Paul, 54 Minn. 398, 56 N. W. 94 (tripped in hole caused by broken plank and partly filled with snow, while walking against a snowstorm at dark, and defect temporarily forgotten); Taylor v. Mankato, 81 Minn. 276, 83 N. W. 1084 (tripped at night where plank out, while looking for defect, and only alternative path was a muddy road); Graney v. St. Louis, 141 Mo. 180, 42 S. W. 941 (tripped over projecting water meter at night, though another safe way); Chilton v. St. Joseph, 143 Mo. 192, 44 S. W. 766 (tripped on loose board while walking and talking with neighbor in the evening); Perrette v. Kansas City, 162 Mo. 238, 62 S. W. 448 (stumbled against water pipe in walk in daytime); Taylor v. Springfield, 61 Mo. App. 263 (tripped in hole in decayed plank, and walk on opposite side of street in good repair); Jennings v. Kansas City, 105 Mo. App. 677, 78 S. W. 1041 (loose board); Deland v. Cameron, 112 Mo. App. 704, 87 S. W. 597 (fell in hole at night, defect temporarily forgotten); Plattsmouth v. Mitchell, 20 Neb. 228, 29 N. W. 593 (general defective condition known, but not defect in question, —a loose board); Shook v. Cohoes, 108 N. Y. 648, 15 N. E. 531 (earth thrown on

walk); Gage v. Hornellsville, 2 N. Y. S. R. 351 (hole in walk filled with snow, and its existence temporarily forgotten); Bullock v. New York, 99 N. Y. 654, 2 N. E. 1 (flag stones laid at intervals where walk torn up); Smith v. Ryan, 29 N. Y. S. R. 672, 8 N. Y. Supp. 853 (fell on broken and uneven flag stones at night); Richardson v. Syracuse, 41 App. Div. 118, 58 N. Y. Supp. 487 (tripped in hole in board walk while view partly obscured by dresses of two girls and mind diverted); Morrissey v. Smith, 67 App. Div. 189, 73 N. Y. Supp. 673 (girl carrying basket behind her brothers fell into hole whose exact location was forgotten); Toledo v. Celestia Center, 16 Ohio C. C. 308, Affirmed without report in 53 Ohio St. 659, 44 N. E. 1133 (fell while stepping across depression in brick walk 2 feet wide and 4 inches deep); Guthrie v. Finch, 13 Okla. 496, 75 Pac. 288 (fell on loose board of walk known to be defective, but not supposed to be dangerous); Altoona v. Lotz, 114 Pa. 238, 6 Am. Rep. 346, 7 Atl. 240 (fell at night into hole where plank removed, dispute whether there was another safe way); Allen v. DuBois, 181 Pa. 184, 37 Atl. 195 (knew walk was somewhat rotten, but it was doubtful whether there was manifest danger); Evans v. Brookville, 5 Pa. Super. Ct. 298 (plaintiff tripped on loose board; he knew of other defects but not the defect in question); Easton v. Neff, 102 Pa. 474, 48 Am. Rep. 213 (tripped at night on shallow gutter beside cross walk); Hampson v. Taylor, 15 R. I. 85, 8 Atl. 331, 23 Atl. 732 (part of sidewalk washed out and slippery from ice); Danville v. Robinson, 99 Va. 448, 55 L.R.A. 162, 39 So. 122 (plank gave way owing to rotten sill); McQuillan v. Seattle, 10 Wash. 464, 45 Am. St. Rep. 799, 38 Pac. 1119 (fell at night, when light was dim, in hole made by missing plank, whose existence was temporarily forgotten); Cowie v. Seattle, 22 Wash. 659, 62 Pac. 121 (tripped at night on plank incline from sidewalk to a blacksmith shop); Jordan v. Seattle, 26 Wash. 61, 66 Pac. 114 (tripped in hole caused by broken board, at night, while proceeding carefully; there was another feasible way); Gallamore v. Olympia, 34 Wash. 379, 75 Pac. 978 (denial by plaintiff of knowledge of defect sufficient to take to jury); Crites v. New Richmond, 98 Wis. 55, 73 N. W. 322 (foot caught in hole in walk while attention diverted); Cuthbert v. Appleton, 24 Wis. 383 (tripped in hole in walk on dark stormy night); Strack v. Milwaukee, 121 Wis. 91, 98 N. W. 947 (tripped in hole in walk on dark night while mind diverted).

But in the following cases the court decided that the traveler who went forward with knowledge of the defect was, under the special circumstances there disclosed, negligent as a matter of law: Davis v. California Street Cable R. Co. 105 Cal. 131, 38 Pac. 647 (falling over street-car rail left on walk on alarm of fire at night, when fire distant and street well lighted); Bloomington v. Read, 2 Ill. App. 542 (where a plank in walk bulged up 2½ to 3 inches,

and there was sufficient room to pass without striking it); *Chicago v. Richardson*, 75 Ill. App. 198 (going on a walk with steep incline when slippery); *Chicago v. France*, 124 Ill. App. 648 (sidewalk clearly very rotten and broken, and there was another convenient, safe walk); *Centralia v. Krouse*, 64 Ill. 19 (sidewalk plainly full of dangerous holes and slippery, and another safe walk was convenient); *Kewanee v. Depew*, 80 Ill. 121 (fell in hole in board walk while observing passing team); *Evansville v. Christy*, 29 Ind. App. 44, 68 N. E. 867 (loose brick when defect seen in the daytime, and the other half of walk was safe); *Indianapolis v. Cook*, 99 Ind. 10 (stumbling at night over a water box $7\frac{1}{2}$ by 6 inches, and $1\frac{1}{4}$ inches above surface of walk); *Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256 (depressions in one side of walk and rest of walk safe); *Plymouth v. Milner*, 117 Ind. 324, 20 N. E. 235 (termination of sidewalk 9 inches high, and locality well lighted); *Hartman v. Muscatine*, 70 Iowa, 511, 30 N. W. 859 (plaintiff knew that street crossing was dangerous because street was higher than walk and slope was slippery, and that there was another convenient way); *Barce v. Shenandoah*, 106 Iowa, 426, 76 N. W. 747 (stumbled owing to difference between thin and thick board with nothing to distract attention, and plaintiff had stumbled there before); *Tuttle v. Clear Lake (Iowa)* 102 N. W. 136 (with nothing to distract attention, was negligent in not stepping high enough to reach walk from depression in alley way); *Covington v. Manwaring*, 113 Ky. 592, 68 S. W. 625 (stumbled over brick in walk raised by root of tree. Defect was long known, and there were no extenuating circumstances); *Grandorf v. Detroit Citizens' Street R. Co.* 113 Mich. 496, 71 N. W. 844 (large paving blocks scattered on walk seen, and not forgotten by plaintiff); *Irion v. Saginaw*, 120 Mich. 295, 75 N. W. 572 (cross walk from sidewalk to curb was sloping, its planks loose and stringers rotten; its defects were seen and in mind, known to be dangerous and there was another safe way); *Hodge v. St. Louis*, 146 Mich. 173, 109 N. W. 252 (tripped on loose board which flew up when another stepped on it; defect was long known, and attention not diverted); *Diamond v. Kansas City*, 120 Mo. App. 185, 96 S. W. 492 (plaintiff walked in his usual manner, without using hand rail or feeling his way, though the night was very dark and he knew of several planks being out); *Neddo v. Ticonderoga*, 77 Hun, 524, 28 N. Y. Supp. 887 (slipped in the daytime on wet clay where section of walk removed, while walking without special care); *Pittman v. El Reno*, 4 Okla. 638, 46 Pac. 495 (old man, after dark and without lantern, fell because of offset in the sidewalk of 10 inches); *Hentz v. Somerset*, 2 Pa. Super. Ct. 225 (fell because of hole in well-lighted cross walk, which could have been easily avoided); *Murphy v. Girardville*, 16 Pa. Co. Ct. 153 (plaintiff tripped where there was a rise in sidewalk of 7 inches; 17 L.R.A. (N.S.)

sidewalk was generally defective and there was another safe way); *Lynch v. Erie*, 151 Pa. 380, 25 Atl. 43 (freedom from contributory negligence is not shown when plaintiff's testimony shows that he knew of the defect,—a hole where some bricks were out, and that there was another safe, convenient way); *Nicholas v. Peck*, 20 R. I. 533, 40 Atl. 418 (fell on raised stones in walk on clear day with nothing to distract attention, and when defect could easily have been avoided); *Richmond v. Courtney*, 32 Gratt. 792 (stumbled at night on loose brick while in a hurry to have prescription filled); *Devine v. Fond du Lac*, 113 Wis. 61, 88 N. W. 913 (fell on clear day on rough stone walk when a safe board walk was provided).

A pedestrian who has no duty to perform in regard to the repair of a sidewalk, is not, as a matter of law, charged with notice of its present defective condition, because he had knowledge, a considerable time before, that it was then defective. *Bluffton v. McAfee*, 23 Ind. App. 112, 53 N. E. 1058; *Valparaiso v. Schwerdt*, 40 Ind. App. 608, 82 N. E. 923; *Finn v. Adrian*, 93 Mich. 504, 53 N. W. 614; *Hunter v. Durand*, 137 Mich. 53, 100 N. W. 191; *Deland v. Cameron*, 112 Mo. App. 704, 87 S. W. 597; *Chilton v. Carbondale*, 160 Pa. 463, 28 Atl. 833.

Travelers passing along a sidewalk are required to use only ordinary care, unless they know of dangerous defects. *Lord v. Mobile*, 113 Ala. 360, 21 So. 366; *Owen v. Chicago*, 10 Ill. App. 465; *Barnes v. Marcus*, 96 Iowa, 675, 65 N. W. 984; *Owen v. Ft. Dodge*, 98 Iowa, 281, 67 N. W. 281; *Fuller v. Hyde Park*, 162 Mass. 51, 37 N. E. 782; *Deland v. Cameron*, 112 Mo. App. 704, 87 S. W. 597; *Sickels v. Philadelphia*, 209 Pa. 113, 58 Atl. 128; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *Berg v. Milwaukee*, 83 Wis. 603, 53 N. W. 890.

In discussing the degree of care one using a sidewalk with knowledge that it is defective should use, the court, in *Americus v. Johnson*, 2 Ga. App. 378, 58 S. E. 518, said: "The degree of care is the same whether the traveler has knowledge of the defect or not; ordinary care and diligence is the requirement in either situation. To constitute ordinary care in the case where knowledge exists may require the exercise of more caution, of more forethought, of more circumspection, or the employment of more acts of prudence, than in the case where the knowledge does not exist; but the degree of care is always the same. The court should leave to the jury, untrammelled by any intimations further than a statement of the general legal rules applicable, the whole question of what acts the plaintiff should have done, or should have refrained from doing, under the particular situation."

The mere fact that a traveler might have taken a better and safer sidewalk than the one he did take, even though he knows of the defect, does not necessarily charge him with contributory negligence as a matter of law; but it is for the jury to say, whether, considering the apparent danger, the feasibility of the alternate route, and all

other facts and circumstances, it was negligence for him to go forward. *Lovenguth v. Bloomington*, 71 Ill. 238; *Aurora v. Dale*, 90 Ill. 46; *Aurora v. Hillman*, 90 Ill. 61; *Bloomington v. Chamberlain*, 104 Ill. 268; *Clayton v. Brooks*, 150 Ill. 97, 37 N. E. 574; *Mattoon v. Faller*, 217 Ill. 273, 75 N. E. 387; *Hartman v. Muscatine*, 70 Iowa, 511, 30 N. W. 859; *Kendall v. Albina*, 73 Iowa, 241, 34 N. W. 833; *Nichols v. Laurens*, 96 Iowa, 388, 65 N. W. 335; *Graham v. Oxford*, 105 Iowa, 705, 75 N. W. 473; *Evans v. Iowa City*, 125 Iowa, 202, 100 N. W. 1112; *Considine v. Dubuque*, 126 Iowa, 283, 102 N. W. 102; *Wichita v. Coggeshall*, 3 Kan. App. 540, 548, 43 Pac. 842; *Ottawa v. Green*, 72 Kan. 214, 83 Pac. 616; *Covington v. Lee*, 28 Ky. L. Rep. 492, 2 L.R.A. (N.S.) 481, 89 S. W. 493; *Graney v. St. Louis*, 141 Mo. 180, 42 S. W. 941; *March v. Phoenixville*, 221 Pa. 64, 70 Atl. 274; *Jordan v. Seattle*, 226 Wash. 61, 66 Pac. 114; *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743.

But, if the defect is known, and the dangers reasonably to be apprehended therefrom are or ought to be appreciated, the traveler is negligent, if, knowing of an alternate, safe, convenient way, he does not take it. *Centralia v. Krouse*, 64 Ill. 19; *Chicago v. France*, 124 Ill. App. 648; *Parkhill v. Brighton*, 61 Iowa, 103, 15 N. W. 853; *McGinty v. Keokuk*, 36 Iowa, 725, 24 N. W. 506; *Hartman v. Muscatine*; *Barnes v. Marcus*; *Nichols v. Laurens*; and *Evans v. Iowa City*,—*supra*; *Jennings v. Kansas City*, 105 Mo. App. 677, 78 S. W. 1041; *Neal v. Marion*, 126 N. C. 412, 35 S. E. 812; *Neal v. Marion*, 129 N. C. 345, 40 S. E. 116; *Murphy v. Girardville* and *March v. Phoenixville*, *supra*; *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114.

And, where these facts are not disputed, the court may so decide as a matter of law. *Centralia v. Krouse*; *Chicago v. France*; and *Hartman v. Muscatine*,—*supra*.

But, if they are in dispute, the question should be left to the jury under proper instructions. *Parkhill v. Brighton*; *McGinty v. Keokuk*; *Barnes v. Marcus*; and *Nichols v. Laurens*,—*supra*; *Erd v. St. Paul*, 22 Minn. 443; *Altoona v. Lotz*, 114 Pa. 238, 60 Am. Rep. 346, 7 Atl. 240; *Jordan v. Seattle*, *supra*.

Nor is a pedestrian necessarily bound to walk on the road because the sidewalk is defective. *Toledo v. Fuller*, 27 Ohio C. C. 729; *Altoona v. Lotz*, *supra*.

The fact that a traveler does not take an alternative safe way is no evidence of contributory negligence on his part, when he does not know that the way he is taking is unsafe. *San Antonio v. Wildenstein* (Tex. Civ. App.) 109 S. W. 231.

The fact that a defect was visible, and could have been seen by the person injured, does not necessarily preclude a recovery for an injury. *Streator v. Hamilton*, 61 Ill. App. 509; *Valparaiso v. Schwerdt*, and *Owen v. Ft. Dodge*, *supra*; *Lamb v. Worcester*, 177 Mass. 82, 58 N. E. 474; *Lattimore v. Union Electric Light & P. Co.* 128 Mo. App. 37, 106 S. W. 543.
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Especially when a person's attention is diverted by some sufficient cause. *Valparaiso v. Schwerdt*, *supra*; *Van Camp v. Keokuk*, 130 Iowa, 716, 107 N. W. 933; *Flynn v. Watertown*, 173 Mass. 108, 53 N. E. 147; *Graves v. Battle Creek*, 95 Mich. 266, 19 L.R.A. 641, 35 Am. St. Rep. 561, 54 N. W. 757.

If a person knew of a dangerous defect in a sidewalk, and was injured thereby, it is presumed, in the absence of evidence to the contrary, that he remembered it and was negligent. *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, 1087; *Devine v. Fond du Lac*, 113 Wis. 61, 88 N. W. 913.

But forgetfulness of the defect, especially when the attention is diverted, or from other good cause, may be considered by the jury as tending to rebut any such presumption as to contributory negligence. *Cuthbert v. Appleton*, 24 Wis. 383; *Crites v. New Richmond*, 98 Wis. 55, 73 N. W. 322; *Collins v. Janesville*, *supra*; *Strack v. Milwaukee*, 121 Wis. 91, 98 N. W. 947.

It was held in *Robb v. Connellsville*, 137 Pa. 42, 20 Atl. 564, that "the reasonable care which the law exacts of all persons in whatever they do involving risk of injury requires travelers, even on the footways of public streets, to look where they are going." This is followed in *Butcher v. Philadelphia*, 202 Pa. 1, 51 Atl. 330.

It was held in *Barnes v. Marcus*, *supra*, that, when two persons are casually walking together on a sidewalk, and one negligently steps on a loose plank, causing his companion to fall, his negligence will not be imputed to his companion, so as to prevent him from recovering from the municipality which was negligent in suffering the walk to be out of repair.

It was held in *Williams v. Hannibal*, 94 Mo. App. 549, 68 S. W. 380, that, when plaintiff was traveling over a defective sidewalk, as he was in the habit of doing daily, and without suspecting danger, his foot was caught by a plank made to fly up without his agency, there was no question of contributory negligence to be submitted to the jury.

It was held in *Burrell v. Greenville*, 133 Mich. 235, 94 N. W. 732, that, where a pedestrian steps near a hole in a sidewalk, and, solely on account of its wet condition, her foot slips into the hole and she is injured, there is no contributory negligence; and that the proximate cause of the injury is the negligence of the municipality in suffering the hole to exist, not the slipping.

Sidewalks are made for the use of the sick, the lame, the halt, and the blind, as well as for persons of sound physique; and it is not negligence, as a matter of law, for such to make use of them. *Mt. Vernon v. Brooks*, 39 Ill. App. 426 (crippled); *Fulton v. Green*, 103 Ill. App. 96 (poor health); *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095 (old, and defective sight); *Smart v. Kansas City*, 91 Mo. App. 586 (lame); *Smalley v. Appleton*, 75 Wis. 18, 43 N. W. 826 (constitutional tendency to disease).

And they are guilty of contributory neg-

ligence only when they fail to use ordinary care. *Yeager v. Spirit Lake*, supra.

But ordinary care requires precautions commensurate with the increased danger. *Mt. Vernon v. Brooks*; *Yeager v. Spirit Lake*; and *Smart v. Kansas City*,—supra; *Smith v. Cairo*, 48 Ill. App. 166 (same and defective sight).

For care required of one of defective sight in using street, see note to *Keith v. Worcester & B. Valley Street R. Co.* 14 L.R.A. (N.S.) 648.

A child using a sidewalk is not deemed negligent if he uses that degree of care which, under like circumstances, would be exercised by ordinarily prudent and careful children of his age. *District of Columbia v. Boswell*, 6 App. D. C. 402; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616; *Stern v. Bensieck*, 161 Mo. 146, 61 S. W. 594; *Reed v. Madison*, 83 Wis. 171, 17 L.R.A. 733, 53 N. W. 547; *Collins v. Janesville*, 107 Wis. 436, 83 N. W. 695.

It was held in *Reed v. Madison*, supra, that the rolling of a hoop in play by a child while traveling along a sidewalk was not negligence *per se*; but that the jury might consider that fact on the question as to whether it contributed to the injury. The principle of the above case was approved in *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, 1087.

For drunkenness as affecting contributory negligence in one using street, see notes to *Covington v. Lee*, 2 L.R.A. (N.S.) 481, and *Kingston v. Ft. Wayne & E. R. Co.* 40 L.R.A. 131, and cases there cited; also *Sylvester v. Casey*, 110 Iowa, 256, 81 N. W. 455, which holds that drunkenness is not negligence *per se*, nor unless it contributes to the accident or injury.

See note to *Bull v. Spokane*, 13 L.R.A. (N.S.) 1105, for cases where the unevenness consists of accumulations of rough or uneven ice or snow on street not otherwise defective.

KANSAS SUPREME COURT.

F. H. HOLT, Plff. in Err.,

v.

A. T. LUCAS, Sheriff, et al.

(— Kan. —, 96 Pac. 30.)

Chattel mortgage — domestic animals — increase.

1. A chattel mortgage on domestic animals, which, in terms, covers the increase thereof, and which is executed during the period of gestation, and is duly filed for record, creates a lien upon the increase when the same are born, which will continue so long as the mortgage lasts, not only as between the mortgagor and mortgagee, but as against creditors and bona fide purchasers of the mortgagee.

Headnotes by PORTER, J.
17 L.R.A. (N.S.)

Same — potential existence — creditor's rights — proof.

2. In an action between the holder of such a chattel mortgage and a creditor of the mortgagor, involving the right to the possession of the increase, the burden is upon the mortgagee to establish that such increase was conceived before the mortgage was given, and was therefore in actual or potential existence.

Same — attachment.

3. An attaching creditor may acquire greater and better rights to mortgaged personal property belonging to his debtor than the debtor himself could claim at the time the attachment is levied.

(April 11, 1908.)

Case Note. — *Necessity that increase of animals be in gestation at time of the execution of chattel mortgage, in order to be covered thereby.*

The question whether, as a matter of construction, a chattel mortgage on animals will cover the increase thereof when not expressly mentioned, is covered in a case note to *Demers v. Graham*, 14 L.R.A. (N.S.) 431. That note, however, did not consider the question whether it is essential, in order that the mortgage cover the increase, that the same shall have been in gestation at the time the mortgage was executed, since that question is not one of construction, and is common alike to mortgages which expressly mention the increase as well as those that do not. As a matter of fact, few of the cases cited in that note refer to the question of gestation or even show the facts with reference thereto.

The following cases hold that a mortgage which expressly mentions the increase of domestic animals covers the increase thereof, although it does not appear as a fact whether in gestation at the time the mortgage was executed; and the courts do not discuss the necessity thereof: *Sprenger v. Graveley*, 34 Can. L. J. 135; *Hopkins Fine Stock Co. v. Reid*, 106 Iowa, 78, 75 N. W. 656; *Packwood v. William Atkinson & F. Co.* 79 Miss. 646, 31 So. 337; *Cox v. Beck*, 83 Fed. 289; *First Nat. Bank v. Western Mortg. & Invest. Co.* 86 Tex. 636, 26 S. W. 488, Affirming 6 Tex. Civ. App. 59, 24 S. W. 691.

In *Battle Creek Valley Bank v. First Nat. Bank*, 62 Neb. 825, 56 L.R.A. 124, 88 N. W. 145, it was held that, as a chattel mortgage of animals did not transfer title to the mortgagee, it would not cover increase not in gestation at the date of the mortgage, although expressly mentioned therein. The court said: "Things which have neither an actual nor potential existence are not the subject of sale or mortgage. . . . A grant of them can not operate *in presenti*. An instrument which assumes to convey or encumber a thing which has not even a potential existence must be regarded as a mere executory contract. . . . The offspring of domestic animals it is true, be-

ERROR to the District Court for Shawnee County to review a judgment in defendants' favor in an action brought to recover possession of the increase of certain domestic animals. Reversed.

The facts are stated in the opinion.

Messrs. W. H. Holmes and J. B. Larimer for plaintiff in error.

Mr. L. H. Greenwood, for defendants in error:

An attaching creditor of personal property takes a greater interest in the property than the debtor had.

Smith-Frazer Boot & Shoe Co. v. Ware, 47 Kan. 483, 28 Pac. 159; Jewell v. Simpson, 38 Kan. 362, 16 Pac. 450; Standard Implement Co. v. Parlin & O. Co. 51 Kan. 566, 33 Pac. 363; Kan. Gen. Stat. § 3246; Swiggett v. Dodson, 38 Kan. 702, 17 Pac. 594; Jones, Chatt. Mortg. § 318.

Porter, J., delivered the opinion of the court:

Plaintiff brought an action in replevin to recover 10 hogs, valued at \$150, and 11 calves, valued at \$55. His right to the possession of the property rests upon a chattel mortgage, given by Louis H. Wiggin, dated April 5, 1904. The defendant F. P. Dickson claims the property by virtue of an attach-

ment, levied thereon by the sheriff of Shawnee county subsequent to the date of plaintiff's mortgage. The controversy is over the increase of the stock described in the mortgage. The mortgage includes 7 brood sows, 9 cows and heifers, and all the increase thereof. The defendants claim that plaintiff allowed the calves and pigs in controversy to remain in the possession of the mortgagor after the expiration of the natural weaning period, and after they had ceased to follow their mothers, and that for this reason, as against an attaching creditor, the increase was no longer subject to the mortgage lien. The jury found for defendants, and found the value of the property to be \$180. They answered special questions, finding that the note secured by the mortgage was due and unpaid; that the property in controversy is the increase of the stock mentioned in the mortgage; that the 10 hogs were not littered at the time the mortgage was given, and were twenty months old when the action was begun; that the calves were born in the spring of 1905, and were from eight to eleven months old when the action was commenced. There is also a finding that the property in controversy was in the possession of the mortgagor at the time of the attachment, and that plaintiff had

long to the owner of the dam. . . . But a chattel mortgage in this state does not transfer title to the mortgagee . . . it only creates a lien, and consequently the young of mortgaged animals, when brought forth, belong to the mortgagor. The case of a mortgage given during gestation may, perhaps, constitute an exception to the rule, but this we do not decide."

And in Thorpe Bros. v. Cowles, 55 Iowa, 408, 7 N. W. 667, the court, in speaking of an instruction by the trial court in substance stating that the increase of chattel mortgaged live stock would not be covered by the mortgage unless conceived by their dams prior to the date of the mortgage, or unless, after the mortgage, the dams and their increase were in the open possession of the mortgagee, said: "As no exception was taken or objection is made by either party to this instruction, it must be regarded as presenting the law of the case." See the criticism of this case in Ellis v. Reaves, *infra*.

And in Shoobert v. DeMotta, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487, in holding that lambs not in gestation at the date of a mortgage, which apparently did not mention the increase of the encumbered sheep, were not covered by the lien thereof, the court expressly refrained from deciding whether the increase would have been covered by the mortgage lien if in gestation at the date thereof.

But, upon the ground that the mortgagee of chattels is vested with the title thereof, 17 L.R.A. (N.S.)

it has been held that the lien of the mortgage will cover the increase of domestic animals, although the mortgage is silent on the subject, and the increase was not in gestation at the date of execution thereof. Ellis v. Reaves, 94 Tenn. 210, 28 S. W. 1089. The court, after citing the cases which discuss the question whether the increase was covered by a mortgage, said that none of the cases make any distinction between the case in which the animal was bred before the execution of the mortgage and that in which it was bred subsequently; in most of them, while in fact the increase was in gestation at the date of the mortgage, the court did not attach any importance to that circumstance, but, on the contrary, based the decision upon the legal proposition that the title of the offspring follows the title of the dam or mother,—*partus sequitur ventrem*. The court criticizes Thorpe Bros. v. Cowles, *supra*, and said it stands alone, and seems to be without sound reason to support it; and, as the correctness of the instruction before the court was unquestioned by either party, whether it would have been regarded as a correct exposition of the law if challenged does not appear.

And, without question, it was held, in Nicholson v. Temple, 20 N. B. 248, that a colt, not in gestation at the date of execution of a bill of sale intended as a mortgage, which did not expressly cover the increase of the dam, was subject to the lien thereof.

And as to the title to the increase of chattel mortgaged animals, see note to Maize v. Bowman, 17 L.R.A. 82.

never taken possession of the same under his mortgage. Another finding is that all of the increase had passed the nurture period and were separated from their mothers. The plaintiff filed a motion for judgment on the special findings, notwithstanding the general verdict. This was overruled, and judgment rendered in favor of the defendants, which the plaintiff seeks by this proceeding to reverse.

The principal question involved is whether the increase is subject to the lien of the mortgage, notwithstanding the fact that the nurture period had passed, and they had ceased to follow their mothers, and were separated therefrom. In *Corbin v. Kincaid*, 33 Kan. 649, 7 Pac. 145, it was held that a mortgage on domestic animals, which, in terms, covers the increase, is valid as to the increase. The question of the duration of the mortgage lien was not involved. A chattel mortgage given upon a crop after the seed sown has sprouted covers the grain, because the latter is an accession to what was already in existence when the mortgage was given; and, by an analogy to this doctrine, the increase of domestic animals, conceived, but unborn, at the time the mortgage is given, may be included therein. This rule is recognized in 6 Cyc. Law & Proc. p. 1049, with the following modification: "But, as against a purchaser without actual or constructive knowledge of the mortgage, the lien does not continue after a suitable period of nurture has elapsed." To the same effect is *Jones on Chattel Mortgages*, § 149. The authorities cited in support of the foregoing texts, so far as we have examined them, are cases in which the increase was not mentioned in the mortgage. The authorities quite generally sanction the rule that a mortgage on domestic animals covers the increase, even though it is silent with reference thereto, and there may be reasonable grounds for holding that, where the mortgage is silent with reference to increase, and is given during the period of gestation, the lien should cover the increase only during the nurture period; but it is not necessary to decide that in this case. Some of the cases which restrict the lien to the nurture period are *Forman v. Proctor*, 9 B. Mon. 124; *Thorpe Bros. v. Cowles*, 55 Iowa, 408, 7 N. W. 677; *Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151, 8 N. W. 699; *Winter v. Landphere*, 42 Iowa, 471; *Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305; *Rogers v. Highland*, 69 Iowa, 504, 58 Am. Rep. 230, 29 N. W. 429; *Rogers v. Gage*, 59 Mo. App. 107. In *Darling v. Wilson*, supra, the court said: "There being nothing in the mortgage showing an intention to create a lien upon the increase of stock mortgaged, the lien, existing only as an inci-

dent to the mortgage, would, as between the parties, continue so long only as is necessary for the suitable nurture of the increase. This view is supported upon sound principles." In *Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576, 24 N. W. 419, the view taken in *Darling v. Wilson* is criticized, and the court used this language: "There would seem to be no valid reason for terminating the lien as against the mortgagor, merely because the period of 'suitable nurture' had passed. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor." The increase was not mentioned in the mortgage, and the court, while holding the mortgage a valid lien thereon as between the parties, declared that it would not be valid as against bona fide purchasers without notice. In the present case the mortgage in terms describes the increase, and, in our opinion, must be held a valid lien upon such increase as had an actual or potential existence when the mortgage was executed, and binding not only as to the parties themselves, but as to third parties. There appears to be no reason why the lien should be restricted to the period during which the young are following their mothers. The mortgage itself, by the mention of the increase, gives to subsequent purchasers and creditors sufficient notice to place them upon inquiry as to what animals the increase consists of. Cases of hardship frequently arise where live stock covered by a chattel mortgage have altered their appearance by growth, or have been removed to another county, and all the notice which a bona fide purchaser may have that a mortgage is in existence affecting them is constructive notice.

The plaintiff argues that the mortgage, being good as between the parties, is valid as against an attaching creditor, for the reason, as he contends, that an attaching creditor is not an innocent purchaser, and takes no better title than the attachment debtor had at the time of the levy. The contention is opposed to the prior decisions of this court. For instance, a chattel mortgage unrecorded is good between the parties, but absolutely void as against an attaching creditor of the mortgagor, where, at the time of the levy, the mortgagee is not in the actual possession of the property. *Standard Implement Co. v. Parlin & O. Co.* 51 Kan. 566, 33 Pac. 363, and cases cited. The language of our statute is, in substance, that an unrecorded chattel mortgage, not accompanied by immediate delivery and followed by actual and continued change of possession, will be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagors in good faith.

There is another principle of law which is not argued in the briefs, but which, in our opinion, has a vital bearing upon this case. The common-law doctrine that a chattel mortgage can only operate on property having an actual and potential existence at the time the mortgage is executed has often been recognized, in previous decisions, as the law in this state. Unless the property can be said to be in existence, there is nothing for the mortgage to operate upon, and it is void. *Long v. Hines*, 40 Kan. 216, 10 Am. St. Rep. 189, 16 Pac. 339, and 40 Kan. 220, 10 Am. St. Rep. 192, 19 Pac. 796. So far as third persons are concerned, it can never be treated as a chattel mortgage. *Cameron v. Marvin*, 26 Kan. 612; *T. B. Townsend Brick & Contracting Co. v. Allen*, 62 Kan. 311, 52 L.R.A. 323, 84 Am. St. Rep. 388, 62 Pac. 1008; *First Nat. Bank v. McIntosh & P. Live Stock & Commission Co.* 72 Kan. 603, 84 Pac. 535. Between the parties the mortgage may be valid, and if, after it comes into existence, the mortgagee take possession, he may hold the property against the mortgagor, or against third persons, as a pledge for the security of his debt. *Cameron v. Marvin*, supra. The application of this rule to the case at bar demonstrates that, as to the calves, which, from the findings of the jury, it appears could not have been in actual or potential existence at the time the mortgage was executed, the judgment is not erroneous. The finding is that the calves were from eight to eleven months old at the time the action was commenced, December 30, 1905. The oldest calves must have been dropped about the first of February, 1905. The date of the mortgage is April 5, 1904. The period of gestation in cows is about nine and one-half months. This leaves a margin of about ten days which, it is true, is slight; but the burden rested upon the mortgagee to establish the fact that the increase was in actual or potential existence when the mortgage was executed. *Thorpe Bros. v. Cowles*, supra. The hogs were found to be twenty months old December 30, 1905. They were conceived, therefore, about December 30, 1903, several months prior to the date of the mortgage, and, being in potential existence, like a crop of grain, the seed of which has sprouted, were properly the subject of a mortgage lien. The jury found the aggregate value of the hogs and calves to be \$180. The value of the calves, apart from that of the hogs, was not found, nor does the aggregate value of both, as found by the jury, correspond with the values alleged in the pleadings and affidavit.

The judgment will therefore be reversed, and the cause remanded, in order that the 17 L.R.A. (N.S.)

aggregate value of each may be ascertained, and the plaintiff will then be entitled to recover the value of the hogs, and the defendant the value of the calves.

Petition for rehearing denied May 15, 1908.

MINNESOTA SUPREME COURT.

ALBERT PRIEBE, Appt.,
v.

A. H. AMES et al., Respts.

(104 Minn. 419, 116 N. W. 829.)

Waters — damages — limitation — mill-dam act.

Section 2369, Gen. Stat. 1894, providing that no action for damages occasioned by a milldam shall be sustained unless brought within two years, construed, and held, that no action for damages for overflowing lands by the erection and maintenance of a milldam, which is a permanent structure, can be maintained unless it is brought within two years next after damages are first sustained by reason of the dam.

(June 12, 1908.)

Headnote by START, Ch. J.

Case Note. — Application of statute of limitations to actions for injuries caused by milldam.

In accordance with the holding of *PRIEBE v. AMES*, and the other Minnesota cases therein cited, so far, at least, as is indicated by the cases concerning injuries by milldams, it seems to be the general rule that, in case the dam is a permanent one, the statute of limitations begins to run against the right of action to recover damages for injuries from the time the dam is built, or the damages first sustained; and the one damage cannot rely upon the theory that every continuance of a nuisance is a fresh nuisance.

Thus, in *Hardesty v. Ball* (Kan.) 22 Pac. 1095, under a statute similar to the one in *PRIEBE v. AMES*, it was held that an action for damages arising from the building of a permanent and lasting dam, brought more than two years after its erection, was barred. On rehearing this case came again before the supreme court, in 43 Kan. 151, 23 Pac. 937, where it was held that an action for damages from the continuance of an obstruction created by a milldam by backing water against the mill of an upper proprietor, although brought more than two years after the erection of the dam, was not barred by the statute, the obstruction being treated as temporary only, both by such action and a prior pending action to abate or lower the dam, and for damages then accrued, and brought within the two years. The court saying that the statute applied only to such dams as are permanent and lasting.

A PPEAL by plaintiff from a judgment of the District Court for McLeod County in defendants' favor in an action brought to recover damages for overflow caused by a milldam. Affirmed.

The facts are stated in the opinion.

Messrs. John Moonan and John J. Isker, for appellant:

The dam was a continuing nuisance, and plaintiff's cause of action for damages resulting therefrom was not barred by the statute of limitations.

Spilman v. Roanoke Nav. Co. 74 N. C. 675; 2 Farnham, Waters, p. 1859; Baldwin v. Calkins, 10 Wend. 167; Ramsdale v. Foote, 55 Wis. 557, 13 N. W. 557; Bowers v. Mississippi & R. River Boom Co. 78 Minn. 398, 79 Am. St. Rep. 395, 81 N. W.

208; Harrington v. St. Paul & S. C. R. Co. 17 Minn. 215, Gil. 188; Adams v. Hastings & D. R. Co. 18 Minn. 260, Gil. 236; Brakken v. Minneapolis & St. L. R. Co. 29 Minn. 41, 11 N. W. 124; Byrne v. Minneapolis & St. L. R. Co. 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339; Adams v. Chicago, B. & N. R. Co. 39 Minn. 286, 1 L.R.A. 493, 12 Am. St. Rep. 644, 39 N. W. 629; Lamm v. Chicago, St. P. M. & O. R. Co. 45 Minn. 71, 10 L.R.A. 268, 47 N. W. 455; 21 Am. & Eng. Enc. Law, p. 724.

The defendant has not acquired a right by prescription to flood the land of the plaintiff, and therefore is a trespasser upon the land, and plaintiff is entitled to damages.

Cobb v. Smith, 38 Wis. 36; Staple v. Spring, 10 Mass. 74.

In Ruehl v. Voight, 28 Wis. 153, it was held that, under a statute providing that no action for the flowing of lands shall be maintained when it shall appear that said lands have been flowed by reason of the construction of any milldam for the ten years next preceding the commencement of such action, an action for the damages accruing immediately prior to the action, but brought more than ten years after the construction of the dam, was barred.

In Call v. Middlesex County, 2 Gray, 232, it was held that the right to apply for damages arising out of the building of a lawfully authorized dam accrues when the dam is complete and put into operation, and therefore the statute of limitations would commence to run from that time.

A case instructive on this point is Missouri, K. & T. R. Co. v. Graham, 12 Tex. Civ. App. 55, 33 S. W. 576, where a dam was built in a creek by a railroad company for the purpose of preventing the water of the creek from injuring the roadbed; and it was held that, where the erection of such dam creates a permanent injury to adjacent land from the time of its construction, limitations in an action for damages for such injury will run from the time of the building of the dam.

In Zeidler v. Johnson, 38 Wis. 335, where it was alleged in the answer that, if certain lands were flowed or injured by reason of the maintenance of a dam, they had been thus flowed and injured to the same extent for more than ten years before this action was brought, it was held that the statute of limitations was a good plea, except that it was not available to defeat a recovery for the flowing of that part of the plaintiff's lands which was owned by the state until shortly before the action was brought.

However, in Baldwin v. Calkins, 10 Wend. 167, it was held that, in case of injury by flowing land by a milldam, the right to maintain which has not been acquired by prescription, the landowner is not barred of his action for damages by lapse of the statutory period for maintaining actions of that character, since the injury is a continuing one; the court saying that he could re-

cover all damages sustained within the statutory period.

So, in Prentiss v. Wood, 132 Mass. 486, where a person kept up a dam at a certain height, without right, thus maintaining a nuisance, it was held that he is liable to successive suits, each continuance being a nuisance, and the plaintiff is entitled to recover all the damages accruing within the statutory period of limitations.

In Athens Mfg. Co. v. Rucker, 80 Ga. 291, 4 S. E. 885, it was recognized that recovery might be had for injuries resulting from the erection and maintenance of a dam, in so far as such injuries accrued within four years preceding the bringing of the action, although the dam may have remained unchanged for twenty years. In this case, however, the declaration and proof showed that the damages occurred in consequence of the raising of the dam within four years of the time the plaintiff brought his action, and that no injury had accrued to the land from the raising of the water prior to the increase of the height of the dam.

In criticizing this latter class of cases, it is said in Farnham on Waters, vol. 2, p. 1860: "The rule that the statute of limitations is not available to defeat an action for damages for the flooding of land until the right to flood it has been acquired by prescription, since every continuance of the injury is a fresh nuisance, is a mere arbitrary rule, invented by the courts to meet the necessities of an apparently hard case. The difficulty seems to be that the courts have confounded two distinct rights of action. As was seen in a preceding section, it is held that ejectment will not lie to destroy an inchoate fowage easement. To avoid the effect of that ruling, the courts which apply the successive injury doctrine in order to prevent the acquisition of an easement in real estate in less than the prescriptive period hold that the nuisance is a continuing one, and that the action may be brought at any time until the right to maintain it has been acquired by prescription. The latter holding seems illogical. If a permanent obstruction is erected,

Although the statute of limitation has run since a cause of action accrued, if injury continued to be done within the time provided by statute, the action is not barred.

Drake v. Chicago, R. I. & P. R. Co. 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215; *McConnel v. Kibbe*, 29 Ill. 483; *Prentiss v. Wood*, 132 Mass. 486; *Wells v. New Haven & N. Co.* 151 Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724; *Doran v. Seattle*, 24 Wash. 182, 54 L.R.A. 532, 85 Am. St. Rep. 948, 64 Pac. 230; *Aldworth v. Lynn*, 153 Mass. 53, 10 L.R.A. 210, 25 Am. St. Rep. 608, 26 N. E. 229; *Uline v. New York C. & H. R. R. Co.* 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536.

Merely maintaining a dam on one's own land, without thereby raising the waters above, will not create a prescriptive right to flood another's land.

2 *Farnham, Waters*, § 559; *Re Minnetonka Lake Improvement*, 56 Minn. 513, 45 Am. St. Rep. 494, 58 N. W. 295.

Mr. Sam G. Anderson, Jr., for respondents:

The right to bring an action to abate a milldam or to eject exists for fifteen years from the time damage is first occasioned; but the right to bring an action for damages caused by a milldam lives for only two years after the damage is first occasioned.

Thornton v. Turner, 11 Minn. 336, Gil. 237; *Thornton v. Webb*, 13 Minn. 498, Gil. 467; *Cook v. Kendall*, 13 Minn. 324, Gil. 297; *Eastman v. St. Anthony Falls Water Power Co.* 12 Minn. 137, Gil. 77; 2 *Farnham, Waters*, p. 1859; *Hempsted v. Cargill*, 46 Minn. 118, 48 N. W. 558.

so that it casts water across the boundary line onto the land of the upper owner, the injury is complete at the time the obstruction is erected and the injury done; and there is no ground for holding that a right of action for damages may be carried along for a period of twenty years when the statute of limitations says that it shall be barred in six years. The only logical rule is that, if the upper owner wishes to recover damages for his injury, he must bring this action within the time named by the statute of limitations."

In *Hurlbut v. Leonard*, *Brayton* (Vt.) 202, it was held that the statute of limitations in an action for injuries received as the result of the building of a dam runs from the time of the injury, and not from the time of the erection of the dam.

In *Augusta v. Lombard*, 101 Ga. 724, 28 S. E. 994, where water gates were taken from a race, causing successive inundations of property by freshets, it was held that such removal, not being *per se* a nuisance, but becoming such only at times of high water, a new cause of action accrued for each 17 L.R.A. (N.S.)

Start, Ch. J., delivered the opinion of the court:

This is an appeal by the plaintiff from a judgment of the district court of the county of McLeod in favor of the defendants; which was entered upon the pleadings in an action, commenced in March, 1907, to recover damages sustained by the plaintiff as the result of the overflow of his land by a dam maintained by the defendants in the Little Crow river, a natural water course. The complaint alleged that the damages were so sustained between March, 1901, and the commencement of the action. The answer alleged, with other averments, that the plaintiff's cause of action did not accrue within two years next before the commencement of the action. The reply put in issue the new matter alleged in the answer, but, by stipulation of the parties, the reply was amended so that it then appeared from the pleadings that the dam was built in the river, that ever since its erection it has been used for milldam purposes, and, further, that it had not been raised or changed within at least six years before the commencement of the action. It follows, from these admissions, that the damages from the maintenance of the dam were continuous during the six years.

It is the contention of the defendants that the admitted facts show that the action is barred by the statute, which, so far as here material, is in these words: "No action for damages occasioned by the erection and maintenance of a milldam shall be sustained unless such action is brought within two years after the erection of said dam." Gen. Stat. 1866, chap. 31, § 17; Gen. Stat. 1894, § 2369. Except for this statute, the claim

inundation, against which the statute of limitations began to run, not from the time of the removal of the gates, but from the time of the accrual of each right of action.

In *King v. Tiffany*, 9 Conn. 162, it was held that where the water from a dam has been set back over the land for several years less than the period of limitation, the upper proprietor may maintain an action if, upon attempting to make a new use of his property, he finds that the use is interfered with by the water. And see *Hardesty v. Ball*, 43 Kan. 151, 23 Pac. 937.

In *Lucas v. Marine*, 40 Ind. 289, it was held that an action for damages for injuries done by the flowage of land, which, in this case, was the result of the building of a milldam, was governed by the statute limiting the time for bringing actions for injuries to real estate.

In *Loftin v. M'Lemore*, 1 Stew. (Ala.) 133, it was held that a vendee of land, after special request to remove a certain dam which had been erected before he purchased, may maintain an action for continuing it.

of the plaintiff, to the effect that he is entitled to recover for any damages sustained by reason of the dam at any time within six years, would be correct, because the flowing of the land is in the nature of a continuing trespass or nuisance, and successive actions may be brought, unless the statute prevents, for the damages as they accrue, until the right to flow the land is acquired by prescription. *Bowers v. Mississippi & R. River Boom Co.* 78 Minn. 398, 79 Am. St. Rep. 395, 81 N. W. 203. This is conceded by counsel for the defendants, who contend that the general rule, that every continuance of a nuisance is in law a new nuisance, and that an action may be maintained for the damages caused thereby from time to time as they accrue, has, by reason of the statute, no application to milldams. We have, then, for consideration two questions.

1. Does the statute apply to the milldam in question? The plaintiff claims in this connection that the dam was not constructed under the statute, but was unlawfully in the stream; hence, it is not within the provisions of the statute, and is governed by the general rule as to actions for damages from continuing nuisances. The language of the statute is general, and purports to apply to all dams used for mill purposes, and not simply to those the right to erect and maintain which has been acquired by the exercise of the power of eminent domain. There is no reason for so limiting the scope of the statute, even if the language would permit; for, if so limited, the statute would serve no practical purpose, because, in cases where the right to erect and maintain the dam has been acquired, as provided by the milldam act, it is not a nuisance, and there would be no occasion for the statute in such cases. It is quite apparent that the legislature, in re-enacting this statute, understood that it applied to all milldams; for the limitation is made a part of the general statute of limitations in these words: "The following actions shall be commenced within two years: . . . For damages caused by a milldam." Rev. Laws 1905, § 4078, subsec. 3. We hold that the limitation applies to all milldams, including the one here in question.

2. What is the effect of the statute upon the right to maintain an action for damages which are continuous by reason of the maintenance of a milldam which is a permanent structure? This statute, if given full effect according to its terms, will not bar an action to abate a milldam as a nuisance if an action to recover damages is not brought within two years next after the damages first accrued. This conclusion follows from the fact that a landowner whose land is overflowed without

right by reason of a milldam has two distinct remedies. He may bring an action at law to recover damages, or he may bring an equitable action any time within fifteen years, to abate the nuisance. It is obvious that a resort to the first remedy in no manner impairs the second one; for the first relates to past damages. The short statute of limitation here under consideration relates only to an action for damages, and the question is as to the effect of the statute upon the right to bring successive actions for damages occasioned by the erection and maintenance of a milldam which is, as in this case, a permanent structure.

Counsel for the plaintiff seems to claim that the question whether a milldam is a permanent structure is to be determined, not by the character of the structure and the purposes for which it was erected, but by an inquiry whether it has been legally established and is lawfully in the stream. This cannot be correct, because, as already suggested, if the dam has been legally established and is rightfully in the stream, there could be no action, either for damages or for its abatement, and the statute would serve no purpose whatever. It may be conceded that, in many jurisdictions, the general rule is that the statute of limitations cannot be invoked to defeat successive actions for damages for the flooding of land until the right to flood it has been acquired by prescription, because every continuance of the injury is held to be a fresh nuisance. It is quite clear, from the decisions of this court relevant to the statute, that the purpose of the short limitation imposed thereby was to quiet a millowner's right to maintain a permanent dam, as against actions for damages caused by it, leaving the injured party at liberty to prosecute his remedy for the abatement of the dam at any time he may choose before a prescriptive right to flow his land is acquired. If the statute were to be construed as taking away the right to maintain an action by a landowner to abate a dam as a nuisance, its constitutionality might well be doubted. See *Baker v. Kelley*, 11 Minn. 480, Gil. 358. But it is manifest that such is not a proper construction of the statute, for, by its terms, it applies only to an action for damages, leaving the remedy by action to abate intact.

A brief reference to our own decisions will show that this is the proper construction of the statute. In *Thornton v. Turner*, 11 Minn. 336, Gil. 237, which was an action to recover damages for the overflowing plaintiff's land by the defendant's milldam, and to have the dam abated as a nuisance, it was held that this statute applied only to actions for the recovery of damages, and

that the limitation commences to run only from the time the dam raises the water so as to overflow the land of another. In the case at bar the dam has not been changed for six years before the commencement of the action; hence, the overflowing of the plaintiff's land by the dam commenced more than two years before the commencement of the action. In *Eastman v. St. Anthony Falls Water Power Co.* 12 Minn. 137, Gil. 77, it was held that it was immaterial, in an equitable action for the removal of a nuisance, whether the action at law for damages was barred. This is a clear recognition that an action for damages resulting from a nuisance and an action to abate it are distinct and independent remedies, and therefore the legislature may enact a different statute of limitation for each. It was also held in *Cook v. Kendall*, 13 Minn. 324, Gil. 297, that the statute here in question applied only to an action for damages. The case of *Thornton v. Webb*, 13 Minn. 498, Gil. 457, is to the same effect. In the case of *Hempsted v. Cargill*, 46 Minn. 118, 48 N. W. 558, the short limitation prescribed in this statute was recognized as effective, and it was held, following previous cases, that the two-year limitation begins to run, not necessarily from the erection of the dam, but from the time damages are first sustained thereby; hence the limitation for bringing an action for damages caused by permanently increasing the height of a dam within two years next before the commencement of the action was not affected by the fact that damages had been caused several years before the dam was raised by temporary additions thereto. The court, in this case, speaking by Chief Justice Gilfillan, said: "The purpose of imposing a limitation different from that in ordinary actions is apparent. Milldams are assumed to be of public benefit, and the right to maintain one ought not to remain long in doubt. For that reason, where the right to maintain a dam is brought in question by an action for damages, a short limitation is imposed. . . . The spirit of § 17 [the statute here in question] is to quiet one's right to maintain a permanent dam as against actions for damages caused by it."

Mr. Farnham, in his valuable work on *Waters* [vol. 2, p. 1860], sums up the question in these words: "The only logical rule is that, if the upper owner wishes to recover damages for his injury, he must bring his action within the time named by the statute of limitations. But the statute also provides, or, in the absence of such provision, the presumption of law is, that an interest in real estate can be acquired only by adverse possession for a much longer period than six years. . . . Therefore, 17 L.R.A. (N.S.)

there is a right of action to prevent the perfecting of the easement, which is entirely distinct from that to recover damages for the injury. . . . This is the rule which is applied by the Minnesota court. For it holds that the statute governing the time for commencing actions for damages does not apply to suits to enjoin an obstruction to the flow of water. . . . This is the only true and logical rule. It is absurd to resort to the legal fiction that every continuance of a nuisance is a fresh one, to carry along a right of action for damages merely to protect the upper owner from the acquisition of an adverse easement, which cannot, by analogy, be acquired short of the time necessary to acquire an interest in real estate, where the only necessity for resorting to such fiction is the erroneous holding that a real action will not lie to prevent such a result."

Such being the rule established by our own court, we have no occasion to discuss the decisions of other courts, cited by plaintiff, holding the contrary. We accordingly hold that, by virtue of the statute, no action for damages for overflowing lands by the erection and maintenance of a milldam, which is a permanent structure, can be maintained unless it is brought within two years next after damages are first sustained by reason of the dam.

Judgment affirmed.

OHIO SUPREME COURT.

ALBERT J. WEATHERHEAD, Plff. in
Err.,
v.
CHARLES ETTINGER.

(78 Ohio St. 104, 84 N. E. 598.)

Broker — sale — implied authority to execute contract.

A real-estate broker is without authority to execute a contract of sale which shall be binding upon one who places real estate in his hands for sale, unless such authority is specially conferred.

(March 24, 1908.)

Headnote by the COURT.

Case Note. — Power of real-estate broker to make contract of sale.

This note is limited strictly to the cases discussing the question whether a real-estate broker, from his employment as such, or from the peculiar conditions and circumstances of the particular case, has the express or implied power to make a binding contract of sale. It therefore does not concern itself with the question whether

ERROR to the Circuit Court for Cuyahoga County to review a judgment which reversed the judgment of the Court of Common Pleas in defendant's favor in an action brought to recover damages for refusal of the defendant to convey certain real estate. **Reversed.**

Statement by Shauck, Ch. J.:

Ettinger brought suit against Weatherhead in the court of common pleas of Cuyahoga county to recover for damages resulting from his refusal to convey lot No. 9 in the village of Glenville in Cuyahoga county, alleging that he was bound to make such conveyance by the terms of a written contract executed in his behalf by one Lewis H. Wain, his agent, thereunto lawfully authorized. The

defendant denied all the allegations of the petition. Upon the trial the plaintiff offered in evidence a written contract of the purport alleged, signed, "Lewis H. Wain, Agent for Albert J. Weatherhead," and the instrument included an acknowledgment of the receipt of \$50 on account of the purchase. For the authority of Wain to make a contract binding upon Weatherhead, plaintiff resorted to parol evidence which tended to show that Wain was a real-estate broker in Cleveland; that he and Weatherhead frequently met at luncheon; and, upon one such occasion, the latter expressed to the former a wish that he would sell this lot for the sum of \$3,500. Upon a later occasion Wain reported that he was making progress toward finding a purchaser, to which Weatherhead answered,

such authority must be in writing or not, nor whether he has the power to make a contract different from the one intended by the principal; nor does it include those cases which deal with the question as to what amounts to a ratification. It may also be well to mention that, although this note is intended to be limited to real-estate brokers, using the term in the popular sense, and would naturally exclude cases wherein the agent in question was not in such business, a few cases have been included wherein it either did not appear whether he was a real-estate broker or not, or, if it did appear that he was not, the court applied the rule applicable to real-estate brokers.

A careful reading of the cases seems to warrant the statement that the question whether a real-estate broker has authority to make a binding contract of sale is generally one of intention, and that the real controversy is not whether the actual grant of authority to sell gives the agent power to execute a contract of sale, but, rather, What form of expression will be deemed to establish an agency to sell, using the term in its broader sense? The inquiry to be determined, then, in each doubtful case, is whether the owner has shown an intention that his agent shall merely find a purchaser, or that he shall go further and actually effect a binding contract of sale. Since it is generally conceded that the only duty of a real-estate broker is to find a purchaser who is ready, willing, and able to purchase upon the terms specified, the overwhelming weight of authority is that the latter intention is not inferred, except from the use of unequivocal expressions to that effect; and that the employment of a real-estate broker, as such, or the mere listing of property with him, or the direct instruction to find a purchaser, or any communication from the owner to the broker with respect to the sale of land, will be regarded as giving the agent only the authority to find a purchaser; and that no wider power than that is necessarily indicated by the words "to sell," or "to make a sale." To use the often-quoted paragraph from *Keim v. Lindlay* (N. J. Ch.) 30 Atl. 17 L.R.A. (N.S.)

1063, and adopted in *Keim v. O'Reilly*, 54 N. J. Eq. 418, 34 Atl. 1073: "The mere employment of an ordinary real-estate broker to effect a sale of a parcel of land, even though the price and terms be prescribed, does not amount to giving present authority to such broker to conclude a binding contract for the same. Moreover, such authority is not usually to be inferred from the use by the principal and broker, in that connection, of the terms, 'for sale,' or 'to sell,' and the like. Those words, in that connection, usually mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms."

The above proposition is supported by the following cases: *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617 (simple instruction to sell certain lots); *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758 (communication to the effect that, if broker could get a certain price, the owner would sell); *Stemler v. Bass* (Cal.) 96 Pac. 809 (correspondence by owner of property in regard to its sale, including acceptance of terms sent to him by broker and directions what to do with deed and purchase money); *Malone v. McCullough*, 15 Colo. 460, 24 Pac. 1040 (street conversation, during which an owner of property gave a broker, who was about to engage in that business and wanted something to sell, prices on his property, and promised a commission for its sale); *Sullivan v. Leer*, 2 Colo. App. 141, 29 Pac. 817 (indefinite amount of correspondence in regard to the sale of property, none of which expressly conferred authority to sell); *McCullough v. Hitchcock*, 71 Conn. 401, 42 Atl. 81 (letter requesting broker "to find a purchaser"); *Ryon v. McGee*, 2 Mackey. 17 (general authority to sell); *Hamilton v. Cutts*, 6 Mackey, 208 (correspondence in regard to sale of property, but giving no express authority to make binding contract of sale); *Mannix v. Hildreth*, 2 App. D. C. 259 (the same); *Jones v. Holladay*, 2 App. D. C. 279 (the same); *Johnson v. American Freehold Land Mortg. Co.* 111 Ga. 490, 36 S. E. 614 (authority of agent only to "negotiate" sale of lands); *Bissell v. Terry*, 69 Ill. 184 (information, upon inquiry that

"Very well." On the day following he executed the contract counted upon in the petition at the price named, accepted \$50 on the purchase, and gave the receipt and contract referred to. Within a day or two he delivered to Weatherhead a copy of the contract, but not the \$50 paid on the purchase. Weatherhead said he was not ready to convey, and, within a few days, announced that he would not convey, and paid to Wain his commission as broker. In the court of common pleas there was a judgment in favor of the defendant on a verdict which the court had directed the jury to return in his favor. The circuit court, being of the opinion that the evidence tended to show the state of facts upon which Ettinger was entitled to recover, reversed the judgment of the court of com-

mon pleas, and remanded the cause to that court for a new trial.

Messrs. Kline, Tolles, & Goff, for plaintiff in error:

No authority was conferred upon the agent to execute the contract of sale.

Coleman v. Garrigues, 18 Barb. 60; Glentworth v. Luther, 21 Barb. 145; Morris v. Ruddy, 20 N. J. Eq. 236; Keim v. Lindley (N. J. Ch.) 30 Atl. 1063; Keim v. O'Reilly, 54 N. J. Eq. 418, 34 Atl. 1073; Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617; Rutenberg v. Main, 47 Cal. 213; Campbell v. Galloway, 148 Ind. 440, 47 N. E. 818; Furst v. Tweed, 93 Iowa, 300, 61 N. W. 857; Ballou v. Bergvendsen, 9 N. D. 285, 83 N.

certain lots were for sale, fixing lowest price, and general correspondence in regard to sale): Jones v. Howard, 234 Ill. 404, 84 N. E. 1041 (letter in regard to sale of property, but showing no express authority to make contract of sale); Burlington, C. R. & N. R. Co. v. Sherwood, 62 Iowa, 309, 17 N. W. 564 (the same); Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364 (letter by owner of property to real-estate agent stating, upon inquiry, what he would sell for); Stewart v. Pickering, 73 Iowa, 652, 35 N. W. 690 (the same); Holmes v. Redhead, 104 Iowa, 309, 73 N. W. 878 (evidence showing authority in son to negotiate sale or exchange of real estate, but not to make binding contract of sale); Balkema v. Searle, 116 Iowa, 374, 89 N. W. 1087 (correspondence in regard to sale of property, but leaving some matters indefinite, doubtless to be settled by owner of property); Brown v. Gilpin, 75 Kan. 773, 90 Pac. 267 (correspondence clearly showing a want of authority to make contract of sale); Stillman v. Fitzgerald, 37 Minn. 186, 33 N. W. 564 (letter, upon inquiry of real-estate agents, stating, in part, terms of sale and willingness to pay commission); Larson v. O'Hara, 98 Minn. 71, 116 Am. St. Rep. 342, 107 N. W. 821 (correspondence looking to the sale of land); Everman v. Herndon, 71 Miss. 823, 15 So. 135 (the same); Barton v. New England Mortg. Secur. Co. (Miss.) 25 So. 362 (the same); Morris v. Ruddy, 20 N. J. Eq. 236 (instructions to brokers, if they could sell, to do so, and for a certain price); Chamberlain v. Manning, 41 N. J. Eq. 651, 7 Atl. 634 (parol authority to find buyer); Milne v. Kleb, 44 N. J. Eq. 378, 14 Atl. 646 (general authority to sell, with terms); Planer v. Equitable Life Assur. Soc. (N. J. Ch.) 37 Atl. 668; Scull v. Brinton, 55 N. J. Eq. 489, 37 Atl. 740; Dickinson v. Updike (N. J.) 49 Atl. 712 (putting property in hands of broker for sale); Stengel v. Sergeant (N. J. Ch.) 68 Atl. 1106 (correspondence in regard to the sale of certain property); Roach v. Coe, 1 E. D. Smith, 175 (letter to broker showing that owners themselves would enter into agreement with prospective purchasers); 17 L.R.A. (N.S.)

Rowland v. Hall, 121 App. Div. 459, 106 N. Y. Supp. 55 (mere employment of a broker as such); Ballou v. Bergvendsen, 9 N. D. 285, 83 N. W. 10 (mere listing of property with brokers); Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453 (listing contract granting "sale" of certain property to real-estate brokers); Halsell v. Renfrow, 14 Okla. 674, 78 Pac. 118 (recognizing general rule that the mere listing of property with a real-estate broker gives him no other authority than to find a purchaser); Fairmount Cab Co.'s Assigned Estate, 9 Pa. Co. Ct. 201 (the same); Fay v. Sullens, 15 Okla. 171, 81 Pac. 426 (letter stating what owner would take for his property); Gault Lumber Co. v. Pyles (Okla.) 92 Pac. 175 (letter written to broker that he might sell certain property); Fisher v. Bowser, 41 Tex. 222 (obiter statement to the effect that authority to find a purchaser or negotiate a sale does not authorize real-estate broker to execute written contract of sale); J. B. Watkins Land Mortg. Co. v. Campbell, 100 Tex. 542, 101 S. W. 1078 (correspondence showing only in general terms authority to sell); Simmons v. Kramer, 88 Va. 411, 13 S. E. 902 (letters in reply to inquiry stating price, terms, and commission); Kramer v. Blair, 88 Va. 456, 13 S. E. 914 (correspondence showing no express authority to make contract of sale); Halsey v. Monteiro, 92 Va. 581, 24 S. E. 258 (letter authorizing real-estate broker to "list" property for a certain time, and allowance of commissions if he "placed the farm"); Chapman v. Jewett, 2 Va. Dec. 336, 24 S. E. 261 (authority to sell); Scully v. Book, 3 Wash. 182, 28 Pac. 556 (holding that an attorney authorized "to sell" land is merely empowered to find a purchaser, the court saying that the fact that he was not a real-estate broker made no difference and conferred no greater authority); Armstrong v. Oakley, 23 Wash. 122, 62 Pac. 499 (letter to agent, that if he could get a purchaser, owner would like to sell); Foss Invest. Co. v. Ater (Wash.) 95 Pac. 1017 (mere listing of property); Bosseau v. O'Brien, 4 Biss. 395, Fed. Cas. No. 1,667 (answer of landowner to an agent asking

W. 10; *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453; *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258; *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 580; *McCullough v. Hitchcock*, 71 Conn. 401, 42 Atl. 81; *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471.

The principle underlying the doctrine of ratification by acquiescence or silence is one of equitable estoppel.

Mechem, Agency, §§ 153, 155, 157; 1 *Clark & S. Agency*, p. 335, § 141; *Mobile & M. R. Co. v. Jay*, 65 Ala. 113; *Zimpelman v. Keating*, 72 Tex. 318, 12 S. W. 177; *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800; *McWhinne v. Martin*, 77 Wis. 182, 46 N. W. 118; *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex. Civ. App.) 47 S. W. 533; *Hoosac*

Min. & Mill. Co. v. Donat, 10 Colo. 529, 16 Pac. 157.

Messrs. W. B. Neff and W. D. McTighe for defendant in error.

Shauck, Ch. J., delivered the opinion of the court:

The substantial question in the case is, Did the evidence tend to show that Wain had authority to make a contract binding upon Weatherhead for the sale of the lot? The significant fact of which all parties to the transaction were aware was that Wain was a real-estate broker. His business was to find intending purchasers and bring them to those who had real estate for sale, and who had employed him for that purpose. It was in that capacity that he was approached

for authority to sell real estate, "I will sell" on terms specified); *Hamer v. Sharp*, L. R. 19 Eq. 108 (request to procure a purchaser); *Prior v. Moore*, 3 Times L. R. 624 (instruction to real-estate agent to put property on his books for sale, and lowest price acceptable); *Chadburn v. Moore*, 61 L. J. Ch. N. S. 674 (instruction to procure a purchaser and to negotiate a sale); *Wilde v. Watson*, Ir. L. R. 1 Eq. 402 (authority for limited time, to procure offer); *Gilmour v. Simon*, 15 Manitoba L. Rep. 205 (general conversation in regard to the sale of property); *Ryan v. Sing*, 7 Ont. Rep. 266 (where a landowner sent a letter to a real-estate agent asking him to see a certain person, and to tell that person that, if he would give a certain price for a certain piece of property, the landowner would send the deed to the agent for him, the agent's further duty being to receive the purchase money, and to write by return mail).

An interesting case on this subject is *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471, where the trial court found as a fact that the persons who executed the contract were the agents of the owner of the property "for the sale of such property, and were then and there duly authorized and empowered by the owner to make and negotiate a sale of such property." Although the language to be interpreted was that of the trial court, instead of the parties, it was held by the supreme court that, on those facts, the agents had no authority to execute a contract of sale; the court, in its opinion, affirming the early New York cases, notwithstanding that they were overthrown by *Haydock v. Stow*, *infra*.

In *Coleman v. Garrigues*, 18 Barb. 60, it was held that a broker employed "to close a bargain" for the sale of real estate is not authorized to sign the name of his principal to a contract for the sale of property. But see *Haydock v. Stow*, 40 N. Y. 363, *infra*.

In *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 580, the fact that the owner of a tract of land made and signed a written description of the land, with a price,

and handed the memorandum to the agent, at the same time requesting him to sell the land and at that price, and stating that he hoped he could make a sale of it, was held insufficient to show authority in the agent to bind the owner by executing a written contract of sale.

In *Furst v. Tweed*, 93 Iowa, 300, 61 N. W. 857, it was held that a letter by an owner of property to a real-estate agent, naming a price per acre, and stating that a sale on almost any terms to suit the buyers would be satisfactory, if a certain amount was paid in cash, and asking a certain per cent on deferred payments, did not give the real-estate agent authority to make a contract of sale, but only to receive offers and submit them to the owner; although the letter also contained a clause to the effect that, if the agent succeeded in selling, a per cent as commission was forthcoming.

In *Riley v. Grant*, 16 S. D. 553, 94 N. W. 427, where one wrote a landowner asking him the price of land, and stating that it was a good time to sell it; and the owner replied, stating the price, and that a third party claimed he could sell it the previous fall, but had not sold it, and, if the one addressed could sell it or rent it, the owner would do what would be right for him,—it was held that such correspondence did not give the one addressed authority to bind the owner by a contract of sale.

To the same effect are *Jenkins v. Locke*, 3 App. D. C. 485; *Sylliaasen v. Hanson* (Wash.) 94 Pac. 187, where an owner of property gave a real-estate agent the exclusive right to sell for a certain price until revoked.

In *Campbell v. Galloway*, 148 Ind. 440, 47 N. E. 818, an unauthorized letter by a clerk of the owner of a lease, to a real-estate agent, stating that the owner of the lease had paid a specified amount for the lease and would not sell for less than another specified amount, and that all over that amount the agent could have, was held, even if authorized, only to empower the agent to find a purchaser, and not to sell the lease.

by Weatherhead, and that the conversations between them were carried on. The subject of executing a contract of sale on the owner's behalf, with one who might desire to become a purchaser, was not considered or mentioned in any of the conversations. The conversations were such, only, as would naturally occur between an owner of property desirous of selling it and a broker engaged in the business of finding purchasers. If it should be conceded that, by custom, a real-estate broker might, without special and express authority, execute a contract of this character, binding upon the owner who placed his land in his hands for sale, the attempt to

show that such a custom existed failed utterly in the present case. It is in accordance with common understanding that one soliciting the services of a real-estate broker, when nothing more appears, reserves to himself the power to conclude the sale. A reference to the cases cited in the reporter's abstract of the briefs will show that the cases are generally in accordance with this view. It is to be observed that the question is not affected at all by any of the cases which determine the right of the broker to compensation. That obligation Weatherhead has conceded in the present case, and he has discharged it. While some support to the

In *Valentine v. Carter* (Wash.) 94 Pac. 932, certain real-estate brokers had simply the management of property, as collection of rents and payment of taxes, etc., and, although they had sent an offer of purchase to their principal, it was held that they had not even power to offer the property for sale, much less to make a contract of sale.

In *Sullivan v. Jähren*, 71 Kan. 127, 79 Pac. 1071, after some correspondence between a nonresident owner of land and a local real-estate broker, the former consented to certain terms entered into orally by the broker and the prospective purchaser, and thereupon sent the deed. A few days thereafter the broker and the purchaser entered into a contract of sale different in terms from those authorized by the owner. Concerning the above action, the court said: "This correspondence between Weyant and Songer did not authorize Songer to make any written contract whatever for the sale of Weyant's land; indeed, it is evident that no written contract was contemplated, or was in any way necessary. The deed forwarded by Weyant was all the contract necessary on his part, and the acceptance of the same and the payment of the money was all that was to be done on Jähren's part. Even if the written contract had been necessary, and had been authorized by Weyant, there was an utter want of authority to embody in the same the provision above copied."

In *Foss Invest. Co. v. Ater* (Wash.) 95 Pac. 1017, it was held that a real-estate agent with whom property has been listed for sale cannot delegate authority to sub-agents to make a contract of sale which will bind the principal.

This question has arisen frequently in actions brought by real-estate brokers for their commissions, and these cases also, either by directly so holding, or by recognition only, add their weight of authority to those already cited as supporting the above stated general principle. Among these cases are: *Dotson v. Milliken*, 27 App. D. C. 500; *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229; *Greene v. Hollingshead*, 40 Ill. App. 195; *Helling v. Darby*, 71 Kan. 107, 79 Pac. 1073; *Glentworth v. Luther*, 21 Barb. 145; *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253; *York v. Nash*, 17 L.R.A. (N.S.)

42 Or. 321, 71 Pac. 59; *Harris Bros. v. Reynolds* (N. D.) 114 N. W. 369.

However, it has been held or recognized in a few cases that the general authority of a real-estate broker "to sell" includes the authority to make a contract of sale; but it will be noticed that in the greater number of the following cases, aside from the use of such expressions as "to sell," "for sale," etc., it clearly appeared in the contract that the owner of the property intended that the broker should have the power to make a binding contract of sale.

Thus, in *Johnson v. Dodge*, 17 Ill. 433, it was said that authority from an owner of land to a general land agent to sell the land in question included the necessary and usual means to make a binding contract in the name of the principal. To the same effect is *Vanada v. Hopkins*, 1 J. J. Marsh. 285, 19 Am. Dec. 92.

This was also recognized in *Smith v. Tate*, 82 Va. 657, where an action was brought by an agent for damages, instead of commissions agreed on in event he made a sale of the land, the inability to complete the sale being alleged to have been due to the fault of the landowner.

This case follows *Yerby v. Grigsby*, 9 Leigh, 387, where it was held that a broker who had been made an agent to sell certain property had authority to make a binding contract of sale.

In *Haydock v. Stow*, 40 N. Y. 363, a written instrument subscribed by the owner of land authorizing a firm of real-estate brokers, as agents, to sell the land upon certain terms specifically stated, was held to empower them to make a contract of sale.

In *Minor v. Willoughby*, 3 Minn. 225, Gil. 154, a letter directing an agent to sell land, although insufficient to authorize its conveyance by the agent because of the lack of a seal, was held sufficient to authorize him to make a binding contract of sale.

So, in *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 908, it was held that, although the authority conferred by an owner of land upon real-estate agents to sell the land was insufficient to empower them to convey, it authorized them, as his agents, to make an executory contract to sell upon the terms therein stated.

In *Pringle v. Spaulding*, 53 Barb. 17, the

opposite view may be derived from two of the cases cited in the brief of the defendant in error, they must be regarded as in conflict not only with the current of authority upon the subject, but with the common understanding of business men. There was, therefore, no original authority in Wain to execute the contract.

But it is said that, if there was not original authority given to Wain to execute the contract, the contract was subsequently ratified by Weatherhead. The case presents no element of ratification. The money delivered to Wain on account of the proposed purchase was not accepted by Weatherhead, if, indeed,

he was informed of the fact that it had been paid to Wain. Weatherhead did nothing but retain the copy of the contract tendered to him for brief and reasonable consideration, and then exercised his right to decline to execute it. The position of Ettinger was in no way changed in consequence of anything that was done or omitted by Weatherhead.

Judgment of the Circuit Court reversed, and that of the Common Pleas affirmed.

Price, Crew, Summers, Spear, and Davis, JJ., concur.

court, perceiving a similarity between the duties of a real-estate broker and an auctioneer, held that the authority given the former "to sell" authorized him to sign a contract of sale and bind his principal. It would appear, however, from the evidence in this case, that the agent had express authority to do so.

To the same effect is *Rutenberg v. Main*, 47 Cal. 213, where, as the court said, it clearly appeared that the agent with whom the property had been left in custody was intended to be clothed with power to do all the law requires to make the sale binding on his principal.

So, in *Rosenbaum v. Belson* [1900] 2 Ch. 267, the court, drawing a distinction between authority "to sell" and authority to find a purchaser, held that authority of a real-estate agent to do the former was sufficient to authorize the agent to make a binding contract of sale.

In *Weaver v. Snively*, 73 Neb. 35, 102 N. W. 77, a letter written to one who had solicited the agency for the sale of certain real estate, to the effect that he still owned such property and would sell for a certain price on specified terms, was held sufficient to authorize such person to make a contract of sale according to the terms therein stated.

In *Smith v. Allen*, 86 Mo. 178, where, among other things, an owner of real estate wrote to a broker that he would leave the sale of certain lots pretty much with him, and that, if anyone was willing to pay a certain price on given terms, he thought he would be willing to have the broker make out a deed, which the former would then perfect, it was held that such a letter authorized the agent to make a contract for the present sale of the lots.

In *Colvin v. Blanchard* (Tex.) 106 S. W. 323, a letter to real-estate brokers to the effect that the owner of certain property would sell for a certain price and pay a stipulated amount as commissions for making a sale, coupled with the fact that the agent had previously been authorized to sell the property, was held sufficient to authorize the latter to make a contract of sale.

So, in *Keim v. Lindley* (N. J. Ch.) 30 Atl. 1063, the chancellor, although recognizing 17 L.R.A. (N.S.).

the general rule that the employment of an ordinary real-estate agent for the sale of land does not empower him to make a binding contract of sale, held that in this case the agent was not of that nature, but that, by the conduct of the owner of the property, and by past dealings, it clearly appeared that the agent was so authorized. This, however, was overruled in *Keim v. O'Reilly*, 54 N. J. Eq. 418, 34 Atl. 1073, where the court said that, in its judgment, no manner of proof was inconsistent with the authority conferred upon the agent having been the restricted authority of the ordinary real-estate agent.

In *Winch v. Edmunds*, 34 Colo. 359, 83 Pac. 632, it appeared by numerous letters that the landowner had commended the agent for the manner in which he was handling his business, urged him to sell all his property at that place, and authorized him to act as he thought best. The owner was a non-resident, and the agent had acted in various transactions similar to the one in controversy, all of which had been ratified and confirmed by such owner. The vendee entered into possession of the property, and made valuable improvements thereon, and the part payment which he made on account of the purchase had not been returned. It was held that the agent was more than a real-estate agent; that he had authority to make a binding contract of sale.

In *Jasper v. Wilson* (N. M.) 94 Pac. 951, where the owner of certain real estate, who was a resident of a foreign country, placed the property in the hands of a local broker for sale, authorizing him to do the best he could for her, and, if he sold the property, to apply the proceeds on a specified debt and fix up all matters as he thought best, it was held that the broker's authority was not limited to finding a purchaser, but extended to the making of a contract of sale.

To the same effect is *Degginger v. Martin* (Wash.) 92 Pac. 674, where an owner of real estate instructed a real-estate agent with whom she had listed the property "to sell quick, take the money, and close the deal."

Also *Littlefield v. Dawson*, 47 Wash. 644, 92 Pac. 428, when a written contract giving

an agent exclusive authority to sell land, and agreeing to convey to the parties designated, was held to empower the agent to make a binding contract of sale.

In *J. B. Watkins Land Mortg. Co. v. Campbell* (Tex. Civ. App.) 98 S. W. 227, where a landowner in general terms authorized real-estate agents to make a sale of certain land, it was held that it might be shown that, in accordance with the custom of real-estate agents in that locality, they were authorized to make a contract of sale. This case was reversed by the supreme court in 100 Tex. 542, 101 S. W. 1078, where it was held that, from the correspondence between the landowner and the agents, it clearly appeared that the latter did not understand that they had authority to make a binding contract of sale.

In *Hopwood v. Corbin*, 63 Iowa, 218, 18 N. W. 911, where an owner of land wrote to a firm of land agents that, if they could effect any sales, he would be glad of it; and assured them that, if they found purchasers at the prices named, before the land was otherwise disposed of, their customers should have it,—the court said: "It may be that the language is capable of the construction claimed for it by the defendant, viz., that it only empowered the agents to submit the offer of the plaintiff to him, and that he reserved the right to accept or reject the offer; but it is certainly open to the construction put upon it by the other parties, and the true rule of construction undoubtedly is that, when the language of a writing is ambiguous, it shall be taken most strongly against the contractor; and especially is this true when a construction of which it is fairly susceptible has been placed upon it, and third parties have been induced to act in the belief that that construction is the correct one."

Although a real-estate broker is unauthorized to enter into a contract of sale of property without authority, yet, if the principal, either expressly or by conduct, ratifies such contract, it would almost naturally follow that it might be enforced against the owner. *Hoyt v. Tuxbury*, 70 Ill. 331; *Roberts v. Hilton Land Co.* 45 Wash. 464, 88 Pac. 946; *Service v. Deming Invest. Co.* 20 Wash. 668, 56 Pac. 837.

As to power of legislature to prohibit offering of another's real estate for sale without written authority, see case note to *Frank L. Fisher Co. v. Woods*, 12 L.R.A. (N.S.) 707; necessity that agent's authority to purchase or sell real property be in writing to enable him to recover compensation for his services, see case note to *Friedman v. Suttle*, 9 L.R.A. (N.S.) 933; effect upon right of real-estate broker to commission, of fact that owner sells to broker's customer at a reduced price, see case note to *Ball v. Dolan*, 15 L.R.A. (N.S.) 272. 17 L.R.A. (N.S.)

ILLINOIS SUPREME COURT.

JAMES H. QUINLAN et al., Plffs. in Err.
v.

ELIZABETH WICKMAN et al.

(233 Ill. 39, 84 N. E. 38.)

Perpetuity — bequest measured by time.

1. A bequest in trust for the benefit of testator's daughter during life, and to distribute the remainder among her children when the youngest reaches the age of thirty years, violates the rule against perpetuities where there is a possibility of the distribution being delayed more than twenty-one years after the death of the daughter.

Same — validity of life estate.

2. A bequest of a life estate for the benefit of a testator's daughter, with remainder to her children, under conditions rendering the remainder void under the rule against perpetuities, may be upheld.

Same — alternative bequest.

3. A bequest to take effect in the alternative at the death of the first taken without children, which is lawful, or at the death of all her children without reaching the age of thirty years, which is void as a perpetuity, will take effect or not, according to the event, so that it will take effect in case of the death of the life tenant without children, but not otherwise.

(February 20, 1908.)

ERROR to the Circuit Court for Cook County to review a decree dismissing a bill filed to partition certain real estate. Affirmed.

Statement by Dunn, J.:

James H. Quinlan and Mary Quinlan, his wife, filed their bill in the circuit court of Cook county against Elizabeth Wickman, Raymond Wickman, Charles Quinlan, Henrietta Quinlan, and Michael Burke, and against Nellie M. Burke, individually and as executrix and trustee under the last will and testament of Ellen Quinlan, deceased, in which they alleged that, on November 19, 1899, Ellen Quinlan died, leaving James H. Quinlan, Charles Quinlan, Nellie M. Burke, and Elizabeth Wickman, her four children and only heirs at law. At the time of her death she was seised of certain real estate in Chicago, and left a will, the material parts of which are as follows:

"I give, devise, and bequeath to my daughter Nellie M. Burke all my estate, real, personal and mixed, for the uses and trusts and for the purposes hereinafter set forth, to wit:

"(A) In trust to take possession of, man-

Note. — As to the effect upon the preceding estate of the invalidity of a remainder limited thereon, for remoteness, see case note to *Re Kountz*, 3 L.R.A. (N.S.) 639.

age, and control the same, invest and reinvest any surplus trust money in her hands in good real estate securities; to collect the rents from my real estate and pay out such sums as may be needed for taxes, insurance, or repairs, and, at her discretion, to sell any portion of my estate, and execute and deliver to the purchaser a good and sufficient deed therefor, but the purchaser thereof shall not be required to see to the application of the purchase money. In case the improvements on my real estate are destroyed, wholly or in part, by fire or otherwise, I hereby authorize my said trustee to restore the same, and, if needed, to borrow money for that purpose and secure payment of the same by the real estate affected.

"(B) In trust when my real estate, or any part thereof, is sold by my said trustee pursuant to the powers hereby vested in her, to pay my son Charles Quinlan, out of the proceeds of said sale, the sum of four thousand dollars (\$4,000).

"(C) In trust out of any trust money in her hands to pay to my daughter Elizabeth Wickman any sum that the said Elizabeth Wickman may desire and my said trustee deem proper. It is my primary purpose by this will to provide for the welfare and happiness of my said daughter Elizabeth Wickman and her children, and I desire my said trustee to provide for her and them in a liberal manner, and make sale of my real estate and convert into money my personal estate whenever it is needful for that object. In case of the death of my said daughter Elizabeth Wickman in my lifetime or afterwards, then I desire my said trustee out of my estate to provide for the welfare and happiness of any child or children of the said Elizabeth Wickman that may survive her, in a liberal manner, and if there be but one of such children, to pay such child, on arriving at the age of thirty years, all trust moneys then in the hands of my said trustee, to be the absolute property of such child. If there be more than one of such children, my said trustee may expend such sums for their welfare as she may deem expedient until the youngest child shall arrive at the age of thirty years; which time all trust moneys then in the hands of my said trustee shall be divided among all of such children, share and share alike.

"(D) In trust my said daughter Elizabeth Wickman should die without leaving any children, or in case the surviving child of my said daughter Elizabeth Wickman, or all of such children, if more than one, die before arriving at the age of thirty years, then I give, devise, and bequeath all my trust estate to my said daughter Nellie M. Burke, or to her heirs in case of her death, as her

or their absolute property and estate, discharged of all manner of trusts whatsoever."

The bill further alleged that Elizabeth Wickman, at the time of the death of her mother, was a married woman between thirty and thirty-five years of age; that she is now an unmarried woman, and has one child, Raymond Wickman, a minor under the age of twenty-one years; that the will of Ellen Quinlan, in so far as it seeks to convey to Nellie M. Burke the property in trust, is void in law, and that the will, in the attempt to dispose of the property in trust, is violative of the law against perpetuities, and ineffectual as a devise or bequest of said property to Nellie M. Burke in trust; that, upon the death of Ellen Quinlan, her four children became seised in fee, as tenants in common, of the real estate in question, each being entitled to an undivided one fourth thereof. The prayer of the bill is for a partition of the premises and for an accounting of the rents and profits and for the appointment of a receiver. An answer was filed, admitting the allegations of the bill, but claiming that the will was a valid testamentary disposition of the testatrix's property. Upon a hearing the court held that the will did not violate the rule against perpetuities or create an illegal trust, and dismissed the bill for want of equity. To reverse the decree, a writ of error has been sued out of this court.

Mr. F. O. Struckmeyer for plaintiffs in error.

Messrs. Vail & Pain for defendants in error.

Dunn, J., delivered the opinion of the court:

The rule against perpetuities is thus stated: "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray, Rule against Perpetuities, § 201; Owsley v. Harrison, 190 Ill. 235, 60 N. E. 89; Lawrence v. Smith, 163 Ill. 149, 45 N. E. 259; Howe v. Hodge, 152 Ill. 252, 38 N. E. 1083. If provisions of a testamentary character are such that, under them, a violation of the rule against perpetuities may possibly happen, then the devise of interest dependent upon such provisions is void. Eldred v. Meek, 183 Ill. 26, 75 Am. St. Rep. 86, 55 N. E. 536, and cases cited, *supra*.

The will in this case directs the payment by the trustee of all trust moneys in her hands to the child of Elizabeth Wickman

that may survive her, on such child arriving at the age of thirty years. If there is more than one such surviving child, then the trustee is to divide the money equally among them on the youngest arriving at that age. Under the settled rules of construction the children of Elizabeth Wickman living when the estate is to be divided, even those born after the death of the testatrix, if any, are included among those to whom payment is directed to be made. Their interest becomes vested only at the time of distribution. *Schuknecht v. Schultz*, 212 Ill. 43, 72 N. E. 37; *Eldred v. Meek*, supra; *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351; *Handberry v. Doolittle*, 38 Ill. 202; *Pitzel v. Schneider*, 216 Ill. 87, 74 N. E. 779. The interest of the children of Elizabeth Wickman, under the will, therefore, does not necessarily fully vest within a life in being at the death of Ellen Quinlan, the testatrix, and twenty-one years. It is possible that Elizabeth Wickman may marry and die leaving a child who would not reach the age of thirty years within the time required by the rule. The direction for payment to the children of Elizabeth Wickman is therefore void. But the invalidity of the limitation to the grandchildren of the testatrix does not necessarily invalidate the bequest to the daughter. "If future interests created by any instrument are avoided by the rule against perpetuities, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument." Gray, *Rule against Perpetuities*, § 247. "When a subsequent condition or limitation over is void, by reason of its being impossible, repugnant, or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised. If for life, it then takes effect as a life estate; if in fee, then as a fee simple absolute." *Howe v. Hodge*, supra; *Nevitt v. Woodburn*, 190 Ill. 283, 60 N. E. 500; *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 363; *Church in Brattle Square v. Grant*, 3 Gray, 142, 63 Am. Dec. 725. Where effect cannot be given to all the provisions of a will, those parts may be sustained which conform to the rules of law, if no violence is thereby done to the general intention of the testator. *Lawrence v. Smith and Eldred v. Meek*, supra.

The testatrix in her will expressly stated that it was her primary purpose to provide for the welfare of her daughter and the latter's children. Having four children,—two sons and two daughters,—she provided for a legacy of \$4,000 to one of the sons, and then disposed of all the rest of the property for the benefit of one of the daughters and her children. This daughter was married,

though after her mother's death she obtained a divorce from her husband. She had one child, a boy sixteen years old, at the time of the testatrix's death. Under the circumstances the testatrix thought best for the welfare of the daughter and her children to create a trust for their benefit, which was done by placing all the property in the control of the other daughter as trustee, subject to the provisions of the will. The provision for the benefit of Mrs. Wickman during her life violates no rule of law, but accomplishes precisely the result desired by the testatrix. The provision for the grandchildren is too remote, and cannot be given effect. They take nothing as heirs. They cannot take under the will. The testatrix has failed to give effect in her will to her intentions for their benefit, but the disposition of her property in favor of Mrs. Wickman is valid.

The final limitation to Nellie M. Burke, contained in clause D of the paragraph of the will under consideration, depends upon one of two contingencies. One is the death of Elizabeth Wickman without leaving any children; the other, the death of the last surviving child of Elizabeth Wickman before any of her children have attained the age of thirty years. The first is bound to occur, if at all, at Elizabeth Wickman's death, and the limitation is lawful. The second may not occur until more than twenty-one years after her death, and is therefore within the rule against perpetuities. Where a devise is void for remoteness, all limitations ulterior to or expectant on such remote devise are also void. 1 *Jarman, Wills*, 283. But where a limitation is to arise upon an alternative event, one branch of which is within and the other is not within the prescribed limits, it will take effect or not, according to the event. *Id.* 285. So far as the gift over depends upon the single event which may or may not happen within the required time, it is void, and the actual happening of the event within that time cannot make it good; but, so far as it depends upon the alternative event, which must happen, if at all, within the limit of the rule, the gift over is good, and, if that event actually does happen, the estate will take effect without regard to the consideration that, upon a different contingency, which might or might not happen within the lawful limit, the limitation would be void for remoteness. *Longhead v. Phelps*, 2 W. Bl. 704; *Leake v. Robinson*, 2 Meriv. 363; *Monypenny v. Deriving*, 2 DeG. M. & G. 145; *Cambridge v. Rous*, 25 Beav. 409; *Atty. Gen. v. Wallace*, 7 B. Mon. 611; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Jackson v. Phillips*, 14 Allen, 539.

The limitation to Mrs. Burke if Mrs.

Wickman dies leaving no child surviving her is valid, and, if that event occurs, will be given effect; but the alternative limitation, in the event of the death of Mrs. Wickman's surviving children before reaching the age of thirty years, is invalid, and cannot be given effect, even though the event occurs within the year. Mrs. Nellie M. Burke holds the title to the property involved, in trust for the payment of the legacy mentioned in the will and for the benefit of Mrs. Elizabeth Wickman during her life, pursuant to the terms of the will, and thereafter for her own benefit, if Mrs. Wickman leaves no children; but, if Mrs. Wickman leaves a child surviving her, the remainder in the property has not been disposed of, and will vest in the heirs of the testatrix. Until the death of Mrs. Wickman, it cannot be known in whom the title will finally vest, or whether complainant will have any interest therein. He has therefore no right to a partition, and his bill was rightfully dismissed for want of equity.

The decree will be affirmed.

KANSAS SUPREME COURT.

MILEY HAWKINS, Plff. in Err.,
v.

E. C. WINDHORST.

(— Kan. —, 96 Pac. 48.)

Evidence — proof of agency — similar acts.

Where the issue is whether a husband was the agent of his wife, with authority to sign her name to a check upon her bank account, evidence that he frequently signed checks on her account, with her knowledge and consent, is competent.

(April 11, 1908.)

Headnote by PORTER, J.

Case Note. — Proof of agency by evidence of similar acts by alleged agent.

This note is confined to a question of evidence,—whether agency in fact may be established by proof of the performance by the alleged agent of similar acts in behalf of the alleged principal, with the knowledge or the acquiescence of the principal, or with his subsequent ratification. The substantive question as to whether or not these circumstances will create an estoppel against the principal, so as to render him liable irrespective of an agency in fact, is not considered. Cases like *Cohen v. Teller*, 93 Pa. 123, for example, wherein it was held that an estoppel could not be predicated on proof that one whose name was forged to notes had paid them and recognized them as valid, 17 L.R.A. (N.S.)

ERROR to the District Court for Edwards County to review a judgment in defendant's favor in an action brought to recover the proceeds of a protested bank check. Reversed.

The facts are stated in the opinion.

Messrs. F. Dumont Smith and A. O. Dyer, for plaintiff in error:

An offer of proof when a witness is upon the stand and the party offering the evidence is prepared to prove it by such witness is proper.

Thomp. Trials, § 678; *Eagon v. Eagon*, 60 Kan. 697, 57 Pac. 942; *Elliott*, App. Proc. § 743; *Marshall v. Marshall*, 71 Kan. 313, 80 Pac. 629.

Agency may be proved by writing or by parol evidence, by a direct grant of authority, or by a course of dealing, by acts of agency on the part of the alleged agent, known to the principal, and relied upon by the person dealing with the agent.

Fowlds v. Evans, 52 Minn. 551, 54 N. W. 743; 1 Am. & Eng. Enc. Law pp. 959-961; *Neibles v. Minneapolis & St. L. R. Co.* 37 Minn. 151, 33 N. W. 332; *Richardson & B. Co. v. School Dist. No. 11*, 45 Neb. 777, 64 N. W. 218; *Roberson v. Clevenger*, 111 Mo. App. 622, 86 S. W. 512; *Siers v. Wiseman*, 58 W. Va. 340, 52 S. E. 460; *International Harvester Co. v. Campbell* (Tex. Civ. App.) 96 S. W. 93; *Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927; *Crosno v. Bowser Mill Co.* 106 Mo. App. 236, 80 S. W. 275; *McCormick Harvesting Mach. Co. v. Lambert*, 120 Iowa, 181, 94 N. W. 497.

Mr. G. Polk Oline for defendant in error.

Porter, J., delivered the opinion of the court:

The plaintiff sued the defendant to recover the proceeds of a protested bank check for the sum of \$500, drawn upon her account by her husband, Fred Windhorst. The petition alleged that the husband was her

so as to render the alleged maker liable on other forged notes, come within this principle and are excluded. Cases involving acts of agency by members of a household in the purchase of necessities are also excluded; so also are cases where it is sought to establish agency by a wife for her husband. This latter class of cases is excluded because a somewhat different rule is applied in many, if not all, jurisdictions, as to the agency of the wife for her husband, than is applied to questions of agency of the husband for the wife. In the former class of cases, the wife is, in many instances, presumed to be an agent of her husband, and therefore a case passing upon the question here under consideration, where similar acts were performed by a wife, would naturally involve the question of the extent of the authority of the wife rather than her agency,

agent, duly authorized to sign her name to checks on the bank, and generally to conduct the business of defendant with the bank as fully as defendant might herself do. It also alleged that the defendant, by her agent, for a valuable consideration, delivered the check in question for the use of the plaintiff, and that afterwards the same was presented and payment refused.

The controlling question raised is upon a ruling of the court in the introduction of evidence. Plaintiff proved, by the cashier of the bank, that the canceled checks, drawn on Mrs. Windhorst's account, had been returned to her. Defendant herself was then called to the stand, and she was asked the following question: "What I want to know is, where are the checks, if any, that your hus-

band signed against your account? Have you got them?" Objected to, unless pertaining to this particular check. By the court: "I will sustain the objection. This is preliminary, but just as well sustained here as later on. That question becomes immaterial, except such checks as relate to this transaction." The husband, Fred Windhorst, was then called as a witness by the plaintiff, and he was asked if he ever signed his wife's name to bank checks. The court sustained the same objection. The cashier of the bank, having been recalled, testified that he personally paid checks drawn on the account of defendant; but, when asked to state whether or not the husband of defendant signed her name to checks drawn against her account, and whether he did so frequently or other-

and they therefore come within a general class of cases which are also excluded for this reason; such as cases involving agency for corporations by their ostensible representatives and the agency of parties in possession of the principal's property or business; all such cases, even though the question of agency itself might be involved, are excluded, as the proof of the agency depends, to a great extent, upon principles of estoppel by the principal's clothing the agent with ostensible authority to act for him in the matters involved in the suit, rather than upon the question here under consideration, as to the admissibility of evidence of similar acts or transactions to establish the agency.

Also, cases where the relation of the alleged principal and agent is such that the principal is bound by the acts of the alleged agent, which he either permits or acquiesces in because of the peculiar relation they bear each other, are excluded, as such cases are based upon the principle that a duty rests upon the principal not to allow the alleged agent by his acts to create an erroneous impression as to his authority and powers. Cases of agency of the wife for the husband in matters similar to previous acts by her as his agent also come within this principle.

Neither is the question of agency or authority of one to collect or receive money on negotiable and non-negotiable obligations owned by another included. This latter class of cases is frequently based on either the negotiable instruments law, or rules of the law merchant, rather than the law of agency, and it is for this reason that they are not included, although, in many instances, where based on the law of agency, such cases would undoubtedly be in point.

Broadstreet v. McKamey (Ind. App.) 83 N. E. 773, goes as far towards sustaining the right of one dealing with an alleged agent to establish the fact of agency by proof of similar acts on the part of the agent as any of the cases on the subject. That case involved an action on a note signed by a father in his name as principal and his son's name as surety. There was no showing that the father had any express authority to sign the note in suit, but evi-

dence was offered that it was a business custom of the father and son for the father to sign both their names, the note so signed being honored by the son. This fact, together with the fact of the relationship of the parties, was held to be sufficient to establish the agency of the father for the son in reference to the transaction in question.

This case is based in part upon the authority of *Morehead v. Murray*, 31 Ind. 418, wherein, in defending an action on promissory notes given for nursery goods, the defendants were permitted to show that the alleged agent, who had taken their order for the goods, had also taken the orders of others in that neighborhood for similar goods, which orders had been approved of by the principal. This evidence was received as tending to show agency. The case can, however, hardly be said to be in point, because the very fact that the suit involved notes given to the principal in payment of goods sold the makers by the agent, where the notes had been received by the principal, and by him transferred to the plaintiff by indorsement, was, in and of itself, sufficient proof of agency.

Generally, however, while the language used by the courts in some cases tends to indicate the doctrine that agency may be established from proof of the ratification by the principal of similar acts of the agent, yet the language has been used in disposing of cases wherein there was other evidence of agency than the mere ratification by the principal of similar contracts or transactions of the agent in the name of the principal. If the purpose of such evidence is to aid in establishing a general agency, it is competent. It is incompetent, however, if it is sought thereby to show agency in another matter, with a view to infer such agency in the matter in controversy.

As said by the court in *Reynolds v. Collins*, 78 Ala. 94: "As a general rule, the fact of agency cannot be established by proof of the acts of the professed agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them; yet, where the acts are of such character, and so continuous, as to justify

wise, an objection was sustained upon the same ground. Proper exceptions were saved to the ruling of the court.

We think the court erred in refusing to permit plaintiff to prove that the husband had signed his wife's name to checks drawn upon her account, with her knowledge and consent. The issue was whether the husband was the general agent of his wife for that purpose. Agency may always be proved by circumstantial evidence. And the rule is well established that, in transaction which relate to trade and commerce, it may be proved or inferred from evidence of the habits and course of dealing between the parties. It is said in 3 Elliott on Evidence, § 1635, that "proof that the principal permitted the supposed agent to perform similar acts and

transactions with other persons is competent, as tending to establish the existence of an agency." Mr. Wigmore, in his work on Evidence (vol. 1, § 377), says that the use of such evidence for proving the authorization of an agent has always been sanctioned; and that, where the question is as to the authority of an agent, and the transaction "has taken the form of a usual and fixed course of business between two persons, this habit is admissible to indicate the probable tenor of a particular transaction" (vol. 1, § 94).

Upon an issue as to the implied authority of an agent to exercise powers in excess of those expressly given him, it is said, in *Wheeler v. McGuire*, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190, that "all the circumstances of the transaction, the previous conduct of

a reasonable inference that the principal had knowledge of them, and would not have permitted them if unauthorized, the acts themselves are competent evidence of agency."

This was also the doctrine enunciated in *Watson v. Race*, 46 Mo. App. 546, wherein, in an action by an architect for services as such in drafting preliminary sketches and drawings for a block of flats about to be erected for defendant, the services having been performed at the request of her alleged agent, the court said that the fact that the alleged agent was a relative of the defendant, or that he had in some way, prior thereto, acted as her agent in the construction of another building, did not establish an agency in the matter of the building then about to be erected. And as to the question to the plaintiff as to whether or not he knew that the alleged agent had been acting prior to the time in question as the agent of the defendant, the court said: "If the object of this question was to elicit facts tending to show a general agency existing between the defendant and Broadwell, then an answer should have been permitted. If, however, it was sought thereby to show that Broadwell had acted as agent for Mrs. Race in another matter, from which it was to be concluded he was her agent in the matter under investigation, then the evidence was, as already said, properly rejected."

Forsyth v. Day, 41 Me. 382, seems also to support this doctrine. In this case, the fact that the defendant, after having discovered that a third person had forged his name upon different notes prior to the note sued on, did not disclose the fact, but paid or promised to pay them, was incompetent to prove authority of the forger to sign the defendant's name to the note in question unless it was further proved that the existence of the notes was known to plaintiff at or before the inception of the note in suit. The rule is here enunciated that, "to hold a party responsible for drawing, accepting, or indorsing a bill or note by another, in his name, on an implied original authority, it must be made to appear that

the party sought to be charged had knowledge antecedent to, or concurrent with, the inception of the instrument sought to be enforced, that his name was being thus used by such assumed agent, and that he permitted it to be done; and further, that injury had arisen in consequence of such permission to the moving party." Applying this doctrine, the court further held that the fact that the defendant had paid other forged notes not connected with the note in suit had no legal tendency to show that he had adopted or ratified that note, and it was not competent evidence for such a purpose.

So, evidence that a son had repeatedly signed his father's name to notes which the father had afterwards recognized and paid was held competent to prove agency of the son, in *Hammond v. Varian*, 54 N. Y. 398. It was here said that this evidence was admissible against the principal for the purpose of showing that he had authorized it to be done, from which the jury might infer or presume an implied authority to sign his name to the note in question, if he was in the habit of recognizing these notes which his son thus signed in his name as authorized and genuine notes. This case cites as authority *Weed v. Carpenter*, 10 Wend. 404. There was other evidence of agency in the latter case, however, than the mere fact of ratification of other notes, to which the name of the principal was concededly forged, such as the fact that, to a notice of protest of the note in question to the principal, he paid no heed, and the further fact that, in an action thereon, he suffered a default to be entered against him.

The fact, however, that the defendant paid a forged bill of exchange, will not estop him from denying the authority of the forger to use his name on other bills of exchange of which he had no knowledge. *Morris v. Bethell*, L. R. 5 C. P. 47. Such payment is, however, evidence of general authority. As said by Willes, J.: "One who pays one bill which purports to bear his signature as acceptor, thereby makes evidence against himself that the person who wrote the acceptance did so with his authority; and if the bill is given in a course

the defendant, and the usages of the business, may be properly considered;" and it was held that any evidence is relevant which shows prior similar acts of the supposed agent, and which tends to prove or disprove the knowledge of the alleged principal. In *Sanborn v. Cole*, 63 Vt. 590, 14 L.R.A. 208, 22 Atl. 716, it is held that testimony that

of business implying a continuance of such authority, it may be conclusive evidence." In this case, however, where the only evidence of agency was the payment of a forged bill of exchange, the court expressed its doubt as to whether this was sufficient to justify its being submitted to the jury on that point. As the jury found against the claim of agency, that question was, however, immaterial.

In *Fowlds v. Evans*, 52 Minn. 551, 54 N. W. 743, although there was no direct evidence of agency, the fact that a railroad contractor referred his engineer to the alleged agent to sign contracts, and the further fact that the alleged agent, for a period of three or four months, acted for the contractor, and at least on one occasion the contractor recognized him as his representative, and paid him occasional visits, and the further fact that the alleged agent was recognized by others as the contractor's agent, which must have been known to the principal, was said to be sufficient evidence from which the fact of agency might be presumed.

So, evidence that the alleged agent had been handling the principal's machines and extras for several years, and that others had bought machines of him, and had settled with him therefor by giving their notes, payable to the principal, is competent as tending to prove agency. *McCormick Harvesting Mach. Co. v. Lambert*, 120 Iowa, 181, 94 N. W. 497.

The fact that the defendant, a corporation, had ratified similar acts of persons who assumed to be acting for it, tends to show that they had authority to make the arrangement in question. *Jewett v. Lawrenceburgh & U. M. R. Co.* 10 Ind. 541. "In showing that such acts had been ratified, it is proper to prove the number of similar instances in which arrangements had been made and approved by the defendants, and the amount that had been paid thereon. If the instances were numerous and the sums large, the inference would be the stronger."

In proving agency for a corporation, evidence that the agent had made other contracts in the name of the corporation, which it had ratified and complied with, was held to be admissible, in *Tennessee River Transp. Co. v. Kavanaugh Bros.* 101 Ala. 1, 13 So. 283. There was other evidence of agency in this case, however, than the mere proof of the ratification and approval by the corporation of similar contracts.

Proof that an agent of a railroad com-

a wife did all of her husband's business is admissible upon the question of her agency in a particular transaction within that time. The general rule is stated in 1 Am. & Eng. Enc. Law, pp. 959, 961, as follows: "In a great proportion of cases agency arises, not from the use of express language, nor from the existence of a well-defined relation, but

pany was in the habit of telegraphing to a distant point for berth reservations in a sleeping car, and that these reservations and contracts made by the agent of the railroad company were honored by the Pullman Company, was held to be competent to prove the agency of the railroad agent for the sale of berths in a sleeping car in an action for breach of contract entered into with such agent for a berth. *Pullman Palace Car Co. v. Nelson*, 22 Tex. Civ. App. 223, 54 S. W. 624.

A long course of dealing by an agent through his principal, during which his acts had never been questioned or in any manner repudiated by the latter, would be sufficient to raise the presumption of agency with authority to do what is done by him in the line of such course of dealing. *Wheeler v. Benton*, 67 Minn. 293, 69 N. W. 927.

So, agency may be presumed from long-continued acts by the alleged agent for the principal, with the apparent approval and recognition of the principal. *Smith v. White*, 5 Dana, 376.

No inference, however, of agency to sign a written contract, can arise from the fact that the alleged agent twice, in the presence of the principal, drew up and signed the principal's name to similar contracts. *Fadner v. Hibler*, 26 Ill. App. 639.

And evidence that one acted as agent for another in a single transaction is not competent to prove agency in another transaction of similar character. *Bartley v. Rhodes* (Tex. Civ. App.) 33 S. W. 604; *Woods v. Francklyn*, 46 N. Y. S. R. 396, 19 N. Y. Supp. 377; *North v. Metz*, 57 Mich. 612, 24 N. W. 759.

Contributing to the first payment on a piece of land is not evidence of authority in the purchaser to bind the persons contributing for future payments. *Jaquins v. Gilbert*, 59 Kan. 777 Appx., 53 Pac. 754.

So, the mere fact of the payment by a contractor of a prior board bill on the order of a subcontractor is not, in and of itself, sufficient to charge him with a liability for subsequent bills contracted by the subcontractor. *Danaher v. Garlock*, 33 Mich. 295.

Where one seeks to hold an alleged principal upon a contract made in his behalf by his alleged agent, by inferring a general agency from the former ratification by the principal of similar contracts by the agent, he must also show that he had knowledge of such ratification, and relied thereon. *Maxey v. Heckethorn*, 44 Ill. 437, *Peter*

from the general conduct of the parties. Where one person holds another out as his agent, with certain authority, he is liable for his acts on the ground of estoppel, whether he actually intends to be bound or not. . . . While agency may be implied from a single transaction, it is more readily inferable from a course of dealing." So, in

Weaver v. Ogletree, 39 Ga. 586, it was held that an agent who has been in the habit of indorsing notes with his principal's name; with the knowledge and consent of the principal, will be presumed to have that authority. And the rule is well settled that agency may be inferred from a series of transactions. In Watkins v. Vince, 2 Starkie, 368,

Schoenhofen Brewing Co. v. Wengler, 57 Ill. App. 184; Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657.

Ratification must also be of contracts of a similar nature, and under substantially similar conditions and circumstances. Smith v. Georgia & A. R. Co. 113 Ga. 625, 38 S. E. 956. And must be made by the principal, with a knowledge of all the facts. Tebbetts v. Moore, 19 N. H. 369. And proof of the acceptance of benefits derived from a similar transaction, without knowledge of the facts, is not competent to establish agency. Cobb v. Hall, 49 Iowa, 366.

Where the question at issue was whether the alleged agent was the agent of the plaintiff or defendant, proof that the alleged agent had acted for the defendant in attempting to purchase other property of a similar nature is not admissible. Duryea v. Vosburgh, 121 N. Y. 57, 24 N. E. 308. The court said: "If the agency in the transaction in question would not by this evidence be sufficiently proved, can it be said that it does legitimately corroborate other evidence of agency, sufficient in itself, if believed, to prove the fact? I should still think not. I cannot see, in the latter case, that it is still anything but speculation, pure and simple. He acted as agent for Peck upon some past occasions, and, therefore, we are asked to say that the inference is legitimate, and that he acted as his agent in the present transaction. Unless it can be said that this evidence naturally tends, in some appreciable degree, to prove the fact of the defendant's acting for Peck in the particular transaction in litigation, I cannot see that it is admissible at all. . . .

It is entirely credible that defendant may have acted as such agent in the former applications to other parties, and still may not have so acted in this particular case. The two positions are not in the slightest degree inconsistent, and there is no intrinsic improbability of the truth of both. . . .

What is it, then, which should render proof of a wholly separate, distinct, and past transaction between other parties competent evidence against these plaintiffs? Reduced to its real merits, the proposition is solely founded upon a possibility, or, in other words, upon a mere guess or speculation, too shadowy entirely to support the inference of defendant's agency in this particular transaction. It is also evidence upon a fact not at issue in the case, for whether the defendant acted as agent for Peck once or twenty times before this would be wholly
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beside the issue, unless this inference which the defendant seeks to draw were a natural and usual one."

Husband and wife.

It will be noted that HAWKINS v. WINDHORST involves an agency by the husband for the wife. In general, the relation of husband and wife does not give rise to any presumption that the husband is acting in a transaction as agent of his wife, but, if the wife allows a husband to have the charge of her property, and knows that he is contracting with reference thereto in her name, and, with knowledge of the facts, she ratifies such contracts, a general agency to act for her, so as to bind her for similar contracts made by him in her name and as her agent, will be presumed. Foster v. Jones, 78 Ga. 150; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436, 36 Atl. 1003.

So, if a married woman allows her husband to contract with reference to her property in such a way as reasonably to lead third persons to believe that a general agency exists in the husband to make similar contracts, she will be held liable on similar contracts made by the husband as her agent. McNichols v. Kettner, 22 Ill. App. 493; Anderson v. Armstead, 69 Ill. 462; Bodine v. Killeen, 53 N. Y. 93.

And where the wife gives to the husband complete control of her real estate, and allows him to contract in her name in reference thereto, she will be estopped to deny his agency in similar contracts. Horr v. Hollis, 20 Wash. 424, 55 Pac. 565; Cunningham v. Mitchell, 30 Ind. 362.

So, evidence that the wife paid for similar goods bought by the husband, to be used on a farm owned by her, and upon which they both resided, is competent to prove agency of the husband to buy the goods in question, where it appeared that the husband carried on the farm by her leave. Lowell v. Williams, 125 Mass. 439.

But proof of the agency of the husband in a sale of one parcel of the wife's real estate is not admissible to prove his agency for the sale of another parcel of her real estate. Molt v. Baumann, 65 App. Div. 445, 72 N. Y. Supp. 832.

Neither is evidence that the husband acted as agent of the wife in other similar transactions, which she subsequently ratified, admissible to establish an agency in the transactions in question. Ham v. Brown Bros. 2 Ga. App. 71, 58 S. E. 316.

it is held: "Evidence that the son of the defendant, a minor, has, in three or four instances, signed bills of exchange for his father, is sufficient, in an action against the father on a guaranty, to warrant the reading of an instrument, purporting to be a guaranty by the father, in the handwriting of the son." To the same effect, see *Lovell v. Williams*, 125 Mass. 439; *Elliott, Ev.* § 1633, and cases cited; *Mechem, Agency*, §§ 84-86.

The doctrine is likewise well established that a person may be estopped from denying the agency of another where he has held the other out as his agent, and induced the public to believe that the relation of principal and agent existed. The doctrine is stated in the following language, in 2 *Kent's Commentaries*, 14th ed. p. 615: "So, where a broker had usually signed policies of insurance for another person, or an agent was in the habit of drawing bills on another, the authority was implied from the fact that the principal had assumed and ratified the acts; and he was held bound by a repetition of such acts, where there was no proof of notice of any revocation of the power, or of collusion between a third party and the agent."

Suppose the plaintiff could establish by evidence that all of the checks drawn upon defendant's bank account, previous to the transaction in question, had been signed by the husband with her knowledge and consent, it could hardly be said that this would not tend to prove general authority of the husband to sign checks, or that plaintiff should be restricted in his proof to evidence showing authority to sign the particular check. One of the reasons urged for the exclusion of the testimony is that the pleadings show that the transaction for which the check was given was one in which the husband alone was interested; but the purpose for which the check was to be used is not controlling. The theory of the plaintiff was that the husband had general authority to sign her name to checks for his own as well as for her business. It is to be observed that the question is not whether the offered instances fully proved the agency, but merely whether they should be received as having probative value. In this respect the value of the evidence depends upon circumstances, like the proof of any habit or custom. It was said by Lord Ellenborough that "one act, undisturbed, does not make a custom, but it will be evidence of a custom." *Roe ex dem. Bennett v. Jeffery*, 2 Maule & S. 92.

Some of the questions to which objections were sustained were preliminary in their nature, but they showed the purpose for 17 L.R.A.(N.S.)

which they were asked. A party is not required to prove all the material facts upon which he relies by a single witness, or to embrace all the issues in a single question. The witness may be unfriendly, and yet the party may call him to prove one of several relevant facts. In this case the plaintiff was not required to prove by the defendant that she authorized her husband to sign her name, or that she had acquiesced in what he had done, but the purpose of the question was clearly to show that certain checks had been destroyed, in order to lay a foundation for secondary evidence. The other questions were competent for the purpose of establishing the authority of the husband generally to sign checks upon her account.

The judgment will be reversed, and a new trial ordered.

Petition for rehearing denied May 15, 1908.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

MARY McNARY'S ADMINISTRATOR.

(— Ky. —, 108 S. W. 898.)

Railroad — stepping on track — looking and listening.

1. To step upon a railroad track without looking or listening for approaching trains will not be held to be negligence as matter of law where the scintilla rule of evidence applies, and there is any evidence that under the circumstances due care was used.

Same — signals — speed.

2. To run a train through a town across a place where persons are reasonably to be expected on the track, without sufficient notice of its approach, and at such speed that those in charge of it are powerless to accomplish anything to avoid injury to a person on the track after they obtain sight of him, is negligence.

Same — depot — approach on track.

3. A railroad company which maintains a depot with no adequate approach except by walking along the track is charged with notice that the presence of persons on the track at that point may reasonably be expected.

Damages — punitive — error.

4. It is error to submit to the jury the

Note. — Duty of railroad company to keep lookout for trespassers on track, see subject note to *Frye v. St. Louis, I. M. & S. R. Co.* 8 L.R.A.(N.S.) 1069. Duty to moderate speed of train where trespassers are to be anticipated, see case note to *Illinois C. R. Co. v. Murphy*, 11 L.R.A.(N.S.) 352.

question of punitive damages in an action to recover for the killing of a person by a railroad company where there is nothing in the evidence to warrant it.

Railroad — signal — sufficiency.

5. A signal of the approach of a train is reasonable which is ordinarily sufficient to give notice of its coming to persons who are themselves exercising ordinary care for their own safety and in possession of their ordinary faculties.

(March 12, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Hopkins County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of his intestate. Reversed.

The facts are stated in the opinion.

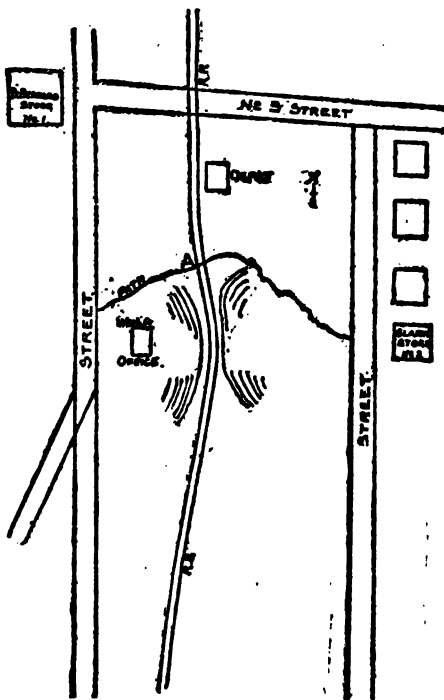
Messrs. Benjamin D. Warfield and Waddill & Dempsey for appellant.

Messrs. Yost & Laffoon for appellee.

Hobson, J., delivered the opinion of the court:

Barnsley, Kentucky, is a town of the sixth class. It has from 400 to 500 inhabitants. It is a mining town. The Louisville & Nashville Railroad runs through it. There are two stores,—one on one side of the railroad, and one on the other. A path runs from one of these stores directly across the railroad to a street on the opposite side, the town lying about equally on each side of the railroad. This path was considerably used by the people of the town in passing to and fro, from 50 to 100 people passing along it every day. There was a street crossing over the railroad about 200 feet north of the path, and about midway between the path and the street was the railroad station. About 800 feet south of the path there was another crossing. In April, 1905, Mary McNary, a woman about seventy years old, was walking along this path going east towards Clark's store. She had on a bonnet, and was not looking out for the train, and just as she got on the track she was struck and killed by a fast passenger train coming from the south, and running 40 or 50 miles an hour. The train was a through express, which stopped at only three or four points in the state, and did not check its speed at Barnsley. Persons in the northern part of the town in going to the depot were accustomed to walk along the street north of it until they came to the railroad crossing, and then to walk along the railroad track to the depot. Persons in the southern part of the town followed the path to the railroad track, and then walked along the track to the depot. The path was also used by persons on one side of the railroad to go to the other side. The situation is shown by the following

plot, on which A indicates the point where the woman was struck:



The only witness for the plaintiff who saw the occurrence was at the house next to Clark's store, and thus states what occurred: "Me and Dona Thomasson was there, and when I came to the door I seen this old lady coming along the dirt road. She was over 6 feet from the railroad track, and she was coming on across, and the train was coming down here about 30 feet from her. Mrs. Young and her two little boys and I were looking and I never seen the train blow a whistle or ring a bell until it hit her. It hit her, and come on up to a telephone post, and whistled two little short whistles, cleared the crossing, and whistled five times."

Mrs. Young's testimony was introduced by the defendant, and was as follows: "I saw Mary McNary killed. The accident occurred right in front of my dwelling. I lived in Barnsley on the east side of the point of accident about 30 or 40 yards from the track. My house was nearest house to the track. I saw Mary McNary come upon the track from the west side to the track just opposite my house. Just as she stepped to the track the train whistled, and she ran across the track, but before she got across she was struck and pitched on the east side of the track. When she came upon the track she had on a bonnet, and did

not look up or down the track, but was looking down to the ground. If she had looked up the track when or before she stepped on the track, she could have seen the approaching train for a long distance."

The track, as shown by the map, makes a slight curve just south of the path, and passes through a cut. The engineer of the train testified that the fireman called his attention to the woman, and almost simultaneously with his exclamation she appeared on his side. The fireman, being on the left side, would naturally see her first, and as shown on the plot neither of them could see her until they were very close to her. The train was running at its usual speed at that point. There was considerable proof for the plaintiff by witnesses who testified that there were no signals given of the approach of the train, and on the other hand there was proof for the defendant by a number of witnesses that the signals were given. The jury found for the plaintiff, fixing the damages at \$1,235. The railroad company appeals.

It is very evident from the proof that those in charge of the train did not see the woman, and could not have seen her in time to avoid striking her. She was hid from them by the cut until they were so close to her that nothing could be done. She was evidently on the track when they saw her, and they were then so close to her that she was struck by the train before she could get out of the way. She was not on a public crossing. It was simply a path across the railroad, similar to many others on all railroads, used by people in the vicinity. The railroad men testify that they did not know anything of the path. This court has laid down in a long line of opinions that the railroad company ordinarily owes no duty to a trespasser until his peril is discovered, and that it is not liable for an injury to him, unless after his peril is discovered the injury to him may be avoided with proper care. This rule has been applied in all cases where the injury occurred in the country. *Louisville & N. R. Co. v. Howard*, 82 Ky. 212; *Shackleford v. Louisville & N. R. Co.* 84 Ky. 43, 4 Am. St. Rep. 189; *Brown v. Louisville & N. R. Co.* 97 Ky. 228, 30 S. W. 639; *Goodman v. Louisville & N. R. Co.* (*Craddock v. Louisville & N. R. Co.*) 116 Ky. 900, 63 L.R.A. 657, 77 S. W. 174; *Chesapeake & O. R. Co. v. See*, 25 Ky. L. Rep. 1995, 79 S. W. 252, and cases cited.

On the other hand, in cities and towns where the population is dense, and from the number of persons passing the danger to life is great, a different rule applies; and in such localities it is the duty of those operating railroad trains to moderate the 17 L.R.A. (N.S.)

speed of the train. to give notice of its approach, to keep a lookout, and take such precautions as the circumstances demand for the proper security to human life. Thus in *Shelby v. Cincinnati, N. O. & T. P. R. Co.* 85 Ky. 225, 3 S. W. 157, the intestate a few hours before his death had been employed by the owner to water hogs in a box car of a freight train. At the time he was killed he was in the yard to solicit employment by the same person in watering cattle in a car of another train, and was standing on the side track opposite the cattle car waiting for the owner who was in it. While he was standing there some cars were kicked in on that track without any signal and with no one upon them to control them. These cars ran over him and killed him. The accident happened at Junction City, a place of 400 persons. About 20 families resided south of the railroad and were accustomed to pass along the side track at this point in going to the part of the town north of the road. It was held that the plaintiff could recover. The court said: "There is some conflict of authority as to the extent of duty which a railroad company owes to pedestrians who, by license or custom, use its track to travel on. But unquestionably such fact should enhance the duty of the servants of the company to exercise caution and prudence in the operation of its road at such place. 1 Thomp. Neg. 453. And in our opinion the full performance of duty requires that neither a train nor single car should be moved at such place without some servant is in a position to give warning of its approach and control its movement." In *Louisville & N. R. Co. v. Schuster*, 10 Ky. L. Rep. 65, 7 S. W. 874, the plaintiff was hurt on the track of the Louisville & Nashville Railroad between Beargrass creek and its depot in the city of Louisville. There was at the place a fill 20 or 30 feet high, and about 23 feet wide at the top. On this fill there were two tracks. Buchanan street had been constructed to within 150 to 200 feet of this fill on the south side, but no street passed the fill or came nearer than this. The plaintiff and a companion came along Buchanan street, and then followed a path over the railroad fill. When they got upon the top of the fill a train was passing them on one track, and, while they were standing upon the other track waiting for this train to pass, Schuster was struck by a train going in the opposite direction on the track on which he was standing. Many persons lived and worked in the vicinity, and there was much passing along the railroad track at this point. It was held that he could recover. The court said: "The degree of care to be exercised by a railroad company must

necessarily depend upon the location and the circumstances of the case. At places not frequented by the public, either by right or the permission, express or implied, of the company, and in localities where people are not constantly passing about, and where they cannot reasonably be expected to be, those in charge of a train are not required by law to be on the lookout for them. In such cases the company is entitled to the exclusive use of its track, and those upon it are trespassers, and those in charge of a train are only required to avoid injury to them if they can do so upon becoming aware of their peril. In a place thickly populated, however, and where many persons are known to be constantly passing about and across the road, as in a city like Louisville, the public interest and regard for the safety of human life require a different rule. In such a case those in charge of such a dangerous agency as a railroad train must be on the lookout for persons upon and crossing its track, and must, by the customary signals, warn them of the approaching danger. This rule should be rigidly enforced." In *Conley v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 402, 12 S. W. 764, Conley was killed at Burgin, Kentucky, a place of about 200 people. A train pulling into Burgin was cut in two about a mile north of the station, the engine running rapidly forward with a part of the cars, and leaving the hinder part of the train to follow on more slowly by its own momentum. It was at night, and dark. There was no light upon the hinder part of the train, and no signal given of its approach. After the engine with its cars had passed the station Conley undertook to walk from the depot across to the section house either on the path leading from one to the other or near the path, and while doing so was struck by the hinder part of the train which had no light upon it, and gave no warning of its approach. It was held that he could recover. In *Gunn v. Felton*, 108 Ky. 561, 57 S. W. 15, a child thirteen years of age suffering from headache fell asleep in the yard of the railroad at Danville. One of his arms rested upon the railroad track. While lying there in this position he was run over by a train. The place at which he was hurt was one where the presence of persons on the track was to be anticipated. It was held that it was the duty of the defendant to be on the lookout and use ordinary care for the protection of such persons. In *Chesapeake & O. R. Co. v. Perkins*, 20 Ky. L. Rep. 608, 47 S. W. 259, Perkins lived in Lexington, and was walking along the railroad track east of Ellerslie avenue, and between it and the Winchester pike. The roadway along there was much used by people in 17 L.R.A. (N.S.)

passing to and fro. He was struck by a train coming up behind him, and a recovery was sustained on the ground that a proper lookout was not maintained. In *Louisville & N. R. Co. v. McCombs*, 21 Ky. L. Rep. 1233, 54 S. W. 179, McCombs was following a path across the railroad track in the city of Hopkinsville. There were two cross streets with regular crossings, but he left the public way and undertook to cut across a lot by following the path, which was much used by persons in that vicinity. He crawled under a freight train on one track, and was afterwards struck by a passenger train on another track running at a very high rate of speed. It was held the case should go to the jury upon the ground that it was the duty of the railroad to moderate the speed of its trains in localities such as that. In *Chesapeake & O. R. Co. v. Keelin*, 22 Ky. L. Rep. 1942, 62 S. W. 261, the intestate was killed in Catlettsburg at a point where many persons walked upon the railroad track, while he was standing on one track waiting for a train on the other track to pass. A recovery was sustained. The principles involved in these cases have been followed in a number of subsequent opinions. See *Louisville & N. R. Co. v. Potts*, 92 Ky. 30, 17 S. W. 185; *Louisville & N. R. Co. v. Cummins*, 111 Ky. 333, 63 S. W. 594; *Louisville & N. R. Co. v. Lowe*, 118 Ky. 260, 65 L.R.A. 122, 80 S. W. 768; *Illinois C. R. Co. v. Murphy*, 123 Ky. 787, 11 L.R.A. (N.S.) 352, 97 S. W. 729; *Rader v. Louisville & N. R. Co.* 31 Ky. L. Rep. 1105, 104 S. W. 774; *Louisville & N. R. Co. v. Taylor*, 31 Ky. L. Rep. 1142, 104 S. W. 777, and cases cited.

The court here instructed the jury in effect that, if the place was habitually used by the public with the knowledge of the defendant, and the presence of persons on the track there was reasonably to be anticipated by it, it was its duty to keep a lookout for them, to give such signals of the approach of the train as were reasonably necessary, and to run its train at such speed as ordinary care for their safety required; that if it failed to do this, and by reason of such failure the intestate was killed, they should find for the plaintiff; but that, although there was negligence on the part of the defendant, yet, if the intestate failed to use ordinary care for her own safety, they should find for the defendant. He also instructed the jury that they should find for the defendant if a signal of the approach of the train was given which was ordinarily sufficient to give notice thereof to persons exercising ordinary care for their own safety. The finding of the jury for the plaintiff under the instructions was necessarily a finding that the train did not give notice of its approach ordinarily sufficient to warn

persons who were exercising ordinary care for their own safety, and that the intestate did exercise ordinary care for her own safety. The evidence was very conflicting as to the signals given by the train; but the jury were warranted from all the evidence in concluding that the train whistled for the crossing 800 feet south of the pathway at which the plaintiff was crossing, but that it did not whistle any more or give any other signal of its approach until about the time it struck the woman. The sounds may have been deflected by the sides of the cut, so that the woman as she approached the railroad track heard neither the whistle nor the noise of the approaching train. It was running so rapidly that it covered the distance in a very few seconds. The woman manifestly could have seen the train if she had looked in that direction just before she went upon the track, but she had a right to assume that notice of the approach of a train would be given; and where proper signals are not given this court has held in a number of cases that the question whether the traveler used ordinary care is for the jury. *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345, 18 S. W. 2; *Louisville & N. R. Co. v. Cooper*, 21 Ky. L. Rep. 1044, 56 S. W. 144; *Louisville & N. R. Co. v. Lucas*, 30 Ky. L. Rep. 359, 98 S. W. 309, and cases cited above. To hold as a matter of law that the footman is guilty of contributory negligence barring a recovery for his injury whenever he goes upon a railroad track without stopping, looking, or listening would be practically to exempt railroads from all responsibility in cases of this sort; for there are few cases, indeed, where the footman if he stopped, looked, or listened could not save himself by stepping to one side and waiting for the train to pass. But the fact is that a person thinking of his own business is sometimes unmindful of where he is, and will get on a railroad track before he is aware of it, or he will from other causes be endangered from passing trains. So it is that in crowded localities, when the presence of persons on the track is to be anticipated, a lookout is required of those operating trains, and notice of their approach, and such moderation of speed as will make a lookout and signals of the train's approach available for the safety of the traveling public. In each case the question whether the traveler used proper care will depend on a number of circumstances, such as the number of trains passing, the warning given of the train's approach, and the circumstances surrounding him. In this state if there is any evidence the question is for the jury, and the scintilla rule applies to questions of contributory negligence no less than to other questions. Where the scintilla rule does not prevail, a different conclusion is 17 L.R.A. (N.S.)

reached by the courts; but where the scintilla rule is followed, the cases are in the main in accord with the conclusion stated above, for the reason that, whether the traveler exercised such care as may be ordinarily expected of the common run of persons, being a question depending on a number of circumstances, to each of which different men may give different weight, is a matter peculiarly for the jury.

If the railroad company had shunted cars down this track in the nighttime, with no light upon them, and with nobody on the cars to control them, and had thus run over the woman at the path crossing, under the authorities above referred to, it would have been liable. But to run a train along there without sufficient notice of its approach at such speed that those in charge of it were powerless to accomplish anything by a lookout after they rounded the curve in the cut was just as great a menace to human life as to have shunted the cars along the track in the dark in the manner supposed. While the men in charge of the train naturally knew nothing about the path at this station, where they did not stop, the defendant was charged with the knowledge that Barnsley was an incorporated town of 400 or 500 people. It was also charged with the knowledge that its depot was approached both on the north and on the south by persons walking along the railroad track, there being no other adequate way to get to it; and so it was charged with knowledge that this was a place at which the presence of persons on the track might reasonably be anticipated. If the woman had been killed at the street crossing, under the proof before us, it could hardly be maintained that the company would not be liable. But it is insisted that the fact that she was at a private crossing, and was not going to the station, exempts it from liability. This would be true but for the fact that the private crossing was in a town where the presence of persons on the track was to be anticipated, and where the defendant was required to keep a lookout for them, and to give adequate notice of the approach of the train. It was peculiarly necessary that adequate notice of the approach of the train should be given, and that the speed of the train be such that the lookout would not be idle, as the train passed through the cut and emerged from a curve within the town, and so close to the station where the presence of persons on the track or about it was reasonably to be expected.

We, therefore, conclude that the court did not err in refusing to instruct the jury peremptorily to find for the defendant; but there was nothing in the evidence to warrant an instruction on punitive damages, and the

court erred in submitting to the jury the question of punitive damages or of gross negligence. On another trial, in lieu of the instructions given the court will instruct the jury as follows: "(1) The court instructs the jury that if they believe from the evidence that the track of the defendant in the town of Barnsley at and about the pathway shown by the testimony frequently and habitually used by the public as a footway, with the knowledge and acquiescence of the defendant, was a place where the presence of persons on the track was to be anticipated, then it was the duty of the defendant's agents, when moving cars on that part of the track, to keep a lookout for persons using it as a footway, and to give reasonable signals and warnings of the movements of its cars when approaching said place, and to run its cars and trains at such speed as ordinary care for the safety of such persons required; and if the jury believe from the evidence that the defendant's agents in charge of its train mentioned by the witnesses negligently failed to perform any of these duties in the movement of said train of cars, and that by reason thereof the plaintiff's intestate, Mary McNary, while so upon the track at said place, was run upon and killed by said train, and that she was at the time using ordinary care for her own safety, the law is for the plaintiff, and the jury will so find. If they find for the plaintiff, they will award such a sum in damages as they believe from the evidence will reasonably compensate the estate of Mary McNary for the destruction of her power to earn money. (2) A signal of the train's approach was reasonable which was ordinarily sufficient to give notice of its coming to persons who were themselves exercising ordinary care for their own safety and in possession of their ordinary faculties. (3) Unless the defendant's servants in charge of the train were negligent as defined in No. 1, the jury should find for the defendant; and although there was such negligence on the part of the defendant's servants, yet if, in going on the railroad track as she did, the deceased failed to use ordinary care for her own safety, and but for this would not have been injured, then the jury will find for the defendant notwithstanding such negligence on its part." These instructions, with Nos. 4 and 5 given by the court defining negligence and ordinary care, cover the whole law of the case, and no other instructions are necessary.

On another trial the evidence in regard to the defendant's putting dirt on the top of the dump will be omitted.

Judgment reversed, and cause remanded for a new trial.

17 L.R.A. (N.S.)

MAINE SUPREME JUDICIAL COURT.

CHARLES E. LANCASTER

v.

MORRILL H. AMES.

(103 Me. 87, 68 Atl. 533.)

Evidence — letter — authentication.

1. A letter bearing a typewritten signature is admissible in evidence as proof of the receipt of a remittance acknowledged therein, without authentication of the signature, where it was sent in response to a letter containing notification of the remittance.

Same — authenticity.

2. That a letter was written in response to another sufficiently appears from evidence that it was dated the day after the latter, and referred to checks transmitted in it and to receipts to be sent to persons from whom the money, represented by them, was alleged to have been received.

Gaming — stock transaction — returning money advanced.

3. A court will not enforce a promise to repay money advanced for use in buying stocks on margins on account of the one making the advance.

(September 19, 1907.)

Case Note. — Necessity of proof of genuineness of reply letter.

Where a letter, properly stamped and mailed, was addressed to a party at his post-office address, and a reply thereto, purporting to be from the party to whom the original letter was sent, was received by the sender in due course of mail, the rule is that such facts are prima facie sufficient evidence of the genuineness of the reply letter. *Campbell v. Woodstock Iron Co.* 83 Ala. 351, 3 So. 369; *Norwegian Plow Co. v. Munger*, 52 Kan. 371, 35 Pac. 11; *Ullman v. Babcock*, 63 Tex. 68.

The courts will not presume that some stranger, surreptitiously or otherwise, got possession of the original letter and answered it (*Chicago, B. & Q. R. Co. v. Roberts*, 10 Colo. App. 87, 49 Pac. 428), but will presume that such answer is the letter of the one whose name is signed to it (*Scofield v. Parlin & O. Co.* 10 C. C. A. 83, 18 U. S. App. 692, 61 Fed. 804; *Ragan v. Smith*, 103 Ga. 556, 29 S. E. 759; *Melby v. D. M. Osborne & Co.* 33 Minn. 492, 24 N. W. 253; *Leesville Mfg. Co. v. Morgan Wood & Iron Works*, 75 S. C. 342, 55 S. E. 768), and will admit such reply letter in evidence without proof that it is in the handwriting of the party purporting to have sent it (*White v. Tolliver*, 110 Ala. 300, 20 So. 97; *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; *Boykin v. State*, 40 Fla. 484, 24 So. 141; *Grayville Waterworks v. Burdick*, 109 Ill. App. 520; *Lyon v. Railway Pass. Assur. Co.* 46 Iowa. 631; *City Nat. Bank v. Jordan* (Iowa) 117 N. W. 758; *Connecticut v. Bradish*, 14 Mass. 296; *J. H. Sanders Pub. Co. v. Emerson*, 64 Mo. App. 662; *Hays v. General Assembly American Benev. Asso.* 127 Mo. App.

EXCEPTIONS by defendant to rulings of the Superior Court for Cumberland County made during the trial of an action brought to recover back money alleged to have been deposited with defendant for investment which resulted in a verdict in plaintiff's favor, and motion by him for new trial. Sustained.

The facts are stated in the opinion.

Messrs. Seiders, Marshall, & Sturgis for defendant.

Mr. Clarence E. Sawyer for plaintiff.

Savage, J., delivered the opinion of the court:

The plaintiff in his declaration alleges, among other things, that he let the defendant have \$100 to invest, and that the defendant promised to account for or return the same at the end of one year, if so requested. Also, under the money counts in his writ, the plaintiff made the following specification: "The plaintiff will prove the defendant accepted \$100 on July 13, 1903, for use of the plaintiff; and that he agreed to repay or account for said sum at the end of one year, but has neglected so to do upon request, and that said money was accepted by the defendant to invest." We can discover no substantial difference between the special count, and the specification under the money counts. Although other promises are set out in the special count, the amount of the verdict for the plaintiff, considered in the light of the evidence, makes it certain that the jury based their verdict upon the allegations which we have already stated. The plaintiff's testimony, or at least some portions of it, tended to support these allegations.

The defendant, on the other hand, denied making the alleged promise, but claimed that the plaintiff let him have the money to be sent to a concern in Boston, known as the Financial Indicator Company, to be used by that company in buying on the plaintiff's account stock in the American Sugar Refining

Company on margins. He also claimed that the sole responsibility assumed by him was the forwarding of the money to the Boston concern, and that he forwarded the money as agreed. Either one of the defendant's claims, if sustained by proof, would constitute a defense. The defendant, therefore, as a part of his defense, had a right to show that he forwarded the money to the Financial Indicator Company.

It seems to be undisputed that when the plaintiff paid his money to the defendant the latter gave him a receipt of the following tenor:

Portland, July 13, 1903.

Received of Charles E. Lancaster one hundred dollars to be invested in the Financial Indicator Co. 31 State St., Boston, Mass. This receipt to be void when he receives receipt from said Co.

The defendant testified, without objection, that he sent a check for the money to the Financial Indicator Company by mail, the night of the 13th of July; that the check came back to him in the ordinary course of banking as paid, and bearing the indorsement of W. H. Gilman, the treasurer and manager of the Indicator company; and that on the 15th of July he received the letter which he offered as a reply to his remittance of the plaintiff's money. This letter bore date "Boston, July 14, 1903." Upon it was printed what appeared to be the letter head of the Financial Indicator Company at 31 State street, Boston, together with the names of the president, and of W. H. Gilman as treasurer. The whole body of the letter, including the name of the one purporting to be the writer, was typewritten. There was no written signature.

The defendant further testified that he had before that time received letters from Gilman or the Indicator Co., having a letter head like the one in question; that usually they had been signed on the typewriter only;

195, 104 S. W. 1141; People's Nat. Bank v. Geisthardt, 55 Neb. 232, 75 N. W. 582; Peycke v. Shinn, 76 Neb. 364, 107 N. W. 386; Armstrong v. Advance Thresher Co. 5 S. D. 12, 57 N. W. 1131; Lewis v. Alexander [Tex. Civ. App.] 31 S. W. 414; Loverin & B. Co. v. Bumgarner, 59 W. Va. 46, 52 S. E. 1000; Ovenston v. Wilson, 2 Car. & K. 1).

And so it was held where the reply letter was typewritten (Davis's Sons v. Robinson, 67 Iowa, 355, 25 N. W. 280; Norwegian Plow Co. v. Munger, *supra*) and type-signed (Huber Mfg. Co. v. Claudel, 71 Kan. 441, 80 Pac. 960), and where the reply letter was written on the letter head of a corporation to which the original letter was addressed, although the signature to the reply letter, of a person named in the

letter head as an officer of the corporation, appeared to have been affixed with a rubber stamp (National Acci. Soc. v. Spiro, 24 C. C. A. 334, 47 U. S. App. 293, 78 Fed. 774).

In Illinois C. R. Co. v. Messnard, 15 Ill. App. 213, it was held that, though such evidence was not conclusive proof of its genuineness, it was sufficient to warrant its introduction in evidence, even though the one whose name was signed thereto denied having written it.

In Nichols-Shepard Co. v. Ringler, 135 Iowa, 181, 112 N. W. 543, a reply letter was held admissible in evidence; but in this case the receiver of the letter identified the signature by comparison with letters previously received from the same writer.

that he had replied to Gilman, taking up matters presented in such letters, and had received replies back from him covering the same subjects.

The letter was addressed to the defendant, and, omitting the letter head and immaterial matters, was as follows:

Dear Sir:—

Your letter of yesterday's date inclosing checks for \$150 received. . . . I have an appointment with some prominent parties at 3:30, and I trust you will excuse the delay about sending receipts until to-morrow.

I shall send one direct to Dr. Charles E. Lancaster, Brunswick, Me., and the other directly to you for Elizabeth W. V. ———.

Yours truly,
W. H. Gilman.

This letter when offered was excluded by the court, and exceptions were taken by the defendant, the verdict being against him. The correctness of this ruling we have now to consider.

The letter was excluded, not because a genuine acknowledgment of the defendant's remittance to Gilman or the Indicator company would not have been admissible, as indeed it would be, but solely because, being wholly typewritten, it was not "authenticated in the usual way," and because "the letter itself, in the judgment of the court, did not seem to possess sufficient internal evidence of its authority to allow it to go to the jury."

It is true as a general rule that documentary evidence, to be admissible, must be authenticated, and in case of a letter this is ordinarily done by proof of the genuineness of the signature of the writer. When the signature is typewritten this method of authentication may be difficult, if not impossible. At any rate it was not tried in this case. But there is a relaxation of this rule in the case of what are called reply letters. The rule does not apply to a letter which is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been duly addressed and mailed. Proof of these facts is sufficient evidence of the genuineness of the reply to go to the jury, without specific proof of the genuineness of the signature. The genuineness is assumed, at least, until the contrary is shown. *Connecticut v. Bradish*, 14 Mass. 296; 3 Wigmore, Ev. § 2153: The rule is recognized in *Abbott v. McAloon*, 70 Me. 98. This is true when the signature is in the handwriting of some person. Logically, it must be equally true when the signature is typewritten.

We think the letter before us bears internal evidence of being an answer to a prior one 17 L.R.A. (N.S.)

written by the defendant to Gilman, the treasurer of the Indicator company. The succession of dates, the reference to checks received and to receipts to be sent to the plaintiff and one other person, taken in connection with the testimony respecting the letter written by the defendant to the Indicator company, leave no real doubt that the letter over the name "Gilman" was an answer to one written the day before by the defendant, in which he says he inclosed the plaintiff's money. That is certainly the purport of it. Accordingly we think that the letter should have been admitted. The defendant's exceptions must be sustained.

We think that the motion for a new trial should also be sustained.

The plaintiff denies that he knew that the money was to be sent to the Boston concern for investment, or that he understood it was to be used for stock gambling either in Boston, or by the defendant at Portland. The effect of the receipt taken by him and of some of his admissions renders it extremely improbable that his present version relating to the defendant's position in the matter is the true one. But assuming that it was as he now claims, and that he thought he was dealing with the defendant alone as a principal, we think, after a careful consideration of all the evidence, that the plaintiff, notwithstanding his denials, intended that his money should be used in stock gambling. To say in the light of the evidence that he did not understand that the money was to be used in buying "sugar" stock on margins is not creditable to the intelligence of an educated professional man such as he is. We are convinced that he so understood, and that he intended the money to be so used. If so, the whole transaction was illegal. *Rumsey v. Berry*, 65 Me. 570; *O'Brien v. Luques*, 81 Me. 48, 16 Atl. 304. The defendant's promise to repay or to be accountable for the money, if he made such a promise, was a part of the illegal transaction, which the court will not enforce. *Tyler v. Carlisle*, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 356. We think the verdict was clearly wrong, and that it should be set aside.

Motion and exceptions sustained.

MICHIGAN SUPREME COURT.

HENRY YOUNG

v.

EUGENE STEIN, Plff. in Err.

(152 Mich. 310, 116 N. W. 195.)

Building contract — binding effect.

1. The owner is, in the absence of fraud or collusion, bound by the certificate of the

architect as to the completion of a building contract where such certificate by the terms of the contract was to be binding on the contractor, although the contract was signed by the architect as agent of the owner,—especially if the owner adopted the contract as his.

Same — certificate — estoppel.

2. The architect's certificate of compliance with the plans and specifications of a building contract estops the owner from disputing such compliance so far as it is not within the exception of the contract that the certificate shall not release the contractor from any obligation to perform the work in a good and workmanlike manner.

Same — defective workmanship.

3. Sloping floors and windows out of shape are evidence of bad workmanship within the meaning of a building contract that the architect's certificate shall not release the contractor from the obligation of performing the work in a good and workmanlike manner.

(May 1, 1908.)

ERROR to the Circuit Court for Wayne County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a building contract. Reversed.

The facts are stated in the opinion.

Messrs. *Stellwagen & MacKay*, for plaintiff in error:

Having taken possession of the house, the owner would be liable only on a *quantum meruit*.

Eaton v. Gladwell, 121 Mich. 444, 80 N. W. 292.

Mr. *Isaac N. Payne*, for defendant in error:

When the architect has the power to inspect and approve or reject work and material, he is the representative of the owner, and his decision as to the character of the work, etc., by his final certificate, is binding on the owner.

Willey v. Fractional School Dist. No. 1, 25 Mich. 419; *Omaha v. Hammond*, 94 U. S. 98, 24 L. ed. 70; *Kihlberg v. United States*, 97 U. S. 398, 24 L. ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 27 L. ed. 1053, 3 Sup. Ct. Rep. 344; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; *O'Reilly v. Kerns*, 62 Pa. 217; *Lull v. Korf*, 70 Ill. 420, 84 Ill. 226; *Condon v. South Side R. Co.* 14 Gratt. 308;

Note. — Effect of decision of architect, engineer, or umpire in case of fraud or mistake, see case note to *Edwards v. Harts-horn*, 1 L.R.A. (N.S.) 1050. As to whether full or substantial performance of a construction contract will, as a matter of law, excuse the failure to secure an architect's or engineer's certificate as required by a contract, see case note to *Bush v. Jones*, 6 L.R.A. (N.S.) 774. 17 L.R.A. (N.S.)

Hudson v. McCartney, 33 Wis. 332; *Kane v. Stone Co.* 39 Ohio St. 1; *Stose v. Heissler*, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161; *Canal Trustees v. Lynch*, 10 Ill. 526; *McAvoy v. Long*, 13 Ill. 147; *Mills v. Weeks*, 21 Ill. 561; *McAuley v. Carter*, 22 Ill. 53; *Parmelee v. Hambleton*, 24 Ill. 608; *Wallace v. Curtiss*, 36 Ill. 156; *Snell v. Brown*, 71 Ill. 133; *Coey v. Lehman*, 79 Ill. 173; *Taylor v. Renn*, 79 Ill. 181; *Downey v. O'Donnell*, 86 Ill. 49, 92 Ill. 559; *Finney v. Condon*, 86 Ill. 78; *Vermont Street M. E. Church v. Brose*, 104 Ill. 206; *Hot Springs R. Co. v. Maher*, 48 Ark. 522, 3 S. W. 639; *McMahon v. New York & E. R. Co.* 20 N. Y. 463; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 264; *Tetz v. Butterfield*, 54 Wis. 246, 41 Am. Rep. 29, 11 N. W. 531.

McAlvay, Ch. J., delivered the opinion of the court:

Plaintiff is a contractor and builder in the city of Detroit. He entered into a contract in writing to build a house for defendant for the sum of \$1,892, according to certain plans and specifications. This suit was brought to recover a balance of \$560 claimed to be due under the contract, and for some extras amounting to \$104.50. The declaration was in assumpsit upon the contract and on the common counts. Defendant under the general issue gave notice of special defense, admitting that the contract was entered into, but that it was not performed by plaintiff according to its terms, to his damage, which he was entitled to recoup. He also gave notice of set-off. A verdict for \$738.50 was rendered in favor of plaintiff, upon which a judgment was entered.

The case is here for review upon writ of error. The terms of the contract need not be set forth, as it is of considerable length. The owner agreed to pay the contractor \$1,892 for the work and materials as follows: "On certificates issued from time to time as the work progresses, reserving 10 per cent until the work is entirely completed and accepted by the owner and architect. It being understood that the final payment shall be made within thirty days after this contract is completely finished; provided that in each of said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to their satisfaction." The contract also provides: "It is further mutually agreed by the parties hereto that the inspection of any work by the architect, or the issuance of certificates thereon by him, or payments made by the owner under this contract, shall not release the contractor of any obligation to perform the work in a good and workmanlike manner; and in case of any default or defects being found at any time,

either in workmanship or materials, the same, with all damages due thereto, shall be repaired, replaced, or made good by the contractor at his own cost and expense." Defendant insists that the house was not built according to plans and specifications, and he was not bound by the certificates of the architect. Paragraph 1 of the contract requires the contractor to do the work under the direction and to the satisfaction of architect (acting as agent of said owner) ". . . agreeably to the drawing and specifications made by said architect." Under paragraph 2, in case of doubt "respecting the true meaning of the drawings or specifications, reference shall be made to the architect, whose decision thereon shall be final and conclusive." Paragraph 4 requires the contractor, on notice from the architect, "to remove from the grounds or building all materials condemned by them, . . . or take down all portions of the work which the architect shall condemn as unsound," etc. Paragraph 8 provides: "The contractor shall make no claim for additional work unless the same shall be done in pursuance of an order from the architect. Paragraph 10 provides: "Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part herein contained, such refusal, neglect, or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, etc. . . . And if the architect shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall be at liberty to terminate the employment of the contractor for the said work, and to enter upon the premises and take possession of all materials thereon, and to employ any other person or persons to finish the work, and to provide materials therefor. . . . The expenses incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

It is clear that, under this contract, the determination of the architect as to what is required of the contractor by the plans and specifications is conclusive upon the contractor, and, unless, such determination is likewise conclusive upon the owner, we should have the anomalous and unconscionable result that the owner might contest the con-

tractor's right to compensation for work performed by him precisely as ordered by the owner's agent, the architect, whose orders he was bound to obey. Such a construction of the contract ought not to be adopted unless imperatively required by its terms. *Willey v. Fractional School Dist. No. 1*, 25 Mich. 419.

The contract was drawn by the architect as the agent of the owner, and was signed by the architect, and not by the owner; the owner adopting the contract as his after its execution. The architect is described in the contract as agent of the owner. The provision in paragraph 13 "that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to their satisfaction" indicates clearly that the acceptance "by the owner and architect" is to be evidenced by the certificate of the architect. This certificate the contractor obtained, and, being made by the owner's unquestioned agent, acting entirely within the scope of his express authority, it bound the owner, in the absence of any showing of fraud or collusion, as much as though he himself had signed it. *Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78.

The trial judge correctly held that defendant was estopped by the architect's certificates from raising the question of a failure on the part of the contractor to comply with the plans and specifications, so far as such failure was not the result of bad workmanship. Defendant was not allowed to show faulty workmanship; the court holding that he had accepted the house and was estopped. The question of acceptance upon this record was one of fact for the jury, so far as the question of good workmanship and materials was concerned. *Gier v. Daiber*, 148 Mich. 190, 111 N. W. 773.

The question of damages from faulty workmanship should have been submitted to the jury, under the fourteenth paragraph of the contract. The testimony tended to show, and it was substantially admitted by plaintiff, that certain rooms were constructed with one side several inches longer than the parallel one; that on one side of the bay window 22-inch glass was used, and on the other 24-inch, which twisted the window around and threw it out of shape. Such construction is at least evidence of bad workmanship, which the parties undertook to cover by the fourteenth paragraph. The court was in error in excluding such evidence.

The judgment of the Circuit Court is reversed, and a new trial ordered.

MICHIGAN SUPREME COURT.

FRANK W. SCOTT, Plff. in Err.,

v.

UNIVERSITY OF MICHIGAN ATHLETIC ASSOCIATION et al.

(— Mich. —, 116 N. W. 624.)

University — student body — collapse of stand.

1. A student association of a university, which erects through one of its directors a stand upon the athletic field to accommodate patrons of athletic exhibitions given thereon, is liable for injuries to a patron through the collapse of the stand due to its negligent construction, although it could not have been constructed without consent of the authorities of the university, and the director who supervised its erection was employed and paid by the university as adviser of the athletic policy of the association.

Amusement — collapse of stand — liability.

2. The mere employment, by persons about to give an athletic exhibition to which the public is invited upon payment of an admission fee, of competent persons to build and inspect a stand for the accommodation of patrons, will not absolve them from liability for injuries to a patron from the collapse of the stand through a patent defect discoverable by the exercise of proper care.

(May 26, 1908.)

ERROR to the Circuit Court for Monroe County to review a judgment in defendants' favor in an action brought to recover damages for personal injury alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. Lee N. Brown, E. B. Norris, and J. W. Bennett, for plaintiff in error:

It is not sufficient that the athletic association and Mr. Baird employed the very best talent obtainable to pass upon the sufficiency of the structure; that they took due precautions to insure the safety of the plaintiff while occupying this bleacher.

Van Dusen v. Letellier, 78 Mich. 492, 44 N. W. 572; Woods v. Chicago & G. T. R. Co. 108 Mich. 396, 66 N. W. 328; Stowell v. Standard Oil Co. 139 Mich. 18, 102 N. W. 227; Hagan v. Chicago, D. & C. G. T. Junction R. Co. 86 Mich. 615, 49 N. W. 509; Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788, Affirmed in 163 N. Y. 559, 57 N. E. 1109; 1 Thomp. Neg. 996; Cork v. Blossom, 162 Mass. 330, 26 L.R.A. 256, 44 Am. St. Rep. 362, 38 N. E. 495.

Note. — Liability of one maintaining exhibition to which public are invited for safety of persons visiting premises, see case note to Higgins v. Franklin County Agri. Soc. 3 L.R.A. (N.S.) 1132. 17 L.R.A. (N.S.)

som, 162 Mass. 330, 26 L.R.A. 256, 44 Am. St. Rep. 362, 38 N. E. 495.

The occupier of premises owes a duty to one visiting the premises upon his invitation, to use reasonable care to prevent damage to the guest.

McIntyre v. Pfaudler Vacuum Fermentation Co. 133 Mich. 552, 95 N. W. 527; Samuelson v. Cleveland Iron Min. Co. 49 Mich. 170, 43 Am. Rep. 456, 13 N. W. 499; Brown v. Stevens, 136 Mich. 311, 99 N. W. 12; McCrum v. Weil & Co. 125 Mich. 297, 84 N. W. 282; Pelton v. Schmidt, 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552.

Although the association employed Pipp to build the stand according to his own plans and methods, he was supervised and controlled by Baird, the managing director of the athletic association; and there is a liability for his acts.

Wright v. Big Rapids Door & Blind Mfg. Co. 124 Mich. 91, 50 L.R.A. 495, 82 N. W. 829; Thompson v. Lowell, L. & H. Street R. Co. 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; Tucker v. Champaign County Agri. Board, 52 Ill. App. 316.

Evidence of proper and thorough inspection and test is not conclusive upon plaintiff.

Woods v. Chicago & G. T. R. Co.; Hagan v. Chicago, D. & C. G. T. Junction R. Co.; and Stowell v. Standard Oil Co.,—*supra*; Howe v. Chicago, K & S. R. Co. 139 Mich. 638, 103 N. W. 185; Merryman v. Hall, 136 Mich. 296, 99 N. W. 27.

Mr. Thomas A. Bogle, with Messrs. Arthur Brown and Edson R. Sunderland, for defendants in error:

At most, the experts who inspected the bleacher were chargeable with errors of judgment.

Faulkner v. Erie R. Co. 49 Barb. 324.

The bleacher was constructed in the customary way, justified by experience and tested by actual use.

Whalen v. Michigan C. R. Co. 114 Mich. 522, 72 N. W. 323; Hagan v. Chicago, D. & C. G. T. Junction R. Co. 86 Mich. 622, 49 N. W. 509.

Plaintiff has sued the wrong parties.

Erwin v. Davenport, 9 Heisk. 44; Lane v. Cotton, 12 Mod. 488; Henshaw v. Noble, 7 Ohio St. 226; Bissell v. Roden, 34 Mo. 63, 84 Am. Dec. 71; Feltus v. Swan, 62 Miss. 415; Ellis v. McNaughton, 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113.

Ostrander, J., delivered the opinion of the court:

Testimony was given from which the jury might have found that plaintiff was injured by the collapse of a stand or bleacher erected by the defendant association for the use of and used by the public at a game of foot-

ball to which the public was invited and required to pay an admission fee for the profit of said association; that the stand, designed to support 5,000 spectators, collapsed from inherent and discoverable weakness when put to its intended use when occupied by less than 3,000 persons. At the trial both parties introduced testimony, and the court without, so far as the record discloses, assigning reasons, directed a verdict for defendants. Judgment was entered on the verdict.

Plaintiff, appellant, contends that the case should have been submitted to the jury. Defendants make three contentions. They are: (1) That the plaintiff has in any event no right of action against these or any of these defendants; (2) that plaintiff has not shown that defendants were guilty of any negligence; (3) that, if the circumstances made out a prima facie case of negligent construction of the stand, the undisputed testimony for defendants establishes the fact of the exercise of due care on the part of defendants to render the premises safe.

And, first, as to the parties defendant, they are the voluntary association and its officers, of whom defendant Baird is one, filling the position of graduate director. The active members of the association are the undergraduates and alumni who contribute money, with an associate membership of business men. Defendant Pipp is the person employed by the association to erect, and who did erect, the stand. The theory of defendants is: "Mr. Baird, as agent of the board of regents, was authorized by regent Fletcher to put up the bleacher. He did so, had it inspected, and the board of regents had it inspected. Not only does the record fail to show any act whatever on the part of the athletic association in regard to the building of the bleacher, but it shows affirmatively that the athletic association could not have built a bleacher had it desired to do so. Ferry Field was a recreation ground for the students, and the students, of course, used the field and the structures standing upon it. As regent Fletcher testified, the association was simply the student in another form. It appears, therefore, that, while the athletic association had nothing to do with the erection of this bleacher, it was allowed by the regents to use the field and the bleacher for the purpose of carrying on and exhibiting the foot-ball game between Michigan and Wisconsin universities on November 18, 1905. But the board of regents never surrendered full and absolute control of Ferry field. While the association was using the field it was as much sub-

ject to the control of the board of regents as at other times. In other words, Ferry field is exactly like other university property. It is owned and controlled by the board of regents for the use of the students, but such use can never be hostile to or exclusive of the continued control by the board. Having no independent rights in Ferry field, the athletic association could sustain no independent liabilities consequent upon its use. It seems clear that the athletic association, under its permission from the board of regents to use Ferry field pursuant to the general purposes of the university, at most merely represented the board of regents in conducting the game in question. So far as the public is concerned, the association might, therefore, be deemed the agent of the board of regents in conducting and exhibiting the game for the benefit of all who wished to witness it. And in that capacity the liability of the athletic association would appear to be the same as that of Mr. Baird himself. Each is liable, if at all, as agent of the board of regents. Now it is an elementary principle of the law that an agent is not liable for mere acts of nonfeasance, but only for acts of misfeasance. This principle has been applied in a great variety of cases." Whether the fact is or is not controlling,—a point not precisely involved,—we do not find in the record any testimony tending to prove that the regents directly or indirectly constructed, or supervised the construction of, the stand, or that the defendant association or Mr. Baird was an agent of the regents in that behalf. The record discloses that, while Mr. Baird applied to the chairman of the committee on buildings and grounds for, and received, permission to build the bleacher, it and all other structures upon the grounds were paid for out of the moneys of the defendant association. The funds of the association are devoted to athletics and to the furnishing and maintaining of Ferry field. The association receives and disburses its money, and the regents exercise no control of its funds, except to insist that there shall be a proper auditing of accounts. Assuming that the regents might have refused permission to erect the particular bleacher, they did not do so. They did not erect it. Assuming, further, that Mr. Baird is paid for his services as adviser of the association's athletic policy by the regents, and that his position of graduate director is dependent upon his engagement with the regents, he is nevertheless one of the directors of defendant association, and by its constitution is a member of its financial committee; and he

also exercises such powers and performs such duties as its board of control may, from time to time, determine and require. Whether the related facts affect alike all of the defendants, whether for any reason the judgment should be affirmed as to some of the defendants, are subjects not referred to in argument, and questions not considered.

The remaining contentions may be considered together. The testimony goes much beyond proving merely an accident and resulting injury. That relied upon to show that defendants exercised due care tends to prove that the stand was erected by a competent and experienced builder, of good materials; that, before it was used, it was inspected by engineers and others admittedly competent to perform the work of inspection, who pronounced it safe. It is clear, however, that a wholly inadequate structure was in fact tendered for public use, and it cannot be determined, upon this record, as matter of law, that a latent, and not a patent, defect, discoverable in the exercise of proper care, existed. The managers of the grounds and stands occupied upon the occasion in question the position of proprietors of a public resort. Plaintiff was not a mere licensee, and did not occupy the stand by mere invitation. Whether responsibility to the plaintiff is grounded, in the form of action instituted, upon a contract, or upon a duty, it exists, if at all, because of an implied contract. The implied contract was that the stand was reasonably fit and proper for the use to which it was put. The duty was to see to it that it was in a fit and proper condition for such use. Neither plaintiff nor the public generally would be expected to examine the stand and judge of its safety. This consideration, and the probable consequences of failure of the structure, imposed upon the responsible and profiting persons the duty of exercising a high degree of care to prevent disaster. They were not insurers of safety. They did not contract that there were no unknown defects not discoverable by the use of reasonable means, but, having constructed the stand, they did contract that, except for such defects, it was safe. 1 Thomp. Neg. §§ 904-997; 21 Am. & Eng. Enc. Law, p. 472; Francis v. Cockrell, L. R. 5 Q. B. 184, s. c. 39 L. J. Q. B. N. S. 113, 39 L. J. Q. B. N. S. 291. See also Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788; Id. 163 N. Y. 559, 57 N. E. 1109.

The judgment is reversed, and a new trial granted.

Petition for rehearing denied.
17 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

CHARLES D'AUTREMONT, JR., et al.,
Appts.,

v.

EDWARD M. GAYLORD et al., Respts.

(104 Minn. 165, 116 N. W. 357.)

Process — defective service — nonresidents.

1. Errors and defects in the proceedings taken to obtain jurisdiction of nonresidents, of a nature tending to mislead and prejudice the defendant, are fatal to the jurisdiction of the court.

Same — error — middle initial.

2. Though the failure to insert the middle initial of the defendant's name in a summons where service is made by publication might not be fatal error, the use of a wrong initial will not confer jurisdiction over the real party defendant.

Same.

3. The publication of a summons to "George H. Leslie" confers no jurisdiction over "George W. Leslie."

(May 1, 1908.)

APPEAL by applicants from a judgment of the District Court for St. Louis County in defendants' favor in a proceeding to register title to land. Affirmed.

The facts are stated in the opinion.

Messrs. Henry S. Mahon and John G. Williams, for appellants:

The rule here has always been to regard a mistake, whether it be in the middle initial or in the spelling of a name, as immaterial, as long as the party intended could not reasonably be misled thereby to his injury.

Stewart v. Colter, 31 Minn. 385, 18 N. W. 98; Lane v. Innes, 43 Minn. 137, 45 N. W. 4; State v. Timmens, 4 Minn. 325, Gil. 241; State v. Sannerud, 38 Minn. 229, 36 N. W. 447; Pinney v. Russell & Co. 52 Minn. 443, 54 N. W. 484; Nystrom v. Quinby, 68 Minn. 4, 70 N. W. 774.

Where substituted service is complete, no irregularity in the process can prevent the jurisdiction of the court which would not have the same effect in the case of personal service.

Quarl v. Abbett, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; Johnson v. Day, 2 N. D. 295, 50 N. W. 701.

The use of the name "George H. Leslie" instead of "George W. Leslie" is not even a misnomer.

Stewart v. Colter and Johnson v. Day,

Headnotes by BROWN, J.

Note. — Effect of summons or notice to person by wrong initial, see case note to Illinois C. R. Co. v. Hasenwinkle, 15 L.R.A. (N.S.) 129.

supra; *Ueland v. Johnson*, 77 Minn. 543, 77 Am. St. Rep. 698, 80 N. W. 700.

Messrs. Sullivan & Grant, for respondents:

A middle initial or name is a part of the name of a person, and cannot be disregarded.

Parker v. Parker, 146 Mass. 321, 15 N. E. 902; *Com. v. Buckley*, 145 Mass. 181, 13 N. E. 368; *Com. v. Hall*, 3 Pick. 262; *Com. v. Shearman*, 11 Cush. 546; *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729; *Ming v. Gwatkin*, 6 Rand. (Va.) 551; *Bowen v. Mulford*, 10 N. J. L. 230.

While it may not be necessary in all cases to insert the middle initial in a name, yet, if a middle initial is used, it must be the true initial, or there is a fatal variance.

Cleveland, C. C. & St. L. R. Co. v. Peirce, 34 Ind. App. 188, 72 N. E. 604; *State v. Hughes*, 1 Swan, 261; *Price v. State*, 19 Ohio, 423; *King v. Clark*, 7 Mo. 269.

Constructive service of process is purely a statutory creation, and in derogation of the common law; for which reason the requirements of the statute must be strictly observed.

Gilmore v. Lampman, 86 Minn. 493, 91 Am. St. Rep. 373, 90 N. W. 1113; *Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. 134; *Clary v. O'Shea*, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115; *Skelton v. Sackett*, 91 Mo. 380, 3 S. W. 874.

Brown, J., delivered the opinion of the court:

Proceedings to register title to real property under the Torrens system of land transfer. Respondent Gaylord had judgment confirming an asserted interest in the land, and applicants appealed.

The facts are as follows: The applicant Charles D'Autremont, and others, including William C. Sherwood, were on May 15, 1897, and for some time prior thereto had been, the owners, but in separate and undivided interests, of the land in question. On that day a judgment was duly rendered in the district court of St. Louis county, in which the land is situated, in an action therein pending wherein George W. Leslie was plaintiff and the said William C. Sherwood was defendant, in favor of Leslie and against Sherwood for the sum of \$2,091.52, which then became by the proper docketing thereof a lien upon Sherwood's interest in the land. Thereafter, on June 20, 1900, D'Autremont brought an action in the district court of said county for the partition of the land among the several owners. All persons having or claiming any interest in or to the land were made parties; Leslie being designated as a party defendant under the name of "George H. Leslie." The result of 17 L.R.A. (N.S.)

that action was a sale of the land by a referee appointed by the court for that purpose, a division of the same having been found impracticable, and D'Autremont became the purchaser. The sale was confirmed by the court, and a formal referee's deed executed and recorded on January 19, 1901. On September 29, 1902, said George W. Leslie duly sold and assigned the judgment against Sherwood to one Sarah L. McNulty, who in turn sold and assigned the same to respondent Gaylord; both instruments of assignment being filed in the office of the clerk of the district court. The proceeds realized from the lands in the partition proceedings were insufficient to discharge the numerous judgments against Sherwood, and no part of the judgment in favor of Leslie has ever been paid. Some time in 1906 Gaylord caused execution to be issued on this judgment, under which the interest of Sherwood in and to the land was levied upon and sold; respondent Gaylord being the purchaser. In this proceeding to register title he asserted an interest in the land under and by virtue of this judgment, execution, and sale.

The sole question involved is whether the court acquired jurisdiction of George W. Leslie in the partition suit, so that the judgment rendered therein and the sale of the land by the referee extinguished the lien of his judgment against Sherwood. The summons in that action was served by publication, and, as already mentioned, designated "George H. Leslie" as defendant. It is the contention of appellant that the error in the name—the use of the initial "H." instead of "W."—was an irregularity not going to the jurisdiction of the court; while respondent contends that the error was fatal, and the publication of the summons conferred no jurisdiction upon the court to adjudicate the rights of "George W. Leslie." The trial court held with respondent, and that the lien of the Sherwood judgment was not affected by the proceedings or judgment in the partition suit. Though the partition suit was a proceeding *in rem*, the mere fact that the court acquired jurisdiction over the subject-matter thereof—the land—did not authorize it to adjudicate the rights or interests of parties, in the absence of proper service of summons upon them. Note to *Pinney v. Providence Loan & Invest. Co.* 50 L.R.A. 597; *Windsor v. McVeigh*, 93 U. S. 277, 23 L. ed. 915; *Hassall v. Wilcox*, 130 U. S. 493, 32 L. ed. 1001, 9 Sup. Ct. Rep. 590; *Dorr v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106. And we have for consideration the question whether the publication of the summons in the form stated was a valid service thereof upon "George W. Leslie," the real party in interest.

As a general rule, the common law recog-

nizes but one Christian name, and failure in judicial or other proceedings, in giving the name of the party, to state his middle name, or the initial thereof, as commonly used, is not fatal to their validity. But the rule, like most rules of judicial procedure, is not without exceptions. *Stewart v. Colter*, 31 Minn. 385, 18 N. W. 98; *State v. Higgins*, 60 Minn. 1, 27 L.R.A. 74, 51 Am. St. Rep. 490, 61 N. W. 816. It had its origin during the early times in England, when a person had but one name, and that his Christian name. His further identification was indicated by some designated physical characteristic, place of residence, or deed of valor or virtue. Even since the adoption of the system of family names, the first or Christian name has been held by the courts of England as the true name, in legal proceedings, for the designation of persons; the middle name, or the initial thereof, being regarded as wholly unimportant. The rule has been followed and applied in proceedings both judicial and extrajudicial in this country, with occasional exceptions based upon special circumstances. In all proceedings where an error in the name may be corrected by appropriate application to the court, or the particular person may be identified by extrinsic evidence, a mistake in the name appearing in the proceeding or writing involved is not ordinarily fatal to its validity. Our statutes, as do the statutes of nearly all the states of this country, provide for the correction of mistakes in the names of parties in judicial proceedings. Rev. Laws 1905, § 4157; *Casper v. Klippen*, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; *Kenyon v. Semon*, 43 Minn. 180, 45 N. W. 10. In respect to similar mistakes in conveyances of land, mortgages, contracts, or statutory proceedings for the foreclosure of mortgages, the rules of evidence permit the full and complete identification of parties misnamed by error or mistake. *Massillon Engine & Thresher Co. v. Holdridge*, 68 Minn. 393, 71 N. W. 399; *Ansley v. Green*, 82 Ga. 181, 7 S. E. 921. Of course, to authorize such amendments in judicial proceedings, the court must have jurisdiction of the parties and afford them an opportunity to be heard, and in other proceedings those interested in the subject-matter must also be before the court, with opportunity to be heard on the question of identity. It has often been held that the failure in any proceeding, judicial or otherwise, to include the initial of the middle name is unimportant, and not fatal to its validity. *Cleveland, C. C. & St. L. R. Co. v. Peirce*, 34 Ind. App. 188, 72 N. E. 604; *State v. Hughes*, 1 Swan, 261; *King v. Clark*, 7 Mo. 269. The rule has been declared otherwise, however, where a wrong initial is used, particularly in deeds or other instruments affecting the title to

land. *Ambs v. Chicago*, St. P. M. & O. R. Co. 44 Minn. 266, 46 N. W. 321; *Burford v. McCue*, 53 Pa. 427. And there has been a tendency in some of the courts to break away from the old rule, and to hold the full true name of all parties essential in all proceedings. *Parker v. Parker*, 146 Mass. 321, 15 N. E. 902; *Com. v. Buckley*, 145 Mass. 181, 13 N. E. 368; *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729; *Ming v. Gwatkin*, 6 Rand. (Va.) 551; *Bowen v. Mulford*, 10 N. J. L. 230. In most states it is held, in both civil and criminal actions, that an omission or the use of a wrong initial does not affect the jurisdiction of the court, where the right party is actually served with process and brought into court. *Casper v. Klippen*, supra; 14 Enc. Pl. & Pr. p. 301, and cases cited.

There is reason and sound sense in that view of the law. In such case the right party is actually served, and the error may be corrected without prejudice to any of his rights. Only an extremely technical view sustains the position that in such cases the error is fatal. *Casper v. Klippen*, supra, overruling *Atwood v. Landis*, 22 Minn. 558: But should the same liberal view be taken where the defendant is only constructively served with summons, as in the case at bar, by publication? We think not. The reasons for disregarding the error where there is personal service upon the right party do not apply where the only service is by publication against a nonresident of the state. In a case of that kind the true name of the party becomes of especial importance. It is well known that there are numerous persons having the same Christian and surname, but with a different middle name, such as John O. Johnson, John A. Johnson, and John M. Johnson, James A. Green, and James E. Green, and they are each identified and distinguished by the initial of the middle name. It would be intolerable in the practical affairs of life if persons by the name of Johnson, Green, or Brown, or even the numerous Jones family, should be required to take notice of every action brought by the publication of summons in which a part of his name appeared as the party defendant. No personal service is made in such cases, and that the real defendant has knowledge of the pendency of the action is an inference of the law only, and the use of a wrong initial is naturally misleading and likely to result to his prejudice. The statute authorizing this form of process is in derogation of the common law, and the mode prescribed must be strictly pursued. *Reno, Non Residents*, 190, *Gilmore v. Lampman*, 86 Minn. 493, 91 Am. St. Rep. 376, 90 N. W. 1113; *Duxbury v. Dahle*, 78 Minn. 427, 79 Am. St. Rep. 408, 81 N. W. 198. This method of acquiring

jurisdiction and adjudicating the rights of parties constitutes due process of law only when the statutes providing therefor have been fully and completely complied with. *Corson v. Shoemaker*, 55 Minn. 388, 57 N. W. 134; *Clary v. O'Shea*, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115.

Some of the courts have held that the use of a wrong initial, or other error in defendant's name, not coming within the rule of *idem sonans*, where the summons is served by publication, is not a compliance with the statute, and is fatal to the jurisdiction of the court. 66 Cent. L. J. 338; 14 Enc. Pl. & Pr. p. 302, and cases cited in note; *Cleveland, C. C. & St. L. R. Co. v. Peirce*, 34 Ind. App. 188, 72 N. E. 604; *State v. Hughes*, 1 Swan, 261; *King v. Clark*, 7 Mo. 269; *Fanning v. Krapf*, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293; *Enewold v. Olsen*, 39 Neb. 59, 22 L.R.A. 573, 42 Am. St. Rep. 557, 57 N. W. 765; *Skelton v. Sackett*, 91 Mo. 377, 3 S. W. 874; *Freeman v. Hawkins*, 77 Tex. 499, 19 Am. St. Rep. 769, 14 S. W. 364; *Fitzgerald v. Salentine*, 10 Met. 436; *Parker v. Parker*, 146 Mass. 320, 15 N. E. 902; *Davis v. Steeps*, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769; 1 Black, Judgm. 232. The cases just cited are not all precisely in point, but they are analogous, and bear out the claim that a service by publication, where there is a substantial error in the name of the defendant, confers no jurisdiction on the court. We are not prepared to say that the mere omission of the middle name, or the initial thereof, would wholly nullify the proceedings; but where, as in this case, there is an attempt to give the full name of the defendant and a wrong initial is used, it must, in view of the very common practice of identifying particular individuals by adding their middle name, be held that the error is misleading, and likely to result in prejudice to those who may perchance notice the same as published in the newspaper. It would be straining the rule requiring a strict observance of the statute permitting service of process in this manner to hold an error so likely to mislead and prejudice an irregularity only.

As bearing upon the question of jurisdiction, numerous instances are reported in the books where errors and defects of far less significance than the one here presented have been held to wholly vitiate a judgment based upon this form of constructive service. In *Barber v. Morris*, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559, and *Brown v. St. Paul & N. P. R. Co.* 38 Minn. 506, 38 N. W. 698, judgments were held void on collateral attack for the failure of the plaintiff to file his affidavit for publication within the time prescribed by statute. In the first of these cases the affidavit was not filed until 17 L.R.A. (N.S.)

the day of the entry of judgment. In the second case, a condemnation proceeding, the affidavit was not filed until after the summons had been published. An affidavit filed two days after the first publication was held insufficient in *Murphy v. Lyons*, 19 Neb. 689, 28 N. W. 328. If the affidavit be technically, in point of substance, not in compliance with the statute, a judgment rendered on service by publication is void. *Carrico v. Tarwater*, 103 Ind. 86, 2 N. E. 227, where the affidavit fails to show that the action is one in which service by publication is authorized; *Harris v. Clafin*, 36 Kan. 543, 13 Pac. 830; *Nelson v. Rountree*, 23 Wis. 367; *Forbes v. Hyde*, 31 Cal. 342. Insufficiently specific as to due diligence in ascertaining the residence of the defendant. *Little v. Chambers*, 27 Iowa, 522. In Illinois the statute requires the issuing and return of process "not found" before publication, and a judgment rendered upon such service without the return was held void in *Chickering v. Failes*, 26 Ill. 507, and also in *Firebaugh v. Hall*, 63 Ill. 81. If the affidavit be not made by all the plaintiffs, where two or more join in bringing the action, the judgment rendered is void. *Kane v. Rock River Canal Co.* 15 Wis. 179; *Mecklem v. Blake*, 19 Wis. 398. And also where the sheriff fails in observance of the statutory requirement to continue in an effort to find the defendant in the state pending publication. *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438; *Kennedy v. Lamb*, 182 N. Y. 228, 108 Am. St. Rep. 800, 74 N. E. 834. And where the summons is defectively addressed to the defendant. *Durst v. Ernst*, 45 Misc. 627, 91 N. Y. Supp. 13. See also *Van Fleet, Collateral Attack*, 331, 348; 6 Current Law, 1090, and cases cited. There is a conflict in the adjudicated cases upon the question whether defects of the nature of those here mentioned are jurisdictional. Many courts hold to the doctrine that a judgment rendered in the face of such defects is not rendered absolutely void, but irregular, and that the irregularity may be corrected by motion. But the two Minnesota cases above referred to settle the rule in this state, and are in harmony with the general principle that to confer jurisdiction in cases of this kind the statutes must be strictly complied with. 1 Black, Judgm. 232.

But we need not pursue this subject. Reference is made to it only to emphasize the importance given by many courts to errors and defects in the proceedings leading up to service of summons by publication. The affidavit of publication in such cases is not filed, nor required to be filed, for the information of the defendant. He receives no benefit therefrom by way of notice of the suit or otherwise, nor by the sheriff's certifi-

cate of "not found," nor from the order for publication, where an order is required; and if a judgment rendered on service by publication is void for want of jurisdiction for errors in these respects, and in others pointed out in the decisions referred to, for a stronger reason should the error of misnaming defendant be fatal, where the error does not come within the rule of *idem sonans*, and is such as is likely to mislead and result in his prejudice. In *Amba v. Chicago, St. P. M. & O. R. Co.* 44 Minn. 286, 46 N. W. 321, it appeared that the land there in question was at one time conveyed to "William H. Brown" and the chain of title disclosed a subsequent conveyance from "William B. Brown." The court there held, Judge Dickinson writing the opinion, that there was no presumption that the two Browns were one and the same person. If that be sound as to private writings, and we have no reason to question the decision, it follows naturally that the same rule should be applied to a judicial proceeding like that at bar; and, if so, we have no right to assume that "George W. Leslie" and "George H. Leslie" are one and the same person.

It is urged by appellant that, inasmuch as in cases where the summons in an action is served by publication, the defendant may, upon good cause shown,—which has been construed as an answer stating a defense,—come in and defend the action within a year after notice of its entry, the court should be more liberal in the consideration of errors of the character of those here involved, citing *Quarl v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476. But we are not persuaded by this argument. If the error in the name is jurisdictional, as we hold, judgment entered is void, and to adopt the contention of appellant would result in compelling a defendant in a particular case to waive the want of jurisdiction in the court to enter judgment against him and to come to this state and litigate the cause on its merits. This the court has no right to do. The law providing for the manner of acquiring jurisdiction over nonresidents is plain, and should not be ignored, even in a case of apparent hardship. We are sustained in this view by the supreme court of Michigan in the case of *Granger v. Superior Ct. Judge*, 44 Mich. 384, 6 N. W. 848, where the court, speaking through Justice Campbell, said: "Where cases and proceedings are not according to the usual course, and are special in their character, they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So where there has been no personal service within the jurisdiction, the doctrine prevails 17 L.R.A. (N.S.)

that proceedings not conforming to the statutes are void. But this is on the ground that there has been no service whatever, and the party, therefore, has not been notified in any proper way of anything."

Counsel called attention to the case of *Illinois C. R. Co. v. Hasenwinkle*, 232 Ill. 224, 15 L.R.A. (N.S.) 129, 83 N. E. 815. While the court in that case in the course of the opinion said that the use of a wrong initial of the middle name of a nonresident defendant in condemnation proceedings would not necessarily render the judgment therein void, the real ground of the decision there made was that the defendant, so erroneously named, had permitted the judgment to remain unquestioned for over fifty years, during which time the railroad company had occupied the premises granted by the judgment as its right of way.

We therefore hold, in harmony with the views of the learned trial court, that the publication of the summons in the partition suit directed to "George H. Leslie" did not confer jurisdiction upon the court to adjudicate the rights of "George W. Leslie."

Judgment affirmed.

NORTH CAROLINA SUPREME COURT.

F. L. WILLIAMSON

v.

LA FAYETTE HOLT, Appt.

(147 N. C. 515, 61 S. E. 384.)

Sale — promissory representation — rescission.

One who buys an ice plant with knowledge that its operation had been abandoned because its output did not equal its capacity, and after having full opportunity to investigate its condition, cannot avoid paying the purchase price because the vendor stated that, with some repairs, it would turn out about a certain amount per day.

(April 29, 1908.)

APPEAL by defendant from a judgment of the Superior Court for Alamance County in favor of plaintiff in an action brought to recover the purchase price of an ice plant sold to defendant. Affirmed.

Statement by Walker, J.:

This is an action to recover \$1,050, the amount of a bond given by the defendant on February 29, 1904, for an ice plant. Defendant, in his answer, admitted the execu-

Note. — As to promissory representations, see subject note to *Cerny v. Paxton & G. Co.* 10 L.R.A. (N.S.) 651.

tion of the bond, but denied any liability upon it, and set up a counterclaim on the ground that it was obtained by false and fraudulent representations as to the conditions and capacity of the plant.

The defendant himself testified:

Q. The first conversation that you had with anybody concerning this ice plant was with Mr. Meechum?

A. Yes, sir; that is my recollection.

Q. Mr. Meechum had been secretary and treasurer of this company?

A. Yes, sir.

Q. He had been operating this plant?

A. Yes, sir; the Home Ice & Refrigerator Company.

Q. You talked with Mr. Meechum about buying the plant?

A. He talked with me.

Q. And in that conversation Mr. Meechum told you that the Home Ice Company had been a failure so far as making money out of the plant?

A. No, sir; he did not say that.

Q. What reason did he give for its having quit?

A. He did not give any.

Q. Did Mr. Meechum tell you in that conversation that the plant would not make ice, or would not make a proper amount of ice?

A. I don't know whether he said those words. He said that they had given it up.

Q. And they had given it up because the plant would not make its capacity of ice?

A. Because it would not make ice.

Q. And in that very conversation did you not say to Mr. Meechum that, if you had it, you could make ice?

A. No, sir; I told him I could do the repairs.

Q. Didn't you tell him that you knew what to do with it, that it needed a thorough overhauling and putting in new parts?

A. No, sir.

Q. You knew that at the time the original plant was brought to Burlington that it was a secondhand plant?

A. I had heard it.

Q. You knew it, didn't you?

A. No, sir; I had very little business with it.

Q. Didn't you supply parts for that plant when it was originally set up in Burlington?

A. I might have furnished some valves. I had nothing to do with the work on it, nor with the parts. I furnished some valves and things. That is all.

Q. After your talk with Mr. Meechum, wherein Mr. Meechum told you that they had made a failure of it, because it would

not make its capacity of ice and they had given it up, you went then to see Mr. Williamson?

A. Yes, sir.

Q. And Mr. Williamson went over to the house in which was the machinery and the plant proper, and you went over it, did you not?

A. Yes, sir; I went over it in company with Mr. Nicholson.

Q. At the time when Mr. Williamson was with you, was Mr. Nicholson with you?

A. Mr. Williamson was along both times, I think. We were there a couple of times.

Q. One of the times that you and Mr. Williamson were there Mr. Nicholson was not along?

A. Yes, sir.

Q. Mr. Williamson just opened the doors, and let you have full swing in looking it over?

A. Yes, sir; we were there together.

Q. He did not attempt to conceal any part of the plant or machinery from you?

A. No, sir; nothing of the kind.

Q. When you and Mr. Nicholson went to see Mr. Williamson to buy this plant, you agreed to buy it from him at the price of \$2,500, did you not?

A. Yes, sir.

Q. And you immediately then and there executed your notes for \$1,250 each, did you not?

A. We signed notes; yes, sir.

Q. Didn't that property stand there absolutely idle and exposed, as property would be, to the elements, during the whole of the winter of 1904?

A. Yes, sir; I think so.

Q. I ask you to look at that bill, Mr. Holt, and tell me if it does not contain items for work done on that plant?

A. Yes, sir; that is every bit my handwriting.

Q. Then you did do repair work on that plant?

A. Yes, sir; but I did not know where it was going.

Q. You knew, and knew at the time you were making this purchase, that this was the identical plant that you had supplied these parts for and had done this work for?

A. I suppose so; yes, sir.

Q. How many times did you go over this plant before you bought it?

A. I was only inside of it twice.

Q. You did that before you purchased it?

A. Yes, sir; I think so. It was in the year 1904. I remember it was cold weather about the time we made the trade.

Q. You knew that you had supplied parts and had done some work there?

A. They had sent for some fittings.

Q. You knew that the plant had been closed out, and that the plant was for sale?

A. Yes, sir.

Q. Did you ask for any explanation of why the plant was to be sold?

A. No, sir.

Q. You did not even ask any questions as to why that plant was being closed out?

A. No, sir; I did not.

Q. You did not pretend to ask whether the old company had made a success of it or not, a financial success of the plant?

A. No, sir; I did not. . . .

Q. You have heard the testimony here of these people. You did go there with Mr. Meechum and Mr. Nicholson to make examination?

A. Yes, sir.

Q. Was it before or after you went with Mr. Williamson?

A. I think it was after; but I cannot say positively which visit was made first.

Q. But you did make two visits and examinations of the plant?

A. Yes, sir.

Q. And these gentlemen threw everything open to you, and let you have free will?

A. Yes, sir; they opened the doors.

Q. And gave you free access to every part of the plant?

A. Yes, sir.

When the evidence was closed, the court, on motion of the plaintiff's counsel, gave judgment for the amount of the note, and the defendant appealed.

Messrs. W. H. Carroll and Long & Long for appellant.

Messrs. Z. V. Taylor and Parker & Parker for appellee.

Walker, J., delivered the opinion of the court:

The evidence in the record is quite voluminous, but fortunately it is not necessary to state even the substance of it in order to a correct understanding of the case. At the time of the sale of the plant, the plaintiff stated to the defendant that, if he would make some repairs, it would turn out about 4,400 pounds of ice a day. There was also evidence that the plant had produced as much as that before the sale. The defendant lived in Burlington, where the ice plant was. Before he and Nicholson purchased it, they made two visits to the ice factory for the purpose of making an examination of the plant. The evidence of the defendant himself shows that he was a machinist and the plaintiff a grocer, and that he and Nicholson were permitted both times to make a free and full investigation for themselves of the condition of the plant, and, besides, that he knew it was second-

17 L.R.A. (N.S.)

hand when it was brought to Burlington; it having been in use for some time. As a machinist he had furnished new valves and other parts for it when it was originally installed. That the plant was not in good condition, at the time he and Nicholson bought it, had come to his knowledge before the time of the purchase. The few extracts selected at random from the evidence, as contained in the record and set out in our statement of the case, will serve to show more definitely whether or not the defendant was influenced by any fraudulent representation of the plaintiff to make the purchase. There was evidence to the effect that the defendant and Nicholson sold the plant to the Burlington Ice Company at \$2,500, which was the price they gave for it, and received in payment of the purchase money stock of that company, the par value of which was equal to that amount and which they took at that valuation; that the Burlington Ice Company was afterwards placed in the hands of a receiver at the instance of the defendant, and that the plant was sold and bought by Nicholson.

In the view we take of this case, it falls directly within the decision of the court in *National Cash Register Co. v. Townsend*, 137 N. C. 652, 70 L.R.A. 349, 60 S. E. 306. In that case Justice Brown, for the court, at page 655 of 137 N. C., says: "All the authorities are to the effect that, where the false representation is an expression of commendation, or is simply a matter of opinion, the courts will not interfere to correct errors of judgment. *Walsh v. Hall*, 66 N. C. 236. The law will not give relief, unless the misrepresentation be of a subsisting fact. *Hill v. Gettys*, 135 N. C. 375, 47 S. E. 449. What has been called 'promissory representations,' looking to the future as to what the vendee can do with the property, how much he can make on it, and, in this case, how much he can save by the use of it, are on a par with false affirmations and opinions as to the value of property, and do not generally constitute legal fraud. *Benjamin, Sales*, 7th ed. 483 et seq.; *Gordon v. Parmelee*, 2 Allen, 212; *Long v. Woodman*, 58 Me. 52, and cases cited. Mr. Clark, in his work on Contracts, states, in substance, that commendatory expressions or exaggerated statements as to value or prospects, or the like, as where the seller puffs up the value and quality of his goods, or holds out flattering prospects of gain, are not regarded as fraudulent in law. (pp. 332-334.) It is the duty of the purchaser to investigate the value of such expressions of commendation. He cannot safely rely upon them. If he does, he cannot treat it as fraud either for the purpose of maintaining an action of deceit, or for the purpose of rescinding a con-

tract at law or in equity. *Saunders v. Hat-terman*, 24 N. C. (2 Ired. L.) 32, 37 Am. Dec. 404; 14 Am. & Eng. Enc. Law, 2d ed. p. 34, and cases cited. Mr. Kerr, in his work on *Fraud and Mistake*, at page 83, says: 'A misrepresentation, to be material, should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which merely amounts to a statement of opinion goes for nothing, though it may not be true, for a man is not justified in placing reliance on it.' Again: 'A man who relies on such affirmation made by a person whose interest might so readily prompt him to invest the property with exaggerated value does so at his peril, and must take the consequences of his own imprudence.' There the alleged false or fraudulent representation consisted in a statement by the plaintiff's agent to the defendant that the use of a cash register would save the expense of employing a book-keeper; and it was held not to be such a fraudulent representation as would avoid the contract of sale, it being nothing more than "dealers' talk," when puffing the wares.

It is difficult to see how the defendant was deceived by the plaintiff into buying the ice plant, when he at the time had full knowledge of facts in regard to the condition of the plant, which should at least have put him on his guard and stimulated greater inquiry. He was himself a machinist, and employed Hyatt, who was an expert, to operate the plant. He had free access to the premises for the purpose of making any desired investigation, and, if he was not satisfied with his own ability to discover defects, if there were any, he might easily have enlisted the services of Hyatt, or someone else having greater knowledge of the matter than he had, for that purpose. It does seem from the evidence that the means were at hand by which he could have ascertained the exact condition of the plant, if he had wished to be better informed, before making the purchase. He knew that the plant had been "given up" because it would not make ice, or that its output had not been equal to its full capacity. The statement of the plaintiff was evidently intended to be the expression of an opinion as to how much ice the plant would make, if put in good condition; and the evidence shows that it was so understood by the defendant at the time. It is said in *Benjamin on Sales*, 7th ed. p. 483: "Fraudulent promises as to the future, as to what the vendee could do with the property, how much he could make on it, etc., do not constitute legal fraud." The same idea is expressed more fully in *Gordon v. Parmelee*, 2 Allen, 213, where the court says: "The alleged false statements concerning the productiveness of the land and its capacity to furnish support

for cattle constituted no defense to the notes. They fall within that class of affirmations which, although known by the party making them to be false, do not as between vendor and vendee afford any ground for a claim of damages either in an action on the case for deceit, or by way of recoupment in a suit to recover the purchase money. They come within the principle embodied in the maxim of the civil law, *Simplex commendatio non obligat*. Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmations concerning the value of land, or its adaptation to a particular mode of culture, or the capacity of the soil to produce crops or support cattle, are, after all, only expressions of opinion or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters which are not peculiarly within the knowledge of the vendor, and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are, strictly speaking, *gratis dicta*. The vendee cannot safely place any confidence in them; and, if he does, he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false as the basis of his claim for damages in reduction of the amount which he agreed to pay for the property." The case of *Long v. Woodman*, supra, furnishes another equally strong statement of the rule: "To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts or to the condition of things as then existent. It is not every misrepresentation relating to the subject-matter of the contract which will render it void, or enable the aggrieved party to maintain his action for deceit. It must be as to matters of fact, substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation. *Hazard v. Irwin*, 18 Pick. 95. An assertion respecting them is not an assertion as to any existent fact. The opinion may be erroneous; the judgment may be unsound; the expected contingency may

never happen; the expectation may fail. An action of tort for deceit in the sale of property does not lie for false and fraudulent representations concerning profits that may be made from it in the future." The following cases also sustain the doctrine: *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881; *Mooney v. Miller*, 102 Mass. 217; *Pedrick v. Porter*, 5 Allen, 324. The test of whether there has been merely an expression of opinion, or the positive statement of a fact, depends, not so much upon the absence or presence of an express assertion based on personal knowledge, as upon the character of the statements alleged to be true. 14 Am. & Eng. Enc. Law, 2d ed. p. 36. A statement taking the form of an exception of opinion may sometimes constitute actionable fraud, while one more positive, and implying knowledge of the facts, may not have that effect in law. 14 Am. & Eng. Enc. Law, 2d ed. pp. 33 et seq. We do not decide, therefore, that a party cannot be liable for a false representation because it is promissory in form, though in substance the assertion of a fact as existing. If he makes a statement which is calculated to deceive the other party, and which he knows to be false, and thereby intentionally misleads the latter to his prejudice, it may amount to such an affirmation of a fact as to constitute actionable fraud or deceit, although the statement may be seemingly a mere expression of opinion, or what is sometimes called a promissory representation. 14 Am. & Eng. Enc. Law, 2d ed. p. 36, and note 5.

The case of *May v. Loomis*, 140 N. C. 350, 52 S. E. 728, cited by the appellant in support of his contention, is not in point, and therefore not an authority in his favor. In that case there was the representation of a fact, false within the knowledge of the party who made it, which was calculated and intended to deceive, and not the mere expression of an opinion. In our case the evidence does not disclose any taint of fraud in the negotiations between the parties for the sale by the plaintiff and the purchase by the defendant of the ice plant. The doctrine of *caveat emptor* applies, for the defendant had been put upon inquiry by his knowledge of the facts, and he was given full opportunity to investigate for himself, which he undertook to do. In *National Cash Register Co. v. Townsend*, 137 N. C. 658, 70 L.R.A. 349, 50 S. E. 308, it is said: "When the purchaser undertakes to make an investigation of his own, and the seller does nothing to prevent this investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations," — citing *Jennings v. 17 L.R.A. (N.S.)*

Broughton, 5 De G. M. & G. 126; *Southern Development Co. v. Silva*, 125 U. S. 259, 31 L. ed. 683, 8 Sup. Ct. Rep. 881.

We conclude from what has been said that the court was right in giving judgment for the plaintiff.

No error.

OREGON SUPREME COURT.

STATE OF OREGON, Appt.,

v.

G. L. HAMMELSY, Respt.

(—Or. —, 96 Pac. 865.)

False pretenses — worthless check.

That one drawing a check which he induces another to cash does not state that he has funds in bank, or that it will be paid, will not prevent his conviction for obtaining money by false pretenses, if he knows that it will not be paid, and draws it with intent to defraud.

(July 28, 1908.)

Case Note. — Mere drawing of check on a bank on which the drawer has no funds or credit, and passing the same, as false pretense.

This note does not include cases in which the maker or passer of the check represented that the check was good, or that there was money in the bank to meet it, or the like, but is restricted to cases in which the representation is to be implied, if at all, from the mere act of drawing and passing the check.

It was held in *Rex v. Lara*, 2 East, P. C. 819, in an action for a common-law cheat, that a bank check is not a false token, although the defendant, to his knowledge, has no money or credit with the bank, since the check entitled defendant to no more credit than his bare assertion that the money would be paid.

False pretenses and representations are not confined to words, but may be made as well by acts. Under modern statutes on false pretenses, according to the better authority, the mere drawing and delivery of a check to a third person, without explanation, is equivalent to a representation that the drawer has funds or credit in the bank, and, if known to be untrue, is a false pretense. *People v. Donaldson*, 70 Cal. 116, 11 Pac. 681; *People v. Wasservogle*, 77 Cal. 173, 19 Pac. 270 (case of draft, *dictum* as to check); *Barton v. People*, 135 Ill. 405, 10 L.R.A. 302, 25 Am. St. Rep. 375, 25 N. E. 776; *Com. v. Drew*, 19 Pick. 179 (*dictum*); *State v. Johnson*, 77 Minn. 267, 79 N. W. 968; *Foote v. People*, 17 Hun, 218; *People v. Whiteman*, 72 App. Div. 90, 76 N. Y. Supp. 211 (*dictum*); *Semler v. State*, 27 Ohio C. C. 581; *Com. v. Wallace*, 114 Pa. 412, 60 Am. Rep. 353, 6 Atl. 685 (*dictum*); *Com. v. Collins*, 8 Phila. 609; *Rex*

APPEAL by the State from a judgment of the Circuit Court for Jackson County in defendant's favor in a prosecution for obtaining money by false pretenses. Reversed.

The facts are stated in the opinion.

Mr. A. M. Crawford, Attorney General, for the State.

No appearance for respondent.

Bean, Ch. J., delivered the opinion of the court:

The defendant was indicted for obtaining money by false pretenses, the false pretense being a check, drawn by himself to his order on a bank, which he indorsed, and fraudulently and feloniously presented and delivered to one Orr, with intent to defraud, knowing at the time that he had no funds in the bank for payment of such check, and that it was worthless. A demurrer to the indictment was sustained, on the ground that it does not allege that any false or deceitful means were used by defendant to induce Orr to accept the check, such as representing that he had money or credit at the bank, or that it would be paid on presentation, or the like. In support of the ruling, it is argued that the mere drawing and passing of a check on a bank in which the drawer has no funds or credit is not a false pretense, although it may be done for the purpose of fraudulently obtaining property or money from another, and with the knowledge of the drawer that the check is worthless and will not be paid. A false

pretense is a "representation of some fact or circumstance, calculated to mislead, which is not true" (Anderson's Law Dict. p. 808); or, as Mr. Bishop defines it, "a false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value" (2 Bishop, Crim. Law, § 415). The pretense need not be in words, but may be implied from the acts of the party. The gist of the offense, against which the statute is directed, is obtaining money or property of another by deceit, fraudulently and feloniously superinduced by the beneficiary; and, when one by his acts intentionally creates a belief, as to an existing fact, which is false, with the intent to deprive another of his property, and does so, it cannot matter whether the erroneous belief was induced by words or acts, or both. Mr. Wharton (2 Wharton, Crim. Law, 9th ed. § 1170) says "the conduct and acts of a party will be sufficient, without any verbal assertion." He cites several cases in support of the text, among which is that of a person who assumed the garb of an Oxford student and, by such garb and his conduct, represented himself to be a student of the university, and so obtained funds. It was held that the false pretense was complete, although not a word passed as to his status. So, also, it was held to be a false pretense when a prisoner obtained money from an officer of a postoffice by indorsing and presenting to her, for pay-

v. Jackson, 3 Campb. 370; Queen v. Hazelton, L. R. 2 C. C. 134.

But the contrary is held in a few instances. Allen's Case, 3 N. Y. City Hall Rec. 118; Stuyvesant's Case, 4 N. Y. City Hall Rec. 156; State v. Seipel, 104 La. 67, 28 So. 880. And in Maxey v. State, 85 Ark. 499, 108 S. W. 1135, it was held that an allegation in an indictment, that defendant pretended that he had money in the bank, was not sustained by evidence that he merely drew and passed a check on a bank in which he had no funds. Whether the evidence would have sustained an allegation that defendant pretended that he had authority to draw on the bank, as was held in Queen v. Hazelton, supra, was not considered.

And in Texas the mere drawing and passing of a check upon a bank in which the drawer has no money or credit is not a representation that he has funds or credit in the bank, and does not constitute swindling under a statute providing that "swindling is the acquisition of any personal or movable property," etc., "by means of some false or deceitful pretense or device or fraudulent representation, with intent," etc. Martin v. State, 36 Tex. Crim. Rep. 125. 35 S. W. 976; Ayers v. State, 37 Tex. Crim. 17 L.R.A. (N.S.)

Rep. 1, 38 S. W. 792; Brown v. State, 37 Tex. Crim. Rep. 104, 66 Am. St. Rep. 794, 38 S. W. 1008; Blackwell v. State, 41 Tex. Crim. Rep. 104, 96 Am. St. Rep. 778, 51 S. W. 919.

It was held in Semler v. State, supra, that a draft upon a bank, payable on demand, is indistinguishable from a check; and either, considered alone, imports a representation that the drawer has funds to meet it.

It was held in Com. v. Drew, supra, that it is not a false pretense for one who has an account at a bank to present his check to the bank in person, even though he knows that his funds have been exhausted, as the presentation of the check amounts merely to a request to pay him the sum named, addressed to the person whose duty it is to know whether it ought to be paid or not.

It was held in Foote v. People, supra, that the giving of a check payable, at a future time, on a bank in which he had no account, was a false pretense, as it amounted to a representation that he kept an account in the bank. But see Lesser v. People, 73 N. Y. 78, which intimates that the fact that a check was postdated would be material.

ment, an order in favor of another person, although he did not make any false declaration or assertion to obtain the money. *Rex v. Story*, Russ. & R. C. C. 80. And, again, the offering of a worthless bill in satisfaction of an obligation is within a statute providing for the punishment of anyone who, by false pretense, with intent to commit a fraud, obtains the property or money of another, although no representations are made as to the value of the bill. *Com. v. Beckett*, 119 Ky. 817, 68 L.R.A. 638, 115 Am. St. Rep. 285, 84 S. W. 758. In ruling upon this case, the court said that the mere offering of the bill in payment of the obligation "amounts to an assertion or representation by conduct, which may be as efficacious to convey an idea, or to constitute the basis of a reasonable belief, as though exact and appropriate words had been used. Words are used to express ideas. Signs might be used instead. Conduct that conveys necessarily the same idea, and intended to do so, is but a substitute for the words or signs, expressive of it. We have no doubt but that the use of a worthless bill, pretending it is valid, and with the intent to defraud, is a false token under the statute."

Now, a check is an order on a bank, purporting to be drawn upon a deposit of funds, and the drawer engages that, on presentation, it will be paid. *Bellinger & C. Anno. Codes & Statutes*, § 4463. The giving of such an instrument is therefore as much of a representation that the drawer has money or credit with the bank as if he had made an oral statement or declaration to that effect. And, when the check is given with the fraudulent and felonious purpose of obtaining the property of another, with knowledge of the drawer that he has neither money nor credit at the bank, and that the check will not be paid, it is within the statute, although the drawer made no other representation in reference thereto. It was so ruled in the early case of *Rex v. Jackson*, 3 Campb. 370. And the doctrine has been approved by the courts and text writers; and it is generally agreed that it is not necessary that the drawer should have told the person to whom he gave the check that he had funds or credit in the bank. 12 Am. & Eng. Enc. Law, 2d ed. p. 838; *Rapalje*, *Larceny*, § 402; 2 *Wharton, Crim. Law*, § 2107; *McClain, Crim. Law*, § 674; *Underhill, Crim. Ev.* § 444; *People v. Donaldson*, 70 Cal. 116, 11 Pac. 681; *People v. Wasservogle*, 77 Cal. 173, 19 Pac. 270; *Com. v. Drew*, 19 Pick. 179; note to *Barton v. People*, 25 Am. St. Rep. 375-380. The Texas cases, *Ayers v. State*, 37 Tex. Crim. Rep. 1, 38 S. W. 792, *Brown v. State*, 37 Tex. Crim. Rep. 104, 66 Am. St. Rep. 794, 38 S. W. 1008, and *Blackwell v. State*, 41 Tex. Crim. Rep. 17 L.R.A. (N.S.)

104, 96 Am. St. Rep. 778, 51 S. W. 919, which apparently hold a contrary doctrine, are under a statute different from ours, and in the construction of which the courts of that state hold that, before a defendant can be convicted, there must be a distinct and certain representation of an existing fact, and the indictment must show such certain and distinct representation of the fact, either past or present. *Martin v. State*, 36 Tex. Crim. Rep. 125, 35 S. W. 976. From our examination of the question, we are constrained to believe that the court below was in error in sustaining the demurrer.

Judgment reversed.

VIRGINIA SUPREME COURT OF APPEALS.

KNIGHTS OF COLUMBUS, Plff. in Err.,
v.

MARY A. BURROUGHS.

(107 Va. 671, 60 S. E. 40.)

Insurance — forfeiture — declaration.

1. No declaration of forfeiture is necessary to terminate the rights of a member of a mutual benefit society for nonpayment of dues where the by-laws provide that any member shall *ipso facto* forfeit his membership who fails to pay his assessment for thirty days after notice.

Same — payment by lodge — effect.

2. Forfeiture of the rights of a member of a mutual benefit society for the nonpayment of dues is not prevented by the fact that they were paid by the local branch of the order to which he belonged, where the local branch forwarded the money without complying with the provisions of a by-law that no money shall be paid from the treasury unless by a two-thirds vote of the members at a regular meeting held subsequently to a regular meeting at which notice of intention to pay and the purpose and amount are given and read.

Same — estoppel of order.

3. The receipt by the supreme body of a mutual benefit society of money from a local lodge to pay the dues of a delinquent member, without knowledge that it is not his money, but an advancement by the lodge, does not estop it from contesting liability on his certificate because of his nonpayment of dues.

(January 16, 1908.)

Case Note. — Necessity of affirmative action in order to terminate rights of member in mutual benefit society for nonpayment of dues.

This note does not intend covering the question of the validity of self-executing provisions. Neither does it include cases passing solely upon the necessity of notice

ERROR to the Corporation Court of Alexandria to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a mutual benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. Crandall MacKay and William B. Rielly for plaintiff in error.

Messrs. John M. Johnson and Leo P. Harlow for defendant in error.

Keith, P., delivered the opinion of the court:

This suit was brought by Mary A. Burroughs, as beneficiary of William J. Burroughs, deceased, in the corporation court of the city of Alexandria, against the Knights of Columbus, a corporation incorpo-

rated under the laws of the state of Connecticut, and doing business in the state of Virginia. The defendant appeared and pleaded *non assumpsit* and two special pleas. The plaintiff took issue upon the first plea, and filed special replication to the second and third pleas. Issue was joined thereon. The jury gave a verdict for the plaintiff for the sum of \$1,000. The court rendered judgment upon that verdict, and the case is now before us upon a writ of error.

And the same was held where the provisions were that upon nonpayment "the risk of the company on the policy shall be suspended." *Maginnis v. New Orleans Cotton Exch. Mut. Aid Asso.* 43 La. Ann. 1136, 10 So. 180; *Blanchard v. Atlantic Mut. F. Ins. Co.* 33 N. H. 9.

And where the provision was that upon failure to pay dues he shall "thereupon become suspended by his own act, and his benefit certificate or certificates shall be absolutely void." *Kennedy v. Grand Fraternity*, 36 Mont. 325, 92 Pac. 971.

And where it was provided that upon default the certificate "shall be null and void." *Pitts v. Hartford Life Annuity Ins. Co.* 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95; *Smith v. Sovereign Camp*, W. W. 179 Mo. 119, 77 S. W. 862; *Hipp v. Fidelity Mut. L. Ins. Co.* 128 Ga. 491, 12 L.R.A. (N.S.) 319, 57 S. E. 892.

So failure to pay operated as a forfeiture where the provision was to the effect that default "shall terminate the policy." *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills*, 27 C. C. A. 212, 54 U. S. App. 290, 82 Fed. 508; *Parker v. Bankers Life Asso.* 86 Ill. App. 315.

And in the following cases also the provisions were held self-executory:

Where the provision was "cease and determine." *Lantz v. Vermont L. Ins. Co.* 139 Pa. 546, 10 L.R.A. 577, 23 Am. St. Rep. 202, 21 Atl. 80.

Where it was "otherwise the certificate shall be void." *Duffy v. Alta Friendly Soc.* 17 Pa. Super. Ct. 531.

Where it was provided that the delinquents "shall cease to be members." *Railway Pass. & F. Conductors' Mut. Aid & Ben. Asso. v. Leonard*, 82 Ill. App. 214; *Railway Pass. & F. Conductors' Mut. Aid & Ben. Asso. v. Loomis*, 43 Ill. App. 599; *Hansen v. Supreme Lodge K. H.* 40 Ill. App. 216.

Where the provision was "shall forfeit his membership." *Lehman v. Clark*, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 22; but see *Harris v. Wilson*, 86 Mo. App. 406.

Where it was provided that "no member shall be entitled to the benefits, etc.," and, further, that arrears for a longer period

to the insured of the delinquency before a forfeiture takes place. At first view the decisions upon the question annotated would appear to be in conflict; an analysis of the cases, however, shows that little, if any, conflict exists. Most of the cases which are apparently in conflict are distinguishable by the presence of a modifying clause, or a materially different wording of the provisions. All of the cases seem to agree that the general proposition that the law abhors a forfeiture, and will relieve against it when possible, is applicable to the provisions under consideration, and such provisions are universally strictly construed against the insurer.

In the following cases where the provisions were in substance "that a member who fails or neglects to pay assessments or dues within the time specified shall stand suspended from the council," it was held that they were self-executing and required no affirmative action: *Feiber v. Supreme Council*, A. L. H. 112 La. 960, 36 So. 818; *National Union v. Hunter*, 99 Ill. App. 146, Affirmed in 197 Ill. 478, 64 N. E. 356; *National Union v. Shipley*, 92 Ill. App. 355; *Supreme Lodge K. H. v. Keener*, 6 Tex. Civ. App. 267, 25 S. W. 1084; *Freckmann v. Supreme Council*, R. A. 96 Wis. 133, 70 N. W. 1113; *Chapple v. Sovereign Camp*, W. W. 64 Neb. 55, 89 N. W. 423; *Hansen v. Supreme Lodge K. H.* 40 Ill. App. 219, Affirmed in 140 Ill. 306, 29 N. E. 1121; *Beeman v. Supreme Lodge*, S. H. 29 Pa. Super. Ct. 387; *Independent Order of Foresters v. Haggerty*, 86 Ill. App. 31; *Stanley v. Northwestern Life Asso.* 36 Fed. 75.

So a provision to the effect that upon default the member shall "stand suspended without notice, and no act on the part of the council or any officer thereof . . . shall be required as essential to such suspension," is self-executory. *National Council, K. & L. S. v. Burch*, 126 Ill. App. 15; *Marshall v. Grand Lodge*, A. O. U. W. 133 Cal. 686, 68 Pac. 25; *Grand Lodge A. O. U. W. v. Lachmann*, 101 Ill. App. 213; *Scheufler v. Grand Lodge*, A. O. U. W. 45 Minn. 256, 47 N. W. 799; *Backdahl v. Grand Lodge A. O. U. W.* 46 Minn. 65, 48 N. W. 454.

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only one instruction is mentioned, which is in the following words:

"The jury are instructed that the local lodge had the power to advance assessments for its delinquent members, unless there was something in the constitution and by-laws of the national or subordinate council prohibiting such advances."

If other instructions were given at the instance of the plaintiff, they are not properly part of the record, and cannot be considered by this court. At the conclusion of the printed transcript of the record it does ap-

pear that three instructions were granted at the instance of plaintiff. We have quoted instruction No. 1, and instructions Nos. 2 and 3, not having been embraced in the bill of exceptions, cannot be considered by us.

From bill of exceptions No. 2 it appears that the court was asked to grant plaintiff in error three instructions, which the court refused to do, and its refusal is assigned as error. These instructions are as follows:

"The court instructs the jury that, if they believe from the evidence that William J. Burroughs failed, neglected, or refused to

"shall render the certificate null and void." *Scheele v. State Home Lodge*, 63 Mo. App. 277.

Where the provision was that upon default the member shall "forfeit all rights as a member." *Grand Lodge, A. O. U. W. v. Marshall*, 31 Ind. App. 534, 99 Am. St. Rep. 273, 68 N. E. 605.

Where the provision was that the member "shall not be entitled to receive any benefits from the fund." *Rhule v. Diamond Colliery Accidental Fund*, 5 Lack. Legal News, 101.

Where the provision was "should become expelled without notice to him or further action by the lodge, and the beneficiary certificate shall become void at that instant, and all rights thereunder shall then cease." *Brotherhood of Railroad Trainmen v. Dee* (Tex.) 111 S. W. 396.

Where it was provided that default "shall work *ipso facto* a suspension and forfeiture." *Lavin v. Grand Lodge, A. O. U. W.* 104 Mo. App. 1, 78 S. W. 325.

Where it was provided that upon default the member's name "shall be erased from the roll of members, and he should forfeit all claims upon the association." *Yoe v. Benjamin C. Howard Masonic Mut. Ben. Asso.* 63 Md. 86.

Where the provision was that no member can pretend to the benefits of the society if he shall neglect for three months to pay his monthly dues. *Houle v. Société St. Jean Baptiste* (Mich.) 15 Det. L. N. 494, 116 N. W. 1076.

Where the provision was that upon default the member "shall not be entitled to benefits." *Wheeler v. Lackawanna Coal Co. Accidental Fund*, 5 Lack. Legal News, 97.

So where the provision that "he should stand suspended, his certificate should cease to be in force and become null and void," was accompanied by the further provision that all the benefits "shall be liable to forfeiture if said member shall not comply," it was self-executory. *Brown v. Knights of Protected Ark* (Colo.) 96 Pac. 450.

In *Harvey v. Grand Lodge, A. O. U. W.* 50 Mo. App. 472, the certificate was *ipso facto* suspended for nonpayment, but the exact provision does not appear. The same is true of *Sparkman v. Supreme Council, A. L. H.* 57 S. C. 16, 35 S. E. 391; *Paster v. Naglesmith*, 30 Misc. 791, 63 N. Y. Supp. 154.

In *American Mut. Aid Soc. v. Kilburn*, 17 L.R.A. (N.S.)

7 Ky. L. Rep. 750, a clause providing for a strict forfeiture was held self-executory.

And in *LaMarsh v. L' Union St. Jean Baptiste Soc.* 68 N. H. 229, 38 Atl. 1045, a provision that upon neglect to pay his dues a member "loses his benefits" was referred to as if self-executory.

In *Dennis v. Massachusetts Ben. Asso.* 120 N. Y. 496, 9 L.R.A. 189, 17 Am. St. Rep. 660, 24 N. E. 843, the court said that, if the certificate had provided without qualification that for a failure to pay an assessment within thirty days after the mailing of a notice thereof it should "lapse and be void," its invalidity would be beyond dispute; and the fact that insured was prevented from making the payment by an act of God would not relieve him from the forfeiture. Provisions for continuing the policy in case of nonpayment were contained in the policy before the court, and the construction of these was the main question passed upon.

In *Bosworth v. Western Mut. Aid Soc.* 75 Iowa, 582, 39 N. W. 903, where the certificate contained a provision that "it should be void if assessments were not received," it was held that the word "void" could not be construed as meaning "voidable at the election of the insurer," where there were no qualifying words or provisions. To the same effect is *Sovereign Camp W. W. v. Hicks*, 37 Tex. Civ. App. 425, 84 S. W. 425; but see *Columbia Ins. Co. v. Buckley*, 83 Pa. 293, 24 Am. Rep. 172.

But in the following cases, where the contract of insurance contained a provision that upon the member's default or his becoming in arrears he "shall be suspended," and such provision was followed by another clause providing for a mode of suspension, or making some provision whereby the lodge might appropriate funds for the payment of such deficiencies, or where the provision was preceded or followed by others qualifying it, it was held not to be self-executory: *Osterman v. District Grand Lodge No. 4, I. O. B. B.* (Cal.) 43 Pac. 412; *Flicke v. High Court C. O. F.* 90 Ill. App. 344; *St. Louis Southwestern R. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Scheufler v. Grand Lodge, A. O. U. W.* 45 Minn. 256, 47 N. W. 799; *Backdahl v. Grand Lodge A. O. U. W.* 46 Minn. 65, 48 N. W. 454; *Murphy v. Independent Order, S. & D. J.* 77 Miss. 830, 50 L.R.A. 111, 27 So. 624.

pay his assessment for the months of April, May, June, July, August, and September, 1904, in the time prescribed by the by-laws, that being the regular monthly assessment due by him, and after he had been requested to pay same by Richard L. Carne, Jr., the financial secretary of Fitzgerald Council No. 459, Knights of Columbus, then he forfeited his membership in the Knights of Columbus, and the plaintiff cannot recover in this action.

"The jury are further instructed that as a matter of law the receipt of said money by

the said Carne, financial secretary of Fitzgerald Council No. 459, Knights of Columbus, on behalf of said William J. Burroughs, was without right or authority on his part, and that the acceptance by him of said money was not a waiver of the conditions by the said defendant under which said benefit certificate was issued. To the contrary, each and every benefit certificate is issued only upon the conditions stated in, and subject to, the constitution and by-laws of the order of said Knights of Columbus.

"The jury are further instructed that the

The same result was reached in the following cases:

Brooks v. Conservative L. Ins. Co. 132 Iowa, 377, 119 Am. St. Rep. 500, 106 N. W. 913, where the provision was, that upon failure to pay assessments he "shall be suspended and his certificate become null and void, and all rights and benefits . . . shall be forfeited;" such provision being followed by another, that "a member who has been suspended for nonpayment of his dues and assessment may be reinstated."

Order of United Commercial Travelers v. McAdam, 61 C. C. A. 22, 125 Fed. 358, where it was stipulated that upon failure to pay assessments the member "shall immediately on the happening of such default, and by virtue thereof, forfeit his good standing," and this was preceded by a provision that "all members who fail to pay their dues or assessments when due shall be suspended from the order at a regular meeting of the council."

Delaney v. Kelly, 45 Misc. 286, 92 N. Y. Supp. 265, where a provision that a member failing to pay his dues "shall *ipso facto* stand disconnected" was followed by a second clause that "one so disconnected can be reinstated within thirty days by payment."

Harris v. Wilson, *supra*, where the provision was that the member "shall forfeit all benefits of the brotherhood."

Lewis v. Western Funeral Ben. Asso. 77 Mo. App. 586, where it was provided that upon a member's becoming in arrears he "forfeits all the rights and privileges except that of being admitted into the council chamber during its sessions."

Rogers v. Union Benev. Soc. No. 2, 111 Ky. 598, 55 L.R.A. 805, 64 S. W. 444, where it was provided that upon failure of members to pay their dues "they may be suspended."

Independent Order of Foresters v. Hagerty, 86 Ill. App. 31, where the provision was "shall be dropped from membership in this order."

Wheeler v. Lackawanna Coal Co. Accidental Fund, *supra*, where it was provided that any member in arrears "shall be dropped from membership."

Scheu v. Grand Lodge, Ohio Div. I. F. 17 Fed. 214, where it was stipulated he "shall be suspended."

High Court, I. O. F. v. Edelstein, 70 Ill. App. 95, where it stated "he shall be dropped from membership."

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Supreme Lodge K. H. v. Wickser, 72 Tex. 257, 12 S. W. 175, where it was provided that upon failure he was "to be suspended."

Northwestern Traveling Men's Asso. v. Schauss, 51 Ill. App. 78, Affirmed in 35 N. E. 747, 148 Ill. 304, where it stated he "shall forfeit his claim to membership and have his name stricken from the roll." To the same effect is Tecumseh Mut. Life Asso. v. Woodman, 99 Ill. App. 546.

In Columbia Ins. Co. v. Buckley, *supra*, it was held that a provision that, if assessments were not paid within a certain time, the policy should be void, did not *ipso facto* render the certificate void, but merely voidable.

In Petherick v. General Assembly, O. A. 114 Mich. 420, 72 N. W. 262, failure to pay dues was held not *ipso facto* to work a forfeiture, where the constitution provided that he should be declared in arrears, and not entitled to vote; and further provided for an announcement before the lodge of his delinquency.

In Columbus Mut. Life Asso. v. Hanrahan, 98 Ill. App. 22, and Schwartz v. St. Elizabeth R. & G. Catholic Union, 29 Ohio C. C. 471, it was held that one did not cease to be a member by a mere nonpayment of dues and without any action on the part of the insurer. It does not appear in this case what the exact provision was.

In Supreme Lodge K. P. v. Kalinski, 6 C. C. A. 373, 13 U. S. App. 574, 57 Fed. 348, Affirmed in 163 U. S. 289, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047, the provision "when a member of the endowment rank becomes in arrears to his lodge for an amount equal to one year's dues, he shall forfeit his membership to the section and said rank, and render void his endowment certificate," construed with another, that, if one resign, "such resignation shall cause a forfeiture of all amounts paid into and all claims upon the endowment rank," was held, following the construction of a board of the society which had previously passed upon the question, not *ipso facto* to work a forfeiture. Further facts entering into the decision were that the lodge, to which the endowment rank was an incident, had failed to notify the rank that he was in arrears in the lodge, and the lodge had taken no action to suspend such member, and the rank had received his monthly assessments.

said Richard L. Carne, Jr., as financial secretary of the said Fitzgerald Council No. 459, Knights of Columbus, and said Fitzgerald Council No. 459, Knights of Columbus, in administering the powers and duties provided under the laws of said defendant, were not the agents of the said order, but the agents of the members thereof, and that the acceptance of said money by said Carne after said forfeiture of membership of said William J. Burroughs did not create, or cannot be construed to create, any liability on the part of said defendant to said plaintiff. Therefore the verdict should be for the defendant."

The evidence before the jury, in the light of which these instructions are to be considered, was as follows: The Knights of Columbus is a corporation, organized under the laws of the state of Connecticut, for the purpose of carrying on a system of fraternal insurance by means of subordinate lodges located throughout the various states of the Union. Of these subordinate lodges one was known as "Fitzgerald Council No. 459," located at Alexandria, Virginia. One of the members of this council was William J. Burroughs, who made application for membership on April 14, 1902, and to whom a benefit certificate was issued on the 25th day of June, 1902. By the terms of this certificate Burroughs agreed to comply with all the requirements and conditions therein set out, and also those contained in the original application made by him for membership in the organization. He agreed to comply with the constitution, laws, rules, and regulations governing the defendant order, and the defendant agreed to pay to the beneficiary, plaintiff in this action, Mary A. Burroughs, the sum of \$1,000, provided that the said William J. Burroughs was, at the time of his death, a member of said order in good standing; all of which conditions and provisions were accepted and subscribed to by Burroughs in his benefit certificate. Burroughs, during the time of his membership, agreed to pay certain assessments, as provided for in defendant's laws, §§ 85 and 89. There was due from Burroughs an assessment for the month of April, 1904, for the sum of 80 cents, which was not paid; nor were the assessments paid for the months of May, June, July, August, and September, 1904. Section 167 of plaintiff in error's by-laws provides: "Any member of this order shall *ipso facto* forfeit his membership in the order, who fails, neglects, or refuses to pay his proportionate part of any assessment for thirty days from the date of mailing or transmitting the notice for assessment by the secretary of his council, or of the regular monthly assessment, within thirty days from the first day of the month in which levied."

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By § 217 it is provided: "A member of the order suspended for nonpayment of assessments, dues, or fines, wishing to be reinstated, must, within one year from the date of suspension, make written application to and at a meeting of the council from which he was suspended, upon a blank issued by the order. Said application shall be balloted upon and forwarded by the financial secretary to the national secretary, with the approval or disapproval of the council recorded thereon, and with the certificate of the financial secretary that all arrearages of assessments and dues have been paid. If an insurance member, the committee on reinstatement shall then act upon said application, and the applicant can only be reinstated upon such conditions as said committee may direct and determine; provided, if such application is made within three months from date of forfeiture of membership, the provisions of this section relative to ballot and approval by the council shall not apply. If an associate member, no action of the committee on reinstatement is necessary. Upon approval of the council and otherwise complying with this section he is reinstated."

By § 125 of the by-laws it is provided: "No money shall be paid or transferred from the treasury of any council (except such moneys as the council is called upon to regularly pay for its current expenses and as provided by the laws of the order, or for purposes approved by the national council or board of directors) unless by a two-thirds vote of the members present and voting at a regular meeting held subsequent to a regular meeting at which notice in writing of a resolution or intention to pay or transfer such money, and the purposes and amount to be paid or transferred, shall have been given and regularly read."

The benefit certificate copied in the record appears to have been issued on the express condition that the statements made by the applicant in his application for membership are warranted as true and made a part of the contract, and upon the further condition "that said member complies in the future with the constitution, laws, and regulations now governing said order, or that may hereafter be enacted to govern said order." And in § 12 of his application he covenants that he "will conform to and abide by the constitution, by-laws, rules, and regulations of said order, and of any council thereof, of which I may at any time be a member, which may now be in force, or which may at any time hereafter be adopted by the proper authorities, or submit to the penalty now or hereafter provided for the breach or violation of such constitution, by-laws, rules, or regulations."

William J. Burroughs died on October 15, 1904. He had failed to pay his assessments for the months of April, May, June, July, August, and September, 1904. It was shown by the evidence of the financial secretary of Fitzgerald Council that it was the custom of that council to keep up the dues of members who were in arrears;—to use his own language: "The council ordered me to carry every man. That was passed at every meeting for every assessment. It was always paid within thirty days. Before I would have a chance to read the delinquent list a motion would be made that we carry the delinquents;"—that this action was taken by the local board, knowing that some of the members were delinquent; and before a list of the delinquents could be read, motion would be made to carry them all. These payments for Burroughs and other delinquents were made by warrants drawn on the treasurer against the insurance fund.

It appears from the evidence of the financial secretary that he called upon Burroughs frequently for his assessments, and he would do so upon an average of twice a month, at his home, at his place of employment, and elsewhere.

The defendant in error proved by another witness that it was the custom for the secretary of the national council to forward to the Fitzgerald Council a statement of the amount due for insurance members, and the secretary of the local council would then forward the amount by check; that the local lodge kept alive the membership of all its members by paying their dues; that up to the time of the death of Burroughs the local council had carried members from month to month, and paid the assessments out of the general fund; and that Burroughs had been asked to meet the assessments due by him, and he always replied that he would do so at the next meeting. He never in terms refused to pay.

It further appears that the secretary of the national council had no knowledge of the custom of the local council, and when he received checks was not aware that they were in part for money advanced to meet the assessments of delinquent members of the subordinate lodge.

Some time after Burroughs, the insured, became ill, and four days before his death, to wit, on October 11, 1904, the sum of \$10.40 was paid to the financial secretary of the Fitzgerald Council, in settlement of the amount that lodge had theretofore advanced to the national council on account of assessments against William J. Burroughs.

The Knights of Columbus is a beneficial association, organized for the purpose of

carrying on a system of fraternal insurance, and not for purposes of gain and profit. The nonpayment of dues and assessments, in such an organization, is subversive of the fundamental object of the society, tends to its destruction, and is a violation of the member's duty as a corporator. Not only has such a society an inherent right to expel members for nonpayment of dues and assessments, but, from its nature and necessities, it has a right to provide in its laws that such nonpayment within a stipulated time after notice shall, without personal or other notice to the delinquent member, *ipso facto* work a forfeiture of all the member's rights of membership. Niblack, Ben. Soc. 2d ed. § 39.

In *Klein v. New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662, it is said: "A condition in a policy of life insurance, that if the stipulated premium shall not be paid on or before a certain day, the policy shall cease and determine, is of the very essence and substance of the contract. Against a forfeiture caused by failure so to pay, a court of equity cannot relieve."

And in *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765, it is said: "Where the policy provides that it shall be forfeited upon the failure of the assured to pay the annual premium *ad diem*, or to pay at maturity his promissory note therefor, the acceptance by the company of the note, although a waiver of such payment of the premium, brings into operation so much of the condition as relates to the note." "Prompt payment," said the court, "and regular interest, constitute the life and soul of the life-insurance business, and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and if a forfeiture is provided for in case of nonpayment at the day, the courts cannot grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it, but that is all."

In *Metropolitan L. Ins. Co. v. Hall*, 104 Va. 572, 52 S. E. 345, it is said: "An insured should look at his policy and conform to it, and limitations of the agent's authority should be effective, unless the insurance company, by a course of business or otherwise, has waived the limitation on the agent's power of waiver. An agent to collect premiums has no authority to extend the time of payment of an overdue premium, and, where the policy declares a forfeiture for failure to pay at maturity, and forbids

waiver by agents, their agreements to extend time of payment do not, as a rule, bind the company." See also *United Moderns v. Rathbun*, 104 Va. 736, 52 S. E. 552.

In *Mutual F. Ins. Co. v. Miller Lodge*, I. O. O. F. 58 Md. 463, it was held that, "when a party takes out a policy in a mutual insurance company, and the contract is complete, he at once becomes a member, and is bound by the rules and provisions of the charter and by-laws of the company, and he is presumed to have knowledge of them all. . . . Although there may be a habit or usage of the company to give notice to the members of the amount of the annual interest and the time of payment, yet, if no obligation to give such notice is created by the charter or by-laws of the company, there is nothing in such habit or usage that could impose such a duty upon the company, with the consequence of making the notice a condition precedent to the right of the company to receive the interest on the premium note, according to the contract of insurance. The company is under no obligation to give such notice, and assumes no responsibility in giving it. The duty of the assured to pay at the day is the same, whether notice be given or not."

Applying the principles of that case to the one before us, there can be no doubt that the insured was bound by the rules and provisions of the charter and by-laws of the order of which he was a member, and that he was conclusively presumed to have knowledge of them all, with this difference between the two cases, that in that under consideration there is no evidence of any habit or usage of the national council to grant indulgence to its members, or to give them notice of delinquency, or that there was any obligation upon its part to do so, or any knowledge that any such usage or habit had grown up in, and was practised by, the local lodge.

In *Rood v. Railway Pass. & F. Conductors' Mut. Ben. Asso.* (C. C.) 31 Fed. 62, it is held that, where the laws of a benefit society provide that, if a member neglects or refuses to pay any assessment for a specified period, he shall cease to be a member, and the secretary shall strike his name from the roll, such laws are self-executing, and the member so omitting to pay loses his rights as a member, although the secretary does not strike his name from the roll.

In *McDonald v. Ross-Lewin*, 20 Hun, 87, § 1, art. 10, of the by-laws of the association, provided that, if any member should neglect to pay any dues or assessments required by the by-laws, "then and in such case such membership shall cease and determine at once without notice, and all claims

be forfeited to the association." It was held that the neglect to pay an assessment for thirty days after notice thereof *ipso facto* determined the membership of the delinquent.

In *Illinois Masons' Benev. Soc. v. Baldwin*, 86 Ill. 479, it was held: "Where a certificate of membership in a society, which provides for paying a certain sum of money on the death of the member, also requires the party to pay all assessments against him within ten days after notice thereof, or the certificate shall be null and void, and the by-laws of the society provide that a party failing to pay his assessments within ten days after notice shall forfeit his membership and all benefits therefrom, and the party, in his application for membership, agreed to be bound by the rules and regulations of the society, a failure or neglect to pay an assessment within ten days after notice of the same will prevent any recovery upon the certificate upon his death, unless there is shown a waiver of the forfeiture, or facts estopping the society from insisting upon the same;" that, "when a party in default in the payment of assessments against him, as a member of a benevolent society, has not been induced by the society or its agents to do, or to omit to do, any act which he would not otherwise have done or omitted, the society will not be estopped from insisting upon a forfeiture of his rights for his neglect to pay. Proof of a custom is never admitted to overcome or change the express terms of a contract. Proof by a witness that, in certain instances known to him, a forfeiture was not exacted, without showing this to be uniform and its duration, is not sufficient to show a custom."

While the authorities concur in conceding the right of beneficial societies in their constitutions and by-laws and in their contracts of insurance to impose conditions, a failure to comply with which is visited with a forfeiture of all rights in the society, there is some apparent diversity of opinion among the cases as to whether or not it is necessary for the society to give notice or take any formal action in order to make the forfeiture effectual. But it will be found, we think, upon a careful examination of the authorities, that the difference really grows out of the construction of the constitution and by-laws of the particular society. If, for instance, the laws of the society provide that the nonpayment of an assessment, continuing for a specified time, shall operate *ipso facto* to determine the connection between the society and the delinquent member, and to forfeit his rights as such member, we know of no case in which the power of such a society to make

and enforce such a rule has been denied; but where, in accordance with the terms of the constitution and by-laws of the society, anything is to be done on the part of the society itself to make the expulsion of the member complete,—to terminate his rights and interests in the society,—the courts require a strict compliance with the course of procedure prescribed, and are astute to discover any departure which will enable them to interfere and prevent a forfeiture.

For example, in *Madeira v. Merchants' Exch. Mut. Ben. Soc. (C. C.)* 5 McCrary, 258, 16 Fed. 749, where a certificate of membership in the nature of a life policy, issued by the mutual society, provided that the amount of insurance therein specified should be paid in case of the member's death to his beneficiary, on condition that he had "complied with the by-laws of the society," and the by-laws provided that members should forfeit their membership if they failed to pay their dues within thirty days after publication of an assessment, and it appeared from the evidence that the assured had failed to pay an assessment within the time specified, and that it remained unpaid at the time of his death, it was held that he had forfeited his membership, and that there could be no recovery under his certificate.

So in *Borgraefe v. Supreme Lodge, K. & L. H.* 22 Mo. App. 127, it was held that, "under a law of a benevolent society, which makes the nonpayment of assessments for a given period after notice operate as a suspension *ipso facto* of the delinquent member, it is not necessary that the suspension should be judicially determined by any judicatory of the order."

In *Bacon on Ben. Soc.* vol. 2, § 385, after a full consideration of the subject and the citation of numerous authorities upon the one part and the other, the conclusion is reached, that "if, however, by the laws of the society, nonpayment of an assessment operates as a forfeiture, time is of the essence of the contract, and the member must elect, every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and its benefits by neglecting or refusing to pay within that time.

. . . The question is one of construction, and we give in a note the cases, not heretofore cited, holding that *ipso facto* suspension resulted from nonpayment, and also those holding to the contrary." An examination of these diverse authorities will show that, in every case in which it was held that the failure to pay did not operate a suspension *ipso facto*, there was something in a just construction of the constitution and by-laws which showed that affirmative

action on the part of the society was necessary; in other words, that in all such cases the nonpayment of the dues and assessment did not, under the particular constitution or by-laws, operate *ipso facto* and by its own force to terminate membership in the society.

In concluding the discussion of this branch of the case, we shall refer to § 289 of Niblack on Ben. Soc. 2d ed. The whole of the section is pertinent, but too long for quotation. It is in part as follows: "However abhorrent it may be to all reason to permit the expulsion of a member without notice and hearing, or opportunity to be heard, for an alleged violation of his duty as a citizen or a corporator, and notwithstanding the fact that a by-law providing that on such charges a member may be expelled by a vote of the society in his absence and without notice is illegal and invalid, it may be laid down as certain that, from the very nature of the plan of mutual assessment insurance, it is proper for mutual benefit societies to provide that nonpayment of an assessment within a specified time after notice shall *ipso facto* work a forfeiture of the insurance and an expulsion of the defaulting member. It is true that, where such stringent clauses of forfeiture are made a part of the contract, they are usually accompanied by provisions for the reinstatement of the delinquent member upon equitable terms, but such provisions are not necessary to the validity of the terms of forfeiture. These societies depend exclusively upon the payment of assessments to meet their losses and expenses, and only by the prompt payment of assessments by their members can they maintain their solvency and responsibility. The only practical way which they have of enforcing payment of their assessments is by forfeiting insurance contracts and expelling the delinquent members for nonpayment, and this power is necessary for the existence of such societies. To hold that specific notice to the member must be given of the time and place at which he will be called upon to answer the charge of having failed to pay his assessment within the stipulated time, and that a judicial act of the society expelling the delinquent member is necessary in order to terminate his rights under the contract, and to hold further that such proceedings may not be waived by express contract of the parties, would be to extend unduly the period of insurance beyond the time for which a consideration had been paid, would offer encouragement to careless members, and greatly impair the ability of the societies to carry on the work for which they are organized."

In *Supreme Lodge K. H. v. Oeters*, 95 Va.

610, 29 S. E. 322, Judge Riely, speaking for this court, said: "The forfeiture of a certificate in a benefit society is not waived by the fact that the financial reporter of a subordinate lodge is in the habit of receiving payment of assessments after the end of the month for which they are levied, and within which they are payable, under the penalty of suspension and a forfeiture of the benefit certificate, when there is no evidence that the supreme lodge, which is sued on the certificate, is aware of such habit."

In *Supreme Council, R. A. v. Taylor*, 57 C. C. A. 406, 121 Fed. 66, the court says: "A fraternal benefit association cannot be deemed to have waived a condition of its contract with a member, requiring the payment of an assessment on or before the last day of each calendar month, without notice, and which provided that in default of such payment the member should stand suspended, and prohibited the collector of the local council from receiving an assessment after the day it became due; nor was it estopped to insist upon such suspension, which occurred some days before the member's death, because on some previous occasions he had paid after the close of the month, where that fact was not reported to the local council nor known to the supreme council, but where, in fact, the assessment had in each case been advanced for him by the collector under an arrangement between them."

In *Modern Woodmen v. Tevis*, 54 C. C. A. 293, 117 Fed. 369, the court says: "Stipulations to insure the prompt payment of benefit assessments constitute the substance and the essence of insurance contracts of beneficial associations;" and that "the insured and the beneficiaries under contracts with insurance companies and beneficial associations are charged with knowledge of the limitations upon the powers of the agents of the companies which are found in the policies or certificates or in the by-laws or applications which are a part of their contracts, and they are bound by these limitations."

In that case the by-laws of the Modern Woodmen of America, which constituted a part of the contract with its members and beneficiaries, provided that a member who fails to pay a benefit assessment at the time specified for its payment is *ipso facto* suspended, and his benefit certificate is thenceforth void; that he may be reinstated within a certain time, if in good health, by furnishing a warranty of that fact, and paying his arrearages; that the clerk of the local camp shall collect and remit to the head camp the assessments paid in accordance with the by-laws; that he shall report to the head camp suspended members; that he is the agent of the local camp, and not of

the head camp; and that no act or omission by him shall create any liability or waive any immunity or right of the society. It was held that the clerk of the local camp is the agent of the head camp to collect and remit the benefit assessments in accordance with the terms of the by-laws; that his authority is limited by the by-laws, and the members and beneficiaries are charged with knowledge of these limitations, because they are a part of their contracts; and that the clerk of the local camp has no authority by contract, estoppel, or waiver to bind the society to its members or beneficiaries either by extending the time of payment of a benefit assessment, or by waiving default in its payment, or by reinstating a suspended member without a warranty of good health, in the absence of notice or knowledge of such acts and acquiescence therein by some of the principal officers of the head camp.

There is much in that case which resembles the one under consideration.

In *Jelly v. Muscatine City & County Mut. Aid Soc.* 120 Iowa, 689, 98 Am. St. Rep. 378, 95 N. W. 197, it was held that "a provision in the constitution of a mutual benefit society, that a member failing to pay his assessment within fifteen days after being notified by the secretary shall be suspended, is not a self-executing provision, and a member who has failed to pay within the time is still in good standing, no action having been taken to suspend him." Construing this provision of the constitution, the court says: "The expression 'shall be suspended,' as the same appears in said article, is declaratory merely of the right of the association to suspend for nonpayment of assessments, and it cannot be said that membership or standing has been lost or forfeited as long as the society does not see fit to exercise such right. A mere delinquency of a member of a mutual-benefit association to pay dues or assessments does not defeat his good standing as long as he has a right to pay and the association forbears to take action,"—citing, among other cases, *Petrick v. General Assembly*, O. A. 114 Mich. 420, 72 N. W. 262.

In *Warwick v. Supreme Conclave K. D.* 107 Ga. 115, 32 S. E. 951, it was held that "the nonpayment of an assessment made upon the member for the common benefit fund, which has become due and payable under the laws of the association, will not *ipso facto* amount to a forfeiture of the benefit of life insurance provided for in the certificate, it appearing that there is no law or rule of the association expressly providing that such nonpayment will of itself work a forfeiture."

In *Puhr v. Grand Lodge G. O. H.* 77 Mo. App. 47, it was held that under the consti-

tution and by-laws of the defendant society a mere delinquency in the payment of dues does not defeat the good standing of a member. "So long as the member has the right to pay and the lodge forbears to take action, he remains in good standing." The provision of the by-laws in that case was, that "members who owe three months' dues and assessments shall in the first meeting of the fourth month be stricken from the membership roll." The court was of opinion that under that section the delinquency of the member would not *ipso facto* result in a forfeiture of membership until the first meeting of the local lodge in the fourth month after the default, and that a construction which summarily deprives the member of his rights is not favored, and it will not be adopted if any other is possible.

In American Council No. 107, O. U. A. M. v. National Council, O. U. A. M. 63 N. J. L. 52, 43 Atl. 2, a by-law provided that, if a member should fail to have his assessments in the hands of the secretary within thirty days from the date of call, he should forfeit his right to receive benefits until all arrearages were paid, and that, if thirty days should elapse before all arrearages were paid, the member should be suspended from the department. It was held that "a failure to pay assessments within thirty days after they became due did not of itself operate to suspend the defaulting member, but that affirmative action on the part of the society was required to produce that result." The court in its opinion laid stress upon the expression "shall be suspended," contending that action is to be taken by the national council for the accomplishment of that result after the default has continued for the specified time; and until such proceedings are taken and completed, the local council still retains its membership in the department.

All of which goes to show that, as we before remarked, courts are astute (and we may add properly so) to discover modes of escape from declaring a forfeiture. To the same effect see *Order of United Commercial Travelers v. McAdam*, 61 C. C. A. 22, 125 Fed. 358; *La Marsh v. L'Union St. Jean Baptiste Soc.* 68 N. H. 229, 38 Atl. 1045.

It will be sufficient to recur to § 167 of the by-laws of the Knights of Columbus to show that there is no room for discussion or doubt as to the effect of a failure to pay an assessment for the stipulated period. "Any member of this order shall *ipso facto* forfeit his membership in the order, who fails, neglects, or refuses to pay his proportionate part of any assessment for thirty days from the date of mailing or transmitting the notice for assessment by the secretary of his council, or of the regular month-

ly assessment, within thirty days from the first day of the month in which levied."

This brings us to a proposition much relied upon by defendant in error. As we understand her position, she did not rely, and under the evidence in this case could not have relied, upon any waiver or estoppel upon the part of plaintiff in error. The defendant in error stands squarely upon the proposition that the Fitzgerald Council had the right to pay, and did pay, the dues and assessments of its members; that the payment of all the dues of all its members by the local council to the national council satisfied all legal demands of the national council; and that, as the amount which the local council had advanced on behalf of Burroughs was, during his lifetime, paid to and received by it, he died a member in good standing.

In *O'Grady v. Knights of Columbus*, 62 Conn. 223, 25 Atl. 111, the construction of the constitution and by-laws of this society, as they then existed (that case having been decided in 1892), became necessary. One of the regulations of the society at that time provided that the endowment should be paid "upon the death of any member . . . in good standing at the time of his demise," and that a member should "be deemed in 'good standing' for the purpose of claiming endowment, who at the time of his death was not indebted to his council." Another article provided that "members four months in arrears for dues . . . shall be . . . *ipso facto* suspended," and that "members legally suspended . . . shall not . . . be entitled to any of the privileges of membership whatever until reinstated according to law." It was held that the right of the beneficiary of a deceased member to recover the endowment depended on the question whether the member at the time of his death was indebted to his council, and not upon the question whether he had been suspended and not reinstated. In that case the member at the time of his death was indebted to his council for several assessments, and had been suspended and not reinstated. A few hours before his death his beneficiary paid the amount due to the financial secretary of his council and took a receipt for it. It was held that this payment did not effect a reinstatement of the member, but that it did extinguish his indebtedness to his council, so that at the time of his death he was not indebted, and his beneficiary was entitled to the endowment.

Since that case was decided the laws of the order have been amended, and as amended again came under the consideration of the supreme court of Connecticut, in the case of *Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223, where it was held

that "the terms of a contract between a member of a benefit society and the society, stipulating that the member agrees to subject himself to the constitution and laws of the order, are determined by the constitution and by-laws of the order as existing when the member became a member, and as amended from time to time." It appeared in that case that, notwithstanding the constitution and laws of the society, it had been the practice, for a long time, of the members of subordinate councils, not to pay their monthly assessments until required to do so by a collecting officer appointed by the council, and it had been the practice of its financial secretary to receive the money so paid after the expiration of thirty days from the first day of the month, and not to state in his monthly report to the national secretary the fact that certain members had paid their assessments after the time prescribed by law for payment had expired. The national secretary, with knowledge of this practice, continued to issue each regular monthly assessment against the subordinate council, based upon the number of insurance members of the council as thus reported to him by the financial secretary, and to receive and accept from the treasurer of that council the full amount of each such monthly assessment. This practice continued with the knowledge of the other officers of the order, charged with duties in connection with issuing and receiving assessments for the death benefit fund against the subordinate council. A similar practice had for a long time prevailed in the other councils of the order in respect to the payment by their members of their regular monthly assessments, and a similar practice with respect to the issue and collection of assessments against the other councils of the order had in like manner prevailed. Coughlin, knowing of this practice, in fact believed that he was not required to pay his monthly assessment within thirty days from the first day of the month, and that he might lawfully pay the same after the expiration of that time, so long as he paid when requested so to do by the proper officer of his council, and, acting on this belief, he did not pay the assessments mentioned in the answer within thirty days from the first day of the month, but did pay the same after the expiration of that time to the financial secretary of his council. The court, in its opinion, says: "The foregoing facts are alleged in the reply, and for the purpose of testing its legal sufficiency are admitted by the demurrer;" and held that "the laws of a fraternal benefit society providing for a monthly assessment against each subordinate council on the number of its members as reported monthly, payable 17 L.R.A. (N.S.)

immediately after the first day of the month, and . . . that each member of a council should pay his regular monthly assessments within thirty days from the first day of each month, under penalty of *ipso facto* suspension for failure to so pay, . . . the payment by the treasurer of a subordinate council of the monthly assessment immediately after the first day of each month was not a payment by any member of the council of his individual monthly assessment," and that "the fact that a member believed that a violation of the laws of the society was justified did not save him from the penalty of suspension . . . ; that a subordinate council could not waive the conditions on which a member's benefit certificate was issued, or change the provisions of the laws of the order with respect to the time of payment of monthly assessments . . . and that the officers of the society in dealing with the members thereof were acting as special agents under a special authority, the limits of which were known to the members; and their acts in allowing members to pay assessments after the time fixed did not operate either by way of waiver or estoppel to prevent the society from maintaining a defense to an action on a benefit certificate, based on the failure of the member to pay a monthly assessment within the time fixed . . . ; [that the fact that] a subordinate council adopted a practice of not requiring its members to pay their monthly assessments until required so to do by a collecting officer appointed by the council, and the financial secretary received the money so paid after the expiration of thirty days from the first day of the month, . . . did not effect a change in the laws of the society, which, under its terms, could only be changed by the national council."

It needs no comment to show that the case just cited is immeasurably stronger on behalf of the beneficiary than the case under consideration. See *Grand Lodge, A. O. U. W. v. Cressey*, 47 Ill. App. 616.

In *Borgraefe v. Supreme Lodge, K. & L. H.* 22 Mo. App. 127, it was held that "the beneficiaries of a member of a benevolent society who stands suspended for nonpayment of assessments, by operation of the laws of the society, at the time of his death, cannot recover on the benefit certificate on the ground that the subordinate lodge of which he was a member had continued to treat him as a member, and to treat his unpaid dues to the supreme lodge as dues payable to the subordinate lodge, for which it had extended him credit."

In *Grand Lodge A. O. U. W. v. Jesse*, 50 Ill. App. 101, a member of a subordinate lodge failed to pay an assessment, and his

certificate, by operation of the rules, became suspended. These rules provided that it might be renewed within a period of three months from the date of suspension, upon the condition that all assessments made during the time of suspension should be paid, and if not done within thirty days from such date, a certificate of good health should be furnished. After the expiration of thirty days his delinquent assessments were paid by his wife to the financier of the subordinate lodge, but no certificate of health was furnished. A minute of the payment and reinstatement was made on the books of the subordinate lodge, and the money forwarded to the proper officer of the general lodge, who refused to receive it because no certificate of health accompanied it, and returned the same to the subordinate lodge. It was returned to the wife of the member who paid it. The minute upon the books of the reinstatement, etc., was stricken out, and an entry made that because of the mental illness of the member and his inability to produce a certificate of health, as required by the rules of the grand lodge, his suspension was upheld. The court held that, "as the rules of the grand lodge provided the only method of reinstating a beneficiary certificate after it had been suspended for thirty days, the officer of the subordinate lodge could not waive the requirements. A subordinate lodge and its officers have no authority to waive any rules of the grand lodge which relate to the substance of a contract between an individual member and the grand lodge." *Modern Woodmen v. Tevis*, 54 C. C. A. 293, 117 Fed. 369, is authority upon this point also.

It appears from the testimony of the financial secretary in this case that in making payments to the national council he drew his warrant on the treasurer of the local council against the insurance fund. Section 125 of the by-laws provides that "no money shall be paid or transferred from the treasury of any council (except such moneys as the council is called upon to regularly pay for its current expenses and as provided by the laws of the order, or for purposes approved by the national council or board of directors) unless by a two-thirds vote of the members present and voting at a regular meeting held subsequent to a regular meeting, at which notice in writing of a resolution or intention to pay or transfer such money and the purposes and amount to be paid or transferred shall have been given and regularly read," which would seem to be a sufficiently expressed inhibition upon the local council to do the very thing which it did do in this case.

We are of opinion that, by his failure to pay his assessments, as provided by the con-

stitution and by-laws, William J. Burroughs *ipso facto* forfeited his membership in the order of Knights of Columbus; that the subordinate local council, in undertaking to make good the delinquencies of its members, by its warrants drawn by its financial secretary against the insurance fund, without complying with § 125 of the by-laws, acted without authority; that in so acting it was the agent of its members, and not of the national council; and that the national council, having received the money in ignorance of the facts, has not waived the forfeiture, and is not by its conduct estopped to set it up in defense to this action.

For these reasons we are of opinion that the instruction set out in bill of exceptions No. 1, asked for by defendant in error, considered in the light of the facts of this case, is erroneous and should have been refused, and that the instructions asked for by plaintiff in error, set out in bill of exceptions No. 2, should have been granted. The judgment of the Corporation Court is therefore reversed, and the case remanded for a new trial, in accordance with the views presented in this opinion.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON EX REL.
GEORGE W. WALTER

v.

SUPERIOR COURT FOR WHITMAN
COUNTY.

(— Wash. —, 94 Pac. 665.)

Holiday — judicial proceedings — validity.

A judgment entered on a judicial day will not be declared void because evidence was taken and arguments heard without objection on a day which had, without knowledge of the court, been proclaimed by the governor to be a holiday.

(March 17, 1908.)

WRIT to review a judgment of the Superior court for Whitman County entered in a mandamus proceeding to compel plaintiff's registration as a qualified voter. Affirmed.

The facts are stated in the opinion.

Messrs. Frank C. Owings and E. K. Hanna for plaintiff.

No appearance for defendant.

Crow, J., delivered the opinion of the court:

On October 17, 1907, one E. S. Burgan, a

Note. — Validity of court business transacted on legal holiday, see case note to *State v. Duncan*, 10 L.R.A. (N.S.) 791.

qualified elector of the city of Pullman, applied to the superior court in and for Whitman county for a writ of mandamus to compel George W. Walter, the city clerk, to register the plaintiff and other qualified electors; there being a dispute between them and the defendant as to the ordinance under which, and the ward in which, they were entitled to registration. After issue joined, trial was commenced and evidence introduced on October 29, 1907. The cause was then adjourned to October 30, 1907, at which time additional evidence was admitted and arguments of counsel were made. On the morning of October 31, 1907, the trial judge prepared a written opinion, announcing his decision, and giving his reasons therefor. Copies of this opinion were forthwith delivered to the respective counsel and filed with the clerk. On November 1, 1907, the parties again appeared by their counsel, at which time findings of fact, conclusions of law, and a final judgment awarding a peremptory writ of mandamus were prepared, signed, and filed. The defendant interposed a motion for a new trial, which was denied. The annual municipal election was about to be held in the city of Pullman, and the city clerk, G. W. Walter, alleging he had no remedy by appeal, applied to this court for a writ of certiorari with an order of supersedeas to review the judgment of the superior court. The writ was granted, but without any supersedeas. On the final hearing and review we, on November 11, 1907, concluded that the judgment of the superior court should be affirmed, but, in the absence of any supersedeas, delayed this opinion until it could be reached in the regular order of business. On the morning of October 30, 1907, the governor of the state of Washington, under authority of § 4709, Ballinger's Anno. Codes & Statutes, issued the following proclamation:

Whereas, a proclamation was issued October 29, 1907, by the governor of Oregon, declaring a legal holiday in said state extending through the week until Saturday, November 2, 1907; whereas, it is made to appear that the closing of the Oregon banks by virtue of said proclamation will cause injury and embarrassment to certain banking interests of the state of Washington transacting business with certain banks of Oregon:

Now, therefore, in order to protect the interests of the banks of the state of Washington so affected, I, Albert E. Mead, governor of the state of Washington, by virtue of the authority in me vested, do proclaim Wednesday and Thursday, October 30 and 31, 1907, legal holidays.

In witness whereof, I have hereunto set 17 L.R.A. (N.S.)

my hand and caused the seal of the state to be affixed at Olympia, this thirtieth day of October, A. D. nineteen hundred and seven.

Albert E. Mead.

By the Governor: Sam H. Nichols,
[Seal.] Secretary of State.

The relator contends that October 30th and 31st, thus declared to be holidays, were each *dies non juridicus*, on which no judicial business could be transacted; that the final judgment was based upon evidence admitted on such nonjudicial days; that the trial judge announced his decision on a legal holiday; and that the final judgment which was subsequently signed and entered was void. The record shows that the relator interposed no objection to hearing the cause on October 30th and 31st; that the question here presented was not raised in the trial court by motion for a new trial or otherwise, but that it was first presented in this court. The respondent's attorney insists that the days named in the governor's proclamation did not become legal holidays except as to banking, financial, and commercial matters, that they were judicial days, and that the governor was without authority to declare more than one holiday in a single proclamation. For the purposes of this opinion, we will disregard these contentions, and assume, without deciding, that both days mentioned in the proclamation were legal holidays in contemplation of §§ 4709, 4712, Ballinger's Anno. Codes & Statutes (§§ 5447, 5448, Pierce's Code). It is conceded that the trial was commenced on a judicial day, that the final judgment was prepared, signed, and entered on another judicial day, and that the other proceedings above mentioned occurred on the alleged holidays. It is shown that neither the trial judge, nor the parties, had actual knowledge of the governor's proclamation prior to noon of October 31st; that no daily paper was published in Colfax, the county seat; that the court and parties first learned of the proclamation through Spokane papers; and that at no time during the trial was objection made to holding court, or to any of the proceedings. Undoubtedly the trial judge would have continued the cause until November 1st, had he known of the proclamation. The relator, however, contends that the court and parties were presumed to have been aware of the proclamation which took immediate effect when issued; citing *Lapeyre v. United States*, 17 Wall. 191, 21 L. ed. 606; *United States v. Norton*, 97 U.S. 164, 24 L. ed. 907; *McElrath v. United States*, 102 U.S. 426, 437, 26 L. ed. 189, 191.

The only question presented is whether the final judgment entered on a judicial day

became void by reason of prior judicial proceedings conducted on the holidays, to which the relator at the time failed to object, or to which, in other words, he impliedly assented. There is much conflict of authority as to the validity of judicial proceedings conducted on holidays. The relator contends that the evidence admitted and the arguments made on the holidays were considered by the trial court in reaching the final judgment; that the hearing and consideration of such evidence and arguments were void judicial proceedings, which entered into the final judgment and avoided it also. In support of this position, he cites, with others, the following authorities upon which he bases his principal arguments: *Davidson v. Munsey*, 27 Utah, 87, 74 Pac. 431; *Lampe v. Manning*, 38 Wis. 673; *State v. Green*, 37 Mo. 466; *Merchants' Nat. Bank v. Jaffray*, 36 Neb. 218, 19 L.R.A. 316, 54 N. W. 258; *Poor v. Beatty*, 78 Me. 580, 7 Atl. 541; *Hemmens v. Bentley*, 32 Mich. 89; *Ex parte Tice*, 32 Or. 179, 49 Pac. 1038. We have carefully examined these and all other cases cited by the relator, and find that in no one of them, except *Davidson v. Munsey*, supra, was the final judgment or order, alleged to be void, entered or made upon a judicial day, as in this case. In *Lampe v. Manning*, supra, relator's leading case, the cause was tried and the judgment was entered on a legal holiday. In *State v. Green*, supra, the giving of instructions to the jury in a criminal case was commenced on Saturday night, but completed after midnight, thus running into Sunday. Objection thereto was urged in the lower court by motion for a new trial, and the supreme court of Missouri with much reluctance held that the final judgment of conviction was erroneous. In *Merchants' Nat. Bank v. Jaffray* and *Poor v. Beatty*, supra, the orders claimed to be void were made and entered on holidays. In *Hemmens v. Bentley*, supra, a magistrate heard evidence on a judicial day, but made and entered the judgment on a holiday. In *Ex parte Tice*, supra, the supreme court of Oregon held that the act of a trial judge in discharging a jury on Sunday when they had failed to agree entitled the prisoner to be discharged, as he could not again be placed in jeopardy. This court, in *State v. Lewis*, 31 Wash. 515, 72 Pac. 121, on a similar state of facts, after discussing the *Tice* Case, made a contrary ruling. With the exception of *Davidson v. Munsey*, supra, which, by reason of our views hereinafter stated, we disapprove, we have been unable to find any case based on statutes similar to our own, in which a judgment entered on a judicial day, after a portion of the trial had been conducted without ob-

jection on a holiday, was declared void. In *Glenn v. Eddy*, 51 N. J. L. 255, 14 Am. St. Rep. 684, 17 Atl. 145, the court, in discussing statutory holidays other than Sunday, said: "The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their status to that of Sunday. 'Holiday,' in its present conventional meaning, is scarcely applicable to Sunday. *Phillips v. Innes*, 4 Clark & F. 234. It is applicable to all, and has long been applied to some of the days named. When the statute declares them to be legal holidays, it does not permit a reference to the legal status of Sunday to discover its meaning; for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the statute, therefore, is to free all persons upon the days named from compulsory labor, and from compulsory attendance upon courts as officers, suitors, or witnesses. Its true interpretation will limit the prohibition with respect to the courts to such actual sessions thereof as would require such attendance."

Although our statute (*Ballinger's Anno. Codes & Statutes*, §§ 4709, 4712) names Sunday as a holiday, we think its evident intention is that litigants shall not be compelled to try their causes on that day or any other holiday. There is no language in § 4712, *Ballinger's Anno. Codes & Statutes*, compelling us to hold a final judgment void simply because it may in part result from other preliminary judicial proceedings which, with consent, or at least without objection, were conducted on a legal holiday. To do so would deprive the court of jurisdiction of the entire cause. Unquestionably it would be erroneous for a court to remain open and transact judicial business on a legal holiday; and we assume that no trial judge in this state would knowingly do so. If, for any cause, one should unwittingly do so, no objection being interposed by parties present, and a judgment should thereafter be entered on a judicial day, this court most certainly would not declare such judgment void on the complaint of a consenting litigant who objects for the first time upon appeal or by writ of certiorari. Although we have found no case identical with this, the above principles have been substantially recognized by other courts, and also by this court. In *Kauffman's Appeal*, 70 Pa. 261, it was held that a confession of judgment delivered to a magistrate on Sunday would not vitiate a judgment entered

on the following Monday. In *State v. Duncan*, 118 La. 702, 10 L.R.A.(N.S.) 791, 43 So. 283, a criminal prosecution, it was held that a defendant who, without objection, had proceeded to trial on a holiday, could not contend for the first time after conviction that the judgment against him was void. In *Ehrlich v. Pike*, 53 Misc. 328, 104 N. Y. Supp. 818, the controversy was referred to arbitrators who, after receiving evidence, met on Sunday, considered the cause, and decided upon an award, which was made, published, and delivered on the following Monday, but the appellate division of the supreme court of New York held the award valid. See also *Houston, E. & W. T. R. Co. v. Harding*, 63 Tex. 162; *Bradley v. Claudon*, 45 Ill. App. 326; *Foster v. Toronto R. Co.* 31 Ont. Rep. 1; *Latta v. Catawba Electric & Power Co.* 146 N. C. 285, 59 S. E. 1028. In *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1082, although it was conceded that legal service of a summons could not be made on a holiday, this court held the defendant estopped from denying the legality of service admitted by him upon a holiday. In *Stewart v. State Medical Examiners* (Wash.) 94 Pac. 472, the applicant, Stewart, by collateral action and attack, endeavored to enjoin the state board of medical examiners from enforcing a judgment of the superior court of Pierce county, which he alleged was void because the trial judge had heard arguments on a demurrer, and had directed the judgment, on a legal holiday. He made no allegation that evidence was admitted or considered, that the final judgment was actually entered on a holiday, or that he had objected to any of the proceedings. The substance of his contention was that the preliminary judicial business transacted on a legal holiday avoided the final judgment, and that the court thereby so completely lost its jurisdiction of the cause that it had no authority to take further action therein. This court, however, in passing upon his contention, refused to declare the judgment void.

The judgment in this cause, which was entered on a judicial day, appears upon its face to be regular and without suggestion of invalidity. The relator, by his own conduct, consented to a trial on the two holidays, thereby waiving any inadvertent error or mistake of the trial judge.

This being true, he is in no position to question in this court the validity of the final judgment, which is affirmed.

Hadley, Ch. J., and Mount and Root, JJ., concur. Fullerton, J., did not sit.
17 L.R.A.(N.S.)

WISCONSIN SUPREME COURT.

**ANNA L. CADY, Resp't.,
v.**

**FIDELITY & CASUALTY COMPANY OF
NEW YORK, Appt.**

(— Wis. —, 113 N. W. 967.)

Insurance — notice by beneficiary — statute.

1. Chapter 235, p. 313, Laws 1901, prohibiting any accident or casualty company from limiting the time for an insured person to serve notice of any injury for which he is entitled to make a claim to less than twenty days, and providing that a memorandum in respect to the matter shall be clearly and conspicuously placed on the face of the policy, and further providing that a specified manner of service shall be sufficient, does not relate to the claim of a beneficiary after the death of the insured person.

Same — attempted compliance.

2. An ineffective attempt to comply with the law aforesaid does not extend beyond the intent, so as to relate to a beneficiary, unless the language of the memorandum is unmistakably to the contrary.

Same — immediate notice — construction.

3. The word "immediate," in an insurance policy, in respect to giving notice of any accident or injury for which a claim is to be made, by settled judicial construction an-

Headnotes by MARSHALL, J.

Case Note. — Effect of words "sane or insane" or other words relating to mental condition, in suicide clause in life-insurance policy.

This note is confined to the questions which arise in consequence of the employment in the suicide clause of a policy or contract of life insurance of the phrase "sane or insane," or other words having reference to the mental state or condition of the insured, and does not in general cover questions which are common to suicide clauses without, as well as those with, such additional words. It will also be assumed for the purposes of this note—what is universally assumed or conceded by the courts—that a suicide clause with these added words is valid in the absence of any statute on the subject. The cases as to the scope and effect of such statutes are also excluded.

Equivalence of phrases.

Before entering upon a discussion of the effect of such additional words or phrases in a clause designed to relieve the company in case of suicide or self-destruction, it is to be noted that, while the word "suicide" denotes an intention to kill one's self, and the various phrases employed as substitutes, "die by his own hand," "self-destruction," and

tedating the policy and so a part thereof, means as soon as practicable under the circumstances of the case, in the absence of some unmistakable limitation to the contrary.

Same — knowledge of beneficiary.

4. Under the foregoing rule, service of notice by a beneficiary as soon as practicable after obtaining knowledge of the existence of the policy is sufficient.

Same — suicide — evidence.

5. Evidence of the state of health of an insured person for a considerable period of time prior to his death, where it is claimed he died by suicide, is proper as bearing on whether the deceased came to his death as the result of a suicidal intent.

Same — self-destruction — purpose.

6. The term "death by suicide, sane or

insane," does not include death by the act of the assured without any mental purpose of self-destruction.

Same — acts done in delirium.

7. If one in a fit of delirium or other condition of irresponsibility, without intention to take his own life, does some act from which his death ensues, such death is by accident, not by suicide.

Same — suicide — sane or insane act.

8. The distinction between suicide by a sane person and suicide by an insane person, within the meaning of a policy clause, "death by suicide, sane or insane," lies in the mental capability in the one case, and the absence of it in the other, to appreciate the moral nature and quality of the purpose.

Same — local disease.

9. A local affection is not a local dis-

the like, do not literally import such an intent, yet the courts have frequently declared that these substitutionary phrases are equivalent to "suicide," and none of the cases base any distinction upon their employment in place of the word "suicide." Indeed, it is obvious that these phrases cannot be given their full literal significance consistently with the intention not to relieve the insurer in case of pure accident.

The words "dying by one's own hand," are equivalent to death by suicide. *Bigelow v. Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918; *Brignac v. Pacific Mut. L. Ins. Co.* 112 La. 574, 66 L.R.A. 322, 36 So. 595; *Keels v. Mutual Reserve Fund Life Asso.* 20 Fed. 198; *Dickerson v. Northwestern Mut. L. Ins. Co.* 200 Ill. 270, 65 N. E. 694.

The word "suicide," and the words "to die by his own hand," or "by his own act," or "to take his own life," mean the same thing, and each conveys the idea of voluntary, intentional self-destruction. *Supreme Lodge O. M. P. v. Gelbke*, 198 Ill. 305, 64 N. E. 1058.

The terms "die by his own hand," "suicide," "self-murder," and the like, are synonymous. *Schultz v. Insurance Co.* 40 Ohio St. 217, 48 Am. Rep. 676.

A provision avoiding the policy in case of "self-destruction of the person, whether voluntary or involuntary, and whether he be sane or insane," is equivalent to a provision avoiding the policy in case of suicide, sane or insane, the word "involuntary" in this connection, being meaningless. *Parish v. Bankers' Life Asso.* (Ill. C. C.) 14 Nat. Corp. Rep. 182.

There are decisions to the same effect under provisions that do not in terms refer to the mental condition of the insured, and, for that reason, are not within the scope of this note.

A provision avoiding a benefit certificate if the member "shall die . . . by any means or act which, if used or done by such member while in possession of all natural faculties unimpaired, would be deemed self-destruction," is equivalent to a provision avoiding the certificate if the assured die by his own hand, sane or insane. *Clemens* 17 L.R.A. (N.S.)

v. Royal Neighbors, 14 N. D. 116, 103 N. W. 402. The same decision was made in *Keefer v. Modern Woodmen*, 203 Pa. 129, 52 Atl. 164, with reference to a substantially similar provision. As subsequently pointed out, it would seem that the fact whether the clause was drawn in this form, or in the ordinary form of a suicide clause, might have a material bearing upon the question subsequently discussed, as to the necessity that the insured shall have been conscious of the physical nature and consequences of his act, and shall have intended to kill himself in order to avoid the policy or limit the liability thereunder. In neither of these cases, however, was its effect on such question discussed.

A similar provision was held in *Cotter v. Royal Neighbors*, 76 Minn. 518, 79 N. W. 542, to apply where the insured came to her death by taking a quantity of carbolio acid sufficient to cause death, administered by her own hands, not by accident, she being at the time mentally insane, and not understanding the moral nature of the act. It will be observed that the hypothesis upon which the decision was rendered does not include the insured's unconsciousness of the physical nature and consequences of her act, or her lack of intention to kill herself.

Pure accident.

In the following cases, in which it was held that the provisions against self-destruction, whether employing the word "suicide" or not, did not include death by accident, it will be observed that there was no question as to the effect of the insanity of the insured, or, at least, that the death would have been regarded as an accident, even in case of a sane person. They are therefore not authority on the question subsequently discussed, whether what would be regarded as suicide in case the insured had been sane may be regarded as an accident because, owing to his insane condition, he was incapable of forming an intent to kill himself.

A condition in a policy of insurance avoiding it if the insured shall die by suicide,

ease within the meaning of a warranty in a policy of insurance, unless such affection has sufficiently developed to have some bearing on the general health.

Same — defense — suicide — burden.

10. In case of the defense of death by suicide being interposed in an action on a life-insurance policy, the burden of proof is on the defendant to establish such defense.

(November 26, 1907.)

APPEAL by defendant from a judgment of the Circuit Court for Wood County in plaintiff's favor in an action brought to recover on an accident-insurance policy. Affirmed.

Statement by Marshall, J.:

Action to recover on an accident-insurance policy.

The assured came to his death March 30, 1904, and during the life of the policy. The

whether the act is voluntary or involuntary, does not apply where the insured, a sane man, kills himself by accident. *Edwards v. Travellers' L. Ins. Co.* 22 Blatchf. 225, 20 Fed. 661 (Affirmed in 122 U. S. 467, 30 L. ed. 1181, 7 Sup. Ct. Rep. 1249, without passing on this point).

An instruction that there can be no recovery under a policy providing that self-destruction, sane or insane, is not a risk assumed by the company, if the insured came to his death by his own act (in this case shooting himself with a pistol), whether he was sane or insane, and did so intentionally or unintentionally, is properly refused, as it is susceptible of a construction precluding recovery in case the insured accidentally killed himself. *Union Mut. L. Ins. Co. v. Payne*, 45 C. C. A. 193, 105 Fed. 172.

A provision avoiding the policy in case of "self-destruction, whether voluntary or involuntary, sane or insane," does not apply where the insured met his death through the accidental discharge of a gun, if he had no intention of discharging it, or no intention of hitting himself. *Knights Templars & M. Life Indemnity Co. v. Crayton*, 110 Ill. App. 656 (Affirmed in 209 Ill. 550, 70 N. E. 1066).

In *Northwestern Mut. L. Ins. Co. v. Hazlett*, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582, it is said that a clause avoiding a policy if the insured "die by his own hand, whether sane or insane," has no application to a case in which death results by accident or without intention or expectation (in this case by taking an overdraft of whiskey), even though it was caused by the hand of the assured; and that death resulting from accident, or from an act which, at the time it was entered upon or engaged in, was not expected or intended to produce that result, cannot be said to be within the meaning of such clause.

A clause in a life-insurance policy, "if I 17 L.R.A. (N.S.)

plaintiff, who was the beneficiary, had no knowledge of the existence of the policy till about sixty days after her husband died. As soon as she obtained such knowledge she complied with the terms of the policy respecting notice to the defendant. The policy excepted from the risks insured against, death by suicide, sane or insane. There was a warranty that the assured, at the inception of the insurance contract, was in a sound condition, mentally and physically, and that he was not then and had not been within one year prior thereto afflicted with any local or constitutional disease.

The complaint was in the usual form.

The defendant answered, pleading want of notice of the accident immediately after the happening thereof as required by the policy, and that death was caused by an event not within the risk insured against, to wit, death by suicide; also breach of war-

die by my own hand or act, voluntarily or involuntarily, sane or insane," is not violated by an act done without suicidal intent. *Brignac v. Pacific Mut. L. Ins. Co.* 112 La. 574, 66 L.R.A. 322, 36 So. 595.

A provision limiting the liability in case the insured "die by his own act or hand, whether sane or insane," refers to suicide, and does not include a killing by accident, even though the act of insured may have been the unintended means of causing death. *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39; *Thaxton v. Metropolitan L. Ins. Co.* 143 N. C. 33, 55 S. E. 419.

A stipulation against liability for death from suicide, sane or insane, does not defeat recovery on a policy of insurance, although the insured died from an overdose of morphine taken by himself, where the company fails to establish by a preponderance of the evidence that the self-destruction was intentional. *Brown v. Sun L. Ins. Co.* (Tenn. Ch. App.) 51 L.R.A. 252, 57 S. W. 415.

Consciousness of moral nature or quality of act.

The occasion of the incorporation in suicide clauses of the additional words "sane or insane," or other words relating to the mental condition of the insured, was the fact that, by the judicial interpretation generally prevailing in this country, a provision in a policy or contract of insurance avoiding the same in case of the suicide of the insured, or in case of death of the insured by his own hand, and the like, without the words "sane or insane," or other words indicating the mental condition of the insured, contemplated and included only a felonious suicide, or at least a suicide committed by one capable of understanding the moral nature and consequences of his act of self-destruction. This view of the suicide clause, without the words "sane or insane," to avoid which these words were added, is thus summarized in the opinion in *Mutual L. Ins. Co. v. Terry*, 15

ranty, in that, at the time the policy was taken out, the assured was afflicted with a local disease, known as "stricture," and by other local and constitutional diseases.

The language of the policy material to the case is as follows:

"Fidelity & Casualty Company of New York . . . does insure the person described in said schedule for the period of one year from . . . the day this contract is dated, against disability or death resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means, suicide, sane or insane, not included."

"Immediate written notice must be given the company at New York of any accident and injury for which a claim is to be made, with full particulars thereof, and full name and address of the assured."

"The words 'immediate notice,' as used in

this policy, are to be construed as meaning notice deposited by registered letter within twenty days of the time of the happening of the casualty insured against."

The assured warranted, as follows: "My habits of life are correct and temperate, and I am in sound condition mentally and physically. . . . I have not now, nor have I had during the past year, any local or constitutional disease."

There was evidence to this effect: The assured complained of having a stricture in October, 1902, which was within one year prior to the date of the policy, and he mentioned the matter again in April thereafter. He went to Hot Springs for his health in February, 1904, and was there operated on for stricture. After remaining at Hot Springs for about a month he went to St. Joseph's hospital at that place for treatment. Before going there, he was low-spirited, and his thoughts at times were on

Wall. 580, 590, 21 L. ed. 236, 242: "If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but, when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

Substantially all of the courts, including those which adhere to the rule declared in the above quotation with reference to an unmodified and unqualified suicide clause, agree that the employment in the suicide clause of the added words, "sane or insane," dispenses with the necessity that the insured shall have been able to understand the moral character and quality of his act as a condition of the applicability of the clause; in other words, hold that, when the words "sane or insane" are present, the provision applies and avoids the policy, or limits the liability, as the case may be, even though the insured was so insane that he was unconscious of and incapable of appreciating the moral nature and quality or criminality of his act. It was expressly so held in *Bigelow v. Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918, under a stipulation avoiding the policy if insured "die by suicide, sane or insane."

To the same effect are *Streeter v. Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779 (where the clause was "die by his own hand, sane or insane"); *Adkins v. Columbia L. Ins. Co.* 70 Mo. 27, 35 Am. Rep. 410 (where the clause was death "by his own act or intention, whether sane or insane"); *Sparks v. Knight Templars & M. Life Indemnity Co.* 61 Mo. App. 111 (where the clause was "self-destruction . . . whether voluntary or involuntary, sane or insane"); *Hart v. Mod-*

ern Woodmen, 60 Kan. 678, 72 Am. St. Rep. 380, 57 Pac. 936 (where the clause was "die by his own hand, whether sane or insane"); *Nelson v. Equitable Life Assur. Soc.* 73 Ill. App. 133 (where the clause was "death . . . by self-destruction, sane or insane"); *Supreme Court of Honor v. Peacock*, 91 Ill. App. 632 (where the condition of the beneficiary certificate was that the order will not pay the benefits of members "who commit suicide, whether sane or insane, except it be committed in delirium, resulting from illness, or while the member is under treatment for insanity, or has been judicially declared to be insane"); *Pierce v. Travelers' L. Ins. Co.* 34 Wis. 389 (where the provision was "die by suicide, felonious or otherwise, sane or insane"); *Mutual Ben. L. Ins. Co. v. Daviess*, 87 Ky. 541, 9 S. W. 812 (die by his own hand while insane").

And it was so held in *Cotter v. Royal Neighbors*, 76 Minn. 518, 79 N. W. 542, under a provision avoiding a certificate of membership in a beneficiary association if the member shall "die . . . by any means or act which, if used or done by such member while in possession of all natural faculties, would be deemed self-destruction." The bearing of this particular phraseology upon the question as to the necessity of a consciousness of the physical nature and consequences of the act and an intention to kill one's self is subsequently referred to.

If insured intentionally took his own life at a time when his mind was so far gone as to render him unconscious that he was taking his life, the act will not be deemed his, but will be regarded in law as an accidental killing. The converse is equally true that, although his mind may have been deranged, still, if he has mind enough to know that the act will probably result in his death, and if he inflicts it with that intention, it is his act in law, for which the company is not responsible under a provision avoiding

the subject of his dying. He said to a friend, in effect, that he did not believe that he would go from Hot Springs alive. During this period he was well enough to be up and about, to take walks, to read the newspapers, and to visit with friends. He went to the hospital March 28, 1904, and was placed in charge of Sarah J. McElroy, a trained nurse. On the day mentioned he sent for an attorney to draw his will, which was done under his dictation, the will being regularly executed and witnessed. He was somewhat delirious the night thereafter. He was less so the next day, but not entirely free from delirium. The next day the nurse was with him, except about an hour in the morning and for a moment or two prior to the act causing

his death. He was much depressed during the day such act occurred. He lay in bed most of the time occasionally sighing. On one occasion he went to the glass and observing his face, suggested that he needed a shave. A friend stepped to his bedside and spoke to him, and at noon his wife did so, saying "Good bye," as she was going to dinner. He did not appear to notice either of them. About that time he was asked what he would have for dinner. He replied, "Not anything," but the nurse directed something to be brought, which was done. He ate some ice cream, remarking that it was "mighty good, but pretty sweet." He then called for a drink of hot water. The nurse left the room to comply with such request. When she returned he was

the policy in case the insured die by his own hand or act, sane or insane. *Masonic Life Asso. v. Pollard*, 121 Ky. 349, 89 S. W. 219.

A provision avoiding a benefit certificate for death resulting from suicide whether sane or insane covers suicide resulting from acute melancholia. *Atty. Gen. v. Colonial Life Asso.* 194 Mass. 527, 80 N. E. 455.

In *Schultz v. Insurance Co.* 40 Ohio St. 217, 48 Am. Rep. 676, it was held that a provision avoiding the policy in case the insured "shall, under any circumstances, die by his own hand," did not apply where, at the time of his death, insured was under the controlling influence of insanity, although he intended to take his life, and understood the physical nature and effect of his act. This decision, however, was upon the ground that the words "under any circumstances" must be disregarded as too general and indefinite, and that the words "shall die by his own hand" were equivalent to "suicide." Eliminating the former phrase, it will be observed the case came within the rule as laid down in *Mutual L. Ins. Co. v. Terry*, supra.

And in *Supreme Council, R. A. v. Pels*, 209 Ill. 33, 70 N. E. 697, it was held that death of the insured, occasioned by his own act at the time when he was incapable, by reason of unsoundness of mind, to resist an insane impulse to take his own life, or to understand the moral character, general nature, consequences, and effect of the fatal act, will not avoid the benefit certificate, under a provision that no benefit shall be paid upon the death of a member who shall commit "suicide," unless "the person or persons claiming under such a certificate or membership shall establish and prove affirmatively that, prior to such suicide, the member had been judicially declared insane, or was under treatment for insanity at the time the act was committed or was then in the delirium of other illness." The court said that such would clearly have been the effect of the provision if it had gone no further than to declare that the society should be exonerated if the assured should commit suicide; and that the effect of the further provision was merely to make proof that 17 L.R.A. (N.S.)

the assured had been judicially declared to be insane, or was under treatment for insanity, or was in delirium of other illness equivalent to that which the law would require to establish liability in the absence of such provision namely, that the assured was affected with unsoundness of mind to such a degree that his moral nature had been overcome and he had lost the power to resist an insane desire or impulse to take his life; and that there was no reason why the beneficiaries, if they could do so, might not take upon themselves the greater burden of proof which the law would cast upon them in the absence of such a qualifying provision.

Irresistible insane impulse.

It is also generally held that the effect of a cause avoiding the policy in case of suicide "sane or insane" cannot be avoided upon the ground that the self-destruction by the insured was due to an insane and uncontrollable impulse. *Zimmerman v. Masonic Aid Asso.* 75 Fed. 236; *Mutual L. Ins. Co. v. Kelly*, 52 C. C. A. 164, 114 Fed. 268; *Supreme Court of Honor v. Peacock*, supra; *Brower v. Supreme Lodge Nat. Reserve Asso.* 74 Mo. App. 490; *De Gogorza v. Knickerbocker L. Ins. Co.* 65 N. Y. 232. But see *Supreme Council, R. A. v. Pels*, supra.

As subsequently pointed out, some of the cases seem to recognize no distinction between self-destruction committed under an irresistible and uncontrollable insane impulse and self-destruction committed without consciousness of the physical nature or consequences of the act or intention to kill one's self, apparently assuming that an intention to kill one's self cannot coexist with an insane and irresistible impulse to do an act which will cause death. This, however, does not seem to be true as a matter of fact.

Consciousness of physical nature of act; intention.

Practically the only serious question arising from the employment of the words "sane or insane" in a clause avoiding the policy

gone. She immediately went in search of him. A workman informed her where he was, pointing to an open shaft, which extended down to the first floor. She was on the fifth floor and looking down she saw him on the stone floor at the bottom of the shaft. She reached him as soon as practicable and found both his feet and limbs were broken. He died in about three minutes. The open shaft was about 12 feet in diameter. Around the opening on the fifth floor and on each floor there was a railing about 30 inches high. The only person who witnessed Mr. Cady's movements was Mary Edwards. She saw him going up stairs in a night robe from the first floor. He passed through the hall of what was called the "old building" into and through what was called the "sun

parlor," leading into the new building. She called to him. He was going very rapidly. Upon her calling to him, he quickened his pace and she ran after him. Upon his arriving at the railing around the shaft he put his hands thereon and leaped over. He was on the fifth floor and had to go up two flights of stairs to reach it. It was light, there being a skylight in the room. The time was between 12 and 1 o'clock. Miss Edwards was within about an arm's length of Mr. Cady as he went over the railing. He threw himself over as she said.

There was some conflict of evidence as to whether the assured was afflicted with a local disease at the time of, or within one year prior to, the issuance of the policy.

At the close of the evidence defendant's

or limiting the liability in case of "suicide," "death by one's own hand," and the like, is whether it obviates the necessity that the insured shall have been conscious of and capable of appreciating the physical nature and consequences of his act; in other words, whether it is necessary, in order to avoid the policy, that he shall have intended by the act to kill himself. While much sound reasoning may be advanced in support of the affirmative of the last question, and it is, by implication or *dicta*, supported by many cases, a clear majority of the cases which have had occasion directly to decide the point have held that a clause avoiding the policy in case of "suicide," "death by one's own hand," and the like, "whether sane or insane," applies even though the insured was unconscious of the physical nature and consequences of his act, and did not thereby intend to kill himself. (Though the courts make no distinction based upon the point whether or not the clause in question employs the specific term "suicide," as a matter of accuracy and completeness, the particular phraseology employed is indicated in parentheses following the citation of the respective cases.) *Clarke v. Equitable Life Assur. Soc.* 55 C. C. A. 200, 118 Fed. 374 ("self-destruction, sane or insane"); *Seitzinger v. Modern Woodmen*, 204 Ill. 58, 68 N. E. 478 ("die by his own hand, whether sane or insane"); *Supreme Court of Honor v. Buxton*, 111 Ill. App. 187 ("suicide, whether sane or insane"); *Blasingame v. Royal Circle*, 111 Ill. App. 202 ("suicide, whether sane or insane"); *Supreme Court, K. M. v. Marshall*, 111 Ill. App. 312 ("suicide, whether sane or insane"); *Zerulla v. Supreme Lodge O. M. P.* 223 Ill. 518, 79 N. E. 160, Affirming 118 Ill. App. 192 ("if death was due to the voluntary or involuntary suicidal act, . . . whether . . . sane or insane"); *Moore v. Northwestern Mut. L. Ins. Co.* 192 Mass. 468, 78 N. E. 488 ("die by his own hand, sane or insane"); *Scarth v. Security Mut. Life Soc.* 75 Iowa, 346, 39 N. W. 658 ("suicide, felonious or otherwise, sane or insane"); *Haynie v. Knights Templars & M. Life Indemnity Co.* 139 Mo. 427, 41 S. W. 461 ("in 17 L.R.A. (N.S.)

case of self-destruction of the holder of this policy, whether voluntary or involuntary, sane or insane"); *Scherar v. Prudential Ins. Co.* 63 Neb. 530, 56 L.R.A. 611, 88 N. W. 687 ("die by suicide, whether sane or insane"); *De Gogorza v. Knickerbocker L. Ins. Co.* supra (death of insured "by his own hand or act, sane or insane," two of the commissioners of appeals dissenting); *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39 (if insured shall, "whether sane or insane, die by his own hand"); *Tritschler v. Keystone Mut. Ben. Asso.* 180 Pa. 205, 36 Atl. 734 ("die by suicide, felonious or otherwise, sane or insane"); *Latimer v. Sovereign Camp, W. W.* 62 S. C. 145, 40 S. E. 155 ("die . . . by his own hand or act, whether sane or insane, or by the hands of the beneficiary or beneficiaries named therein except by accident," the decision rendered on affirmance of a verdict for defendant, the supreme court being equally divided on the point); *Billings v. Accident Ins. Co.* 64 Vt. 78, 17 L.R.A. 89, 24 Atl. 656 ("suicide, sane or insane," two judges dissenting).

In *Hart v. Modern Woodmen*, 60 Kan. 678, 72 Am. St. Rep. 380, 57 Pac. 936, the court, without adopting or repudiating the distinction between unconsciousness of the moral nature and quality of the act, and unconsciousness of its physical nature and consequences, said that there was no room for the distinction in the case under consideration.

As already intimated, much of the support for the doctrine that, notwithstanding the addition of the words "sane or insane," or other words relating to the insured's mental condition, the suicide clause does not apply so as to avoid the policy or limit liability thereunder if the insured, by reason of his disturbed mental condition, was unconscious of the physical nature and consequences of his act, and did not intend thereby to kill himself, is to be found in cases in which the point was not involved, but in which the courts, in stating the rule already referred to, that consciousness of the moral nature and quality of the act is not essential to make such a provision ap-

counsel moved for the direction of a verdict, which was refused. The cause was submitted to the jury, resulting in a verdict in favor of the plaintiff.

Messrs. Felker, Stewart, & McDonald for appellant.

Messrs. Barbers & Beglinger for respondent.

Marshall, J., delivered the opinion of the court:

Did the court err in not granting the motion for a nonsuit, because there was a delay of some sixty days in giving notice to the company, notwithstanding the memorandum on the policy that "the words 'immediate notice' as used in the policy are to be

construed as meaning notice deposited by registered letter within twenty days of the time of the happening of the casualty insured against," and chapter 235, p. 313. Laws of 1901, providing that "the time for the service of any notice of injury that may be required of the person insured" shall not be limited "to a less period of time than twenty full calendar days," "the time, not less than twenty full calendar days, that may be required of any injured person for serving a notice of injury. . . . shall be clearly and conspicuously written or printed upon the face of" the policy, and that "the deposit in any postoffice by any injured person, his agent or attorney, of a registered, postage-prepaid letter, containing the proper notice of the injury at any time within

pliable, assume or state as a condition of the applicability of that rule that the insured was conscious of the physical nature and consequences of the act, and intended thereby to kill himself. The case of *Bigelow v. Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918, is a good illustration of this class of cases. The court there said: "For the purposes of this suit, it is enough to say that the policy was rendered void if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although, at the time, he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing."

Other cases which in the same way, without deciding the point, assume the insured's consciousness of the physical nature and consequences of the act, or his intention to kill himself, as a condition of the applicability of the suicide clause, notwithstanding the additional words "sane or insane," are the following: *Manhattan L. Ins. Co. v. Beard*, 112 Ky. 455, 66 S. W. 35; *Metropolitan L. Ins. Co. v. Thomas*, 32 Ky. L. Rep. 770, 106 S. W. 1175; *Sabin v. Senate of National Union*, 90 Mich. 177, 51 N. W. 202; *Parish v. Mutual Ben. L. Ins. Co.* 19 Tex. Civ. App. 457, 49 S. W. 153; *Brown v. United Moderns*, 39 Tex. Civ. App. 343, 87 S. W. 357; *Pierce v. Travelers' L. Ins. Co.* 34 Wis. 389.

To the foregoing list may be added the following Illinois cases, which, however, are of but little value on the point, since the express adoption of the contrary doctrine by the supreme court of that state in *Seitzinger v. Modern Woodmen*, supra, destroys any implied support that they might otherwise lend to this side of the question. They are referred to, however, for the purpose of showing that the distinction upon which this view rests has frequently been recognized by the courts, and that it is not, as some of the courts seem to imply, one resorted to as a desperate expedient to avoid the effect of a clause clearly applicable: *Supreme Lodge O. M. P. v. Gelbke*, 198 Ill. 305, 64 N. E. 1058; *Dickerson v. Northwestern Mut. L. Ins. Co.* 200 Ill. 270, 65 N. 17 L.R.A. (N.S.)

E. 694; Weld v. Mutual L. Ins. Co. 61 Ill. App. 187; *Nelson v. Equitable Life Assur. Soc.* 73 Ill. App. 133. These explanations and remarks also apply to *Adkins v. Columbia L. Ins. Co.* 70 Mo. 27, 35 Am. Rep. 410.

The doctrine that consciousness of the physical nature and consequences of the act and an intent to kill one's self are essential to the applicability of a suicide clause with the added words "sane or insane," so as to render the policy void or limit the liability, which is adopted and applied in *Cady v. Fidelity & C. Co.*, is also supported by a few other cases in which the point was directly involved.

Thus, in order to defeat a recovery under a clause avoiding the policy in case the assured shall die by his own hand while insane, the company must show that the insured knew the physical nature of the act he was about to commit, and that it would result in self-destruction; but it is not necessary to show that he was either legally or morally responsible for his acts. *Mutual Ben. L. Ins. Co. v. Daviess*, 87 Ky. 541, 9 S. W. 812. The court said that, if the defendant was unconscious of the physical nature of the act, and did not intend to kill himself, the shooting must be regarded as the result of an accident, as much so as if the pistol had gone off unexpectedly to the insured and killed him. See also *Masonic Life Assn. v. Pollard*, 121 Ky. 349, 89 S. W. 219, supra.

In *Parish v. Mutual Ben. L. Ins. Co.* supra, the court said that it was probably the intention of the insurance company, in employing language avoiding the policy in case the assured commit "suicide while sane or insane," to guard against liability in all cases of self-destruction by the assured, whether, at the time, he was sane or insane; but that the language has not that effect, and will not prevent a recovery where death was the result of an accident or mistake; or where there was no intent on the part of the assured to take his life.

A pistol wound causing tetanus and great bodily pain and delirium or fever may be found to be the proximate cause of death where a person insured against accident,

twenty full calendar days after the injury received by the assured, properly addressed to the company . . . issuing the . . . policy, shall be sufficient service of any notice of injury that may be required?"

It is conceded that the memorandum on the policy in question was placed there for the purpose of complying with the law aforesaid; yet it does not follow such law in letter or spirit. The statute precludes requiring the insured person from being limited to less than twenty days for serving notice of his injury, and provides that it may be served within the time limited by registered letter. The memorandum on the policy provides that the only means of serving notice shall be by registered letter, and, instead of plainly providing for a period

for making such service of not less than twenty days by express language to that effect, it does so by attempting to contractually construe the word "immediate." Obviously, we think the service referred to in the memorandum is the one mentioned in the law, which relates to a claim by the person insured, not to a claim by a beneficiary after his death. That might not be entirely clear looking at the memorandum itself, but it is when such memorandum is regarded as an attempt to comply with the law making it unlawful to limit the time for an assured person, under a policy like the one in question, to give notice of his injury, to less than twenty days.

It is the opinion of the court that the statute does not refer to a death claim made by

excluding suicide, sane or insane, and intentional injuries, cuts his throat in a period of delirium or state of frenzy which is uncontrollable. *Travelers' Ins. Co. v. Melick*, 27 L.R.A. 620, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178. The question in this case seems to have been discussed entirely as one of proximate cause.

In *Streeter v. Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779, the court said that, if a person does an act in a state of unconsciousness or involuntarily, whether he is sane or insane, such act is nothing more nor less than accidental, and will not operate to forfeit the policy under a provision that the policy shall be void if the insured shall "die by his own hand, sane or insane." In this case, however, the court apparently held that the insured's consciousness of his act, and his intention to take his life, were to be deduced from his employment of a loaded pistol, there being no evidence tending to show lack of such consciousness or intent.

The decision in *Mauch v. Supreme Tribe, B. H.* 100 App. Div. 49, 91 N. Y. Supp. 367, was to the effect that, where the insured's self-destruction was not her voluntary, intelligent, or rational act, but was the result of her mental derangement, it did not come within a provision of the by-laws of the benefit order that no benefit shall be paid on account of the death of the member occurring from "suicide, whether sane or insane, or whether voluntary or involuntary." *McLennan, P. J.*, put his concurrence upon the ground that it was held in *Weber v. Supreme Tent, K. M.* 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258, and *Shipman v. Protected Home Circle*, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83, that the act of taking one's own life while insane is not suicide.

The case of *Shipman v. Protected Home Circle*, supra, is not strictly in point as the question there was whether an amendment of the by-laws of a mutual benefit society declaring that the certificate should be forfeited in case the insured "shall die by suicide, felonious or otherwise, sane or insane," 17 L.R.A. (N.S.)

or by his own hand, "sane or insane," applied to a certificate previously issued. The court, however, in discussing the effect of a finding of fact by the trial court that the insured committed suicide, said: "For colloquial purposes, the term 'suicide' is at once sufficiently specific and comprehensive to cover all kinds of human self-destruction; but, if the law is to distinguish between the self-destruction of the insane and the self-inflicted death of the sane, insurance contracts must be construed in the light of definitions which express the distinction. Our Penal Code defines suicide as the intentional taking of one's own life (§ 172), and the definitions referred to in *Weber v. Supreme Tent, K. M.* supra, are to the same effect. Intent is of the essence of the act, and this presupposes reason or sanity. Thus, the unqualified finding of the learned trial court that plaintiff's husband committed suicide is, in effect, a determination that it was the intentional act of a sane man."

It is now proposed to consider more in detail a number of the cases on either side of the question under consideration. The value of *Clarke v. Equitable Life Assur. Soc.* as an authority for the position that it is not essential to the applicability of such provision that the insured shall have been conscious of the physical nature and consequences of the act, or that he shall have intended thereby to cause his death, is somewhat weakened by the fact that the replication which was held bad in that case combined, if it did not confuse, two grounds for avoiding the effect of the provision, namely: (1) Insured's unconsciousness of the physical nature and consequences of his act and absence of an intention to cause his death; and (2) an irresistible insane impulse to commit the act. And the court itself seems to ignore any distinction between these two points. It would seem, however, that theoretically, at least, a consciousness of the physical nature and consequences of the insured's act of self-destruction, and an intention by him to kill himself, thereby might coexist with an irresistible insane impulse to commit the act. The value of

a beneficiary, as in this case. It treats from beginning to end of situations where the assured himself has a claim which he, personally, proposes to enforce.

It follows that whether the notice in this case, served by the beneficiary substantially as soon as she knew of the existence of the policy, was seasonably served, notwithstanding the language of the contract that "immediate written notice must be given the company of any accident and injury for which a claim is to be made," etc., is not affected by the memorandum or the law referred to.

As held in *Comstock v. Fraternal Acci. Asso.* 116 Wis. 382, 93 N. W. 22, the contract as the parties made it must prevail, and what that contract was must be deter-

mined within the reasonable meaning of the language which they used under all the circumstances. The court cannot, legitimately, arbitrarily add a stipulation to the contract which the parties did not intend to have in effect embodied therein, merely for the purpose of preventing hardship to some party concerned. If it were an original proposition it would be difficult, if not impossible, to so change by construction the literal meaning of the word "immediate" as used in the policy so as to postpone the time for giving notice till it was possible, under all the circumstances, to do so; but, in view of the state of the law at the time the contract was made, there is no serious difficulty in respect thereto. It was then well settled that in case of the person required to give

the decision on this point is further weakened by the fact that the court relied upon *Bigelow v. Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918, under an apparent misapprehension as to the effect of that decision. It is true that in the *Bigelow* Case the court sustained a demurrer to a replication alleging that the insured was of "unsound mind and wholly unconscious of the act." But it is apparent from the statement already quoted from the opinion in this case that the court did not construe or interpret such allegation as meaning that the insured was unconscious of the physical nature and consequences of his act, or as an allegation that he did not intend to kill himself by the act. This misapprehension is further indicated by a remark of the court in the *Clarke* Case, that the distinction between the replication before it, which specifically alleged that insured was not conscious of the "physical nature and consequences of the act," and "did not intend by it to cause his death," and the replication that was held bad in the *Bigelow* Case, was a distinction without a difference. Clearly, in the light of the language above quoted from that case the distinction was, or at least was regarded by the court in that case as, one with a difference.

In *Haynie v. Knights Templars & M. Life Indemnity Co.* 139 Mo. 427, 41 S. W. 461, the court said that, without regard to the views it might entertain as to the requisite mental power necessary to defeat an action when the words of avoidance in a policy are "in case of suicide," "death by one's own hand, act, or intention," or "in case of self-destruction of the insured," it was of the opinion that when, to the words, are superadded the words "whether voluntary or involuntary, sane or insane," the issue as to the extent of the mental capacity of the assured is eliminated, and all conditions of insanity are included within the exemption. It is to be remarked in this connection, however, that much of the argument seems to be addressed to combating the proposition that the avoidance clause does not apply if death results from an irresistible insane impulse, although the 17 L.R.A. (N.S.)

decision holding the provision applicable embraced the hypothesis that the insured was unable to form an intent to take his own life, and that he was unable to comprehend or appreciate either the moral or physical effect of the operations that resulted in his death.

In *Spruill v. Northwestern Mut. L. Ins. Co.* 120 N. C. 141, 27 S. E. 39, the court said that the distinction drawn by some eminent authorities in case of self-killing by an insane person, "whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect," did not commend itself to the judgment of the court, but belonged to the domain of speculative psychology rather than to the practical administration of the law.

With reference to the decision in *De Gogorza v. Knickerbocker L. Ins. Co.* 65 N. Y. 232, it is to be noted that the case was decided, not by the court of appeals, but by the commissioners of appeals, and that only three of the commissioners concurred in the result, the other two dissenting. The dissenting opinion, which was by Earl, C., afterwards a member of the court of appeals, contains a strong presentation of the opposite side of the question. Among other things, he said: "It is conceded that this proviso as now written does not apply to the case of unintentional death of a sane man by his own hand, such a death being accidental. No more should it apply to an unintentional death of an insane man by his own hand." In reply to the argument that, unless the construction given by the majority opinion to the proviso should prevail, no insurance company could use words that would shield it from liability in case of the self-destruction of a person so insane as to be incapable of forming an intention or controlling his acts, he said that he did not perceive the difficulty, and suggested the following language to accomplish that result: "In case of suicide or death of the assured resulting from insanity," or

notice not being able to do so from any cause, compliance with the requirement as to notice is sufficient if notice be given as soon as practicable after the disability is removed, unless there is some unmistakable stipulation in the policy to the contrary. That is the effect of *Comstock v. Fraternal Acci. Asso.* supra, following *Kentzler v. American Mut. Acci. Asso.* 88 Wis. 589, 43 Am. St. Rep. 934, 60 N. W. 1002, and *Foster v. Fidelity & C. Co.* 99 Wis. 447, 40 L.R.A. 833, 75 N. W. 69. As said, in effect, in the *Comstock Case*, when the contract was made the language in question, as judicially construed, did not require notice to be given in advance of its being possible to do so under the circumstances of the case; and, therefore, such language must be presumed

to have been used in making the contract in that sense. The reasoning leading up thereto need not be repeated here. That the rule adopted applies in case of a beneficiary who fails to give notice of the injury and death of the assured till the lapse of considerable time thereafter because of ignorance of the existence of the policy, without fault on the part of such beneficiary, is grounded in reason and supported by authorities, as the citations called to the attention of the court by respondent's counsel amply show. *Provident L. Ins. & Invest. Co. v. Baum*, 29 Ind. 236; *McElroy v. John Hancock Mut. L. Ins. Co.* 88 Md. 137, 71 Am. St. Rep. 400, 41 Atl. 112; *Solomon v. Continental F. Ins. Co.* 160 N. Y. 595, 46 L.R.A. 682, 73 Am. St. Rep. 707, 55 N. E.

"in case of the self-destruction of the assured while insane, whether he was conscious of, or intended, the act of self-destruction, or not."

It may be remarked that there is a general tendency upon the part of the courts which repudiated the doctrine that consciousness of the physical nature and consequences of the act and an intention to kill one's self are essential to make the suicide clause applicable, to overlook, or at least to ignore, the point on which that doctrine rests. The essential distinction between "suicide" and "accident"—and, as already shown, the variations "death by own hand," and the like, are equivalent to suicide—lies in the intention or lack of intention with which the act is done. It is therefore not an answer to this doctrine to say that the provision expressly includes suicide by an insane person as well as by a sane person. That may be conceded; but the question is whether suicide at all, by either a sane or an insane person, has been shown. Not only does the term "suicide" import an intention to kill one's self, but it is difficult to see how, unless such intention is accepted as the criterion, it is possible to draw any line between suicide and accident. If a sane person drinks a fatal quantity of carboic acid knowing it to be such, but being under a misapprehension as to its natural effect; or supposing that, for some reason, he is immune from injurious effects,—his death would clearly be regarded as an accident, and not as suicide. Would it have been any less an accident had the misapprehension as to the fatal character of the liquid been due to an insane mental condition upon the part of one who, had he been insane, would not have been under such a misapprehension? It may be, and very likely is, true that the insurance company, had two such hypothetical cases occurred to it, would have been desirous of drawing just such a distinction, but the question is whether it has done so by the provision under consideration.

As already shown, the dissenting opinion in *De Gogorza v. Knickerbocker L. Ins. Co.* supra, suggests a number of ways of ex-17 L.R.A. (N.S.)

pressing such an intention without ambiguity, and with a slight alteration that is accomplished by the provisions in the certificate involved in *Clemens v. Royal Neighbors*, 14 N. D. 116, 103 N. W. 402, supra, which is to the effect that, if the member "shall die . . . by any means or act which, if used or done by such member while in possession of all natural faculties unimpaired, would be deemed self-destruction." Had that provision restricted the means of death to an act done by the insured himself, it would seem to have accomplished in express terms and without ambiguity the same result that is reached by many of the cases above cited by means of a forced and strained construction of the suicide clause in the ordinary form, with the added words "sane or insane." It is difficult to understand how a construction of a suicide clause in the last form which makes it applicable notwithstanding the insured's unconsciousness of the physical nature and consequences of his act and the lack of any intention to kill himself can be justified, either theoretically or practically, except by the adoption of the view that such clause is something more and beyond a provision against liability in case of suicide, sane or insane, and comprehends—what in the instance just referred to is covered in express terms—an additional provision against death of insured while insane under such circumstances that, if he had been sane, it would have been regarded as suicide; in other words, this construction seems to involve the total elimination of insanity as a circumstance in determining whether or not the insured committed suicide, and the application to the question whether the death was by accident or suicide of the same criterion that would have been applied had the particular individual in question committed the act of self-destruction while sane and in possession of all his faculties. In view of the general rule that, in case of ambiguity, the policy or contract of insurance should be construed favorably to the insured, it seems very doubtful whether this mode of interpretation is justifiable,—especially in view of the demonstrated feasi-

279; *Trippe v. Provident Fund Soc.* 140 N. Y. 23, 22 L.R.A. 432, 37 Am. St. Rep. 529, 35 N. E. 316.

In *McElroy v. John Hancock Mut. L. Ins. Co.* supra, this view expressed by counsel was fully adopted by the court: "The tendency of the courts has invariably been to take all the facts and circumstances of the case into consideration; and, if it appears that the beneficiary has been ignorant of the death, or of the existence of the policy, the time has always been held to date from the acquisition of such knowledge;" citing *Kentzler v. American Mut. Acci. Asso.* supra, as a leading case, with others.

In *Foster v. Fidelity & C. Co.* supra, this court said in respect to language identical to that under consideration: "The word 'immediate,' in this connection, means such convenient time as was reasonably necessary, under the circumstances, to do the thing required."

It follows from what has been said that the court did not err in denying the motion for a nonsuit because of noncompliance with the policy on the subject of notice.

bility of so drafting a clause as to leave no ambiguity on the point. It is to be observed that a strict construction of the suicide clause, with the added words "sane or insane," so as to hold it inapplicable in case the insured was not conscious of the physical nature and consequences of his act, and did not intend to kill himself thereby, does not involve the denial of all scope or effect to the additional words "sane or insane," since, as already shown, even under such a construction, those words would have the effect to obviate the necessity, which existed under the interpretation generally given in this country to the suicide clause without those added words, of showing that the insured was conscious of the moral nature and quality of his act; in other words, would remove the necessity of showing that the suicide was a felonious one. It is further to be noticed that, even if this strict construction were adopted, the instances would probably be somewhat rare in which it could be successfully invoked to escape the effect of the suicide clause, in cases where the insured, though insane, died by his own hand under circumstances which, in case of a sane person, would have compelled the inference of suicide, since it is obvious that a consciousness of the physical nature and consequences of the act, and an intention to kill one's self thereby, may co-exist with an unsound condition of the mind; and often, of course, even in case of an insane person, there may be unmistakable extrinsic evidence of an intention to kill himself. And frequently, if not generally, even where there is no such extrinsic evidence, there is an almost irresistible inference of such an intention from the very means by which he killed himself. If, for example, the body of insured is found with

Error is assigned because the court admitted evidence as to what kind of a fever Mr. Cady was afflicted with prior to his death, and as to whether he was in his right mind when he left the room. The evidence was not prejudicial, since it was conceded that, if he committed suicide, sane or insane, there could be no recovery. Moreover, we are unable to see why the evidence was not proper as bearing on the question of whether there was a suicidal intent on the part of Mr. Cady at the time he committed the act causing his death, which intent was necessary to suicide, as will be hereafter seen.

The court refused to give this instruction asked by appellant's counsel: "It is immaterial whether Frank A. Cady was delirious or not at the time immediately preceding his death and at the time he went over the railing, if his act in going over the railing was voluntary on his part,—that is, that he intended to throw himself over the railing in the manner as shown by the evidence;" but instructed the jury, in substance, that suicide, sane or insane, involved an executed purpose to take one's own life, and

a rope around his neck, and an examination discloses that death resulted from strangulation, the inference that he was conscious of the physical nature and consequences of his act, and intended to kill himself, is very strong, even if it be conceded that he was so insane as not to understand the moral nature and quality of his act, or even if it be conceded that he was driven thereto by an insane and irresistible impulse. It would seem that some of the decisions, *e. g.*, *Scherar v. Prudential Ins. Co.*, where the insured strangled himself, might have been decided on that ground without going so far as to deny that, in any case where the words "sane or insane" are employed in the suicide clause, the effect of that clause may be avoided on the ground that the insured did not intend to take his own life. (See, in this connection, *Streeter v. Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779, supra.) There would be more opportunity for successfully invoking this doctrine of strict construction to avoid the effect of the suicide clause where, as in *Cady v. Fidelity & C. Co.*, the insured did the act which resulted in his death while in a fit of delirium or similar condition of irresponsibility. Possibly even the courts which hold in general that an intention to kill one's self is not essential to the applicability of the suicide clause when the words "sane or insane" are added would, by drawing a distinction between an intention to kill one's self and an intention to do an act which will inevitably result in death, permit a recovery in case the insured acts in a fit of delirium merely as a blind force, without any conscious intent or purpose whatever either to kill himself, or to do the act which results in his death.

that, if Cady went over the railing pursuant to a design to take his own life, he died by suicide; but if, when he committed the act, though it was voluntary and involved carelessness, if it was not with a conscious purpose to take his life; if, by reason of his mental condition he did not appreciate the physical nature of the surroundings and consequences of his act, and intend to take his life,—the result was not suicide within the meaning of the policy.

Whether the court committed error in refusing the requested instruction and instructing the jury as indicated, is ruled by *Pierce v. Travelers' L. Ins. Co.* 34 Wis. 389. The position which the court there took in respect to the meaning of a clause in a policy of insurance substantially like the one in question is unmistakable, and has not been departed from by any subsequent decision.

The effect of the decision above referred to is that, if one takes poison by mistake, or steps into an elevator shaft, not having in mind for the time being its existence, or falls from a window or any place involving danger while walking in his sleep or flying from imaginary danger, he not having any mental purpose of self-destruction; and death ensues,—such result is accidental. The court said, in effect, that death resulting from an act committed under the influence of delirium, as by one who, in a paroxysm of fear, precipitates himself from a window, or, having been bled, removes the bandage, or takes poison by mistake, and death ensues, never received nor deserved the name "suicide" and is not within the meaning of the language, "death by suicide, felonious or otherwise, sane or insane." Such language does not include an act of self-destruction resulting in death, whether intentional or not, unaccompanied by a purpose to effect death, with the absence of all design to take life.

The conclusion reached by the court in the *Pierce Case* is thus stated, referring to the language above quoted: "The condition here relieves the company from liability only where the self-destruction was intentional, or committed by a party who was conscious . . . of its direct and immediate consequences, though the act may have been unaccompanied by any criminal or felonious intent or purpose." The opinion of the court, as epitomized in the syllabus and as since understood here and elsewhere, is as follows: "These words include every case in which the insured kills himself by a voluntary act, the natural, ordinary, and direct tendency of which is to produce death, and the physical consequences of which he has a sufficient mental capacity to foresee; in other words, every case of intentional

self-destruction," and not "cases of unintentional or accidental death, though brought about by acts of the deceased involving negligence or carelessness."

Thus, it will be seen that the court held, the distinction between suicide by a sane person and suicide by an insane person lies in the mental capability of understanding and appreciating the moral nature and quality of the purpose. That is made very clear by this language from the early case of *Borradale v. Hunter*, 5 Mann. & G. 639, which was quoted and indorsed.

It was enough that it was "the voluntary and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether, at the time, he was capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself."

The doctrine announced as aforesaid has since been recognized in a number of cases. *Karow v. Continental Ins. Co.* 57 Wis. 68, 46 Am. Rep. 17, 15 N. W. 27; *Scheiderer v. Travelers' Ins. Co.* 58 Wis. 13, 46 Am. Rep. 618, 16 N. W. 47; *Bachmeyer v. Mutual Reserve Fund Life Assn.* 87 Wis. 325, 58 N. W. 399; *Fey v. I. O. O. F. Mut. L. Ins. Soc.* 120 Wis. 358, 98 N. W. 206; *Rohloff v. Aid Assn. for Lutherans*, 130 Wis. 61, 109 N. W. 989. It is adopted in *Bacon on Benefit Societies and Life Insurance* at § 336, where many cases are cited, all to the effect that suicide by an insane man involves a suicidal intent.

The foregoing seems to fully justify the court's instruction and the refusal of the one requested by appellant's counsel. The rule governing the subject is so firmly entrenched in our own decisions that it does not seem advisable to go elsewhere for authorities.

Appellant's counsel requested the court to instruct the jury that, if Mr. Cady had an organic stricture at the time he took out the policy of insurance, or at any time during one year prior thereto, he had a local disease within the meaning of the policy. The court gave the instruction coupled with an explanation and instructions in the general charge to the effect that, if Mr. Cady had an organic stricture, it did not constitute a local disease within the meaning of the policy, unless the affection was so far developed and had become so serious as to have some bearing upon his general health.

Voicing the opinion of the court, but not

entirely my own views, it is considered that the meaning of the term "local disease," as used in the policy, was correctly given to the jury. The parties to the contract must have intended to use the term "local disease" so as not to bind the assured unreasonably. Absurd results are always regarded as not within the contemplation of parties to a contract at the time of reducing the same to writing, where their words in any reasonable view will admit of a construction making the agreement reasonable. It is considered that an affection, even though curable only by medical or surgical treatment, but nevertheless readily remediable and so not necessarily tending to shorten life, before it has become so far developed as to have some bearing, *in presenti*, upon the general health, is not a "disease" as one would ordinarily understand that term; and that to go further and give to such term, as urged in the contract in question, its technical meaning, would be going too far. Parties are supposed, generally speaking, in making their contracts, to use words in their common, ordinary sense; and that assumption should prevail in the absence of some reasonably clear indication to the contrary. 2 Parsons, Contr. 9th ed. 501. It is believed by the court that the conclusion reached is in harmony with the decided cases, notwithstanding there has been no adjudication of the matter, so far as we are advised, on facts the same or very similar to those here involved. Bacon v. United States Mut. Acci. Asso. (Stedman v. United States Mut. Acci. Asso.) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; Manhattan L. Ins. Co. v. Francisco, 17 Wall. 680, 21 L. ed. 700; Rand v. Provident Sav. Life Assur. Soc. 97 Tenn. 291, 37 S. W. 7; Meyer v. Fidelity & C. Co. 90 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328.

Complaint is made because the court instructed the jury that the burden was upon the defendant to affirmatively establish its claim that Mr. Cady died by suicide. That is ruled in respondent's favor by Rohloff v. Aid. Asso. for Lutherans, 130 Wis. 61-70, 100 N. W. 989, 992, where the following instruction was approved: "The presumption of law is against the commission of suicide, and the defendant must first overcome this presumption in law against suicide, and establish the fact of suicide by a preponderance of evidence; and, in the absence of such proof, you must answer the question submitted to you by 'No;' . . . but this presumption may be rebutted by proof, and . . . the burden is on the defendant to rebut that presumption and satisfy you by the evidence that the cause of death was suicide."

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It should be said, in this connection, the court realizes that there are authorities elsewhere out of harmony with the foregoing approved instruction.

The only other point which needs special mention is that the court erred in failing to direct a verdict for the defendant, and so failing, in not setting the verdict aside as contrary to the evidence and granting a new trial.

It is strenuously urged that the evidence will not reasonably admit of any other inference than that Mr. Cady intentionally jumped, or threw himself, into the shaft to take his life. It is the opinion of the court that reasonable minds might reasonably differ on that question in view of the law as heretofore declared. It does not appear that Mr. Cady had ever been in that part of the building where he went to his death, prior to the occasion in question. There is evidence tending to show that he might probably have left his room in a state of delirium and continued in such condition to the instant of the fatal act, not realizing what he was doing. There is evidence tending to prove that, when he ran to the side of the shaft, he was in a state of alarm, and was fleeing from some fancied danger; and that a person in a delirious state is liable to do things dangerous to his own life, or the lives of others, under a misapprehension of what he is doing and its consequences. On the whole, there is room for belief that, when Mr. Cady went over the railing, he did not appreciate that he was going into the shaft; that he was not conscious of the nature of his act, and did not have in mind any idea of self-destruction, which, as we have seen, is essential to suicide even of an insane person,—one so bereft of reason as to be incapable of "understanding and appreciating the moral nature and quality of his purpose."

The judgment is affirmed.

COLORADO SUPREME COURT.

CANON CITY et al., Pliffs. in Err.,
v.

FRANK MANNING et al.

(— Colo. —, 95 Pac. 537.)

Trial — waiver of error.

1. Answering to the merits waives error in overruling a demurrer for want of capacity of plaintiffs to maintain the action.

Note. — As to power of court to enjoin illegal acts of police officers other than arrest, see case note to Delaney v. Flood, 2 L.R.A. (N.S.) 678.

Municipal corporation — ordinance — summary enforcement.

2. A municipal corporation cannot determine for itself that a club is violating the city ordinance against dispensing intoxicating liquors by furnishing them to its members, and proceed summarily to close the club on that ground.

Same — injunction.

3. A municipal corporation may be enjoined from proceeding to enforce its order to close a clubroom, based upon an arbitrary *ex parte* determination that the furnishing by the club of intoxicating liquors to its members violates the ordinance against dispensing such liquors in the city.

Injunction — municipal ordinance — statute.

4. Injunction against the arbitrary closing of a clubhouse because of alleged violation of an ordinance against dispensing intoxicating liquors within the city is not prevented by a statute providing that no injunction shall issue to restrain the enforcement of a penal ordinance, since the statute refers only to its judicial enforcement.

(April 6, 1908.)

ERROR to the District Court for Fremont County to review a judgment enjoining the attempted enforcement of a municipal ordinance. Affirmed.

Statement by Gabbert, J.:

The Benevolent & Protective Order of Elks of the United States of America is a fraternal, social, and benevolent society having many subordinate lodges, one of which is located at Canon City. This lodge is a voluntary society, not incorporated, and consists of upwards of 325 members, and is supported by the fees and dues paid in by its membership. The rules of the order prescribe the qualifications for membership. Pursuant to the constitution and by-laws of the order, it maintains clubrooms at Canon City for the social enjoyment of its members, where liquors are dispensed to them, each paying for that consumed by himself or his guests in a sum fixed by the board of control. The membership of the club is limited to members of the organization in good standing. None but members of the order or their guests are admitted to the club, and no person not a member of the order who is a resident of Canon City or the immediate vicinity can be admitted. Guests, except members of the order, are not permitted to spend any money in the club. The club has quite an elaborate set of rules for the government of its members and the management of its affairs, and is part and under the control of the Canon City lodge of the order. It is not incorporated, and its affairs are managed by a board of control

appointed in accordance with the rules of the order and the rules and regulations of the club. The club is conducted in an orderly manner, and no conduct calculated to disturb the peace is permitted. Billiard and card tables are maintained for the use of the members and guests. The rooms are supplied with magazines and other reading matter. Canon City has ordinances prohibiting the sale or giving away of intoxicating liquors within its corporate limits by any person, except regularly licensed druggists, duly licensed to sell liquors for medicinal, mechanical, and chemical purposes. One of these ordinances declares that every place within the limits of Canon City where intoxicating liquors are sold or dispensed, except by druggists duly licensed, is a nuisance. Penalties in the way of fines are provided for the violation of these ordinances. One of the provisions of the ordinance declaring places where liquors are sold or dispensed nuisances is: "The city marshal and all police officers of said city shall abate said nuisance by securely closing such place and preventing any person and all persons from entering the same except for the lawful removal of such liquor, until all liquor or any or every kind hereinbefore mentioned shall have been removed therefrom, and until the owner of said place shall have given bond to the said city in a form and with sureties to be approved by the city council of said city of Canon City, in the penal sum of \$2,500, conditioned that such place shall not again be suffered or permitted to be used for any purpose hereinbefore specified as constituting it a nuisance." Under this provision, the city, through its mayor and marshal, gave notice to the club to stop the sale and dispensing of liquors to its members within the rooms occupied by it, and that, unless such sales were stopped within a time specified, the provisions of the ordinances of the city with respect to the sale and dispensing of intoxicating liquors would be rigidly enforced against the club. Up to the time of giving such notice, no prosecution under any of the ordinances in question had ever been commenced or prosecuted against the club or its members. Defendants in error, constituting the board of control of the club, thereupon commenced an action against the city of Canon City and its mayor and marshal to restrain them, except by some regular form of judicial proceeding in a court of competent jurisdiction, from closing the clubrooms or preventing any member or members from entering them, or interfering with the full and entire enjoyment of such rooms by the members. The complaint filed stated substantially the facts above set forth. To this complaint a demurrer was filed by the defendants, which challenged

the complaint upon the grounds, among others, that the plaintiffs had no capacity to sue, and that the complaint did not state facts sufficient to constitute a cause of action, or as a basis for relief of any kind. This demurrer was overruled. The defendants thereupon answered, and a trial was had before the court. The facts established under the issues made by the pleadings were substantially as above recited. Judgment was rendered for the plaintiffs, enjoining the defendants, except by some regular form of judicial proceeding in a court of competent jurisdiction, from closing the club-rooms or preventing any member or members of the club or their guests from entering such rooms, and to refrain and desist from interfering with the full and entire enjoyment of such rooms by the members of the club or their guests. The defendants bring the case here for review on error.

Messrs. Taylor & Sayre, for plaintiffs in error:

The complaint shows an attempt to invoke the aid of a court of equity to prevent the enforcement of a penal ordinance.

Civil Code, § 143; *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624; *Olympic Athletic Club v. Speer*, 29 Colo. 158, 67 Pac. 161; *Delaney v. Flood*, 183 N. Y. 323, 2 L.R.A. (N.S.) 678, 111 Am. St. Rep. 759, 76 N. E. 209; *Chicago v. Chicago City R. Co.* 222 Ill. 560, 78 N. E. 890.

Mr. H. L. Ritter also for plaintiffs in error.

Messrs. Charles E. Waldo, Clyde C. Dawson, A. L. Jeffrey, and E. H. Stine-meyer, for defendants in error:

The two objections, lack of jurisdiction, and insufficiency of statement of cause of action, are the only objections which are not waived by the filing of answer.

Thalheimer v. Crow, 13 Colo. 397, 22 Pac. 779; *Gutheil Park Invest. Co. v. Montclair*, 32 Colo. 420, 76 Pac. 1050; *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642; *Baden Baden Gold Min. Co. v. Jose*, 20 Colo. App. 260, 78 Pac. 313.

A city cannot, by an ordinance, make that a nuisance which is not a nuisance either at common law or by statute; nor can it, under such an ordinance, authorize the summary abatement of anything as a nuisance which, in fact, is not a nuisance.

Wood, Nuisances, 3d ed. § 744, pp. 976, 977; *Joyce, Nuisances*, § 332; 1 Dill. Mun. Corp. 4th ed. §§ 374-376, 379; *Poyer v. DesPlaines*, 18 Ill. App. 225; *DesPlaines v. Poyer*, 123 Ill. 350, 5 Am. St. Rep. 524, 14 N. E. 677; *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

The power to abate a nuisance does not 17 L.R.A. (N.S.)

include the power to do so by force, without some form of judicial proceedings in some competent court.

Wood, Nuisances, 3d ed. §§ 32, 33, 732, 734, 740; *Ely v. Niagara County*, 36 N. Y. 297; *Welch v. Stowell*, 2 Dougl. (Mich.) 332; *Brown v. Perkins*, 12 Gray, 89; *Denver v. Mullen*, supra; 3 Bl. Com. p. 5; *Western & A. R. Co. v. Atlanta*, 113 Ga. 537, 54 L.R.A. 294, 38 S. E. 996; *Munn v. Corbin*, 8 Colo. App. 113, 44 Pac. 783; *Gray v. Ayres*, 7 Dana, 376, 32 Am. Dec. 107.

Messrs. Bonynge & Ritter, T. A. McHarg, Albert A. Reed, Frank C. West, George H. Van Horn, and George A. Carlson, amici curiae:

The district court was without jurisdiction to entertain the suit in equity and grant the writ of injunction which it did.

Denver v. Beede, 25 Colo. 172, 54 Pac. 624; *Olympic Athletic Club v. Speer*, 29 Colo. 158, 67 Pac. 161; *Adams v. Cronin*, 29 Colo. 488, 63 L.R.A. 61, 69 Pac. 590; Act 1903.

Gabbert, J., delivered the opinion of the court:

The first error assigned on behalf of defendants is that the court erred in overruling their demurrer to the complaint, which challenged the capacity of plaintiffs to bring the action. Presumably, if there was any merit in this contention, it appeared upon the face of the complaint. By answering to the merits, the defendants waived that question. It has been repeatedly decided that, where a demurrant wishes to take advantage of any supposed error in overruling a demurrer to a complaint upon grounds which, under our Civil Code, constitute grounds for demurrer, which appear upon the face of the complaint, he must, except for want of facts or jurisdiction, let final judgment be entered, for, by afterwards answering to the merits, he cannot, except for the two defects mentioned, raise such questions in connection with his answer. *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642; *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 15 L.R.A. (N.S.) 775, 92 Pac. 922.

It is next urged that the complaint shows that the plaintiffs have attempted to invoke the aid of a court of equity to prevent the enforcement of a penal ordinance, and that for this reason, and also because the testimony establishes this fact, the judgment is erroneous. The judicial enforcement of a penal ordinance cannot be inhibited by a court of equity. *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624; *Adams v. Cronin*, 29 Colo. 488, 63 L.R.A. 61, 69 Pac. 590; *Olympic Athletic Club v. Speer*, 29 Colo. 158, 67 Pac. 161. There may be exceptions to this rule,

as suggested in the above cases, but this case does not fall within the exception, so far as the judicial enforcement of the ordinance in question is involved. Neither is that question the vital one in this case. The plaintiffs did not seek a judgment inhibiting the defendants from judicially enforcing such ordinance, nor did the judgment rendered inhibit the defendants from so doing. On the contrary, the questions presented by the complaint and on the facts established at the trial are: (1) May the city authorities summarily close the clubrooms and exclude the members of the club therefrom; and (2) if not, may they be enjoined from so doing?

The defendants claim that they have the right, by virtue of the ordinances of the city, to close the clubrooms and exclude its members therefrom, and do not deny the averments of the complaint, to the effect that it was their intention and purpose to take these steps. In support of their authority and right to do so, it is claimed that the clubrooms managed by the plaintiffs are maintained in violation of the ordinances of the city inhibiting any place to be kept within its limits wherein intoxicating liquors are sold or dispensed to members of the club occupying such place. That question is not the material or crucial one involved, and we shall express no opinion upon it. We are not concerned with the guilt or innocence of plaintiffs; neither can that question, under our rulings in the Beede and other cases, be determined in this proceeding. The first important question to determine, in order to solve what we have indicated are the only ones in the case, is whether the defendants may determine for themselves that the club is violating the ordinances of the city, and proceed summarily to enforce its *ex parte* orders against it. This question must be answered in the negative. The fact that members of the organization represented by plaintiffs meet in their clubrooms is not a violation of the ordinances. Neither is the mere storage of liquors in such rooms contrary to any provision of such ordinances. The violations of such ordinances, if any there be, consist in dispensing such liquors to the members of the club. Whether or not that is a violation cannot be determined by the city officials, but only by a court of competent jurisdiction, wherein plaintiffs are afforded an opportunity to be heard, so that the question of whether they are violating the ordinances of the city can be judicially determined. By the terms of the ordinances which the defendants say they proposed to enforce, no such opportunity is afforded the plaintiffs. Defendants propose *ex parte* to determine that the ordinances of 17 L.R.A. (N.S.)

the city have been violated, and, pursuant to that conclusion, contend they have the right to close the clubrooms and exclude the members therefrom. Such a proceeding as that cannot be upheld. Persons, even though they be officials of a municipality, may not take the law into their own hands, however justifiable they may think such a course may be to prevent infringement of the law. Such a course must inevitably result in bringing about conditions destructive to the peace of a civilized community. If it can be done in one case, it may in another; and thus there would be no limit to the unlawful means which might be resorted to for the purpose of punishing alleged infringements of the law, although those engaged in doing so would also be violating it. A man's property cannot be seized, nor can he be punished, except for a violation of the law, and whether he has been guilty of such violation as justified the seizure of his property, or the infliction of punishment, can only be determined by a court of competent jurisdiction, where he is afforded an opportunity to be heard before judgment is pronounced against him. *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301; *Earp v. Lee*, 71 Ill. 193; *Baldwin v. Smith*, 82 Ill. 162. The law provides a method whereby the unlawful selling of liquor may be judicially determined and judicially punished. In the present case the ordinances of Canon City make such provision.

Having concluded that the ordinances cannot be enforced in the manner threatened by defendants, the next question is whether they may be enjoined from carrying their threat into execution. This question must be answered in the affirmative. The reason upon which the Beede and other cases decided by this court, wherein it is held that the judicial enforcement of a penal ordinance could not be enjoined, rests, is that equity can only be invoked when there is no plain, adequate, and complete remedy in the law courts of which the party invoking its aid can avail himself. That condition is not present in the case at bar. On the contrary, it is entirely absent, for the obvious reason that no opportunity is afforded by the provisions of the ordinance under consideration whereby the plaintiffs may be heard on the question of whether or not the dispensation of liquors in their clubrooms in the manner set out in their complaint, and as established by the facts, is a violation of the ordinances of the city inhibiting the sale of liquors within its limits. They must either submit to the *ex parte* determination of the city officials that they are violating the ordinances of the city, and permit their clubrooms to be closed, and the members excluded therefrom, and then bring

an action to be reinstated in the possession of their rooms, or they must resort to force when the city authorities undertake to enforce the provisions of the ordinances against them. Certainly the first course does not afford an adequate remedy at law, because that expression does not mean that such a remedy is afforded by quietly submitting to an alleged wrong, and then bringing an action against the alleged wrongdoer to redress it. Neither is the second expedient one to which the law will compel a party to resort by refusing him protection in the first instance, because that course invites violence and a breach of the peace. Perhaps he might justify such action if called to account therefor, but that is not an adequate remedy at law to afford protection against the illegal invasion of his rights. The general rule is that if, in order to protect the rights of a party, an action at law does not afford a plain, speedy, and adequate remedy whereby the whole mischief of which he complains may be reached, and his rights, both present and future, be secured in a perfect manner by the judgment of a court at law, he may invoke the interposition of equity for his protection. 1 Story, Eq. Jur. § 33. Applying this rule, it is clear that this case does not fall within the rule laid down in the Beede and other cases cited by counsel representing the city authorities. The amendment of § 143 of Mills's Anno. Code, which provides that no writ of injunction shall issue to restrain the enforcement of a penal ordinance, does not apply, because that can only be construed to mean that no writ of injunction shall issue to restrain the judicial enforcement of such ordinance. There are doubtless instances where city authorities would be justified in employing summary methods, because of the emergency of the situation, to prevent infringement of the law, or to prevent parties from taking steps which would inevitably lead to a violation of the law, or to protect the health of the public, or where, for the protection of the public, police surveillance must be exercised and prompt action taken; but no such emergencies are presented in the present case. Whether or not the plaintiffs and those whom they represent are violating the ordinances of the city can be determined judicially, and, if they are so found guilty, the judgments to that effect can be enforced by judicial process, without jeopardizing the safety of the public in the slightest degree; and any attempt on the part of the city authorities to do otherwise cannot be permitted. In reaching this conclusion, we must not be understood as indicating that a judgment of a court, to the effect that the clubrooms could be closed

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and the members excluded, would be upheld, or that the dispensing of liquors in these clubrooms to members of the organization represented by plaintiffs in the circumstances established in this case is not a violation of the ordinances of the city inhibiting the sale of liquors within its limits. It will be time enough to determine either, or both, of these questions, when presented by an appropriate proceeding. What we do determine is that, in the circumstances of this case, the city authorities cannot enforce the provisions of the ordinances involved extrajudicially, and that they may be enjoined from attempting to do so.

The judgment of the District Court is affirmed.

Campbell and Helm, JJ., concur.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS

v.

AURELIUS C. TURPIN et al., Pliffs. in Err.

(233 Ill. 452, 84 N. E. 679.)

Evidence — opinion — value of bonds.

1. A dealer in bonds cannot be allowed to give his opinion as to the value of particular bonds which he has never dealt in, or seen, except those before the court.

Confidence game — mutual traders.

2. One who trades to another properties at fictitious and greatly exaggerated value, as to which there is no evidence that he had title, is not within the protection of a statute against obtaining property by means of the confidence game, so as to render one guilty who trades to him, in return for his property, worthless securities.

(April 23, 1908.)

Case Note. — Illegal intent of prosecutor as affecting guilt of obtaining property by false pretense or confidence game.

According to the weight of authority, it is no defense to a criminal prosecution for obtaining property by false pretenses or confidence game, that the prosecuting witness himself, in the very transaction of which he complains, was guilty of an intent to defraud the defendant or another, or to violate some law. The cases so holding, though admitting that it is ordinarily a defense to a civil action by the prosecutor, contend that the rule has no application to criminal actions in which the state is plaintiff, and conducted, not for the benefit of the prosecutor, but for the protection of the public, and over which the prosecutor has no control, and that therefore the doctrine of estoppel is not applicable, as the state

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant Turpin of obtaining money by means of a confidence game. Reversed.

The facts are stated in the opinion.

Messrs. Cantwell & Roth for plaintiffs in error.

Mr. F. L. Barnett, with Messrs. William H. Stead, Attorney General, and John J. Healy, for defendant in error:

The crime was charged with sufficient detail.

Cochran v. People, 175 Ill. 23, 51 N. E. 845.

Vickers, J., delivered the opinion of the court:

Aurelius C. Turpin, the plaintiff in error, and James Low, were indicted in the criminal court of Cook county on the charge of

obtaining from William G. Schroeder six deeds of various values to said Schroeder, who was then and there the owner of said deeds, the same being the personal goods and property of said Schroeder, by means and use of the confidence game. A motion to quash the indictment was overruled by the court. Upon a trial the defendants were found guilty by a jury. A motion for a new trial was granted as to Low and overruled as to Turpin. After overruling Turpin's motion in arrest of judgment, the court sentenced him to the penitentiary for an indeterminate term. Turpin filed his bill of exceptions and sued out this writ of error.

The principal errors relied on for a reversal are that the indictment was insufficient and should have been quashed; the giving of erroneous instructions on behalf of the people, and refusing to give proper

is not *particeps criminis*; that the public good is better served by punishing both the guilty parties than by letting either escape.

The doctrine was applied in *People v. Martin*, 102 Cal. 558, 36 Pac. 952, where the defendant, by falsely pretending that a judgment had been rendered against the prosecuting witness, and that her property would be seized to pay it, induced her to turn over her property to defendant to prevent her creditors from realizing on the supposed judgment. In addition to the reasons given above, the court said that the defense of *particeps criminis* was not good for the reason that, since there was no actual judgment, the prosecutrix was guilty only of a wrongful intent, which does not of itself constitute a crime.

The doctrine was also applied in *Re Cummins*, 16 Colo. 451, 13 L.R.A. 752, 25 Am. St. Rep. 291, 27 Pac. 887, where the money which was obtained by the defendant from the prosecuting witnesses by false pretenses was to be used in the furtherance of the illegal purpose to obtain by fraud valuable coal lands from the United States.

In *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995, the prosecuting witness was cheated in a confidence game while he was, as he supposed, assisting the defendant in cheating another person. A conviction was sustained. The point as to the effect of the prosecutor's intent to aid in a fraud was, however, not specifically raised.

The doctrine has also been applied where the prosecuting witnesses were defrauded of their money in a confidence game in which they were induced to think that they were entering into a scheme to tap telegraph wires running to a pool room. *Gilmore v. People*, 87 Ill. App. 128.

Where the prosecuting witness, by false pretenses of defendant, was induced to loan him money to enable him to violate the law by wagering with a third person. *Casily v. State*, 32 Ind. 62.

Where the defendant, by falsely pretending that he was an officer possessed of a 17 L.R.A. (N.S.)

warrant and with power to arrest prosecutor for a pretended forgery, induced prosecutor to sign a note to prevent his arrest, and settle and compromise the supposed crime. *Perkins v. State*, 67 Ind. 270, 33 Am. Rep. 89.

Where the defendant and prosecuting witness traded goods, and each made false representations to the other concerning their value, etc. *Com. v. Morrill*, 8 Cush. 571.

Where the prosecutor, who was induced by certain false pretenses to part with his money for shares in a corporation to be organized, made an illegal agreement with the defendant whereby the defendant was to vote to employ him as agent in the corporation when formed. *Com. v. O'Brien*, 172 Mass. 248, 52 N. E. 77.

Where the prosecutor, who was induced to indorse a note by false pretenses, knew that the indorsement would be dishonestly used. *People v. Henssler*, 48 Mich. 49, 11 N. W. 804.

Where the prosecuting witness was induced by a confidence game involving a sham bet to hand over money to one of the betters, in order, as he thought, to enable his supposed confederate to defraud the other better. *People v. Shaw*, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121.

In *People v. Watson*, 75 Mich. 582, 42 N. W. 1005, the doctrine was applied to a prosecution for conspiracy to obtain money by false pretenses by means of a confidence game, the complaining witness having tried to obtain money which he thought he had won in a supposed lottery.

Again, the doctrine has been applied where the prosecutrix, by the false pretense of defendant, an attorney, that he had started a suit on a claim known by her to be fictitious, was induced to pay him money. *Cunningham v. State*, 61 N. J. L. 67, 38 Atl. 847.

Where the prosecutor, by the false pretense of defendant that he had a warrant for the arrest of prosecutor's daughter for a criminal offense, was induced to pay mon-

instructions requested by plaintiff in error; the admission of incompetent evidence on behalf of the people; and that the verdict should have been set aside because it is not supported by sufficient evidence. In the view that we take of this case, it will not be necessary to consider any of the alleged errors except the one last above stated.

The evidence shows that plaintiff in error was known as a "trader." His business seems to have been to exchange real estate, stocks, and bonds for other property. He made his headquarters, for business purposes, at the Chicago hotel, where a number of other persons engaged in the same line of business were putting up. These so-called "traders" made deals with each other very freely, and apparently without regard to the location, value, or title of the property involved. In most instances the manifest purpose was to acquire property with a view of trading it in turn to someone else, so that exchanges were made based upon the supposed "trading value" of property instead of the real cash value. The trading value was rather a vague and variable standard. It meant such value as ingenious and energetic puffing would lead the buyer to believe he could realize from the stuff in his next deal. Schroeder, the prosecuting witness, resided at South Bend, Indiana, and was seventy-nine years of age. He was

engaged in trading in real estate, stocks, and bonds at South Bend. For thirty-five years of his life he had been engaged in teaching in various institutions of learning in the state of Indiana. He came to Chicago in December, 1905, looking for "trades." He went to the Chicago hotel and there met Low. He and Low talked over their various properties, and both of them became satisfied that they could do some trading. Schroeder did not have his title papers with him, and Low told him to go back home and get his papers, and upon his return he would trade with him. Among other things that Schroeder told Low he had at home, he mentioned some Colorado mining stocks, which he, however, said were worthless. Low said: "There is no such thing as worthless mining stocks; bring them along when you return and I will trade for them." Low was eight years older than Schroeder. In accordance with Low's suggestion, Schroeder brought the mining stocks with him on his return to Chicago, a month later. On January 10, 1906, Schroeder reappeared at the Chicago hotel, inquiring for an elderly gentleman, known as a "trader," by the name of Low. He found him, and negotiations were soon well under way. Schroeder had in his valise deeds purporting to convey to him title to large quantities of real estate in Indiana, Michigan, Missouri, and

ey to defendant, to compromise the offense. *Com. v. Henry*, 22 Pa. 253.

Where the prosecutor lost money in a fake bet in which he thought he was aiding two of the defendants in defrauding the third. *Reg. v. Hudson*, 8 Cox, C. C. 305.

In *Rex v. Stratton*, 1 Campb. 549, note, though it was not necessary to pass squarely on the proposition, the court held that to collect subscriptions for an illegal corporation comes so near to obtaining money upon false pretenses that, if a man is indicted for so doing, he cannot be considered as prosecuted by the officers of such illegal corporation without any reasonable or probable cause.

There is, however, a line of cases, notably those from New York, which hold that the illegal intent of the prosecutor is a defense. This holding is, in part, based upon the language of the preamble of the English statute of 30 Geo. II., chap. 24, of which the New York statute is substantially a transcript, which recites that ill-disposed persons had, by various subtle stratagems, etc., fraudulently obtained divers sums of money, etc., to the great injury of industrious families, and to the manifest prejudice of trade and credit, etc. From this they conclude that the design of the law is to protect those who, for some honest purpose, are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal pur-

poses, part with their goods. The following cases hold that the illegal purpose of the prosecutor is a defense for the reasons above stated.

People v. Stetson, 4 Barb. 151, where the prosecutor was induced by defendant to give him his watch on the false pretense that a warrant was issued against prosecutor for rape, which defendant would settle in consideration of the watch.

McCord v. People, 46 N. Y. 470, where the prosecutor parted with his property on the false representation that defendant was an officer and held a warrant for the arrest of prosecutor on a criminal charge, for the purpose of inducing the supposed officer to take some illegal action inconsistent with his duty as an officer.

People v. Livingstone, 47 App. Div. 283, 62 N. Y. Supp. 9, where the prosecutor parted with his goods to a "green-goods" man, expecting to get counterfeit money, but really getting brown paper.

People v. Tompkins, 186 N. Y. 413, 12 L.R.A. (N.S.) 1081, 79 N. E. 326, where the defendant, by falsely representing that he had advance information as to result of certain horse races, induced the prosecutor to bet in a pool room, where he lost \$50,000.

In *People v. Klock*, 55 Misc. 46, 106 N. Y. Supp. 267, it was held that the fact that the prosecutor parted with his money owing to a false representation by defendant, a game protector, that he had a right to receive the money for logs cut by trespassers

Colorado, the trading value of which was, according to his claim, many thousand dollars. One particular 80 acres of iron-ore land in Missouri Schroeder thought might be worth a million dollars. The valise also contained the Colorado mining stocks. Low had a valise also, and in it he had the evidence of title to properties of fabulous value, largely made up of stocks and bonds. If it became necessary, however, to even up inequalities in value, to put in a quantity of land, Low was always prepared to put it in. These trades were made without any examination of the properties involved, and with no information other than that furnished by the owner, and all he knew, in most cases, was what the man said who traded them to him. During the two days that Schroeder remained at the Chicago hotel, the contents of his valise underwent a complete change. He made numerous trades with Low and Turpin. These several transactions so intermingled and overlapped each other that it is difficult to get a clear understanding of the details of each particular trade. Counsel for both parties admit the confusion and attempt to explain, but their explanations are not clear. The merits of this controversy do not depend upon an accurate understanding of the details of all or any one of the trades. Enough appears to show that in his first trade Schroeder traded Low 80

acres of land in Kit Carson county, Colorado, for a section of land in Presidio county, Texas, and for 80 acres of land in Roscommon county, Michigan. Low traded Schroeder two sections of land in Yoakum county, Texas. Schroeder put his Colorado mining stock into this trade. The second trade was between Schroeder and plaintiff in error, Turpin. Schroeder traded Turpin 50 acres known as the "South Bend property," subject to a mortgage of \$1,000. There was also a second mortgage for \$500 on this 50 acres which Schroeder did not mention. Schroeder also traded him 8 lots in Valverde, Colorado, and 220 acres in Howe county, Missouri, and Turpin traded Schroeder a half interest in 5,000 acres of land in Johnson county, Kentucky, plaintiff in error agreeing to pay \$500 difference. Twenty-five dollars was paid in cash and the balance was to be paid in thirty days, and was secured by a mortgage on the "iron-ore eighty" in Howe county, Missouri, which was a part of the 220 acres Schroeder traded to plaintiff in error. Afterwards, on March 15, 1906, Schroeder made another trade with plaintiff in error, in which he traded plaintiff in error his undivided half interest in the Kentucky land for five \$1,000 bonds issued by the South Carolina Railway Company, and by another trade, in which Schroeder received \$75 in cash, he obtained

on the state forest reserve, will not sustain a conviction for obtaining money by false pretenses, since prosecutor is presumed to know that, by law, the game protector had no such right, and that he was paying money for an illegal purpose.

But in *People v. Tompkins*, supra, the court placed the decision on the ground that the rule in that state had existed so long that it had become a rule of personal liberty as firmly established as rules of property; but joined in a recommendation made in *People v. Livingstone*, supra, that the legislature change the rule by statute.

In *People v. Koller*, 116 App. Div. 173, 101 N. Y. Supp. 518, Affirmed without opinion in 187 N. Y. 572, 80 N. E. 1116, the defendant obtained a loan from the prosecutor by false representations as to the title to lands given as security. It was held that the usuriousness of the loan was no defense, the court distinguishing *McCord v. People*, supra, by saying that "the representations were not made and the money paid by the complainant for the purpose of or an inducement to violate the law."

In *Anonymous*, 10 Ohio Dec. Reprint, 649, the court, in answer to a question, instructed the grand jury that, where two persons are engaged in a criminal design, and, while so engaged, one obtains from a third party money upon a false pretense relating to and being in pursuance of the criminal design in which such persons are together acting, such false pretense is not indictable, since 17 L.R.A. (N.S.)

the laws are not for the protection of law breakers in and about the concoction and carrying out of schemes to break the law. The facts prompting the question are understood to be that two men who were to run a race falsely pretended that it had been arranged that one of them should win, thereby inducing prosecutor to bet, whereas the other runner won according to private arrangement between themselves, and the two runners divided the money so won.

In *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719, it was held that defendant cannot be convicted of obtaining money by false pretenses when the false pretense of one defendant consisted in working the "green-goods" game on the prosecutor, and that of the other defendant in falsely pretending to be an officer and taking the money to compound the pretended offense of having counterfeit money. The reasoning of the early New York cases then decided was approved. But in *Baker v. State*, 120 Wis. 135, 97 N. W. 566, the doctrine of the last case was limited to its facts, and the doctrine of some of the New York cases that the act was only to protect trade and industry repudiated, the court holding that one who obtains charity by false pretenses would be guilty.

For the question of civil relief to party defrauded by fraudulent scheme, who went into it with the intention of defrauding others, see case note to *Hobbs v. Boatright*, 5 L.R.A. (N.S.) 906.

another \$1,000 bond of the South Carolina Railway Company, and some amount of stock in an oil and petroleum company. In this last trade Schroeder released his mortgage on the "iron-ore eighty" in Missouri. As the result of this last trade Schroeder had \$6,000 in the bonds of the South Carolina Railway Company, the plaintiff in error and Low had Schroeder's deed to the real estate above referred to, and the possession of the Colorado mining stocks.

It is claimed that the bonds of the South Carolina Railway Company are worthless. This claim is not established by any competent evidence in the record. On the trial defendant in error called a witness by the name of Bell, who is connected with the Harris Trust & Savings Bank, who testified, over the objection of plaintiff in error, that in his opinion as a dealer in bonds these bonds were worthless. The witness had never bought or sold any of these bonds, nor had he ever seen any except those introduced in evidence. This was all the evidence offered on this question. We do not think that the witness showed any knowledge whatever of the particular bonds in question, and he was therefore not competent to give an opinion as to their value.

But, even if it be conceded that the bonds are worthless, still the evidence does not bring Schroeder within the protection of the statute upon which this prosecution is based. It is apparent from the nature of the transactions between the parties that they were upon an equal footing, dealing at arm's length in properties at fictitious and greatly exaggerated values. When the whole evidence is considered it is impossible to say which party, if either, is swindled. There is no competent evidence in the record that Schroeder had any title whatever to any of the real estate which he traded to Low and plaintiff in error. There is no evidence of the cash value of any of the property that Schroeder traded, unless it may be his testimony in regard to the South Bend 50 acres. Schroeder admits that he had never seen the Michigan, Colorado, or Missouri lands. On the other hand, Turpin had never seen the Kentucky lands, and Low had not seen the Texas land. The parties all acquired claim of title by trades, for trading purposes. We have no doubt, under the evidence, that all the parties made extravagant representations in respect to the value of their property, and statements in regard to the title which, to say the least, were not known to be true; and in this respect we are unable to say that plaintiff in error appears in any worse light than Schroeder. There is utterly no evidence that the prosecuting witness reposed confidence in plaintiff in error, and, in fact, the relation of the parties and the 17 L.R.A. (N.S.)

nature of their transactions are such as to rather repel the idea that either of the parties should have a special confidence in the other. The confidence of the prosecuting witness in plaintiff in error was apparently no greater than the plaintiff in error had in Schroeder. No reason existed why either should have any particular confidence in the other. We find here no evidence of any false or deceitful means employed for the purpose of obtaining the confidence of Schroeder in order to swindle him out of his money or property. "Confidence game is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler." *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995; *Du Bois v. People*, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658. This statute was never designed to apply to a business transaction between parties dealing on an equal footing, even though one of them may believe he has parted with more than he received.

The court erred in not setting aside the verdict for want of sufficient evidence. The judgment is reversed.

KENTUCKY COURT OF APPEALS.

MILFORD ROBERTS et al., App'ts.,

v.

E. S. MOSS et al.

(— Ky. —, 106 S. W. 297.)

Trespass — waiver — effect.

1. One who waives the trespass of another who has entered upon his land and cut timber therefrom, by bringing an action for the value of the timber, cannot subsequently maintain another action to recover for the trespass.

Judgment — res judicata.

2. The dismissal of an action on the merits based on the facts as shown by the pleadings is a bar to a subsequent action based on the same cause.

Same — ejectment.

3. Adverse judgment, in an action to recover the value of timber alleged to have been wrongfully taken from land, does not bar an action by plaintiff to recover possession of the land.

(December 19, 1907.)

Note. — It is a general rule of law that, where a tort is of such a character as to afford the plaintiff a right to sue in assumpsit as well as in tort, the adoption of one remedy is a conclusive bar to a resort thereafter to the other; and this rule was applied in *ROBERTS v. MOSS*. The action in assumpsit not only waived the tort, but the plaintiff, in bringing the action, proceeded upon the theory that there was an implied

APPEAL by plaintiffs from a judgment of the Circuit Court for Whitley County dismissing as to the defendant Moss an action brought to recover damages for trespass upon certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. T. Z. Morrow for appellants.

Mr. J. N. Sharp for appellees.

Settle, J., delivered the opinion of the court:

This is an appeal from a judgment of the Whitley circuit court sustaining appellee Moss's plea and defense of *res judicata*, and dismissing, as to him, appellants' action, which was one of trespass *quare clausum (regit)*. The petition particularly described two adjoining tracts of land lying in Whitley county, of which it averred appellants to be the owners, and, in substance, charged that appellee and Dennis Brothers, a partnership having its chief office and place of business at Somerset, Pulaski county, in the year 1903, unlawfully, wrongfully, with force and arms, and without the consent of appellants, entered upon the lands described, drove wagons over the same, and cut down and destroyed much valuable timber thereon, consisting of white oak, chestnut, poplar, pine, and hemlock. For the alleged trespass and consequent injury to the lands and timber, the prayer of the petition asked judgment against appellee and his codefendants in the sum of \$3,000. Appellee Moss filed a separate answer to the petition, of three paragraphs; the first containing a traverse, the second a claim of title in appellee to the smaller tract of land described in the petition, and the third the defense of *res judicata*, which was bottomed on these substantially alleged facts: That, in an action

previously brought by appellants in the Pulaski circuit court against the same defendants a recovery was sought for the value of the timber, alleged in the petition of the case at bar to have been cut by appellee and his codefendants, and that in the petition of the former suit the trespass to the land for which a recovery was sought in the case at bar was expressly waived. The same paragraph of the answer contains, in substance, the further averments that appellee, by separate answer, filed in the first action, denied the conversion of the timber charged in the petition, or that appellants owned it, and also denied that they were the owners of the land; that the first action was tried in the Pulaski circuit court upon the issues thus formed and on the merits, resulting in a verdict and judgment in appellants' favor against Dennis Brothers for \$1,600; but at the same time the jury, under a peremptory instruction from the court, returned a verdict in favor of appellee upon which judgment was entered dismissing the action as to him. Certified copies of the pleadings, orders, and judgment of the Pulaski circuit court in the first action were filed with and made a part of appellee's answer in the last action. Appellants filed a demurrer to the third paragraph of appellee's answer, which was overruled, and they then filed a reply, which controverted in part the affirmative matter of the answer. A demurrer was filed to the reply by appellee and sustained by the court, because, in its opinion, the matters contained therein constituted no defense to the plea of *res judicata* presented by the third paragraph of appellee's answer. When the demurrer to the reply was sustained, appellants refused to plead further. Thereupon the lower court dismissed their

contract of sale and the title to the timber taken had passed to the defendant, while the second action is based on the tort, and the only damage claimed is for injury to the land. While, under the facts of the case, it would seem that the injuries might be divisible,—that there might be a cause of action for the timber removed and also a cause of action for the injury done to the land beyond the mere value of the timber taken,—yet, even were that so, by bringing the action in assumpsit, the plaintiff waived all question of tort, and, by the general rule such a waiver is irrevocable.

There are cases involving election of remedies where the material facts creating the cause of action were the wrongful cutting and removal of timber, but in the majority of these cases the election was between remedies each of which proceeded upon the theory that the property involved was personal property, as, for instance, where there was an attempted election between the remedy of assumpsit (on the theory that there

had been an implied sale), and of trover or of trespass (on the theory that there had been a wrongful retention, or a wrongful taking and retention, of the property); but the cases are not at all numerous where, as in *ROBERTS v. Moss*, one of the alternative remedies was based upon the injury to the real estate. In addition to the several cases set out at length in that opinion, one other may be noted.

Where the defendants had cut timber upon property which was claimed under an unauthorized contract of sale, it was held, in *Warren v. Landry*, 74 Wis. 144, 42 N. W. 247, that the plaintiff could not maintain an action for trespass for the wrongful cutting, after he had brought suit for a strict foreclosure of the lien through power given in the unauthorized contract.

Upon the question of an action for price as bar to an action for damages for fraud, see case note to *Standard Sewing Mach. Co. v. Owings*, 8 L.R.A.(N.S.) 582.

action, thereby, in effect, sustaining appellee's plea in bar.

The facts furnished by the averments of appellee's answer and the record of the first action, many of which are not materially controverted by appellants' reply, make it fairly apparent that the timber, for the value of which appellants sued, in the first action, was the same timber, the cutting of which is included in the trespass for which the last action was brought. Therefore it would seem to follow that the forcible entry of appellee and his codefendants upon the lands described in the petition, their cutting of the timber thereon, the value of which was sued for in the first action, hauling over the land, etc., were all acts and injuries connected with and growing out of the one trespass or successive trespasses for which the last or present action was brought. If so, appellants might have recovered in one action, brought in Whitley county where the lands lie, for the injuries resulting from the several acts of wrongdoing constituting the one trespass or series of trespasses to the lands, and such recovery would have included the value of the timber cut and converted by the defendants. But, instead of pursuing this course, they elected, as they were privileged to do, to waive the tort, *i. e.*, the trespass, committed by appellee and his codefendants in forcibly entering upon the land, cutting and removing the timber, etc., and to sue them in *assumpsit* for the value of the timber cut and appropriated by them. That action being a transitory one, it was properly brought in the circuit court of Pulaski county, in which county one or more of the defendants at the time resided. Having thus waived the trespass, and sued appellee and Dennis Brothers for the value of the timber, the cutting and removal of which from their lands constituted in part, at least, the trespass complained of, appellants cannot in a subsequent action recover for the trespass. The right to waive a tort and to sue in *assumpsit* has long been recognized by the law. The rule broadly, yet with entire correctness, may be stated thus: If one takes and converts to his own use another's property, the latter may maintain an action for trespass, or for trover, or replevin, or for money had and received; but a recovery in one, or a failure to recover in one, after trial on the merits, is a bar to another, because each would be for the same act. This question seems to have received careful consideration from Judge Cooley, who, in his admirable work on Torts, concluded an exhaustive discussion of the subject as follows: "The decisions are quite numerous in this country that *assumpsit* cannot be maintained unless the property of which the plaintiff has been

deprived has been converted into money. But other cases decide that, if the defendant has converted the property in any manner to his own use, that is sufficient. The following are illustrations: Trading off the property for other property, turning one's cattle wrongfully into another's field and pasturing them there, employing an apprentice without the master's assent, and so on. In all these cases it will appear all the elements of an implied contract are found, and we can conceive of no sufficient reason for denying the right to bring *assumpsit*. 'If the wrongdoer has not sold the property, but still retains it, the plaintiff has the right to waive the tort and proceed upon an implied contract of sale to the wrongdoer himself; and in such event he is not charged up for money had and received by him to the use of the plaintiff. The contract implied is one to pay the value of the property as if it had been sold to the wrongdoer by the owner.' But, by all the authorities, it is conceded that, where the act is a naked trespass, an action of *assumpsit* cannot be maintained, because the elements of an *assumpsit* are wanting. In most cases this is clear enough. Suppose one commits an assault and battery upon another, there is absurdity in the suggestion of a contract that the one party should permit this and the other should pay for it a reasonable compensation. Suppose his cattle have invaded his neighbor's premises and trampled down and destroyed his crops, the ground for an implication of contract is equally wanting. There is a wrong, nothing more and nothing less. We cannot imply a contract that one party should proceed to destroy the other's crop and then pay him for it. That is an unnatural transaction, and we cannot suppose it would take place except as a wrongful act. But, where a trespass is committed, and trees or mineral is severed from the land and taken by the trespasser and converted to his own use, *assumpsit* will lie for the value of the material so converted." 1 Cooley, Torts, §§ 109-111. In Addison on Torts a much briefer consideration is given this subject. The author, however, adopts the rule as stated by Cooley. "If a man [he says] has taken possession of property and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrongdoer, and sue him for a trespass, or for a conversion of the property, or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and, if he has once affirmed his acts and treated him as an agent, he cannot afterwards treat him as a wrongdoer, nor can he affirm his acts in part and avoid them as to the rest." Addison, Torts, Wood's ed.

§ 52; *Downs v. Finnegan*, 58 Minn. 112, 49 Am. St. Rep. 488, 59 N. W. 981. In *Van Fleet on Former Adjudication*, vol. 1, § 153, we find this statement of the law: "A trespass upon land and a conversion of goods in one continuous transaction constitutes only one cause of action, so that a recovery for the goods, or for the trespass, bars an action for the other." The case of *Johnson v. Smith*, 8 Johns. 383, is in point. The action was one of trespass *quare clausum fregit*, and for cutting and carrying away wheat. The defendant pleaded a former suit against him for the wheat, in bar, and the plea was held good. In *Savage v. French*, 13 Ill. App. 17, the plaintiff brought an action of *quare domum fregit*. The defendant pleaded in bar a judgment against him in favor of plaintiff in a previous action of replevin for the taking of the same goods. The court held that the judgment in the replevin suit was a bar to the action of trespass for the taking of the same goods, the original cause of action being merged in the judgment.

While we have found no decision of this court upon the question involved, based upon the precise state of case here presented, the doctrine we announce has nevertheless received its approval. Thus, in *Hall v. Forman*, 82 Ky. 505, which was an action to recover upon an attachment bond the special damages embraced by it, it was held that a previous recovery against the principal in the bond, of general damages in an action for the wrongful and malicious suing out of the attachment, was a bar to the action on the bond. In the opinion it is said: "While the two actions differ not only in form, but as to parties, as well as the testimony necessary to establish each, and also as to the extent of the recovery, yet the entire damage is the result of the one act or wrong, and each action is *pro eadem causa*, or for the wrongful suing out and levy of the attachment. . . . If one trespasses upon another, and, in doing so, carries away the latter's horse, the owner may waive the trespass and sue for the value of the horse; but, if he does not do so, and sues for the trespass, he could not thereafter sue for and recover the value of the horse, although he may not have sought in the first action to recover for the taking of the horse." Such a splitting of a cause of action as appellants have attempted by the institution of this action the law will not tolerate. They might, as before suggested, by suing in the Whitley, instead of the Pulaski, circuit court, have recovered for the trespass to the land and also the value of the timber, but, having failed to do this, and made their election to sue for the value of the timber alone in a court

which had not jurisdiction of the trespass to the land, they are bound by that election. And had they first sued in the Whitley circuit court for the value of the timber alone, the effect would have been the same. In *Pilcher v. Ligon*, 91 Ky. 228, 15 S. W. 513, it was held that, "where one has sued for a part of an entire demand, he will not be allowed to sue for the residue in another action; and this is true, although the court in which the first suit was brought did not have jurisdiction of the full amount of plaintiff's claim, and although the judgment was for defendant." It is not always necessary that there should be a taking of proof in order to make the judgment rendered in one case a bar in another. A judgment dismissing a petition is a bar to another action for the same relief, provided the determination has reached the merits of the case, whether the facts upon which the court acted were shown by evidence, or were averred in the petition and admitted by demurrer. *Maize v. Bowman*, 93 Ky. 205, 17 L.R.A. 81, 19 S. W. 589.

We cannot suppose appellants labored under any misapprehension as to their rights at the time of bringing the first action. That they acted understandingly, as well as voluntarily, at the time, is shown by the waiver of the trespass expressly made in the petition in that action. The legal definition of the word "waive" is thus stated by Webster: "To throw away; to relinquish voluntarily, as a right which one may enforce if he chooses; to desert; to abandon." The same author defines the word "waiver" as "the act of waiving, or not insisting on some right, claim, or privilege." As appellants put themselves on record in the first action as waiving, and therefore surrendering, the right to recover for any injury resulting from the alleged trespass committed by appellee and Dennis Brothers, except as to the value of the timber taken, and that issue on the trial of that action was determined on the merits in appellee's favor, they cannot complain of the ruling of the lower court holding the judgment in that case a bar to the recovery sought in the last action. The ruling of the court was manifestly correct.

We do not mean to be understood as holding that the question of title to the lands described in the petition was determined or involved in the first action. If appellee is wrongfully in possession of the lands, or any part thereof, appellants may maintain an action in ejectment to recover it, if they are in fact the owners of it; and in such action, if entitled to recover the land, they may also recover for its detention or use and occupation by appellee, or may, by separate action, recover therefor. Civil

Code Prac. § 83, subsec. 2; Burr v. Woodrow, 1 Bush, 602; Shean v. Cunningham, 6 Bush, 123; Walker v. Mitchell, 18 B. Mon. 541. Our decision goes no further in the case before us than to hold that, upon the record as presented, the lower court's judgment sustaining appellee's plea in bar was proper.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

W. S. HAYS, Appt.,

v.

B. F. MEYERS.

(32 Ky. L. Rep. 832, 107 S. W. 287.)

Sale — fraud — setting aside.

The sale of a remainder at the price it was worth if the life tenant was in good health will be set aside, where the purchaser, with knowledge that the life tenant was on his deathbed, sought the remainderman, and, with knowledge of his ignorance of the facts, gave a misleading answer to a question as to how the life tenant was getting along, with the object of affirmatively deceiving him, and thereby secured the trade.

(January 31, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Metcalfe County setting aside a sale of an interest in real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Duff & Hutcherson for appellant.

Messrs. Porter & Sandige and Lewis McQuown for appellee.

Carroll, J., delivered the opinion of the court:

The single question presented by this appeal is whether the concealment of the fatal illness and impending death of a life tenant from the owner of the remainder interest

Case Note. — Effect of misrepresentation or suppression of truth as to the health of life tenant upon a sale of the remainder interest.

A very thorough search has resulted in the finding of but one other case on the subject of this note, and there the remainderman was induced to assign his interest in an estate to another remainderman for an inadequate price, on the express representation, falsely made, that the life tenant was hale and hearty, whereas she was at the time very ill; and the court held that the transfer, having been procured by false and fraudulent representations as to the health of the life tenant, was therefore void. Obney v. Obney, 28 Pa. Super. Ct. 116. 17 L.R.A. (N.S.)

by a purchaser of the remainder is sufficient to authorize a rescission of the contract.

The appellee was the owner of an undivided interest in a tract of land in remainder, subject to the life estate of Mrs. Carnes. The remainderman had no knowledge or information that the life tenant, who lived about 20 miles from him, was dangerously ill, but the appellant, W. S. Hays, who lived in the same neighborhood with the life tenant, knew of her dangerous sickness, and went to the home of appellee and purchased the remainder from him for \$600, which was the price fixed by the remainderman when he knew the life tenant was in good health. Hays spent the night preceding his purchase with appellee, but failed to inform him of the serious sickness of the life tenant, who died the day after the contract of sale and purchase was executed. The death of the life tenant converted the remainder into a fee worth \$1,200. No inquiry was made by appellee concerning the health or condition of Mrs. Carnes, nor did appellant Hays volunteer any information concerning it, or in any other manner mislead or deceive appellee in respect to her anticipated death, unless the following question and answer may be construed to be an inquiry and a deceptive answer. Appellant was asked by appellee, "How Mr. and Mrs. Carnes were getting along?" and he replied, "He thought, they were getting along a little smoother than they had been." That, after obtaining knowledge of the critical illness of the life tenant, and in anticipation of her speedy demise, appellant visited the home of appellee for the purpose of purchasing their interest in remainder, is conceded.

The question presented is a very narrow one. On behalf of appellant, it is said that he was under no legal obligation to impart to appellee the information in his possession concerning the condition of the life tenant, but only to refrain from saying or doing anything that would affirmatively deceive or mislead him; and that his answer to the query "How they were getting along?" did not have this effect. For appellee, it is insisted that he was ignorant of the material facts in the possession of appellant, and was induced by his ignorance to make the contract; that appellant, with knowledge of his ignorance, by his failure to speak, practised a fraud upon him, or else by the evasive and deceptive answer to the question propounded misled and deceived him. A person may with perfect honesty and propriety use for his own advantage the superior knowledge of property he desires to purchase that has been acquired by skill, energy, vigilance, and other legitimate means; and in the ordinary business and commercial affairs of the world he is not un-

der any legal obligation to disclose to the person he is trading with the reasons that influenced him to desire the property, or his views as to its value, or the sources of information at his disposal. Nor need he disclose the knowledge that he has concerning the circumstances or condition that may depreciate or enhance its value. If any other rule were adopted, it would have a depressing tendency on trade and commerce by removing the incentive to speculation and profit that lies at the foundation of almost every business venture. Every purchaser of land or other property of value buys it because he believes he can make a profit on the investment, or because he needs it in his business or for some purpose of his own; and he is not required to explain the reasons that induce him to make the purchase, or give to the seller any information concerning the purpose to which he intends to put the property.

The following authorities illustrate the prevailing opinions upon this subject entertained by text writers and courts of last resort: In 20 Cyc. Law & Proc. p. 65, it is said: "Although a prospective purchaser has special knowledge of facts which enhance the value of the property, and the vendor is ignorant of these facts, the purchaser is ordinarily under no duty to disclose them to the vendor, and is not liable in an action of deceit for failure to do so. But if, in such a case, he volunteers to convey information which may influence the vendor's conduct in making the sale, he is bound to tell the whole truth; and a fraudulent misrepresentation of a material fact will render him liable. . . . Where the parties deal on equal footing, and the facts in question are equally open to the knowledge of the vendor, the general principles requiring reasonable investigation or inquiry are applicable." In 14 Am. & Eng. Enc. Law, 2d ed. p. 66, the editor states the rule as follows: "It is a general rule that the mere failure of a party to a contract to disclose material facts—that is, mere silence without more—does not amount to fraud if no inquiry is made by the other party. Something must be said or done to conceal the truth, or there must be a partial or fragmentary statement, or else the relation of the parties or the nature of the subject-matter of the contract must be such as to impose a legal or equitable duty to disclose all material facts." In Taylor v. Bradshaw, 6 T. B. Mon. 145, 17 Am. Dec. 132, we find this statement: "Fraud may, no doubt, be, and frequently is, committed by the suppression of truth as well as by the suggestion of falsehood; and it is equally competent for the court to relieve against a fraud whether it be perpetrated in the one way or the other. By suppressing the truth,

the deception may often be as base, and the injury to others as great, as by the suggestion of falsehood. But the failure to disclose to others whatever is known to us cannot with any propriety be at all times a suppression of the truth. From those who have reason to expect information from us the truth should not be withheld; but such as look not to us for information, and expect no disclosure from us, have no cause to complain of our silence, and to reproach us for not speaking, with having suppressed the truth." In Williams v. Beazley, 3 J. J. Marsh. 577, the court, in approving the quotation from Taylor v. Bradshaw, further said: "The Supreme Court of the United States has decided that the purchaser of property does not legally commit fraud by failing to communicate to the seller a knowledge of existing facts of which the seller is ignorant and the purchaser informed, although such facts, if known, would operate directly to enhance the value or price of the property. Whatever the moralists may think of these doctrines, the jurist is bound by them." In Stewart v. Wyoming Cattle Ranch Co. 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. Rep. 101, the court said: "In an action of deceit, it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment. . . . A suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." In Akers v. Martin, 110 Ky. 335, 61 S. W. 465, the court said: "If, in addition to a party's silence, there is any statement, word, or act on his part which tends affirmatively to a suppression of the truth, to covering up or disguising the truth, or to a withdrawal or distraction of a party's attention from the real facts, then the line is overstepped, and the concealment becomes fraud. . . . In other words, while a party may keep absolute silence and violate no rule of law or equity, yet, if he volunteers to speak or to convey information which may influence the conduct of the other party, he is bound to tell the whole truth; and a false

or fraudulent misrepresentation of a material fact which would be important for the vendor to know affords ample ground for the interposition of a court of equity to relieve against the consequence of such fraud." In *Mills v. Lee*, 6 T. B. Mon. 91, 17 Am. Dec. 118; *Bowman v. Bates*, 2 Bibb, 47, 4 Am. Dec. 677, and *Smith v. Fisher*, 5 J. J. Marsh. 188, other illustrations involving questions in some respects like the one before us can be found. From these authorities the rule may be deduced that, when the parties are dealing at arms' length, and there is no relation of trust or confidence between them, and no representation or statement made that would have a tendency to deceive or mislead, and there are no special circumstances imposing a duty to speak, mere silence or the nondisclosure of facts in the possession of one of the parties will not amount to such fraud as would authorize a rescission of the contract, or justify a refusal to specifically enforce it, although in every case the purchaser will not be permitted to rely on his silence as a defense, as there are times and occasions when it is the duty of a person to speak in order that the party he is dealing with may be placed on an equal footing with him, as when the knowledge he possesses is not within the fair and reasonable reach of the other, or of such a character that, by the exercise of diligence, it could be discovered, or it is not open alike to both parties. And if any relation of trust or confidence exists between the parties, or any statement or representation is made that does or might create a wrong impression, or there is a failure to impart information that is asked for, and the knowledge of which would affect the value of the property, or the acts or conduct of one of the parties is reasonably calculated to deceive or mislead the other, or the circumstances surrounding the parties and the transaction are such as to make it the duty to disclose the information not within the knowledge of the other, equity will afford relief. In some jurisdictions the courts have gone so far as to hold that each party is bound in every case to communicate to the other his knowledge of material facts provided he knows the other to be ignorant of them, and they be not open and naked or equally within the reach of his observation. An examination of the various decisions will show that a great many of them are on the narrow line that separates fair and legitimate contracts from those that are tainted by fraud; and hence the courts have virtually come to the point of adjudging each case by the facts disclosed by the record. It will readily be perceived that it is difficult to set down any fixed rules that may be followed, especially in cases where strangers are dealing with

each other, and no active fraud is practised or affirmative misrepresentation indulged in, and where only a deceptive answer or a studied silence may be seized hold of as evidence of fraud. While the tendency of the courts is to allow the utmost freedom in business and commercial transactions, and not to impose upon traders restrictions that would deny speculation, competition, and profit, at the same time, where gross injustice has been perpetrated, and valuable property has been acquired at an inadequate price, the slightest evidence of fraud will be seized upon to relieve the injured party; and it is a rare case when courts of equity cannot find some means of redress if the facts authorize it.

In the case before us the appellee was in total ignorance of the fact that the life tenant was on her deathbed. Appellant, with actual knowledge of her impending death, visited appellee for the purpose of buying his interest at such a price as it would be worth with the life tenant in good health. If no inquiry had been made, or question asked, by appellee, concerning the life tenant, and appellant had refrained from any act or word that might have a tendency to mislead or deceive him concerning her health, it would present a question that is not before us in this record. But, when appellee inquired of appellant how the life tenant was "getting along," and he replied, "He thought they were getting along a little smoother than they had been," his response was not only deceptive but misleading. The inquiry was broad enough to embrace the condition of the life tenant's health, and ordinarily might fairly be said to include it. So that, when appellant, without giving any intimation that the life tenant was dying, or disclosing in any way his knowledge of her condition, replied he thought they were "getting along a little smoother than they had been," his purpose in making this character of reply was manifestly to avoid giving him the information that he must have understood his question called for. It is clear that his object was not only to withhold from him the information in his possession, but to affirmatively deceive him by leaving the impression that there had been no immediate change in the life tenant's condition, or, if there had been, that it was for the better. Under the facts of this case, if appellant's contention was sustained, the courts would be used as an agency to enable him to perpetrate a wrong and to accomplish a fraud, when one of the ends of the law as correctly administered is to withhold relief from persons who seek its aid to practise fraud.

The judgment of the lower court must be affirmed.

LOUISIANA SUPREME COURT.

CHARLES E. LE BLANC, Appt.,
v.ORLEANS ICE MANUFACTURING COM-
PANY.

(121 La. 249, 46 So. 226.)

Nuisance — operation of ice plant.

The location and operation of factories and other works likely to disturb neighbors by smoke, smells, noise, etc., must be determined by the police regulations or customs of the place. Civil Code, art. 669. Unavoidable noises resulting from the operation of an ice plant constructed under a municipal permit furnish no basis for enjoining its operation as creating a private nuisance.

(April 13, 1908.)

Headnote by LAND, J.

Case Note. — Noise with or without vibration incident to lawful industrial business, as a nuisance.

This note is limited to cases in which the alleged nuisance consisted of noise alone, or noise accompanied by vibrations which affect the sensibilities only, and does not include cases where there was, in addition to the noise, some other element of nuisance, such as smoke, disagreeable odors, noxious vapors, etc. And the note is also confined to cases involving noise and vibration incident to a lawful industrial business; and cases involving noise arising from other sources, such as the ringing of bells, blowing of whistles, the conduct of places of amusement, etc., have been excluded.

Upon the subject of keeping barking dogs as a nuisance, see case note to Herring v. Wilton, 7 L.R.A.(N.S.) 349.

The cases generally recognize that noise alone, or noise accompanied by vibration which affects the sensibilities only, and does not cause any actual physical damage to the adjoining property, may be a nuisance which a court of equity will enjoin.

There can be no fixed standard as to what noise would constitute a nuisance and what would not, as the character of the locality in which the business is conducted must necessarily influence the decision. What would constitute a nuisance in one case might be entirely proper in another locality; and this fact is recognized in the majority of the cases.

As was said in Rushmer v. Polsue [1906] 1 Ch. 234, the standard of comfort differs according to the situation of the property and the class of people who inhabit it.

And in Broder v. Saillard, L. R. 2 Ch. Div. 692, in an action for an injunction to restrain the keeping of horses in a stable, the court said: "It is no answer to say that the defendant is only making a reasonable use of his property, because there are many

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in defendant's favor in an action brought to abate an alleged nuisance and to recover damages. Affirmed.

The facts are stated in the opinion.

Mr. Frank McGloin for appellant.

Mr. Phillip Joseph Patorno for appellee.

Land, J., delivered the opinion of the court:

This is a suit to abate an alleged nuisance by injunction and to recover damages. The plaintiff alleges, in substance, that the operation of the defendant's ice plant, by day and by night, produces noises and vibrations, which are a continual source of annoyance and distress to petitioner and his family, residing on the adjoining premises, and which deprive them of necessary rest and sleep at night. The petition charges

trades and many occupations which are not only reasonable, but necessary, to be followed, and which still cannot be allowed to be followed in the proximity of dwelling houses, so as to interfere with the comfort of their inhabitants."

In *Eller v. Koehler*, 68 Ohio St. 51, 67 N. E. 89, the judgment of the lower court, granting an injunction, was reversed, for the reason that the judge in his charge to the jury proceeded upon the theory that the character of the neighborhood in which the business alleged to be a nuisance was carried on was not to be considered.

And in *Hafer v. Guynan*, 7 Pa. Dist. R. 21, it was held that an injunction would not issue to restrain the operation of a boiler factory, where it was located in a neighborhood given over to a great extent to industries of like character, and to some extent to the residences of the employees of such industries.

So, also, in *Straus v. Barnett*, 140 Pa. 111, 21 Atl. 253, it was held that the noise caused by the defendants in their business as file makers would not be enjoined, where the works were located in a neighborhood exclusively devoted to manufacturing purposes.

And the annoyance and discomfort suffered by the complaining party must be such as would be suffered by persons of ordinary sensibilities.

Thus, in *Shaw v. Queen City Forging Co.* 7 Ohio N. P. 254, the court said: "The standard must be notions of comfort entertained by persons of ordinary susceptibilities, and not by those of fanciful or fastidious tastes, nor by those not sensible of any annoyance."

And in *Dittman v. Repp*, 50 Md. 523, 33 Am. Rep. 325, the court said: "The authorities are numerous which hold that noise alone, if it be of such character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility, may create a nuisance and be the

that the operation of said plant constitutes a continuous nuisance, which has damaged the petitioner in the sum of \$5,000.

For answer the defendant denied all the allegations of the petition, except as specially admitted, and averred that they had constructed and were operating their plant under a permit from the municipal authorities of the city of New Orleans, and had invested more than \$125,000 in the enterprise, and that the plaintiff, residing on the adjoining premises, did not oppose the granting of said permit by the city council, and never objected to the construction and operation of defendant's ice plant prior to the institution of the present suit. The respondent, further answering, specially denied that the operation of said plant was accompanied by loud, constant, unusual, and disagreeable noises and vibrations, and specially denied that their business therein conducted was a nuisance, either public or private.

subject of an action at law or injunction from a court of equity, though such noise may result from the carrying on of a trade or business in a town or city."

So, in *Seligman v. Victor Talking Mach. Co.* (N. J. Ch.) 63 Atl. 1093, the court quotes with approval the following statement from *Cleveland v. Citizens Gaslight Co.* 20 N. J. Eq. 205: "The discomforts must be physical, not such as depend upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. Other persons or classes of persons whose senses have not been so hardened, and who, by their education and habits of life, retain the sensitiveness of their natural organization, are entitled to enjoy life and comfort as they are constituted."

It is scarcely necessary to say that a business can be lawfully conducted during the daytime without in any way being detrimental to the surrounding residences, while the noise caused by the same business conducted at night would create an unbearable nuisance. As will be noted in the cases following, an injunction has been frequently granted restraining the operation of machinery during the nighttime only.

In *McCann v. Strang*, 97 Wis. 551, 72 N. W. 1117, the court said: "The real test, it is said, whether a noisy trade is a nuisance in a particular locality and to a particular person in the enjoyment of his property, is whether it is of such a character as would be likely to be physically annoying to a person of ordinary sensibilities, or whether it is carried on at such unreasonable hours as to disturb the repose of people dwelling within its sphere."

Observing the general rules set out above, the following cases held the noise or busi-

ness indicated to be a nuisance under the circumstances:

Ladies' Decorative Art Club's Appeal, 10 Sadler (Pa.) 150, 22 W. N. C. 75, 13 Atl. 537, where the defendants conducted a school for instruction in the arts of metal work and wood carving in the house adjoining plaintiff's; *Roth v. Conly*, 21 Ky. L. Rep. 1623, 55 S. W. 881, where the noise complained of was made by unreasonable operation of defendant's business in a house or shed adjoining the plaintiff's residence; *Lipman v. Pulman*, 91 L. T. N. S. 132, where the noise and vibration of a printing office interfered with the quiet enjoyment of an adjoining house used partly as a residence and partly for the business of a green grocer; *Yocum v. Hotel St. George Co.* 18 Abb. N. C. 340, where the operation of electric-light engines in the cellar of a hotel caused such noise and vibration as to render adjoining property materially uncomfortable and to interfere with the carrying on of ordinary conversation; *Braender v. Harlem Lighting Co.* 2 N. Y. Supp. 245, where untimely and unusual noises were made by an electric-lighting plant, and the vibration caused a jarring of the adjoining houses such as might be caused by the passing of a fire engine or a heavy ice wagon; *Scott v. Firth*, 4 Fost. & F. 349, where the operation of a rolling mill near the houses of plaintiff caused such noises and vibration as to cause the tenants of the latter to leave; *Sturges v. Bridgman*, L. R. 11 Ch. Div. 852, where the noise and vibration of defendant's confectionary factory prevented the plaintiff, a physician, from using a building erected in his garden especially for consulting purposes; *Roskell v. Whitworth*, 19 Week. Rep. 804, where an iron and steel factory was located near a church and school; *Elliotson v. Feetham*, 2 Bing. N. C. 134, where a workshop was located near a residence in a residential district; *Wallace v. Auer*, 10 Phila. 356, where a silver and gold beater set up his business in a residential neigh-

After hearing a large number of witnesses on each side, and the argument of counsel, the judge *a quo* rendered judgment in favor of the defendant. Plaintiff has appealed. The issues are purely of fact, and after carefully reading and considering all the evidence adduced, pro and con, we are not prepared to say that the judge below erred in his conclusions. The location and operation of factories and other works likely to disturb neighbors by reason of smoke, smells, etc., must be determined by the rules of the police or the customs of the place. Civil Code, art. 669. The evidence shows that the defendant constructed and is operating its plant under a permit from the municipal authorities. The plaintiff made no opposition to the granting of this permit. It is not charged that the defendant has violated any of the requirements of city ordinances relative to factories. The permit to operate a manufacturing plant at

ness indicated to be a nuisance under the circumstances:

Ladies' Decorative Art Club's Appeal, 10 Sadler (Pa.) 150, 22 W. N. C. 75, 13 Atl. 537, where the defendants conducted a school for instruction in the arts of metal work and wood carving in the house adjoining plaintiff's; *Roth v. Conly*, 21 Ky. L. Rep. 1623, 55 S. W. 881, where the noise complained of was made by unreasonable operation of defendant's business in a house or shed adjoining the plaintiff's residence; *Lipman v. Pulman*, 91 L. T. N. S. 132, where the noise and vibration of a printing office interfered with the quiet enjoyment of an adjoining house used partly as a residence and partly for the business of a green grocer; *Yocum v. Hotel St. George Co.* 18 Abb. N. C. 340, where the operation of electric-light engines in the cellar of a hotel caused such noise and vibration as to render adjoining property materially uncomfortable and to interfere with the carrying on of ordinary conversation; *Braender v. Harlem Lighting Co.* 2 N. Y. Supp. 245, where untimely and unusual noises were made by an electric-lighting plant, and the vibration caused a jarring of the adjoining houses such as might be caused by the passing of a fire engine or a heavy ice wagon; *Scott v. Firth*, 4 Fost. & F. 349, where the operation of a rolling mill near the houses of plaintiff caused such noises and vibration as to cause the tenants of the latter to leave; *Sturges v. Bridgman*, L. R. 11 Ch. Div. 852, where the noise and vibration of defendant's confectionary factory prevented the plaintiff, a physician, from using a building erected in his garden especially for consulting purposes; *Roskell v. Whitworth*, 19 Week. Rep. 804, where an iron and steel factory was located near a church and school; *Elliotson v. Feetham*, 2 Bing. N. C. 134, where a workshop was located near a residence in a residential district; *Wallace v. Auer*, 10 Phila. 356, where a silver and gold beater set up his business in a residential neigh-

a particular place carries with it the privilege of using all machinery necessary for the particular work. The owner of such a plant must take all proper precautions to prevent noise, smoke, etc., from becoming a nuisance to the neighbors, and to that end must comply with the requirements of all the police regulations on the subject-matter.

This being done, unavoidable noise, smoke, etc., must be considered as an inconvenience to which the neighbors must submit for the public good. Of course, a city ordinance or permit cannot validate a nuisance. *Blanc v. Murray*, 36 La. Ann. 162, 51 Am. Rep. 7. The noise of a factory is not a nuisance *per se*. *New Orleans v. Lagasse*, 114 La. 1055, 38 So. 828.

In *Frolicher v. Oswald Ironworks*, 112 La. 709, 64 L.R.A. 228, 35 So. 821, and 118 La. 1077, 43 So. 882, there was no permit from the municipal authorities, and the defendant was operating boiler and sheet iron

works, thereby causing intolerable noises and also injurious vibrations.

The evidence shows beyond dispute that the machinery of defendant's plant operates with little or no noise and causes no vibration. There is no steam exhaust. The only noise of any consequence results from the handling of large ice cans, and this noise seems to be practically unavoidable. The witnesses differ widely as to its intensity.

The plaintiff did not take the stand in his own behalf, but was content to file his *ex parte* affidavit for the injunction. We think the evidence preponderates in favor of the defendant, whose witnesses testified from inside knowledge of the working of the plant and of the noises thereby produced. Many of the noises testified to by plaintiff's witnesses were either imaginary or did not emanate from the ice plant.

Judgment affirmed.

borhood; *Frolicher v. Oswald Ironworks*, 111 La. 705, 64 L.R.A. 228, 35 So. 821, where a boiler factory was conducted upon premises in a neighborhood not strictly residential, and the plaintiff himself conducted a saddlery business upon his premises; *Rushmer v. Polsue* [1906] 1 Ch. 234, where the machinery in a printing shop separated by a party wall from a house used partly for residence and partly for conducting a dairy business was operated at night; *Farell v. Foster*, cited in 34 Phila. Leg. Int. 88, where a trip hammer was operated between the hours of seven in the evening and six in the morning; *Dennis v. Eckhardt*, 3 Grant, Cas. 390, where a tinsmith kept up his business from daylight until about 11 o'clock at night in a shop constructed of thin boards and located about 8 feet from plaintiff's sleeping apartments; *Seligman v. Victor Talking Mach. Co.* (N. J. Ch.) 63 Atl. 1093, where a manufacturing plant was located in the same block with plaintiff's dwelling apartments, and operated at night; *Shaw v. Queen City Forging Co.* 7 Ohio N. P. 254, where the operation of a trip hammer in defendant's carriage hardware factory was carried on night and day; *Broder v. Saillard*, L. R. 2 Ch. Div. 692, where the ordinary noise made by the stamping of horses in a stable interfered seriously with the rest and comfort of the occupants of a house built close to, but not actually touching, the walls of the stable; *Ball v. Ray*, L. R. 8 Ch. 467, where a new occupier of a stable so altered the building that the noise of the horses was an annoyance to his next-door neighbor; *Bartlett v. Marshall*, 44 Week. Rep. 251, where the noise was caused by newspaper carts and the shouting of newsboys at an early hour of the morning.

In some cases an increased noise will be restrained, although the original noise was not a nuisance.

Thus, in *Heather v. Pardon*, 37 L. T. N. S. 393, it was held that the increased noise and vibration caused by a change of ma-

chinery would be enjoined, although the original noise and vibration were established by prescription.

And, in *Ball v. Ray*, supra, it was held that, where the increased noise from a stable seriously interfered with the welfare of the next-door neighbor, an injunction would issue restraining such noise, although the building had previously for a long time been used as a stable.

An injunction will not issue to enjoin the conduct of a lawful business where there has been no actual injury to the plaintiff.

Thus, in *McCaffrey's Appeal*, 105 Pa. 253, 341, the court refused to grant an injunction restraining the operations of a steam laundry on the second floor of a building, where it did not appear that the plaintiffs, who occupied the first floor of the building, or their employees, were injured in any way.

So, also, in *Scott v. Houtp*, 8 Kulp 42, it was held that the mere noise made by be granted to restrain the noise made by steam planers, circular saws, etc., where, although the noises were discomfoting, they were not actually injurious to health, nor unusual or peculiar.

And in *McCann v. Strang*, 97 Wis. 551, 72 N. W. 1117, it was held that the buzzing noise made by an electric-light plant, although distinctly heard at the plaintiff's building, was not a nuisance, and would not be abated, where it produced no material injury to the plaintiff, and was not carried on after 11 o'clock at night.

In *McKeon v. See*, 4 Robt. 449, Affirmed in 51 N. Y. 300, 10 Am. Rep. 659, it was held that mere noise to be a nuisance must be unusual, ill-timed, or deafening; and following this definition it was held in *Butterfield v. Klaber*, 52 How. Pr. 256, that the noise made by cutting and polishing marble by machinery during regular working hours, which did not interfere with ordinary conversation in the room where the machinery was at work, was not a nuisance.

Nor will an injunction be granted to restrain a lawful business, where the business is conducted in a reasonable and careful manner and the noise complained of causes but trifling injuries.

Thus in *McGuire v. Bloomingdale*, 33 Misc. 337, 68 N. Y. Supp. 477, in an action to restrain the running of pneumatic blowers and electric-light engines and machinery, so as to cause vibration and noise on plaintiff's premises, it was held that the running of the blowers was a reasonable use of the premises, although they made a puffing noise plainly audible in certain parts of plaintiff's house when the windows were open.

So, also, in *Eller v. Koehler*, 68 Ohio St. 51, 67 N. E. 89, in an action to recover damages for injuries alleged to have been caused by the defendant's machinery on an adjoining lot, the judgment of the trial court was reversed upon the ground that the judge erred in refusing to instruct the jury that the plaintiff could not recover if they found that the injuries were trifling, or if the defendant's business was conducted in a careful and legal way in a locality given over to businesses of like character.

And in *Romer v. St. Paul City R. Co.* 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825, it was held that an injunction would not issue to enjoin the operation of street cars over tracks and curves entering defendant's barns, in close proximity to the plaintiff's house, where it appeared that the location of the tracks and curves was not an improper or unreasonable one, and that the operation of the cars generally was authorized by the ordinances of the city.

So an injunction was refused in *Penrose v. Nixon*, 140 Pa. 45, 21 Atl. 364, where the alleged nuisance consisted of the moving of stage properties, etc., from a theater building late at night, it appearing from the evidence that there was no unnecessary noise made by the defendants.

Nor will an injunction issue where the evidence as to the injury is conflicting.

Thus, in *Miller v. Schindle*, 15 Pa. Co. Ct. where the evidence was very conflicting as to both the noise and the vibratory effect of printing presses, it was held that the lower court committed no error in refusing to grant an injunction, in view of the great damage which the defendant would sustain if he were enjoined against pursuing his printing business.

So, in *Hafer v. Guynan*, 7 Pa. Dist. R. 21, it was held that an injunction will not issue to restrain the operation of a legal business where the evidence leaves any doubt as to the injuries caused.

So, also, in *Scott v. Houpt*, supra, the court said: "There must be an absolute invasion of the rights of those affected by it [the noise] before it can be so condemned, and unless the business in which it arises is a nuisance *per se*,—which it seems to me can almost never be the case so far as noise only is concerned,—the fact that it is a nuisance must be clearly established before a court of equity can be asked to interfere."

And in *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 804, 12 L.R.A. 53, 12 S. E. 1085, in an action to enjoin the defendant from running its furniture factory in such a manner as to produce loud and injurious noises which interfered with the plaintiff's physical comfort and the enjoyment by him of his house, lot, and premises, it was held that an injunction would not issue upon the ground that courts of equity would not enjoin a legal manufacturing business unless the fact of nuisance were made in some way to appear clearly, beyond all ground for fair questioning.

Numerous other cases may be cited which present some unusual phase of the question. The noise made by pumps necessarily used in sinking a shaft in a lot adjacent to plaintiff's residence, under the powers granted by certain water acts, was held in *Harrison v. Southwark & V. Water Co.* [1891] 2 Ch. 409, not to be a nuisance at law, in the absence of any negligence in the conduct of the business.

But, in *Morton v. New York*, 140 N. Y. 207, 22 L.R.A. 241, 35 N. E. 490, it was held that the right of a city to build a pumping station for waterworks on its own land so near to the premises of a private owner that buildings subsequently erected by him will be made untenable by noise and vibration of the pumping machinery, is not conferred, even if the legislature has power to confer it without compensation to him, by general authority to locate necessary structures and machinery for the waterworks.

In an action to restrain a railroad company from bringing animals into a certain station upon the ground that the noise made by the animals and drivers was a nuisance, it was held in *Truman v. London, B. & S. C. R. Co.* L. R. 25 Ch. Div. 423, that an injunction would be granted as the railroad company was not obliged under its charter to carry cattle or to maintain stations for them, and the defendant had not shown the impossibility of erecting a station anywhere else without its being a nuisance.

In *Shepard v. Hill*, 151 Mass. 540, 24 N. E. 1025, in an action for a nuisance which consisted of the noise of operating a paper mill night and day within a short distance of plaintiff's house, it was held no error to admit evidence to show the kind and amount of noise produced by the paper mill, that the noise was not greater than that of other paper mills of a similar character and capacity, that the machinery used was the ordinary and usual kind of machinery, that it was the custom of other mills to run night and day, and that a paper mill could not compete with other mills unless it did run night and day.

The giving of music lessons within reasonable hours was held not to be a nuisance in *Christie v. Davey* [1893] 1 Ch. 316. In *Curran v. McGrath*, 67 Ill. App. 566, it was held that an injunction would not be granted against the defendant's manufacturing plant was

a nuisance, and the fact that others were disturbed by the noise was no defense in an action for damages upon the ground of nuisance.

In *First Baptist Church v. Utica & S. R. Co.* 6 Barb. 313, it was held that the trustees of a church could not recover for the depreciation of their property for use for divine worship from the noise caused by the operation of a railroad in close proximity thereto, as, although the disturbance alleged might have been a public nuisance, yet as to the plaintiffs the consequences were too remote.

However, in *First Baptist Church v. Schenectady & T. R. Co.* 5 Barb. 79, an action brought by the same plaintiff against another railroad occupying the same tracks, but before the appellate term in a different department, it was held that the plaintiff had a cause of action both for damage and for an injunction.

In *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401, the court held that an injunction would not issue to restrain the nuisance of a noise created by a business which was in itself illegal, as an adequate remedy at law existed.

And in *White v. Cohen*, 19 Eng. L. & Eq. Rep. 146, it was held that equity would not interfere to enjoin a nuisance if adequate compensation therefor in damages could be recovered.

MISSISSIPPI SUPREME COURT.

W. L. GAMBRELL, Appt.,

v.

STATE OF MISSISSIPPI.

(— Miss. —, 46 So. 138.)

Dying declaration — evidence to discredit.

1. Evidence that deceased did not believe in a Supreme Being, offered to discredit his dying declaration, is not rendered inadmissible by the fact that it relates to a time a year before his death.

Evidence — admissibility — doubt.

2. A serious doubt as to the admissibility of evidence in a criminal case should be solved in favor of the accused.

(April 27, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Smith County convicting him of murder. Reversed.

Deceased was shot from ambush, and the only evidence to connect defendant with the crime was his dying declaration.

Further facts appear in the opinion.

Note. — The effect of disbelief in God upon the admissibility of dying declarations is discussed in a subject note to *Worthington v. State*, 56 L.R.A. 353, and in an opinion in the case of *State v. Hood*, 15 L.R.A. (N.S.) 448.

17 L.R.A. (N.S.)

Messrs. J. J. Stubbs, B. W. Sharrbrough, R. S. Tullas, G. R. Noble, W. H. Hughes, and Stone Deavours for appellant.

Mr. George Butler for the State.

Mayes, J., delivered the opinion of the court:

Among the many assignments of error made in this case we deem it necessary to notice only the one discussed in the opinion. The evidence upon which appellant was convicted was mainly circumstantial. The only positive proof as to who did the killing is shown by the dying declaration of deceased. Under these circumstances, and by way of impeachment of this dying declaration, which is the most damaging and conclusive testimony as to who did the killing, the defense offered a witness to show that the deceased was an infidel, and offered to prove that the deceased boasted of the fact that he did not believe in God, the devil, or anything of a like nature; that deceased was an irreligious man, and had contempt for the church, etc. The witness by whom this was sought to be proven had employed deceased, but he had quit working for him about a year before he was killed, and from that time witness had no acquaintance with him. The testimony was objected to by the state, and the objection was sustained; the court assigning as a reason for excluding this testimony that, in its judgment, it thought such testimony ought to be confined to the time the supposed dying declaration was made. In the case of *Hill v. State*, 64 Miss. 432, 1 So. 494, it was held that testimony of this character was admissible for whatever it was worth as a detraction from the weight and value of the dying declaration. Such proof is not admissible for the purpose of rendering incompetent the dying declaration; but, when the dying declaration had been admitted, such proof is admissible as affecting the value of the dying declaration, and it is proper to go to the jury for whatever it is worth. § 1919, Code 1906. The dying declaration of a party is simply a part of the evidence. It is not regarded in law as more sacred than the testimony of a witness, to say the least of it. It is subject to discredit and impeachment by any competent testimony which impairs its value.

Under our law it is a prerequisite of the right to testify that the witness shall be sworn or affirmed to speak the truth. The object of the oath or affirmation which the law requires of a witness before he may testify is to obtain a hold on his conscience by thus reminding him that there is a superhuman power to whom he will be retributively accountable for any false statements. The oath or affirmation presupposes a belief

by the party making it in that superior power which is clung to by all Christian people. As affecting the credit of any witness's testimony, it may be shown that the party introduced has no sense of the binding force of his oath or affirmation, because he does not believe in a Supreme Being. For the same reason such testimony is admissible as affecting the credit to be given by the jury to a dying declaration. It is true that, in order to render admissible a dying declaration, it need not have the sanction of an oath. Because the dying declaration is made under a sense of impending dissolution, the law considers this as imposing upon the conscience of the declarant as great an inducement to speak the truth as could be imposed by any form adopted by the law. Wigmore, Ev. § 1443; 21 Cyc. Law & Proc. p. 992. The dying declaration may be discredited by any testimony which would be permissible to discredit the testimony of the declarant, were he in court testifying. This being the case, the dying declaration may be discredited by showing that the declarant was a nonbeliever; and such testimony is for the jury to pass on, and to say to what extent it shall be allowed to affect the value of the dying declaration as evidence. It can make no difference when this state of mind existed, in so far as it affects the admissibility of such evidence. It was not necessary, in order to render this testimony admissible, that it should show that the deceased was a nonbeliever at or near the time he made the dying declaration. It was admissible on the part of the defense to show that such a state of mind existed at any time during the life of deceased, and it was for the jury to say, under the facts, whether or not deceased had reformed or been converted to the faith, and what influence it should have. It can in no way affect the right to introduce the testimony by showing that this frame of mind existed a long time prior to the date the dying declaration was made. The time when this condition of mind is shown to have existed is a matter of argument, to be made to the jury, as showing or not showing that it existed at the time the dying declaration was made, and hence as to its weight; or it was open to the state to rebut this proof of non-belief by other proof that the condition of the mind of the deceased had changed.

But all these matters were for the jury on the proof made, and could not affect the admissibility of the testimony. Wherever there is any serious doubt in the law as to whether or not certain proof is or is not permissible, a safe rule to pursue is to solve the doubt in favor of the accused and permit the testimony to go to the jury. What is here said in reference to admitting testimony 17 L.R.A. (N.S.)

in cases of serious legal doubt equally applies to the granting of instructions in favor of accused. If this policy was pursued by the trial court, it would save many reversals. On the facts in this case, we are not prepared to say, with this proof in, that the jury would have returned the same verdict; and, because of this, it is compulsory on us to reverse the case. The testimony offered was in impeachment of the most dangerous evidence in this case showing the guilt of the appellant. It was admissible, and it is not for us to say what weight would have been given to it by the jury. They had a right to hear this testimony, and to pass on it, and to give it such weight as, in their judgment, they deemed proper.

Reversed and remanded.

MISSOURI SUPREME COURT.
(Division No. 1.)

HENRY J. KOERNER, Appt.,
v.
ST. LOUIS CAR COMPANY, Respt.
(209 Mo. 141, 107 S. W. 481.)

Master — fellow servant — distinct departments.

1. One employed to paint cars in a very large car-manufacturing plant requiring various and distinct branches of labor, and who works under the general paint foreman, is not a fellow servant of the switching crew employed and superintended by the general superintendent to move cars as the exigencies of the work require, over whom the paint foreman has no authority.

Same — safe working place — duty.

2. A car manufacturer who sets a painter to work on a car owes him the duty of seeing that other cars are not run against it, and that cars pulled out are not attached to it without giving him warning of intention to move the car; and is responsible for the negligence of his servant, of whatever grade, to whom he delegates the performance of the duty.

Same — contributory negligence.

3. One sent to paint a car is not negligent, as matter of law, in failing to place his scaffold so that it will clear the car steps in case the car moves where he has a right to

Note. — Upon the question whether a servant charged with the duty to warn other servants of danger is a vice principal, see case note to Illinois Steel Co. v. Ziemkowski, 4 L.R.A. (N.S.) 1161; as to whether the duty of a railroad or street railway company with respect to signals or warnings is a delegable one, see subject note to Lafayette Bridge Co. v. Olsen, 54 L.R.A. 124; and case note to Carter v. McDermott, 10 L.R.A. (N.S.) 1103.

rely on the car not being moved without warning.

(Graves, J., dissents. Burgess, J., dissents from proposition 2.)

(January 27, 1908.)

APPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. William L. Bohnenkamp and William R. Gentry, for appellant:

The switchman was a servant in a different department from the department in which the plaintiff was employed, for whose act the master was liable.

Lanning v. Chicago G. W. R. Co. 196 Mo. 647, 94 S. W. 491; Dixon v. Chicago & A. R. Co. 109 Mo. 413, 18 L.R.A. 792, 19 S. W. 412; Parker v. Hannibal & St. J. R. Co. 109 Mo. 362, 18 L.R.A. 802, 19 S. W. 1119; Sullivan v. Missouri P. R. Co. 97 Mo. 113, 10 S. W. 852; Condon v. Missouri P. R. Co. 78 Mo. 567; Tabler v. Hannibal & St. J. R. Co. 93 Mo. 79, 5 S. W. 810; Smith v. Wabash, St. L. & P. R. Co. 92 Mo. 359, 1 Am. St. Rep. 729, 4 S. W. 129; Miller v. Missouri P. R. Co. 109 Mo. 350, 32 Am. St. Rep. 673, 19 S. W. 58; Swadley v. Missouri P. R. Co. 118 Mo. 268, 40 Am. St. Rep. 366, 24 S. W. 140; Jones v. St. Louis Southwestern R. Co. 125 Mo. 666, 26 L.R.A. 718, 46 Am. St. Rep. 514, 28 S. W. 883; Keown v. St. Louis R. Co. 141 Mo. 86, 41 S. W. 926; Schlereth v. Missouri P. R. Co. 115 Mo. 87, 21 S. W. 1110.

The duty owed by the master to furnish the servant a reasonably safe place to work could not be imposed upon any servant, whether of high or low position.

Dayharsh v. Hannibal & St. J. R. Co. 103 Mo. 570, 23 Am. St. Rep. 90, 15 S. W. 554; Moore v. Wabash, St. L. & P. R. Co. 85 Mo. 588; Metropolitan West Side Elev. R. Co. v. Skola, 183 Ill. 454, 75 Am. St. Rep. 120, 56 N. E. 171; Hannibal & St. J. R. Co. v. Fox, 31 Kan. 587, 3 Pac. 320; St. Louis, A. & T. R. Co. v. Triplett, 54 Ark. 289, 11 L.R.A. 773, 15 S. W. 831, 16 S. W. 266; Evansville & T. H. R. Co. v. Holcomb, 9 Ind. App. 198, 36 N. E. 39; International & G. N. R. Co. v. Hinzle, 82 Tex. 623, 18 S. W. 681.

The department rule is not limited to railroads.

Musick v. Jacob Dold Packing Co. 58 Mo. App. 322; Sullivan v. Missouri P. R. Co. *supra*; Condon v. Missouri P. R. Co. *supra*; Hall v. Missouri P. R. Co. 74 Mo. 298; Illinois Steel Co. v. Bauman, 178 Ill. 351, 17 L.R.A. (N.S.)

69 Am. St. Rep. 316, 53 N. E. 107; Wenona Coal Co. v. Holmquist, 51 Ill. App. 507; Hammarberg v. St. Paul & T. Lumber Co. 19 Wash. 537, 53 Pac. 727; Bellis v. Maxfield, 1 A. J. R. (Victoria) 35; Bain v. Athens Foundry & Mach. Works, 75 Ga. 718; McTaggart v. Eastman's Co. 27 Misc. 184, 57 N. Y. Supp. 222; Kielley v. Belcher Silver Min. Co. 3 Sawy. 437, Fed. Cas. No. 7,760; John Spry Lumber Co. v. Duggan, 80 Ill. App. 394; North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Leiter v. Kinnare, 68 Ill. App. 558.

Messrs. Seddon & Holland for respondent.

Gantt, Ch. J., delivered the opinion of the court:

This is an action for damages for personal injuries, commenced in the circuit court of the city of St. Louis. At the close of the plaintiff's case, the circuit court gave a peremptory instruction to find for the defendant, and a verdict was accordingly returned. After an unsuccessful motion for a new trial, the cause was appealed to this court.

The petition alleges the incorporation of the defendant, and charges that it was engaged in the business of manufacturing street cars, and, in carrying on its business, it maintained large sheds, yards, and railroad tracks, both in the yards and in the sheds, wherein cars were kept standing until they were ready to be taken out and delivered to purchasers; that, for the purpose of moving the cars from place to place in the yards and sheds, the defendant had a crew known as a "switching crew," composed of a motorman and switchman; that the motorman ran what was known as a "dummy," which was in fact an electric car, and that it was the duty of the switchman to give proper signals to the motorman, and it was the duty of the motorman to start and stop the dummy on receipt of these signals; that, in addition to having the duty of signaling to the motorman, the switchman was intrusted with the duty of coupling this dummy engine to new cars when they were ready to be taken out of the sheds, and to see that other cars standing upon the same track with the one which was to be moved were not coupled thereto, before giving the signal to the motorman to start the dummy, after it was coupled to the car which the switching crew undertook to move. It is further alleged that it was a part of the duty of the switchman to see that the cars standing upon the said track as the one to which the dummy was coupled, which cars were to be left on the said track, had their wheels properly blocked to prevent them from moving when the car to which

the dummy was attached was pulled away. It is also alleged in the petition that the motorman and switchman were under the direct supervision and orders of the general superintendent of the defendant. The petition then proceeds to state that, at the time of the accident, and for a long time prior thereto, the plaintiff was a painter by trade, and was employed by the defendant to paint cars in this said plant, and to do other work necessary in and about the finishing of the cars; that plaintiff was engaged in a different department of service from the switchman and motorman, and was a member of what was known as the "paint gang," under the direction of the paint foreman, who had no authority whatever over the motorman and switchman; that, on the 12th day of March, 1903, plaintiff had climbed upon a scaffold or trestle erected by the side of a new car, which was standing on one of the tracks in the defendant's sheds, and was at the time engaged in removing surplus putty from the edges of the windows on the outside of said new car; that, while so engaged working upon the said car, there was another new car on the same track directly in front of the one upon which the plaintiff was working, and was so close to it that the ends of the two cars touched each other, and they were fastened together in some manner, which was, and is still, unknown to the plaintiff, but plaintiff did not know at the time that they were so fastened together; that, while plaintiff was so engaged at his work, the switching crew came in with the dummy, and coupled to the car standing on the same track immediately in front of the car upon which plaintiff was working; that the switchman, after having coupled the dummy to the car in front of the one on which plaintiff was working, negligently gave to the motorman the signal to start said car in motion, without having unfastened said car from the one upon which plaintiff was working, and without having used ordinary care to see that it was not attached to the car upon which plaintiff was working. It was further alleged that the switchman on said occasion negligently failed to block the wheels of the car upon which plaintiff was working so as to prevent it from moving, and negligently failed to warn plaintiff of his intention to move the said car which he was about to move, as was his duty to do. It is also alleged that the defendant negligently failed to provide plaintiff with a reasonably safe place in which to work, and negligently failed to provide for his safety, in that the defendant, through its said switchman, carelessly and negligently gave the signal to the motorman to start the dummy in motion, and negligently caused the car upon 17 L.R.A. (N.S.)

which plaintiff was working to be moved while plaintiff was working upon the same, and negligently failed to warn the plaintiff of his intention to move the said car, and negligently failed to block the wheels of the car upon which plaintiff was working; and that the motorman started the dummy in response to the signal from said switchman, putting in motion the car to which the dummy was coupled, and that the said car, when it moved forward, pulled with it the car upon which plaintiff was working, so that the step of the car upon which plaintiff was working was caused to strike the support of the scaffold upon which plaintiff was working, and knocked the same down, throwing the plaintiff off and injuring him severely. The petition then closed with a description of the plaintiff's injuries and the damages he had sustained, and a prayer for judgment in the sum of \$15,000, together with the costs of the case.

The answer was, first, a general denial; second, a plea of contributory negligence on the part of the plaintiff; and, third, that any injuries sustained by the plaintiff were caused by the act of a fellow servant of the plaintiff, and plaintiff assumed the risk of any negligence on the part of such employee or employees. The reply was a general denial of the new matter set up in the answer.

The evidence on the part of the plaintiff tended to prove that for some time before his injury he had been employed as a car painter by the defendant in its car works, under a man by the name of Mehlin, who was the general paint foreman, having authority to hire and discharge men working as painters, about 150 of whom worked at the plant; that, on the day he received the injuries of which he complains, the plaintiff was directed, by his superior in the paint department, to work on the new car standing in one of the sheds; that, in order to reach the windows, from the edge of which he was ordered to remove the surplus putty, it became necessary for him to erect a little scaffold; that he placed the trestles supporting the scaffold as best he could, not having a very good opportunity to place it, on account of a pile of old scrap iron which was in the way; that, as it was placed, the trestle supporting the scaffold was near the side of the car, and, as it afterwards turned out, it was too near to allow the step of the car to clear it if the car was moved, but plaintiff was not expecting the car to be moved, as it was not finished; that he had been at work about three quarters of an hour, and, while working on this car, it was suddenly pulled away, and he was knocked down, and fell on a pile of iron, and received a broken arm, and his side was badly bruised, and he suffered a fracture of

the skull. The plaintiff himself testified, further, that there were five cars out on the tracks that were to be shipped that day, two on the north or inclined track, and three on the track south of the inclined track. The car on which plaintiff was working was standing east and west, and the car coupled onto it in front of this car stood in sort of a northeast position. There was a dummy car used as an electric locomotive in charge of a motorman named Fokerst and a switchman named Hensler; that this switching crew was not under the direction of the paint foreman, plaintiff's boss, and he had nothing to do with them. The plant was a very large one, and employed a large number of men in its various departments. One of the witnesses estimated the number of men employed at 2,500; others said from 1,000 to 1,500 at a time. The testimony also tended to show that, when the general superintendent wanted any cars taken out of the sheds, he sent this switching crew to any part of the yards where the cars might be; and that it had been the universal custom, before any car was moved in the sheds, for the switchmen to walk around the car, see that any car standing immediately behind it was blocked so that it could not move forward, and see that it was clear so that the car to which the coupling was made would not pull it along as it started out, and, if any workman was engaged in working upon the car, to notify and warn him of his intention to move the car. The evidence further tended to show that the workmen engaged in working upon these cars relied upon this custom, and paid no attention to the movements of the dummy unless directed by the switchman to look out. The evidence further tended to show that the car upon which plaintiff was working was so situated that a car immediately in front of it, standing upon a curve, concealed the plaintiff from the switchman as he approached with the dummy; that the switchman coupled the dummy immediately in front of the one upon which plaintiff was working, and neglected to give any warning or to ascertain whether or not any of the men were so situated that they might be injured by moving the car, and neglected to see whether the car to which the dummy was coupled was fastened in any manner to the car upon which plaintiff was working, and neglected to see that the wheels of the car upon which plaintiff was working were blocked, which last precaution was necessary in this case, from the fact that there was a slight downgrade from the place where the car upon which plaintiff was working stood toward the dummy. When the dummy started, in some manner it pulled with it the car upon

which plaintiff was working, and the step of the car upon which the plaintiff was working struck the support of the plaintiff's scaffold, and plaintiff was thrown off and severely injured. It is true that the witness Hensler, defendant's switchman, who was called by the plaintiff as a witness, testified that the car upon which plaintiff was working lacked a little bit of touching the car to which he coupled; but a number of other witnesses testified positively that the two cars were touching each other. The importance of the switchman taking all the precautions alleged to have been necessary, and which the evidence tended to show he failed to take, was shown by the fact that the men frequently worked under the cars, attaching pipes and apparatus for the air brakes, worked on scaffolds adjoining the car on the outside, and also worked inside of the cars. The plaintiff testified that at the time of his injuries he was working on the south side of the car, and the dummy came from a northeast direction; that no warning whatever was given him that the car was about to be moved. On cross-examination, he stated that he placed his carpenter's horse, upon which his scaffold was resting, in position himself; that he did not notice the steps at the end of the car, and so arranged the horse that, if the car started, it would not hit the horse, because they had always warned him to look out, and he had no thought that the car was to be pulled out.

1. The rule is firmly established in this state that a demurrer to the evidence admits every fact which the jurors may infer, if the evidence were before them, and should be sustained only when the evidence thus considered fails to make proof of some essential averment. *Rine v. Chicago & A. R. Co.* 100 Mo. 228, 12 S. W. 640; *Myers v. Kansas City*, 108 Mo. 480, 18 S. W. 914; *Franke v. St. Louis*, 110 Mo. 516, 19 S. W. 938; *Moore v. St. Louis Transit Co.* 194 Mo. 1, loc. cit. 9, 92 S. W. 390; *Bender v. St. Louis & S. F. R. Co.* 137 Mo. 240, 37 S. W. 132. Were the plaintiff and the switchman, whose alleged negligence in pulling out the car to which the unfinished car on which plaintiff was working was attached, without warning to the plaintiff, and thereby causing plaintiff's injuries, fellow servants so as to exempt the defendant from said negligent act? We all agree that the rule which exempts the master from liability to one servant for the negligent act of a fellow servant prevails in this state; but we think it must be conceded that the broad and sweeping rule announced in *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, has not met the approval of this court in many cases. As said by Judge Black

in *Parker v. Hannibal & St. J. R. Co.* 109 Mo., loc. cit. 407, 18 L.R.A. 802, 19 S. W. 1127: That rule "had but little more than been approved when courts and legislatures began the process of cutting it down, because of the gross injustice which it worked out in its application to the great enterprises of the day." On the other hand, what is known as the "department rule" has not been adopted in this state in all of the broadness for which many of its advocates have contended. Much of the difficulty has arisen from the inability of the courts to determine at all times whether the employment was a common service, and the employees fellow servants, within the meaning of the rule itself. We are aware that it is insisted that the courts ought to be able to so express the rule that all cases can be weighed and gauged by it. But we are of the opinion, after long consideration, that, unsatisfactory as it might seem, the rule itself must remain general, and its application specific, as the cases arise. The subject was given great consideration in *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 18 L.R.A. 802, 19 S. W. 1119. In that case, contrary to the views of the present writer, this court refused to hold that a railroad locomotive engineer and a track walker in the service of the same company were fellow servants within the rule exempting masters from liability for injuries received through the negligence of a fellow servant. Afterwards, when the same question arose in *Schlereth v. Missouri P. R. Co.* 115 Mo. 87, 21 S. W. 1110, this court *in banc*, through Burgess, J., approved the opinion of Judge Macfarlane in division in which he said: "The importance of having the rules of law firmly established, especially those under which property rights are held, or the business and wages of large classes of citizens are made to depend, is fully recognized; and we therefore hold, in accordance with the late rulings of this court, that the husband of plaintiff [the track walker] was not a fellow servant of the negligent engineer within the rule of exemption. *Sullivan v. Missouri P. R. Co.* 97 Mo. 113, 10 S. W. 852." In the last-cited case it was ruled that a track walker on a railroad is not a fellow servant of the locomotive engineer or fireman of a passenger train. In *Condon v. Missouri P. R. Co.* 78 Mo. 567, it was ruled that a car repairer at a station and a trainman were not fellow servants within the meaning of the rule. And in *Hall v. Missouri P. R. Co.* 74 Mo. 298, it was held that a section foreman and a switchman were not fellow servants. In *Dixon v. Chicago & A. R. Co.* 109 Mo. 413, 18 L.R.A. 792, 19 S. W. 412, a quarry laborer under orders of a foreman who had control of the

quarry, and represented the company there, was not a fellow servant with the trainmen on a passenger train. All of these cases were cited with approval, and followed, by this court *in banc*, in *Lanning v. Chicago G. W. R. Co.* 196 Mo. 647, 94 S. W. 491. In this last-mentioned case it appeared that the plaintiff was a workman, engaged as a part of a crew emptying cars of coal into bins at a coal chute, and was injured by the negligence of an engineer in backing some cars up an incline, and causing them to strike the car on which plaintiff was working. The crew in which plaintiff worked had its own foreman, from whom he took his directions, and the engineer worked under the general supervision of the yard master, and it was held that the plaintiff and the engineer were not fellow servants; this court saying: "We think that the workmen so distantly related to each other in the service of a common master as plaintiff and Gahagan were, were not fellow servants within the meaning of the rule which exempts the master from liability for injuries inflicted by a fellow servant upon a fellow servant. . . . In our opinion, the reason of the rule forbids its application to the facts in this case."

When we look for the underlying principle upon which all of these cases rest, as exceptions to the general rule announced in *Farwell's Case*, it will perhaps be found as well stated in the separate opinion of Judge Black, in *Parker v. Hannibal & St. J. R. Co.* 109 Mo., loc. cit. 409, 18 L.R.A. 802, 19 S. W. 1127, as anywhere. As the rule prevailed in that case, it will bear repeating here: "Now, it being conceded, as it must be, that the master is liable to third persons for the negligent acts of his servants, it is difficult to see how public policy has much to do with the question as to who shall be deemed fellow servants within [the meaning of] the rule of exemption. The liability being admitted in case a third person is injured, but denied in case a servant is injured by another servant, the denial in the latter case must stand on some peculiar relation between master and servant. This peculiar relation cannot be simply the fact that the servants are in a position where one may be injured by the negligence of another; for third persons often occupy the same position, as where they become passengers. The real and only point of distinction, it seems to us, arises out of the fact that servants are so associated and related in the performance of their work that they can observe and influence each other's conduct and report any delinquency to a correcting power. To say a clerk engaged in an office making out pay rolls for a railroad company is a fellow servant, within the rule of

exemption, with those engaged in operating trains, is out of all reason. Guided by the real reason for the rule, it seems to us it should be applied, and applied only, in those cases where the servant injured and the one inflicting the injuries are so associated and related in their work that they can observe and have an influence over each other's conduct, and can report delinquencies to a common correcting power or head. In short, they should be fellow servants in fact, and not simply in dialectic theory. If in separate and distinct departments, so that the circumstances just stated do not, and cannot, exist, then they are not fellow servants within any just or fair meaning of the rule. This conclusion, though not in strict accord with the majority of the adjudged cases, is, it is believed, within the true and only reason for the rule, and has the support of many cases, some of which go much further than has been indicated."

Now, in the case at bar we have seen that the plaintiff belonged to a gang of painters who were working under a general paint foreman, Mehlin, who had authority to hire and discharge them and to direct their work. This foreman had no power or authority over the switching crew, to which the switchman, Hensler, belonged, but the latter worked under the directions of the general superintendent of the whole works, who, when he desired a car taken out of the yards or sheds to be shipped, sent his switching crew with the motor for that purpose. The plant, as the evidence all shows, was a very large one, and a very large number of workmen were employed therein. The plaintiff was employed in the construction of cars, while the switching crew were engaged in an entirely different branch of the work, to wit, the transportation or movement of the cars. In a word, these painters were not so associated or related with the switching crew that they were required to observe and report any delinquencies on their part, and unless we are to disregard the decisions which we have cited, especially the Lanning Case, the conclusion cannot be escaped that the plaintiff and the switching crew were not fellow servants within the meaning of the exception which we have just noted to the general rule exempting masters for the negligence of their servants. But it is said that, while those cases may have been properly decided, they were all rendered in railway cases, and the doctrine should not be extended to any other class of masters; and we are cited to a sentence in the opinion of Judge Black in the Parker Case, in which he says: "Thus, the persons engaged in and about machine shops, foundries, and the like, are often strictly fellow servants, though under

and subject to the orders of different foremen." But this view ignores the other remarks of the learned judge in the beginning of that paragraph, where he says that the general rule had been cut down by the courts "because of the gross injustice which it worked out in its application to the great enterprises of the day." We agree that servants of a common master, working under different foremen, may be brought into such consociation and relation to each other that they would still be held to be fellow servants within the meaning and modification of the general rule which was announced by Judge Black in Parker's Case; but we are unwilling to say that the underlying reason of the decisions in the cases we have cited would restrict the rule to railroads alone. The reason of the law is the life of the law; and, where a master is operating a great enterprise which calls for various departments in the execution of his work, whether it be a railroad, or, as in this case, immense car works for the manufacture and construction of cars, requiring various and distinct branches of labor, he is equally within the rule. The same reason which applied to the owner of a railway must be held applicable to other large manufacturing plants of business. But we are cited to the decision of this court in *Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 340, 48 L.R.A. 399, 77 Am. St. Rep. 721, 55 S. W. 108. in which the departmental doctrine is strongly criticized by Judge Marshall, in which decision the majority of this court, including the writer hereof, concurred; but a careful examination of that case will show that the final conclusion was that the engineer and firemen on the train in that case were fellow servants, and that the negligence of the engineer was the sole cause of the injury to the fireman, and that the master was not liable for the negligence of the engineer. It is true that Judge Marshall makes an extended review of the cases on this subject, but none of the cases which we have cited were overruled. In 2 Lewis's *Sutherland Statutory Construction*, § 486, it is aptly said: "The maxim of *stare decisis* applies only to decisions on points arising and decided in causes. It has been held not to extend to reasoning, illustrations, and references in opinions. The precedent includes the conclusions only upon questions which the case contained, and which were decided. 'The members of a court,' says Downey, Ch. J., 'often agree in a decision, but differ decidedly as to the reasons or principles by which their minds have been led to a common conclusion. It is therefore the conclusion only, and not the process by which it has been reached, which is the decision of the court, and which has the force of precedent in

other cases.' So viewed, the decision in the Grattis Case did not overturn any of the decisions which we have cited for the purpose of showing what the views of this court have been as to who are and who are not fellow servants in this state. In our opinion, the plaintiff was not a fellow servant with the switchman, whose negligent act, the evidence tended to show, was the cause of the plaintiff's injuries; and, if the court sustained the demurrer to the evidence on the ground that the switchman and plaintiff were fellow servants, as is asserted by plaintiff, then it committed reversible error.

2. But there is another view upon which the plaintiff was entitled to have his case submitted to the jury. It is the duty of the master to provide and maintain a reasonably safe place for his servant to work. *Wendler v. People's House Furnishing Co.* 165 Mo. 527, 65 S. W. 737; *Herdler v. Buck's Stove & Range Co.* 136 Mo. 3, 37 S. W. 115; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Curtis v. McNair*, 173 Mo., loc. cit. 280, 73 S. W. 167; *Purcell v. Tennent Shoe Co.* 187 Mo. loc. cit. 285, 86 S. W. 121. When, then, the defendant, through the paint boss, Mehlman, sent the plaintiff to work upon the unfinished car on one of its tracks, it was its duty to provide against other cars running down against the car upon which he was working, and to see that other cars which were pulled out were not attached to the car upon which he was working, without giving him warning of its intention to move the said car. While the servant, in entering the service of the master, assumes the risks that ordinarily and usually are incident to the business being conducted by the master, the servant does not assume the risk arising from the master's neglect to adopt suitable precaution for his safety. The duty of the master in this regard is a continuing one, and it will not suffice to say, when plaintiff went to work on the car, that it was a reasonably safe place. If the place was afterwards rendered unsafe by the negligent act of the defendant in sending a switching crew in there, who negligently pulled the car upon which plaintiff was working, without giving him warning of their intention to move it, then defendant was liable for the consequence of the negligent act of the switchman. The plaintiff had the right to presume, in the absence of knowledge to the contrary, that the defendant would furnish him a reasonably safe place to work, and that he would not imperil his safety by sending its servants in there to move the car upon which he was working, without notifying him. *Doyle v. Missouri, K. & T. Trust Co.* 140 Mo. 1, 41 S. W. 255. But it may be said that the switchman was not

the vice principal of the defendant in moving and directing the car to be moved, whereby plaintiff was injured. On this point this court, in *Moore v. Wabash, St. L. & P. R. Co.* supra, approved the doctrine laid down by Wood on Master and Servant, page 860, as follows: "Whenever the master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and, to the extent of the discharge of those duties by the middleman, he stands in the place of the master, but as to all other matters he is a mere co-servant." In that case the plaintiff, Moore, was employed as a car repairer, and he was ordered by his foreman to repair the drawhead of one of the freight cars of the defendant company then standing, with other freight cars, upon the side track of the defendant, and was promised by the foreman that he would protect him while he was so employed in repairing the drawhead. Relying on the promise of the foreman, Moore undertook to repair the drawhead, and, while engaged thereat, an engine of the defendant came down upon the said side track, and against the car standing thereon, and the car upon which plaintiff was at work was driven back against the freight car standing in the rear thereof, and plaintiff's right arm was cut and crushed between the same. Judge Henry, speaking for this court said: "It was the duty, a contractual obligation of the company, to provide for the safety of the men at work in repairing the car. The company devolved that duty upon the person who represented it in conducting, ordering, and managing the work, and the men engaged in it. It could not impose that duty upon the car repairers so as to absolve itself from liability for its own negligence. It might make, as it did, reasonable rules, and impose the duty upon the servants to observe those duties for their own safety." Accordingly, it was held that the plaintiff was entitled to recover on the ground of the failure of the defendant to provide for the safety of the plaintiff. In *Dayharsh v. Hannibal & St. J. R. Co.* 103 Mo., loc. cit. 575, 23 Am. St. Rep. 900, 15 S. W. 554, it was said by this court: "A person employed to perform any of the master's duties towards his servant is, while that relation continues and in respect to such duties, no fellow servant of the latter. The duties which the master owes the servant may in many particulars be delegated to subordinates, and the wide extent of modern business enterprises often necessitates so doing; but that delegation of an-

thority does not relieve the master from a proper discharge of those duties." In that case a "night hostler" backed an engine upon the plaintiff, who was at work in an ash pit under the track. It was earnestly contended in that case that, because "the night hostler" had control and direction of the men necessary to assist him in the roundhouse he was a fellow servant, because, in the actual backing of the engine, he was doing the work of a servant, and was not acting in his capacity as a boss over the men, but this court said: "If he had expressly directed the engine to be moved down by another, upon the plaintiff, in the manner described in the evidence, . . . the defendant would have been responsible for the act; and we are unable to perceive any logical or reasonable distinction between so directing it and his performing such negligent act himself, in the circumstances here shown. It was one which fell within his authority, as the master's representative, to direct, and it can make no difference in principle whether he did it personally or by another, . . . where his act involved an obvious breach of the master's duty to use care to provide a reasonably safe place for plaintiff to work." And it was held that the hostler's negligence was ascribable to the master. The ash pit in that case, as was the car track in the Moore Case, and the car track in this case, were each safe enough in themselves, but each was rendered unsafe by the acts of the servants of the company in moving the cars and engines against and over the place where the injured servant was at work. The danger of pulling this car upon which the plaintiff was at work, without warning the plaintiff, is apparent from a statement of the facts; but the testimony in this case went further, and tended to prove that it was the duty of the defendant's switchman, who was intrusted with the work of moving cars, to give the painters warning and see that no car was moved without affording them an opportunity to look out for their safety. Obviously, it was a personal duty of the defendant to the plaintiff not to move the car without such warning; but the performance of this duty was intrusted to the switchman, and the fact that the switchman was not a servant of high degree does not change or affect the responsibility of the defendant for the negligent manner in which that duty was performed. The act of the switchman was the act of the defendant itself. The views we have expressed have been approved in many other jurisdictions, notably in *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586, 3 Pac. 320; *International & G. N. R. Co. v. Hinzle*, 82 Tex. 623, 18 S. W. 681; *St. Louis, A. & T. Co. v. Trinlett*, 54 Ark. 289, 11 L.R.A. 773, 17 L.R.A. (N.S.)

15 S. W. 831, 16 S. W. 266. We think the testimony on this branch of the case required the court to submit the question of the defendant's negligence to the jury under proper instructions, and, for this reason, also, the demurrer to the evidence should not have been sustained.

3. As to the plaintiff's contributory negligence, we think it is obvious that the court had no right, as a matter of law, to declare that the plaintiff's own negligence would bar his recovery. It was a question that should have been submitted to the jury under proper instructions. As to the defense of assumption of risks, what we have already said sufficiently indicates our view as to that. Certainly the evidence was not such as would have justified the court in taking the case from the jury.

The judgment is reversed, and the cause is remanded for a new trial in accordance with the views herein expressed.

Burgess, J., concurs in the first and third paragraphs; Fox, J., concurs in the first and third, but expresses no opinion on the second; Valliant, Lamm, and Woodson, JJ., concur *in toto*; and Burgess and Graves, JJ., dissent as to the second, and Graves, J., generally.

Petition for rehearing overruled.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA, Appt.,
v.
JAKE WILLIAMS.

(146 N. C. 618, 61 S. E. 61.)

Intoxicating liquor — constitutional rights — forbidding possession.

Forbidding one, under penalty, to carry into a county where the sale of intoxicating liquor is prohibited, more than a half gallon of such liquor on any one day, deprives him of his constitutional property rights in case he has no intent to sell it.

(Clark, Ch. J., and Hoke, J., dissent.)

(April 1, 1908.)

Case Note. — Constitutionality of statute forbidding carrying of intoxicating liquors into a prohibition district.

It is well settled that a state has no power to prevent the bringing of liquors into it from another state. *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup.

A PPEAL by the State from a judgment of the Superior Court for Burke County quashing an indictment charging defendant with unlawfully carrying liquor into a certain county. Affirmed.

Statement by Connor, J.:

The defendant was called to plead to the following bill of indictment: "The jurors for the state, upon their oaths, present: That Jake Williams, late of the county of Burke, on the 10th day of July, in the year of our Lord 1907, with force and arms, at and in the county aforesaid, did unlawfully and wilfully have and bring into said county of Burke, on one certain day, more than $\frac{1}{2}$ gallon, to wit, 1 gallon, of spirituous, vinous, and malt liquors, the same not being then and there brought by the said Jake Williams to a druggist for medical purposes, nor for delivery at the state hospital, nor the school for the deaf, nor Broad Oaks sanitarium, nor to Grace hospital, in said county, for medical purposes, against the form of the statute in such cases made and provided, and against the peace and dignity of the state."

Defendant moved to quash. Motion allowed. The solicitor for the state appealed.

Mr. Robert D. Gilmer, Attorney General, for the State.

No appearance for appellee.

Connor, J., delivered the opinion of the court:

By chapter 24, p. 57, Pub. Laws 1907, the

Ct. Rep. 681; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447.

But upon the question of the constitutionality of a statute forbidding the carrying of intoxicating liquors from one place to another within the state, there appears to be but one other case, viz.: State v. Rhodes, 90 Iowa, 496, 24 L.R.A. 245, 58 N. W. 887. In this case it appeared that the statute prohibited any carrier or person from transporting or conveying any intoxicating liquor between points, or from one place to another, within the state, unless he had first secured a certificate from the county auditor of the county into which or within which the liquor was to be carried, stating that the consignee was authorized to sell liquors in such county. It also appeared that the defendant, an employee of the railroad company, merely carried the package, containing a jug of whisky, from the depot platform into the freight room; that neither he, nor his employer, had a permit to sell liquor, and neither had a certificate that the consignee was authorized to sell liquors in that county. It does not appear that the

legislature enacted a statute declaring that it shall be unlawful for any person to "manufacture, sell, or otherwise dispose of for gain" spirituous, vinous, or malt liquors in the county of Burke. The act contains the usual exceptions in regard to sales by druggists. It is also provided that neither the manufacture of domestic wines, "nor the sale of such wines at the place of manufacture in quantities not less than 1 gallon," are prohibited. The place of delivery of any liquors brought into the county is declared to be deemed the place of sale. Common carriers are prohibited from bringing liquors into the county, etc. The statute is amended by chapter 806, p. 1147, Laws 1907, by adding at the end of § 1 the following: "It shall be further unlawful for any person, except to a druggist for medical purposes, as aforesaid, to bring into said county of Burke, in any one day, more than $\frac{1}{2}$ gallon of such spirituous, vinous, or malt liquors, and every person so offending shall, upon conviction, be fined, or imprisoned, in the discretion of the court." The motion to quash the bill of indictment involves the proposition that chapter 806 is an unwarranted interference with defendant's property and of his liberty. That it is violative of the Constitution, which declares that "among the inalienable rights of all men are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness," of which they cannot be deprived but "by the law of the land." That the Constitution is "the law of the land," in the sense that no act of either department of the gov-

consignee had any intent to sell it, or unlawfully to use it, or that such intent had any bearing whatever upon the crime charged. The defendant's conviction was affirmed. This case was reversed in 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, upon the ground that this was an interstate shipment, and that moving the liquor from the railroad platform to the warehouse was a part of the interstate-commerce transportation, and that, as to such a shipment, the law of Iowa could not be held to apply while the goods were yet in transit. This constitutional question was raised in the Iowa supreme court, but the contention made in STATE v. WILLIAMS, that such a statute would interfere with the liquor owner's constitutional guaranty that, "he shall enjoy the fruits of his own labor and pursue his own happiness," was not made. However, it would seem that, if there had been any force in the contention that the statute forbidding the carrying of the liquor from one place to another within the state deprived the owner of his constitutional right to enjoy his own property, it would have been urged as a defense in the Iowa case, for it would have operated to acquit defendant, who, in moving the liquor, was acting as agent for the owner.

ernment which violates its provisions or exceeds its powers can be enforced to deprive the citizen of his life, liberty, or property, is a fundamental truth. To deny it is to assert that constitutional government is a failure, and liberty, regulated by law, has no abiding place in our political system. The Constitution is of necessity, as well as the declared will of the people, the supreme law; and in no proper legal sense can any act of either department of the government which violates its provisions or exceeds the powers delegated be the law. To state the same proposition affirmatively: An act of the legislature which finds no support in the Constitution, or is not an exercise of the power conferred therein, imposes no duty, deprives the citizen of no right, and subjects him to no penalty. This is a "first principle," the recognition of which is essential to the preservation of liberty. "If the Constitution prescribe one rule and the law another and different rule, it is the duty of courts to declare that the Constitution, and not the law, governs the case before them for judgment." Curtis, J., in *Scott v. Sandford*, 19 How. 628, 15 L. ed. 793. "An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous but is illegal and void, and cannot be a legal cause of imprisonment." Bradley, J., in *Ex parte Siebold*, 100 U. S. 376, 25 L. ed. 719. "The limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions." Matthews, J., in *Hurtado v. California*, 110 U. S. 536, 28 L. ed. 238, 4 Sup. Ct. Rep. 121. "An unconstitutional act is not a law. It binds no one, and protects no one." Field, J., in *Huntington v. Worthen*, 120 U. S. 101, 30 L. ed. 589, 7 Sup. Ct. Rep. 471. "No court is bound to enforce, nor is anyone legally bound to obey, an act of Congress inconsistent with the Constitution." "In this country the will of the people, as expressed in the fundamental law, must be the will of courts and legislatures." Harlan, J., in *Robertson v. Baldwin*, 165 U. S. 297, 41 L. ed. 722, 17 Sup. Ct. Rep. 335. "Whatever the people, framing their organic act, have declared to be the limits of legislative power, and the modes in which that power shall be exercised, must always be recognized by the courts, state and national, as obligatory." Brewer, J., in *Stearns v. Minnesota*, 179 U. S. 241, 45 L. ed. 173, 21 Sup. Ct. Rep. 80.

It is the right of the citizen, when called to the bar of the court, to appeal to the Constitution and demand that the court declare

whether the statute which he is charged with violating be "the law of the land." To make this right of any value or protection to the citizen, it must be the duty of the court to declare its judgment thereon. To deny this is to keep the promise to the ear and break it to the hope,—to make of none effect the declaration that "ours is a government of law, and not of men." "It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violations of the principles of the Constitution." Harlan, J., in *Downes v. Bidwell*, 182 U. S. 382, 45 L. ed. 1143, 21 Sup. Ct. Rep. 823. Judge Iredell in *Calder v. Bull* (1798) 3 Dall. 399, 1 L. ed. 653, referring to the omnipotence of the British Parliament and its unrestricted power, from which they had suffered so much, and against which they waged successful war, said: "In order, therefore, to guard against so great an evil it has been the policy of all the American states, which have individually framed their state Constitutions since the Revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void." "It is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore that, in cases properly presented, it has the power of determining whether a given manifestation of authority has exceeded the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this nation."

The people, in the exercise of their political sovereignty, established the government, delegated to it certain enumerated powers, assigned to it appropriate functions, established departments, and assigned to them appropriate powers and duties, imposed such limitations as experience had taught to be necessary for the preservation of liberty, and, to the end that their government should not, by construction, implication, or otherwise deprive them of unenumerated, but "inalienable, rights," declared: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." Article 1, § 37. This court, in *Den ex dem. Bayard v. Singleton* (1787) 1 N. C. pt. 1, p. 42 (*Martin*, pt. 1, p. 48), after most care-

ful consideration, "and with great deliberation and firmness," unanimously declared that no act which the legislature could pass could, by any means, repeal or alter the Constitution. However much we may desire to sustain the acts of the legislature as a co-ordinate department of the government, we may not, without being recreant to the duty imposed upon us and the rights of the citizen, refuse to decide firmly and fearlessly the issue which he makes with the government. In the discharge of the duty, and the exercise of the power, to pass upon the validity of the statute, we are admonished by the uniform decisions of the courts that we should "approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." Shaw, Ch. J., in *Re Wellington*, 16 Pick. 95, 26 Am. Dec. 631; *Cooley*, Const. Lim. 182. Another great judge has said: "It is but a decent respect, due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." Washington, J., in *Ogden v. Saunders*, 12 Wheat. 270, 6 L. ed. 625. "Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question." Fuller, Ch. J., in *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 554, 39 L. ed. 809, 15 Sup. Ct. Rep. 675. "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case." Waite, Ch. J., in *Sinking Fund Cases*, 99 U. S. 718, 25 L. ed. 501.

The same principle has been announced and uniformly followed by this court. Before, however, discussing the principal question, we deem it proper to call attention to the vague and uncertain terms in which the bill of indictment is drawn. The defendant is charged with bringing into the county of Burke, "on one certain day, more than $\frac{1}{2}$ gallon, to wit, 1 gallon, of spirituous, vinous, or malt liquors." The names of two witnesses are marked on the bill. Under this indictment, it is held, by frequent rulings of this court, that the defendant may be convicted, upon the testimony of wit-

nesses other than those marked on the bill, of bringing into the county, on any day, within two years prior to July 10, 1907 (except, for the fact in this case, that the act was not passed until March 8, 1907), of more than $\frac{1}{2}$ gallon of either wine, whisky, brandy, beer, or other liquor. While we do not hold that bill is fatally defective, we think that it barely corresponds to the letter or spirit of the constitutional provision that "in all criminal prosecutions every man has the right to be informed of the accusation against him." The courts have wisely given a liberal interpretation to statutes, relaxing the rigid rules regarding the particularity required in bill of indictment which formerly prevailed. It would seem that the grand jury could have made its presentment more specific by saying which of the prohibited kinds of liquors the defendant brought into the county. It is hardly probable that he brought all of them in "on one certain day." The disjunctive "or" would indicate that the grand jury could not ascertain from the witnesses which of them he "brought in." Indictments against citizens, subjecting them to imprisonment in default of bail awaiting trial, annoyance, mortification, and expense, be they never so innocent, are serious matters. It is a vain thing to preserve in our Constitution guaranties of personal liberty; such as, that general warrants shall not issue; persons shall not be put to answer any criminal charge, except upon indictment by a grand jury, etc., if the substance of them may be explained away by legal fictions and expedients based upon real or imaginary necessity. We would not put unnecessary restrictions upon the government in the prosecution of crime, but substantial rights are not to be sacrificed. It would be very easy to make the several allegations in separate counts in the bill, thus enabling the grand jury to ascertain from the witnesses the very truth of the charge which, "upon their oaths," they make against the citizens. Under our statutes, all manner of counts, which are but separate bills, may be included, and a "drag net" thrown out to insure the conviction of guilty men.

Coming to the discussion of the question presented by the motion to quash the bill of indictment, i. e., whether the carrying into the county of Burke, without any unlawful purpose, more than $\frac{1}{2}$ gallon of wine, brandy, etc., is reasonably related to its sale,—certain questions may be regarded as settled. The legislature, in the exercise of the police power, may, by appropriate enactments, regulate, and, if they deem it conducive to the public health, morals, peace, or safety, entirely prohibit, the manufacture and sale of intoxicating liquors. For

the purpose of making effective such legislation, they may make it criminal for any person to have such liquors in his possession, within the territory wherein the sale or gift is prohibited, with intent to sell or give away. They may prescribe or change the rules of evidence by making such possession *prima facie* evidence of a guilty intent. This court has uniformly sustained legislation of this character. *Paul v. Washington*, 134 N. C. 363, 65 L.R.A. 902, 47 S. E. 793; *State v. Barrett*, 138 N. C. 630, 1 L.R.A.(N.S.) 626, 50 S. E. 506; *State v. Patterson*, 134 N. C. 612, 47 S. E. 808. In *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002, we held that a certified copy of the record kept by the collector of internal revenue was competent, not only as evidence, but sufficient to sustain a conviction, for selling liquor in violation of the statute. We have endeavored to give full force and effect to the legislation enacted in this state for the suppression of the liquor traffic, resolving, as was our duty, every reasonable doubt regarding its validity in favor of the enactments. This legislation finds its support in the police power vested in the state government. It is exercised primarily by the legislature, which may adopt any measure within the extent of the power, appropriate and needful, for the protection of the public morals, the public health, or the public safety. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. That there is a limit to the police power which the courts must, when called upon in a judicial proceeding, ascertain and declare, is as well settled as the existence of the power itself. In *Mugler v. Kansas*, *supra*, wherein the question underwent a most thorough investigation, Mr. Justice Harlan says: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the Constitution." *State v. Redmon* (Wis.) 14 L.R.A.(N.S.) 229, 114 N. W. 137. Recognizing the difficulty of fixing any definite limitation upon the police power, the courts have refrained from doing more, in cases which have arisen, than inquiring whether "the real purpose of the statute under consideration has a reasonable connection with the public health, welfare, or safety." *People v. Havnor*, 149 N. Y. 195, 31 L.R.A.(N.S.)

L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, cited in *People v. Lochner*, 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373. The result of the decisions has been well stated in 22 Am. & Eng. Enc. Law, 2d ed. p. 938: "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals, or general welfare, and that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do, in some plain, appreciable, and appropriate manner, tend towards the accomplishment of the object for which the power is exercised." In *State v. Moore*, 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342, *Shepherd, Ch. J.*, says: "While it is for the legislature to determine what regulations are needed to protect the public health and secure public comfort and safety, and its measures calculated and intended to accomplish these ends are generally within its discretion, and not the subject of judicial review, it is nevertheless true that this extensive authority must be exercised in subordination to those great principles of fundamental law which are designed for the protection of the liberty and the property of the citizen." *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143.

In the entire range of legislation, in the exercise of the police power, no subject has received more consideration, or found more varied forms of expression, than the efforts to prevent the manufacture and sale of intoxicating liquor. Beginning with the Maine liquor law, the statutes and Codes of every state in the Union abound with every conceivable variety of legislation having for its object the regulation, restriction, or prohibition of the liquor traffic. The courts, both state and Federal, have been called on to construe, interpret, and pass upon the validity of many of these statutes. They have, with remarkable uniformity, sustained them, and, when of doubtful meaning, given them such interpretation as would suppress the evil and advance the remedy. An unusually careful and diligent examination by the assistant attorney general and ourselves fails to discover any statute, either in terms or scope, similar to the one under discussion. While the legislatures have resorted to many expedients to control, regulate, restrict, and prohibit the manufacture and sale, either in entire states, or counties, towns, cities, or districts, we do not anywhere find any suggestion that the possession of intoxicating liquor without any unlawful purpose, or carrying it into the ter-

ritory wherein its sale is prohibited with no unlawful purpose, is made indictable. While by no means decisive of the power to do so, the fact that no such attempt has been made is worthy of note in seeking the basis of the asserted power. It will be well to note the unusual, if not unprecedented, terms of the statute,—what it prohibits and the penalties imposed for its violation. Any person who shall bring into the county of Burke, in any one day, more than $\frac{1}{2}$ gallon of spirituous, vinous, or malt liquor, except for the purpose of delivery to a druggist for medical purposes, is guilty of a misdemeanor. Unless we may read into the statute an exception to save it from interfering with religious liberty guaranteed by the Constitution, a minister, steward, deacon, or elder of any church, bringing into the county more than the prohibited quantity of wine, violates this law. A man who brings into the county more than $\frac{1}{2}$ gallon of wine for domestic purposes, or of spirits for his own use or for that of his family for medical or for any other purpose, is guilty. If he would escape the penalty, he may bring it in to a druggist for medical purposes, but not otherwise. No possible intent, purpose, or occasion can avail as a defense. A person passing through the county on the cars or in a private conveyance, having in his trunk or baggage more than the prohibited quantity, without stopping on his journey or having the slightest intent to sell or give it away, is guilty. Upon conviction he may be fined or imprisoned, in the discretion of the court. No limit has ever been fixed by this court to the amount of fine which may be imposed. We have lately sustained, as not excessive, a sentence of two years in the county jail and hard labor on the public roads, for violating the liquor laws. *State v. Dowdy*, supra. Surely, when we recall that, upon an indictment so vague in its terms,—upon a trial in which the defendant may be convicted upon testimony of witnesses whose names he has never heard, and whom he has never seen until confronted by them, and no definite time is required to be fixed in the bill, the citizen may be convicted for conduct which, but for this statute, has neither legal nor moral guilt, may be fined in the discretion of the court or imprisoned, and in felon's garb, in company with felons, worked upon the public roads for two years,—the courts should carefully examine the basis upon which the power to thus restrict the liberty of the citizen rests. If the statute is within the police power, it is not within our province to question its wisdom. It is ours to declare and enforce the law of the land, the Constitution, the law which the people, in the exercise of their sovereignty, have made for their protection and our

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guide. It is no answer to the contention that the law will be administered with justice and mercy, that only those who are guilty will be convicted and punished. Experience taught those who founded this state, established government, and secured its limitations by written Constitutions that the liberty of freemen could not be safely intrusted to the unrestricted sense of justice and mercy of any man or set of men. The test of the constitutionality of a statute is what it empowers those in authority to do.

If the quantity of intoxicating liquor which any person may have for any purpose, except those named in the act, is a public nuisance in Burke county, it is unquestionably within the power of the legislature to make it criminal to carry it there. No person has any legal right to create or maintain a public nuisance. This is elementary. Can it be said that the act of carrying the prohibited article into the county is, or that when carried there it becomes, *per se*, a public nuisance? This suggestion was made in support of certain provisions of the Maine statute. Shepley, Ch. J., said: "There is nothing which can be regarded as a nuisance when considered by itself alone and separate from its use. It is the improper use or employment of a thing which causes it to become a nuisance. It would be not a little absurd to declare that to be a nuisance and, as such, liable to be abated and destroyed, which the act allows to be sold and purchased as an article useful for medicinal and mechanical purposes." *Merrimon, J.*, in *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458, says: "The exercise of [the police] . . . power does not extend to the destruction of property under the form of regulating the use of it, unless in cases where the property, or the use of it, constitutes a nuisance. In such cases, if the owner of the property suffers injury, it is such as happens in the illegal use of it, or because the property itself, in its nature or application, is unlawful." *State v. Tenant*, 110 N. C. 610, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387. Does spirituous, vinous, or malt liquor cease to be property when its manufacture and sale are prohibited? Shepley, Ch. J., in *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639, says: "It is, however, insisted in argument that a person, by the common law, can no more acquire property in spirituous and intoxicating liquors than he can in obscene publications and prints. There is a clear and marked distinction between them. Such liquors may be applied to useful purposes. This is admitted in the act by its authorizing their sale for medicinal or mechanical purposes. It is their misuse or abuse alone which oc-

casions the mischief. Obscene publications and prints are, in their very nature corrupting and productive only of evil. They are incapable of any use which is not corrupting and injurious to the moral sense." In *Lincoln v. Smith*, 27 Vt. 328, in a well-considered opinion, it was held that the legislature had the power to prohibit the traffic in intoxicating liquor and subject it to seizure, forfeiture, and destruction when kept for that purpose. Bennett, J., says: "The act does not declare that they [the liquors] are not property, and there is no language which should receive a construction to forbid their being property. Though there is a prohibition not to sell them; yet that cannot prevent a man from having a property in them for his own use, without any intention to sell them; and they may be transported through the state, where there is no intention to violate the law." In *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, it is said: "Whatever produce has, from time immemorial, been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce, although it may, to a certain extent, be within the police power of the state." So, Taney, Ch. J., in the *License Cases*, 5 How. 504, 12 L. ed. 256, says: "But spirits and distilled liquor are universally admitted to be subjects of ownership and property." If, then, the spirits, wine, or beer, as the case may be, which the defendant had on the 10th July, 1907, was his property, he was, by virtue of the constitutional guaranty that he shall enjoy the fruits of his own labor and pursue his own happiness, entitled to carry it with him whithersoever he went and apply it to his own use in such manner as he saw fit, unless prohibited by some law enacted in accordance with, and in the exercise of, the power conferred upon the legislature. The legislature had the power to prohibit him from selling this property in the county of Burke. This it has done. It had the further power to prohibit him from having it in his possession or carrying it into the county with intent to sell, and to make the possession *prima facie* evidence of the unlawful intent. *State v. Barrett*, 138 N. C. 630, 1 L.R.A.(N.S.) 626, 50 S. E. 506. It has not undertaken to prohibit him from using it for himself, or from keeping it for domestic purposes in his family. It has not undertaken to prohibit him from giving it away in the county. The language of chapter 24 of the Acts of 1907 is "to sell, manufacture, or otherwise dispose of for gain." Conceding the power of the legislature to

prohibit any person from using or drinking wine, spirits, or beer as a beverage, or to have it in his possession or carry it into the county for that purpose, the prohibition imposed by the statute is not so limited. Except to deliver to a druggist for medical purposes, or to certain state and health institutions named, the carrying it into the county for any purpose is made a misdemeanor.

Assuming that the wine or spirits described in the bill of indictment was the defendant's property, the fruits of his labor, he was entitled to carry it with him whithersoever he went, unless, in doing so, he injuriously affected the public morals, health, or safety, or that his doing so was so reasonably related to the sale of intoxicating liquor, which is the thing prohibited in Burke county, as to come within the police power. It is no answer to his contention to say that, if spirits, he would probably drink it, or, if wine, permit his family to use it for domestic purposes, because the law does not prohibit him from doing either. Viewed from any possible point of view, the sole question is, What, if any, relation has the act of carrying into the county of Burke, in any one day, more than $\frac{1}{2}$ gallon of vinous, spirituous, or malt liquors, in said county, to the sale of such liquor? In view of the numerous uses to which that quantity of such liquor may be put other than selling, and of the improbability of any reasonable person carrying into the county the prohibited quantity for sale, can it be insisted that any such real or substantial relation to the sale exists? The only case in which a statute at all similar to the one before us has been before the court is *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283. The defendant was indicted for violating a statute making it a misdemeanor "to keep in his possession for another" spirituous liquor. Upon a motion to quash the bill of indictment, the court said: "The keeping of liquors in his possession by a person, whether for himself or another, unless he does so for the illegal sale of it, or for some other improper purpose, can, by no possibility, injure or affect the health, morals, or safety of the public; and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen, without any legal justification, and therefore void. . . . It is simply an attempt to make the possession of liquor, for any purpose, a crime. A very different question would be presented if the act had made it unlawful for any person to keep intoxicating liquors in his possession, either for him-

self or for another, for the purpose of selling it."

It is unquestionably true that the legislature may make the mere possession of burglars' tools, counterfeiting outfits, gaming tables, etc., obscene pictures or prints, and probably other articles incapable of any lawful use, indictable. They are essentially injurious to the public welfare, incapable of any use consistent with the public welfare. Many articles, such as decaying animals or things emitting noisome, poisonous vapors or odors, may be summarily destroyed. They are either not the subject of property rights, or are public nuisances. We find no statute or decision of any court treating vinous, spirituous, or malt liquors within this classification. In *Ah Lim v. Territory*, 1 Wash. 156, 9 L.R.A. 395, 24 Pac. 588, it is held, by a divided court, that a statute prohibiting the use of opium, by smoking and inhaling the fumes thereof through an "opium pipe," is a valid exercise of the police power. Two of the five judges dissented. In *Ex parte Mon Luck*, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693, a statute prohibiting any person from having in his possession or offering for sale opium, and other enumerated drugs made from opium, who has not obtained a license from certain officers, was held valid. Bean, Ch. J., said: "Opium is an active poison, and has no legitimate use, except for medicinal purposes; but it is frequently used to produce a kind of intoxication, by smoking or eating," etc. Noticing the case of *State v. Gilman*, supra, he says: "But the principle of these cases has no application here. It is a matter of common knowledge that intoxicating liquors are produced principally for sale and consumption as a beverage; and so common has been their manufacture and use for this purpose that they are regarded by some courts as legitimate articles of property, the possession of which neither produces nor threatens any harm to the public. But the use of opium, for any purpose other than as permitted in this act, has no place in the common experience or habits of the people of this country," etc. It is unnecessary to further discuss these cases. The distinction, as pointed out by the courts making them, is obvious. We do not hold that common carriers may not be forbidden to transport liquor into prohibition territory. That question is not before us. Nor do we undertake to express any opinion regarding the effect of the 14th Amendment upon the power of the states to deal with the manufacture or sale of liquor, or the power of Congress to legislate upon the question of interstate transportation. Nor do we express any opinion in regard to the right of 17 L.R.A. (N.S.)

the state to prohibit liquor, bought in non-prohibition territory, with intent and for the purpose of bringing into prohibition territory, in such quantities as are reasonably related to or indicate a purpose to sell. We decide nothing except the question raised upon the record. Chapter 806 of the Laws of 1907, prohibiting any person from carrying into the county of Burke, in any one day, more than $\frac{1}{2}$ gallon of vinous, spirituous, or malt liquor, is not a valid exercise of the police power, for that it unduly restricts the right of the citizen to the use of this property, without any intent to violate any prohibited act in relation to it; that the carrying into the county of Burke of the prohibited quantity has no reasonable, substantial relation to the sale of liquors, as prohibited by law. It may be well to repeat that we have expressly held valid the "anti-jug" law which makes the place of delivery the place of sale, thus effectually prohibiting the sale of liquor in one place in the state for the purpose of delivering in another place. *State v. Patterson*, 134 N. C. 612, 47 S. E. 808.

It is suggested that the defendant might, by way of defense, show that he had no unlawful intent, or that he carried it into the county for a lawful purpose. That would be to write language into the statute which is not there, and do violence to the intention of the legislature. If its terms were doubtful and open to interpretation, it would be our duty to so interpret it as to make it correspond to the Constitution, because we would presume that the legislature intended to comply with the Constitution. We have retained this appeal from the last term, and given to the question our most careful and anxious consideration.

We are constrained, both by reason and authority, to conclude that in quashing the indictment there was no error.

Clark, Ch. J., dissenting:

The statute of 1907, chap. 24, p. 57, forbids anyone to "bring" any quantity of spirituous liquor however small, into the county of Burke, for any purpose whatever, even for the owner's own use (wine excepted), by making it in the county, even out of one's own grain or fruit. It has been held universally that nothing in the Constitution prevents the expression of the will of the people, to that effect, by their representatives in the legislature. It would require much ingenuity to frame a constitutional provision that would enable the legislature to forbid the "bringing in" liquor, in any quantity, for any purpose whatever, by its manufacture in the county, and would at the same time disable the people, speaking through their

legislature, from prohibiting the "bringing it in" across the county line, when manufactured, perhaps, in an adjoining county. If there is such a constitutional provision, no one has been able to find it. Certainly it has not been referred to or pointed out in the opinion of the court. There is no express power conferred by the Constitution to hold any statute unconstitutional, and such power has not been asserted by any court anywhere outside of the United States. Three centuries ago Sir Edward Coke tentatively, but not judicially, put such doctrine forward in England, and he was so completely overwhelmed by the contrary argument by my Lord Bacon that it has never since been recognized as sound doctrine in England, and has been ever denied since by all the courts of the English-speaking world (and by all others), save this. Here, soon after the Revolution, the courts assumed this power, without any constitutional provision conferring it. It has now long been acquiesced in by the courts, but with this well-recognized limitation,—that there must be a constitutional provision, and there must be a statute in conflict with it, and the statute must, "beyond reasonable doubt (*Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Sutton v. Phillips*, 116 N. C. 504, 21 S. E. 968; *Cooley*, Const. Lim. 7th ed. 254), conflict with the provision in the Constitution." A statute cannot be held unconstitutional "on general principles," nor because the lawyer or lawyers on a court may think that the larger number of lawyers and others in the legislature have enacted a law unadvisedly or unwisely, or that it is harsh or too comprehensive. If the lawmaking body has jurisdiction of the subject, how it shall legislate upon it is a matter for their discretion. The courts have no veto power.

If the legislature has power to absolutely prohibit the manufacture of liquor, in any quantity, for any purpose, it must have the power to prohibit its importation, from other points, in the state. As to importations across the state line, that point is not before us; but it is notable that every bill now pending in Congress to prohibit the importation of intoxicating liquor into prohibition states is worded like the statute (*Laws 1907*, chap. 806, p. 1147) now before us, and does not restrict the prohibition to such liquor only when imported "with intent to sell." Conceding that the provision of the statute before us which restricts the importation of intoxicating liquor into Burke county, in quantity of more than a half gallon a day, by any one person, would forbid the importation of a larger quantity per day by him, even though it might be for his own consumption, is not that as much as

one could safely consume per day, and would not the importation of a large quantity per person per day be prejudicial to the public health and, presumably at least, for the use of others? In limiting each person to a half gallon per day for his own use (for the law permits no sale), the legislature was not niggardly. Besides, if the manufacture, though exclusively for one's own use and out of one's own apples and peaches, in the county, can be forbidden by statute without breaking the Constitution, why cannot the importation of the same article across the county line, in a greater quantity than a half gallon per day, even for one's own use, be prohibited by the same power? The truth is that, the legislature having jurisdiction of the subject, the limitations upon its exercise rest in the wisdom and sound judgment of the legislature, subject only to review by the people, not by the courts.

The act contains exceptions, allowing importations in unlimited quantity "by druggists for medical purposes" and for use by the hospitals and sanitariums in the county; and it is clear that, even at the limit of $\frac{1}{2}$ gallon per day to each person, enough can be brought in for all necessary and proper purposes. Certainly the ministers can thus get enough for communion purposes, for they cannot buy it after it is brought in; sale being forbidden by the uncontested part of the act. The legislature was not so liberal when it passed the admittedly valid act forbidding the manufacture of liquor in the county, even for one's own use, or its sale for the use of others.

The act prohibits the bringing "into" the county of more than $\frac{1}{2}$ gallon of liquor, by any person, on any one day. By no construction can that be held to forbid the carrying it "through" the county. The theological controversy over the form of baptism was subtle and critical, but it never occurred to anyone to assert that the Greek word *eis* (into) meant *dia* (through). Certainly the members of the legislature must be credited with knowing the difference between two such common Anglo-Saxon words as "into" and "through," and that, when they forbade any person "bringing into" the county more liquor per day than he could be reasonably supposed to bring for his own use, to wit, $\frac{1}{2}$ gallon, they did not intend to prohibit "carrying it through" the county. On the contrary, it was exactly what they wished,—that, if it got in there in larger quantity, it should be carried on through and out of the county.

If this is a bad law, public opinion, as formulated by the legislature, placed it on the statute book, and the same power can repeal it. The courts should not do so. As

General Grant, when President, well observed: "The best way to secure the repeal of a bad law is to enforce it." It does not make an act unconstitutional that no preceding act like it has been passed, for this must have been the case at some time of every kind of statute. Every declaration of the legislative will must, when first made, have been without a precedent. "The world moves, and we must move with it." There are, however, other statutes like this. Laws 1907, chap. 112, p. 121, "to prohibit the manufacture, sale, and importation of liquor into Lincoln and Catawba county," and Laws 1907, chap. 380, p. 568, "to prevent . . . the transportation or delivery of intoxicating liquors into Rutherford county." Sections 2 and 7. If the legislature can make it illegal to manufacture liquor at all, it can make it illegal to import it at all. If it has power to make it unlawful to sell it, it can make it unlawful to buy it, for it is the same transaction. It is a vain thing to prohibit liquor being "manufactured" in a county if the legislature is powerless to prohibit it being "imported" from another county. To "import" is to "bring in" across the county line, either by one's self or by an agent.

Hoke, J., also dissents from the opinion of the court.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

WILLIAM STITT.

(146 N. C. 643, 61 S. E. 566.)

Homicide — pointing gun — manslaughter.

One is guilty of manslaughter who killed another with a gun intentionally pointed at him, although it was believed to have been unloaded, where such pointing of a gun is, by statute, made a misdemeanor, and the gun had not been handled for several weeks, so that accused was culpably negligent.

(May 6, 1908.)

APPEAL by defendant from a judgment of the Superior Court for Mecklenburg County convicting him of manslaughter. Affirmed.

Statement by Hoke, J.:

This was an indictment of defendant for the murder of Jim Pearce, tried before

Note. — Homicide by misadventure, see subject note to *State v. Legg*, 3 L.R.A. (N.S.) 1153.
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Ward, J., and a jury at April term, 1907, of the superior court of Mecklenburg county. The state offered evidence tending to prove that defendant and deceased were playing and "projecking" together, when defendant took down a gun and pointed it at deceased, when the gun was fired killing deceased; that, when the defendant took down the gun, his sister told him to quit playing with the gun, and defendant replied that there was no shell in it, because he was the one that had the gun last, and there was no shell put in it, and said, further, "You know I would not point a loaded gun at my friend." When the gun fired, and deceased fell, defendant said, "Goodness, I didn't know there was a shell in the gun;" and said, further, if he had known there was a shell in the gun or any danger of its killing him, he would not have pointed it at him. Defendant, as a witness in his own behalf, testified as follows: "I knew the deceased, Jim Pearce, for about eight or nine years. About the 16th of February last, he came over to my house to get his hair cut. I told him to come in, he said to me, 'Are you going to cut my hair?' He said he had 10 cents, but wanted it for something. He said, 'Say coz, are you going to cut my hair?' Then we began to play. He had hold of my hand and called me a good boy. I stepped back, and got the gun and cocked it and pointed it toward him. My sister told me to put it down, it might be loaded. I told her it was not, I would not point a loaded gun at him. He (Pearce) stepped off, and I picked up the gun and shot him. I got it behind the door. I was 'projecking' with it. I knew I was the last one who had it, and I had put it up empty. It had been three or four weeks since I had it last time. He threw his hands across his breast and fell. I said, 'I have shot Jim.' I said I would not have done it for anything. I told Mr. Caldwell about how it happened."

Defendant in apt time preferred a request that in no aspect of the case could the defendant be convicted of murder, and several other requests suggesting views of the evidence by which the jury might acquit defendant of any offense, on the facts disclosed. The court charged the jury as follows: "That they should not convict the defendant of murder in the first degree, or murder in the second degree, and charged the jury that the burden was on the state to satisfy them, from the evidence, beyond a reasonable doubt, that the defendant was guilty of manslaughter. The court then defined to the jury what constituted manslaughter. To this there was no exception. The court then charged the jury, among other things, that, if they found from the evidence be-

yond a reasonable doubt that the defendant picked up the gun, and intentionally pointed it at the deceased, and cocked it, aiming it at him; and, if they further find beyond a reasonable doubt that the gun discharged its load and killed defendant, and this was done wilfully and intentionally,—the defendant would be guilty of manslaughter; and it would be the duty of the jury to return a verdict of guilty of manslaughter." The jury found defendant guilty of manslaughter, and from judgment on verdict, defendant appealed.

No appearance for appellant.

Messrs. Robert D. Gilmer, Attorney General, and Hayden Clement, for the State:

Under a statute making it a misdemeanor to point a gun at a person, if a person points a gun at another, whether loaded or not, without any intention of taking life, and, by accident, it is discharged, producing death, he is guilty of manslaughter.

1 Wharton, *Crim. Law*, 10th ed. § 305; *State v. Turnage*, 138 N. C. 569, 49 S. E. 913; *Barnes v. State*, 134 Ala. 36, 32 So. 670; *State v. Grote*, 109 Mo. 345, 19 S. W. 93; *Surber v. State*, 99 Ind. 71; *Ford v. State*, 71 Neb. 246, 115 Am. St. Rep. 691, 98 N. W. 807.

At common law, one who levels a gun at another, unnecessarily under the circumstances, though without any intention of discharging it, when it goes off accidentally and kills the other, is guilty of manslaughter.

Reg. v. Weston, 14 Cox, C. C. 346; *State v. Turnage*, 138 N. C. 568, 49 S. E. 913.

Whether the firing was accidental or not made no difference.

State v. Vines, 93 N. C. 493, 53 Am. Rep. 466; *State v. Capps*, 134 N. C. 622, 46 S. E. 730; *State v. Hall*, 132 N. C. 1094, 44 S. E. 553.

If one uses a dangerous and deadly weapon in a careless and reckless manner, and thereby kills another, he is guilty of manslaughter, although no homicide is in fact intended.

Wharton, *Crim. Law*, 10th ed. § 344; 1 McClain, *Crim. Law*, § 347; *State v. Hardie*, 47 Iowa, 647, 29 Am. Rep. 496; *State v. Morrison*, 104 Mo. 638, 16 S. W. 492; *State v. Roane*, 13 N. C. (2 Dev. L.) 58.

Hoke, J., delivered the opinion of the court:

There is no error in the record which gives the defendant any just ground of complaint. The court correctly held that, on the testimony, defendant could not be convicted of murder. A conviction of murder should never be allowed unless there has

been an unlawful and intentional taking of another's life. Sometimes this intent will be imputed by reason of the killing with a deadly weapon, or under circumstances which indicate a reckless indifference to human life; but it must always exist before a charge of murder can be sustained. And in the present case we think the testimony on the part of the state was of a kind to justify the position that no intentional killing of the deceased had been shown. In no aspect of the evidence, however, if believed, could the defendant be held entirely innocent, and his prayers for instructions, based upon any such view of the facts, were therefore properly rejected.

It is well established that, if one causes the death of another by reason of culpable negligence, or by an unlawful act which amounts to an assault on the person, he is guilty at least of the crime of manslaughter. *State v. Turnage*, 138 N. C. 568, 49 S. E. 913; *State v. Vines*, 93 N. C. 493, 53 Am. Rep. 466; *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. 883; Wharton, *Homicide*, 3d ed. p. 696. In *State v. Turnage*, supra, it is held that, if death ensues from the unjustifiable and reckless use of a gun, it is manslaughter, whether the gun was intentionally discharged by the prisoner or not. And, delivering the opinion, Associate Justice Brown, for the court, said: "We do not controvert any of the legal propositions contended for by the state as to what acts will constitute manslaughter, when death ensues from the reckless use of a deadly weapon, such as a pistol or gun. Pointing a gun at another under such circumstances as would not excuse its intentional discharge constitutes, in this and many other states, a statutory misdemeanor, and an accidental killing occasioned by it is manslaughter." True a new trial was ordered in *Turnage's Case*, but that was chiefly because the defendant had expressly testified that he did not intentionally point the gun at anyone. In *State v. Vines*, supra, it is held: "Where one is engaged in an unlawful and dangerous sport, and kills another by accident, it is manslaughter." The pointing of a gun or pistol at another has come to be so generally recognized as an act importing negligence that "didn't know it was loaded" has passed into a saying descriptive of the serious or fatal results that frequently attend such conduct, and with us the matter has been considered of such importance that our statute law (*Revisal 1905*, § 3622) has made it a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court, for anyone to point a gun or pistol at another, "in fun or

otherwise, and whether the gun or pistol shall be loaded or unloaded."

According to "defendant's statement, he intentionally pointed the gun at the deceased, and, while it is not a matter of controlling importance, he evidently snapped it, for his exclamation was, "Goodness, I did not know there was a shell in the gun." And this, too, when his testimony further shows that he had not handled or examined the gun in three or four weeks. His own version of the occurrence therefore brings his conduct within the condemnation of either principle announced and sustained by the authorities cited. He was culpably negligent, and was engaged at the time in an act which, by our statute, is made an unlawful assault on the deceased. There is nothing here said which militates in any way against the doctrine upheld by this court in the case of *State v. Horton*, 139 N. C. 588, 1 L.R.A.(N.S.) 991, 111 Am. St. Rep. 818, 51 S. E. 945. In that case the facts were presented to the court in the form of a special verdict, by which, with other statements, it was made to appear: "That said killing was wholly unintentional; that the shooting of the deceased was done while the defendant was under the impression and belief that he was shooting at a wild turkey; that the hunting engaged in by the defendant was not of itself dangerous to human life, nor was he reckless in the manner of hunting, or of handling the firearm with which the killing was done." A perusal of the opinion will disclose that these facts just mentioned were referred to throughout as controlling in the case, and were made the basis of the judgment on which the defendant's innocence was declared. In the opening sentence of the opinion the judge said: "It will be noted that the finding of the jury declares that the act of the defendant was not in itself dangerous to human life, and excludes every element of criminal negligence." And, on page 592 of 139 N. C.: "The special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life, and negatived all idea of negligence, we hold that the case is one of excusable homicide."

The two cases are thus clearly distinguished, and in the case at bar the judge could well have charged that, if the jury was satisfied beyond a reasonable doubt that defendant intentionally pointed the gun at the deceased, and, while so engaged, the gun was discharged, killing the deceased, the defendant would be guilty of manslaughter.

There is no error to defendant's prejudice, and the judgment below is affirmed.
17 L.R.A.(N.S.)

OKLAHOMA SUPREME COURT.

HOPPE HARDWARE COMPANY, Plff. in

Err.,

v.

DAN A. BAIN, Sheriff, et al.

(— Okla. —, 95 Pac. 765.)

Insolvency — preferences — beneficial interest.

1. A failing or insolvent debtor may prefer one or more of his creditors, but, if the arrangement by which he does so stipulates or provides a benefit for him, it is fraudulent on his part; and, if the preferred creditors knew of the existence of other debts due by the failing debtor, they are charged with participating in the fraud.

Same — organization of the corporation — fraudulent conveyance.

2. An insolvent debtor organized a corporation with a capital stock of \$7,000, and, in payment of indebtedness due by him to his wife and brother-in-law, who knew of the existence of other debts, he had issued to them all the stock of the corporation except one share of the value of \$100, and transferred to the corporation by a bill of sale all of his assets of the value of about \$11,000 for a consideration of \$10,000, and, by a collateral agreement, the debtor was retained as president and manager of the corporation at a salary of \$40 per month, and the corporation was to pay debts due by him to other creditors in the sum of about \$4,000. Held, that the transfer by the debtor of his assets to the corporation was fraudulent and void as to a creditor not assenting thereto.

(May 15, 1908.)

Headnotes by HAYES, J.

Case Note. — *Effect of contemporaneous agreement to give the debtor employment, or retain him in a position, to render an attempted preference invalid as to other creditors.*

The courts are not in harmony as to whether such an agreement, made contemporaneously with the conveyance or property, to prefer the grantee as a creditor of the grantor, raises a presumption of fraud, and, if so, whether the presumption is *prima facie* or conclusive. That it is at least evidence of fraud, and should be given to the jury together with other facts relied upon to establish fraud, is beyond question. The weight of authority and the better doctrine seem to be to the effect that such an agreement or understanding, made contemporaneously with and a part of a transfer of property, to prefer a creditor, depends for its validity upon the intention of the parties thereto. If the purpose and intention of this agreement were to create a benefit or trust for the debtor, it avoids the transfer. On the other hand, if it was an incident to the transfer, and not made primarily to

ERROR to the District Court for Kay County to review a judgment in favor of defendants in an action in replevin brought to recover possession of certain hardware in the hands of the sheriff on execution. Affirmed.

Statement by Hayes, J.:

This is an action in replevin, brought by the plaintiff in error (plaintiff below) against the defendants in error (defendants below) in the district court of Kay county, which resulted in judgment in that court for defendants. The material facts disclosed by the evidence in the case and involved in the consideration of the assignments of error are as follows: For a number of years prior to January, 1901, Fred H.

Hoppe resided at Chillicothe, Missouri. In January, 1901, he came to Blackwell, Oklahoma, and purchased from W. R. Stapleton a stock of hardware for a consideration of \$7,600, and gave to Stapleton for said property real estate valued at \$4,200, \$500 in cash, and a note for \$1,400. Mr. Hoppe afterwards made payments on the note until the same was reduced to \$660. He continued to conduct the hardware business which he had purchased from Stapleton at Blackwell until May, 1902. At that time he was owing various wholesale houses and the First National Bank of Blackwell in the aggregate the sum of about \$4,000. He also owed Mary L. Hoppe, his wife, \$3,100, and William A. Lockwood, his brother-in-law, \$3,600. He owed other indebtedness as

create a benefit or trust for the debtor, but rather as incident to the realizing of more from the property transferred because of the debtor's knowledge of the property, it is a valid condition, and its existence will not invalidate the transfer.

A somewhat similar question sometimes arises in respect to the subsequent employment of the debtor by the creditor where no agreement to that effect was made at the time of the transfer. Cases involving that question, however, are excluded. So, also, are cases involving the validity of general assignments for the benefit of creditors, where, as a condition of the assignment, the assignee was to retain the assignor in his employ in reference to the property assigned.

The doctrine that such a condition in a transfer to prefer a creditor does not *per se* render the transfer invalid and void was stated and applied by the court in *Smith v. Craft*, 123 U. S. 436, 31 L. ed. 267, 8 Sup. Ct. Rep. 196, wherein a bill of sale of a stock of goods to prefer a creditor was attacked by creditors as fraudulent and void because it contained a stipulation that the vendee therein should employ the debtor, the vendor, in the business transferred, at the rate of \$150 per month so long as the vendee carried on or continued such business. The court, however, refused to hold that this stipulation rendered the transfer fraudulent and void *per se*. On this subject, it is said: "Whether such a stipulation is valid or invalid depends upon its intention. If its object appeared on its face to have been to secure a benefit to the debtor or his family, it would be fraudulent in law. . . . But, if its sole purpose was to obtain services necessary to wind up the business and turn the goods into money as promptly and economically as possible, for the benefit of the other party, it is valid." It is further said that it cannot be concluded, as matter of law, either on the face of the bill of sale, or with the aid of evidence of what was done under its provisions, that such compensation was unreasonable, or that the stipulation in question was fraudulent; that

these were questions of fact to be taken in connection with other facts and circumstances produced at the trial, to be considered by the court.

This doctrine was reaffirmed by that court in *Bamberger v. Schoolfield*, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225, as to a bill of sale of a stock of goods. It does not appear in this case that the agreement for employment was contemporaneous with, or incorporated in, the bill of sale. In holding that the fact of employment of the debtor would not of itself render the transaction fraudulent, the court followed the decisions of the courts of Alabama, and also cited with approval *Smith v. Craft*, *supra*, as to the effect of a stipulation of employment contemporaneous with the transfer. It said: "Certainly, if nothing else appeared but the mere employment of Warten [the debtor], subsequent to the sale, to assist in the disposition of the goods and the getting in of the book accounts, such fact would not be a circumstance in itself sufficient to prove, within the meaning of the Alabama law, that the transaction was fraudulent. Even if, at the time of the sale, there had been an agreement to employ, such fact would not of itself have necessarily implied a reservation of benefit in favor of the seller so as to have rendered the sale invalid under the Alabama law. . . . Such, also, is the general rule."

In *P. J. Peters Saddlery & Harness Co. v. Schoelkopf*, 71 Tex. 418, 9 S. W. 336, a bill of sale of a stock of goods to prefer a creditor, together with a written contract by which the creditor employed the debtor to take charge of and sell the goods, were construed as one instrument; and, so considered, it was held that the employment of the debtor under the circumstances, he being familiar with the business and understanding the manufacture of material into saddles, was most natural, and that such employment did not render the bill of sale fraudulent and void.

In other jurisdictions such stipulations in transfers of property to prefer creditors have been upheld on the ground that the mere stipulation for employment is not

surety on notes the exact amount of which the evidence does not disclose, and he owed a balance on his note to Stapleton. His stock of hardware at that time invoiced about \$11,000. He was in an insolvent condition, and his creditors were crowding him for payment on their accounts. He went to St. Louis in the month of May, 1902, to try to borrow money from Lockwood, his brother-in-law, with which to pay off the accounts of those who were urging him for payment. He took with him to St. Louis the invoice of his stock of goods which had been made by him in the preceding February, and a statement of the indebtedness he owed the various wholesale houses and the bank at Blackwell. Lockwood refused to advance him further money, for the reason that Mr.

Hoppe was already indebted to him in a large sum which he had been owing him since 1889; but Lockwood proposed to Mr. Hoppe that, if he would incorporate his business and give him (Lockwood) stock for what he already owed him, he would loan to the corporation the sum of \$3,000, which amount could be applied on the indebtedness Hoppe owed the wholesale houses and the First National Bank of Blackwell, and the remaining \$1,000 could be paid out of the proceeds of the sales made by the company. Mr. Hoppe went to Chillicothe, Missouri, and conferred with his wife about the matter, and finally it was agreed between Lockwood, Hoppe, and his wife that a corporation should be formed whose capital stock should be \$7,000; that Lockwood should

fraudulent in its operation, and is in and of itself an independent agreement. And, if the transfer is complete, and the consideration thereof apart from the question of employment is fair and adequate, the mere stipulation for employment will not be construed as a reservation of a benefit or trust for the debtor, within the rule holding transfers of property containing such reservations fraudulent and void.

This is the doctrine of *Griffin v. Cranston*, 10 Bosw. 1, as to a stipulation in a transfer made by one member of a partnership to his copartner, of his interest in a hotel lease and furniture, by the terms of which the debtor and his wife were to be employed in the hotel and to have rooms therein. In holding that such a stipulation did not stamp the transfer as fraudulent *per se*, the court said: "There is no extrinsic evidence of fraud in this case. No facts or circumstances are shown which would produce conviction on the mind that Judson designed to hinder, delay, and defraud his creditors. From the service contract alone we are called upon to spell out such a fraudulent intent. To vitiate this sale, there must have been fraud in fact (what was formerly denominated fraud in law, no longer exists); and we must be able to say that the provisions of the instrument are such that, when carried out to their apparent and reasonable intent, it will be fraudulent in its operation. We cannot presume fraud when the instrument admits of a contrary construction. . . . Part of the inducement of the sale doubtless was that Judson [the debtor] should be taken into the employment of Cranston [the preferred creditor]; but the transfer was absolute and complete, without reservation, and did not secure such a future benefit from the assigned property as would render the assignment void."

To the same effect, as to a stipulation for employment, as part of a transfer of a stock of goods to prefer certain creditors, is *Havens v. Exteine*, 5 N. Y. Supp. 735, and *Kelly v. Sprague*, 36 N. Y. S. R. 445, 13 N. Y. Supp. 64, as to a stipulation for employment in the sale of a hotel, made to

prefer creditors, wherein it is said that such a stipulation is not in itself evidence of fraud upon the creditors.

To the same effect is *Nicholson v. Leavitt*, 4 Sandf. 252, Reversed in 6 N. Y. 510. 57 Am. Dec. 499, on the ground that provisions in deeds of assignment for sale of goods on credit were fraudulent and void as to a judgment creditor.

Upon a similar theory, a transfer of personal property by a partnership to prefer creditors, which contained an agreement to employ one of the partners at a stipulated salary per month to manage the business, was held not to be vitiated by such agreement, in *Cribb v. Bagley*, 83 Ga. 105, 10 S. E. 194. The court said that such an agreement, in and of itself, did not constitute fraud in law. "If the sale was made in good faith and with no design to hinder, delay, or defraud any creditor, and if the consideration, apart from this agreement, was full and adequate, the superadding of the agreement as an additional element of the consideration would not render the transaction void. If, however, the sale was for less than the full value of the property, and this agreement represented a part of that value, then the agreement would be in the nature of a reservation for the benefit of one member of the debtor firm and the sale would be void as against the existing creditors. It will be noticed that there was no stipulation for payment of the monthly wages out of the corpus, or of the income of the property sold. The wages contemplated were not made a charge upon that property in any manner whatsoever, but, when earned, would constitute a debt by the employers to the employee. Hence the creation of such a debt could operate in no way to the prejudice of any creditor of *Cribb & Phillips* [the debtors]. Indeed, it might be to their advantage for *Cribb* to earn and receive an income for his services, since in some way it might be applied in whole or in part to the outstanding debts of the firm to which he belonged. It would certainly seem that it would be better for the creditors of an insolvent debtor that the debtor

take \$3,800 of this stock, and pay therefor \$200 in cash, and surrender to Hoppe the notes he held against him; that Mary L. Hoppe should take \$3,100 of the stock, and pay therefor by surrendering to Hoppe the note she held against him, and Mr. Hoppe should retain one share of the stock of the par value of \$100; and it was agreed between them there at that time, although this agreement was not made in writing, nor does it appear as a part of the bill of sale hereafter referred to, that Mr. Hoppe should be president and general manager of the corporation, and as such should continue in the management and control of the business, and should receive a salary in the sum of \$40 per month, and that Mrs. Hoppe should be secretary and treasurer, and should re-

ceive as her salary the sum of \$10 per month. The corporation was organized. Hoppe executed a bill of sale to it, conveying his stock of goods for a consideration of \$10,000. This bill of sale was filed for record in the office of the register of deeds of Kay county shortly thereafter, and Mr. Hoppe notified his clerks of the change in the business, and also notified the bank at Blackwell and the various wholesale houses to whom he was indebted, but it does not appear that he gave any notice to W. R. Stapleton or that W. R. Stapleton ever received any notice of the change in the business until sometime thereafter, Lockwood sent to the corporation \$3,000, and the corporation executed to him its note therefor payable on demand. The

should have an income from his labor than that he should have none."

A somewhat similar doctrine was enunciated in *Whitson v. Griffis*, 39 Kan. 211, 7 Am. St. Rep. 546, 17 Pac. 801, as to a chattel mortgage given to prefer certain creditors. The court said that, to render a mortgage void by reason of some benefit resulting to the mortgagor from the giving of the mortgage, such benefit must have been given for the purpose of hindering, delaying, or defrauding creditors; and added: "If it was found that this condition was put in the mortgage for the purpose of hindering and delaying the collection of the debt, then, of course, the mortgage would be void; but the court ought to have submitted the question to the jury, and they ought to have been informed that, where such conditions and stipulations are contained in a mortgage, and placed there in good faith, that it would not be, for that reason, void."

A bill of sale of a stock of merchandise, made to prefer certain creditors, which contained a stipulation to the effect that the vendors were to attend to the business as the vendee should direct, to receive as pay a per cent of the net profits, the agreement to continue in force until its discontinuance was requested by either party by giving sixty days' notice, was held, in *Wilcox v. Landberg*, 30 Minn. 93, 14 N. W. 365, not to be fraudulent upon its face, the question of fraud being for the jury. To the same effect, also, are *Rindskoff v. Guggenheim*, 3 Calw. 284; *Marks v. Hill*, 15 Gratt. 400; *Jannet v. Barnes*, 11 Leigh, 103; *Norris v. Persons*, 49 Wis. 101, 5 N. W. 224 (sale of real estate).

So, in *Hill v. Taylor*, 125 Mo. 331, 28 S. W. 599, a stipulation in a bill of sale of horses, that the vendor should resell them for the vendee, where the purpose of the sale was to prefer the vendee as a creditor of the vendor, was held not to render the transfer fraudulent and void, where the vendee had paid a fair price for the property and taken possession and control of it. The same conclusion was also reached in *Young v. Booe*, 33 N. C. (11 Ired. L.) 347, as to a deed of trust to a creditor, to prefer

him as such over other creditors, and which contained a stipulation that the vendor was to act as agent for the trustee in realizing on and disposing of the property conveyed in the deed, he to receive support for his family while disposing of it; and also in *Frank v. Robinson*, 96 N. C. 28, 1 S. E. 781, under a very similar state of facts. It was here, however, said that, while such a stipulation did not render a deed fraudulent, yet it was evidence of fraud, to be considered with other facts in determining that question.

The doctrine also finds support in *Faunce v. Lesley*, 6 Pa. 121, wherein an assignor of a business to prefer certain creditors stipulated for the employment of apprentices whose wages were to be paid to him. This stipulation was held not to amount to fraud sufficient to invalidate the instrument, because it was collateral to the assignment, and also because the wages secured could be reached by creditors; also, in *Davis v. Hukill*, 173 Pa. 138, 33 Atl. 882, wherein, in a transfer of stock in a corporation to prefer certain creditors, the debtor reserved the right or privilege to sell the stock and receive a percentage of the profits, if any, derived from the sale. An earlier Pennsylvania case, *M'Clurg v. Lecky*, 3 Penr. & W. 83, 23 Am. Dec. 64, seems to be opposed to the foregoing cases. In the latter case a deed of a tract of land together with an assignment of engines, machinery, and other chattels thereon, made to prefer certain creditors, was held to be fraudulent and void, as a matter of law, because it was conditioned upon employment of the debtor as agent to superintend and conduct the factory located on the land conveyed by the assignment. The case is distinguishable from the other Pennsylvania cases on the subject and also the other cases herein considered, because the stipulation for employment provided as compensation a percentage of the profits derived from the business, which, over and above what was necessary for the support of the debtor's family, was to be divided *pro rata* among all his creditors; in other words, it was an attempt, not only to provide for employment, but also to place so much of the proceeds of

debts due by Mr. Hoppe to the various wholesale houses and to the First National Bank of Blackwell were paid off by the corporation. Two small payments were made by Mr. Hoppe to W. R. Stapleton after that time. Stapleton, after making diligent efforts to collect the balance due on his note from Hoppe, brought suit thereon, and, on December 18, 1903, recovered judgment in the total sum of \$726.85, and, on the 2d day of February, 1904, he had an execution issued thereon and levied upon certain hardware claimed by the plaintiff in error. Plaintiff in error, on the 14th day of February, 1904, filed this action to recover the property from the sheriff who served the writ of execution. The case was tried before a jury, and, upon motion of defendants, a verdict was directed by the court in their favor, and the assignment of error complaining of this action of the court presents

to this court for its consideration the only question in the case.

Mr. W. C. Tetrick for plaintiff in error.

Messrs. J. W. Peery and H. S. Gurley, for defendants in error:

At common law, a conveyance to the use of the grantor, or which, purporting upon its face to be absolute, was upon secret trust in his favor, or reserved to him a benefit, was fraudulent in law, and void as to creditors, without regard to the intent with which it was made.

14 Am. & Eng. Enc. Law, 2d ed. p. 222; Cadogan v. Kennett, 2 Cowp. 432; Twyne's Case, 3 Coke, 80b. 1 Smith, Lead. Cas. 39; Robinson v. Elliott, 22 Wall. 527. 22 L. ed. 764; 1 Cooley's Bl. Com. bk. 2, p. 440; American Oak Leather Co. v. Wyeth Hardware & Mfg. Co. 57 Mo. App. 297; Sauer v. Behr, 49 Mo. App. 86.

employment as was necessary to support the debtor's family beyond the reach of his creditors. The language of the court, however, is not, apparently, based upon this feature of the case, but rather upon the theory that such a stipulation, in and of itself, would render the contract fraudulent and void as a matter of law.

In other jurisdictions such stipulations, together with other facts in relation to the transaction, have been held to amount to a fraud upon creditors, invalidating the transfer. Such cases, however, are not necessarily contrary in principle to those above cited. In *Cowan v. Phillips*, 119 N. C. 26, 25 S. E. 711, a chattel mortgage of a stock of goods, which contained a provision that the husband should remain in possession at a salary greatly in excess of what he had formerly received from the business, was said to be presumptively fraudulent because of the reservation of so large a salary. The mortgage, however, was held not to be fraudulent on its face, as the presumption might be rebutted, but not by evidence of good faith.

In *Best v. Fuller & F. Co.* 185 Ill. 43, 56 N. E. 1077, a secret understanding between the vendor and vendee, in a bill of sale of a stock of goods made to prefer a vendee, that the vendor was to be retained in his store as manager, and to pay himself a stated salary per month, was a circumstance considered by the court in arriving at its conclusion that the transfer was fraudulent. The case does not go to the extent of holding that the mere stipulation itself amounted, in law, to fraud.

In *Trask v. Bowers*, 4 N. H. 309, a secret understanding in a sale of personal property to prefer a vendee as a creditor of the vendor, that the vendor was to be employed in reference to the property, was held to invalidate the transfer, not, however, because the agreement or stipulation for the employment of the vendor would have been, in and of itself, fraudulent had 17 L.R.A. (N.S.)

it been made openly, but because it was made secretly.

While the United States Supreme Court, in *Bamberger v. Schoolfield*, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225, construed the Alabama decisions to be in harmony with the general doctrine as herein stated, yet the Alabama decisions seem to go much farther than most courts have toward holding that such stipulations render the conveyance fraudulent. Thus, in *Stephens v. Regenstein*, 89 Ala. 561, 18 Am. St. Rep. 156, 8 So. 68, a stipulation in a sale of a stock of goods by an insolvent debtor to prefer certain creditors, that the business was to be continued by the purchaser, and he was to be employed as a clerk at a monthly salary, was said to create a benefit for the debtor, and therefore to invalidate the entire transaction. As to such stipulation, the court said: "One of the direct results of the sale was that, by the agreement, the failing debtor secured to himself a paying employment, which, but for the sale and agreement, he would not have had. This was a benefit secured to him, which rendered the transaction fraudulent as to that part of the property conveyed which was in excess of the debtor's exemptions."

The doctrine of the foregoing case was also recognized and applied in *Birmingham Dry Goods Co. v. Roden*, 110 Ala. 511, 55 Am. St. Rep. 35, 18 So. 135, and *Roden v. Norton*, 128 Ala. 129, 29 So. 637, both of which involved a stipulation of this kind in a chattel mortgage of a stock of goods.

Such a stipulation in a bill of sale of a stock of goods in payment of a debt to prefer a creditor, by which the vendor was authorized to sell the goods as agent of the vendee and pay him the proceeds less expenses, but which did not stipulate that any wages were to be paid the vendor for his services, was, for this reason, held not to be fraudulent and void. *Bluthenthal v. Magnus*, 97 Ala. 530, 13 So. 7.

By act of Parliament, 3 Henry VII., chap. 4, such transactions were expressly declared to be void. This statute long antedated the general statute of Elizabeth, and it was imported into this country and into this territory as a part of the common law.

6 Am. & Eng. Enc. Law, 2d ed. pp. 279-287; McKennon v. Winn, 1 Okla. 327, 22 L.R.A. 501, 33 Pac. 582; Coburn v. Harvey, 18 Wis. 147; 2 Wilson's Rev. Stat. (Okla.) p. 970.

When the debtor undertakes to prefer a creditor by a conveyance the legal effect of which is to secure to him a benefit or interest in the property (no matter how small the same may be), and cover up the property and place it beyond the reach of his creditors, it is fraudulent in law as to those of his creditors who do not assent thereto.

Lukins v. Aird, 6 Wall. 78, 18 L. ed. 750; Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758; Means v. Dowd, 128 U. S. 273, 32 L. ed. 429, 9 Sup. Ct. Rep. 65; Montgomery Web Co. v. Dienelt, 133 Pa. 585, 19 Am. St. Rep. 663, 19 Atl. 428; First Nat. Bank v. F. C. Trebein Co. 59 Ohio St. 316, 52 N. E. 834; Beidler v. Crane, 135 Ill. 92, 25 Am. St. Rep. 349, 25 N. E. 655; Kellogg v. Douglass County Bank, 58 Kan. 43, 62 Am. St. Rep. 596, 48 Pac. 589; Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372; Metcalf v. Arnold, 110 Ala. 180, 65 Am. St. Rep. 24, 20 So. 301; Stephens v. Regenstein, 80 Ala. 561, 18 Am. St. Rep. 156, 8 So. 68; Pritchett v. Pollock, 82 Ala. 169, 2 So. 735; McDowell v. Steele, 87 Ala. 493, 6 So. 288; Page v. Francis, 97 Ala. 379, 11 So. 736; Taub v. Swofford Bros. Dry Goods Co. 8 Colo. App. 213, 45 Pac. 513; Hurd v. Ascherman, 117 Ill. 501, 6 N. E. 160; Beidler v. Crane, 22 Ill. App. 538, Affirmed in 135 Ill. 92, 25 Am. St. Rep. 349, 25 N. E. 655; Doyle v. Smith, 1 Coldw. 15; Donnebaum v. Tinsley, 54 Tex. 362; First Nat. Bank v. Knowles, 67 Wis. 373, 28 N. W. 225; 14 Am. & Eng. Enc. Law, 2d ed. pp. 245-248; Bump, Fraud. Conv. 4th ed. § 174; Oliver-Finnie Grocer Co. v. Miller, 53 Mo. App. 107; Roden v. Norton, 128 Ala. 129, 29 So. 637; Deposit Bank v. Caffee, 135 Ala. 208, 33 So. 152; McNeil & H. Co. v. Hovland, 91 Ill. App. 315; Hornsby v. City Nat. Bank (Tenn. Ch.) 60 S. W. 160; Davidson v. Watts Min. Car-Wheel Co. 121 Ala. 591, 25 So. 758; Low v. Ivy, 10 Pa. Super. Ct. 32; Fuller & F. Co. v. Gaul, 55 Ill. App. 500, Affirmed in 185 Ill. 43, 56 N. E. 1077; Pennsylvania Knitting Mills v. Bibb Mfg. Co. 12 Pa. Super. Ct. 346; Adams v. Dempsey, 35 Wash. 80, 76 Pac. 538; St. John Woodworking Co. v. Smith, 82 App. Div. 348, 82 N. Y. Supp. 1025, Affirmed in 178 N. Y. 629, 71 N. E. 1139; 17 L.R.A. (N.S.)

Hunt v. Knox, 34 Miss. 655; Bacon v. P. Brockman Commission Co. 48 Neb. 365, 67 N. W. 304; Stout v. Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857; Ely & W. Dry Goods Co. v. McLaughlin, 78 Mo. App. 578; McDonald v. Hoover, 142 Mo. 495, 44 S. W. 334; Bowlus v. Shanabarger, 19 Ohio C. C. 137; Revercomb ex rel. Worland v. McCully, 74 Mo. App. 575; Pennsylvania Knitting Co. v. Bibb Mfg. Co. 21 Pa. Co. Ct. 537; Harris v. Osnowitz, 35 App. Div. 594, 55 N. Y. Supp. 172; Robinson v. McKenna, 21 R. I. 117, 79 Am. St. Rep. 793, 42 Atl. 510; Vilas Nat. Bank v. Newton, 25 App. Div. 62, 48 N. Y. Supp. 1009; Cowan v. Phillips, 119 N. C. 26, 25 S. E. 711; Kayser v. Heavenrich, 5 Kan. 324; Clark v. Robbins, 8 Kan. 574; Manley v. Larkin, 59 Kan. 528, 53 Pac. 859; Will T. Little Co. v. Burnham, 5 Okla. 283, 49 Pac. 66; Bank of Perry v. Cooke, 3 Okla. 534, 41 Pac. 628.

Hayes, J., delivered the opinion of the court:

Counsel for both parties to this suit have, we think correctly, admitted in their briefs that this case turns upon the proposition whether the act of Mr. Hoppe in organizing the Hoppe Hardware Company, a corporation, and in transferring to it his stock of merchandise for a consideration of \$10,000 recited in the bill of sale, and having 38 shares of the stock of the corporation issued to his brother-in-law, and 31 shares to his wife in payment of indebtedness due by him to them, when, by a collateral secret agreement, it was provided that he should be retained as president and manager of the corporation, and should receive a salary of \$40 per month, and that \$4,000 of his assets transferred by him to the corporation should be used in payment of his debts to certain of his creditors, is in law a fraud against W. R. Stapleton, who was one of his creditors at that time, and who did not assent to the transaction. There can be no question that Mr. Hoppe had the right to prefer his wife and Mr. Lockwood to his other creditors, and, if his transaction had consisted only in organizing a corporation and in transferring all of his assets to it, and in having issued certain shares of stock to Mr. Lockwood and Mrs. Hoppe in payment of his debts to them, such act would not have constituted fraud, though it might have had the effect to hinder, delay, or defeat other honest debts owing by him to other creditors. Wilson's Rev. & Anno. Stat. 1903, § 2778; Brittain v. Burnham, 9 Okla. 522, 60 Pac. 241; Jaffray v. Wolf, 1 Okla. 312, 33 Pac. 945; Nix v. Underhill, 8 Okla. 123, 56 Pac. 959.

Plaintiff in error contends that the case should have been submitted to the jury to

find whether such transaction was made by Mr. Hoppe with fraudulent intent to hinder and delay his creditors; but it is the well-settled rule that fraud may arise as an inference of law, and that, when a conveyance is made under such circumstances that fraud exists as an inference of law, then it is the duty of the court to pronounce the conveyance in question void as if the fraudulent intent were directly proved. *Lukins v. Aird*, 6 Wall. 78, 18 L. ed. 750. If the collateral and secret agreement made by Mr. Hoppe with Mr. Lockwood and his wife, which appears neither in the articles of incorporation, nor in the bill of sale executed by him to the corporation, to the effect that he should be retained as president and manager of the corporation, and should continue in control and management of the business theretofore conducted by him, and that \$4,000 of the assets transferred by him to the corporation should be applied in payment of his debts to certain creditors, constitutes, as a matter of law, fraud against those of his creditors who did not assent to the transaction, then the action of the court in directing a verdict was not error. It is a well-settled rule of the common law that a conveyance to the use of the grantor, or which purports upon its face to be absolute, when there exists a secret agreement creating a trust in favor of the grantor, or by which a benefit is reserved to him, is fraudulent in law, and void as to creditors, without regard to the intent with which it was made. *Lukins v. Aird*, supra; *Robinson v. Elliott*, 22 Wall. 527, 22 L. ed. 764. This rule of law was in force in the territory of Oklahoma as part of the common law at the time of this transaction. When the people, in 1899, came from the different states into Oklahoma, they brought with them the rules of the common law as recognized and promulgated by the American courts. *McKennon v. Winn*, 1 Okla. 327, 22 L.R.A. 501, 33 Pac. 582. And, by § 4200, *Wilson's Rev. & Anno. Stat.* 1903 of Oklahoma, it is provided that the common law, as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes.

In *Lukins v. Aird*, supra, the facts were that Aird, being indebted and subsequently having failed, conveyed to Spring certain town lots for the sum of \$1,200 in money, Spring agreeing at the time that Aird should have the use of two of the lots for one year free, and with the privilege to use them thereafter at \$100 per year so long as Spring did not desire to use them. *Lukins*, one of Aird's creditors, brought the action alleging the transaction was fraudulent and praying that the conveyance be set

aside and the property subjected to his claim. Mr. Justice Davis, who delivered the opinion of the court, said: "A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right,—the right of possession,—and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors. . . . It makes no difference in the legal aspect of this case that the interest reserved was not of great value. It is enough that it was a substantial interest for the benefit of the grantor, reserved in a manner which was inconsistent with the provisions of the deed."

The same justice, in *Robinson v. Elliott*, 22 Wall. 523, 22 L. ed. 762, said: "But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract." In that case the question before the court was whether a certain stipulation in a chattel mortgage, by which it was provided that, until default in payment of one of the notes secured thereby, the mortgagor might remain in possession of the goods, wares, and merchandise, and sell them the same as he had done theretofore, and supply their places with other goods, was fraudulent and vitiated the mortgage. The court held, notwithstanding it was provided by the statute of Indiana, where that case arose, that the question of fraudulent intent in all cases shall be a question of fact, that the court was the proper party to say whether the mortgage, on its face, was void.

The same rule is discussed in *Means v. Dowd*, 128 U. S. 273, 32 L. ed. 429, 9 Sup. Ct. Rep. 65, in which case Mr. Justice Miller, speaking for the court said: "The prevailing doctrine, however, is unquestionably that which we have stated; and its fundamental essence is that an insolvent debtor making an assignment, even for the benefit of his creditors, cannot reserve to himself any beneficial interest in the property assigned, or interpose any delay, or make provisions which would hinder and delay creditors from their lawful modes of prosecuting their claims."

In *McDowell v. Steele*, 87 Ala. 493, 6 So. 288, the court held that a failing or insolvent debtor might select one or more of

his creditors and pay them in full, even though he thereby disables himself to pay anything to the others; but, if the conveyance or arrangement, going beyond the limits of full payment or security, stipulates or provides, openly or secretly, for a benefit to the debtor, it is fraudulent on his part; and, if the grantee or secured creditor knows of the existence of other debts left unprovided for, or has knowledge of facts calculated to put him on inquiry as to them, he is charged with participation in the fraud.

This rule was followed by the same court in the case of *Stephens v. Regenstein*, 89 Ala. 561, 18 Am. St. Rep. 156, 8 So. 68, in which case T. A. Stephens, a failing debtor, sold B. F. Stephens, his brother, who knew of his failing condition, his stock of goods. B. F. Stephens, the purchaser, knew that the sale was being made by his brother for the purpose of preferring certain of his creditors, one of whom was his mother. It was agreed in the sale that T. A. Stephens, the vendor, should be placed in control and management of the business at a monthly salary of \$40. The court held that one of the direct results of the sale was that, by the agreement, a failing debtor secured for himself a paying employment, which, but for the sale, he could not have had, and that this benefit going to him rendered the transaction fraudulent.

The court held in *Robinson v. McKenna*, 21 R. I. 117, 79 Am. St. Rep. 793, 42 Atl. 510, that, where a debtor who owed a merchant for groceries, assigned to the merchant his wages due and that might become due for a period of six months in payment of his account, with an agreement that the merchant was to continue to furnish the debtor with groceries and to give him \$11 per month to pay his rent, and also from time to time during six months to let him have such other sums as he needed out of his earnings, and apply the remainder to his old and running account, such contract was fraudulent and void. In that case, as in the case at bar, it was insisted that fraudulent intent is always a question of fact, but the court, upon that proposition, said: "While we do not question the general accuracy of this proposition of law, yet it is by no means absolute or without exception; for, while a fraudulent intent in the making of a conveyance is ordinarily a question of fact, yet it is not always so."

In *McDonald v. Hoover*, 142 Mo. 484, 44 S. W. 334, the court held that a debtor has the legal right to prefer one of his creditors over another so long as he acts in good faith, but he has no right to pay one creditor in such a way that it not only secures that creditor, but places the surplus of his property over and beyond that security in

the hands of such creditor to be applied by him in the payment of other debts of the debtor. And in *Ely & W. Dry Goods Co. v. McLaughlin*, 78 Mo. App. 578, the court used the following language: "A secret trust for the benefit of the grantor, whether express upon the face of the conveyance creating the trust, or shown by proof *aliunde*, is void as to creditors, and, while a debtor has the right to prefer one creditor above another, and thus discriminate in favor of one and against other of his creditors, he cannot delegate this privilege to a third party; and, where he makes a conveyance conveying this delegation to his grantee, or where it is proved *aliunde*, the conveyance will be declared void as to creditors."

In the case at bar the transaction by which Mr. Hoppe preferred his brother-in-law and wife resulted, not only in accomplishing such preference by him, but, by the agreement secretly made between them, it resulted in giving to him a profitable employment, and, if such transaction is valid, also in placing \$4,000 worth of his assets in the possession of the newly formed corporation, to be distributed for the benefit of Mr. Hoppe in the payment of certain of his creditors. The effect of the transaction was that Mr. Hoppe applied approximately \$7,000 of his assets in making preferred payments to his wife and brother-in-law, and placed the remainder of his assets in the sum of about \$4,000 in the possession of the corporation beyond the reach of his other creditors. If the corporation, with or without collusion with Mr. Hoppe, had refused to pay out this \$4,000 worth of assets to Mr. Hoppe's creditors, and this contract were valid, the effect would have been to have enabled Mr. Hoppe to have still retained in his control and possession said amount of property beyond the reach of his creditors, thereby hindering and delaying them. At the very time this transaction occurred Mr. Stapleton was urging him to pay the balance on his note, and no doubt Mr. Hoppe thought that by this transaction, as admitted by him in his cross-examination, his property would be protected to a certain extent; but whether he so thought or not is immaterial. The question in this case is not what he may have intended, but, What is the result of his deliberate acts? If they resulted in hindering and delaying his creditors, and, by secret agreement, a beneficial interest in his property was reserved to him, the presumption conclusively arises that such illegal object furnished one of the motives for his making the contract, and it should be held to be fraudulent.

Plaintiff in error has cited *Gardner v. Haines*, 19 S. D. 514, 104 N. W. 244, as being in point. In that case John C. Haines,

who had been engaged in business for some time, on the 18th day of October, 1895, or gani-ized a corporation to be known as "John C. Haines, Incorporated," the incorporators of which were John C. Haines, May Haines, his wife, and H. C. Loveland, his mother-in-law. The capital stock was \$50,000, were taken and held by John C. Haines, 50 shares were issued to May Haines, his wife, as payment of a debt due by him to her, and 5 shares were issued to H. C. Loveland, his mother-in-law, without any money consideration. Haines conveyed all his assets to the corporation. On the 28th day of January, 1894, prior to the time the corporation was organized, Haines became liable to O. L. Snyder on assignee's bond. Snyder obtained judgment against Haines on the bond in December, 1897. Haines had, in 1899, become indebted to John T. Potter for the sum of \$12,500. In 1896 Haines gave Potter a new note for said indebtedness, which at that time, including interest, amounted to \$23,000. In 1896, a year after the corporation was organized, Haines borrowed from Marshall Field & Company the sum of \$25,000 with which he took up the Potter note, and assigned to Marshall Field & Company as collateral his 445 shares of the capital stock of the corporation. About six months thereafter Marshall Field & Company received from Haines 440 of said shares of capital stock in full payment of their note. Haines, in 1898, filed his petition in bankruptcy. As was said by the court in its opinion in that case, it appears that the corporation was organized and the property conveyed to it by Haines two years or more before the judgment of Snyder was obtained against him, and that the petition in bankruptcy was filed three years after the organization of the corporation. It does not appear that in the formation of the corporation there was any agreement between Haines and the other stockholders that he should be retained at a salary of \$100 per month, nor was there any agreement by which a portion of the assets were to be taken by the corporation and paid out by the debtor to his creditors. Having issued to his wife 50 shares of the capital stock, he thereby preferred her as one of his creditors, and in delivering to Marshall Field & Company 440 shares of the stock he preferred that company. This he had a right to do; but in making these preferences nothing appears in the record to the effect that any beneficial interest was retained by secret agreement either in the stock thus transferred or relative to the management of the business. The court, in its opinion, sets forth the seven different contentions made by counsel for the creditor who was assail-

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ing the good faith of the transaction, but no contention is made that in any of these transactions there was any secret or public agreement by which Haines retained a beneficial interest in the property transferred, and that case cannot control in the case at bar.

The same is true of *McNerney v. Hubbard*, 3 Neb. (Unof.) 108, 93 N. W. 1123, also relied upon by plaintiff in error. The attack in that case was not upon the good faith of the debtors in the organization of the corporation, but that shares of the stock had been issued to a creditor to pay off an indebtedness and release a mortgage that plaintiff alleged was based upon a fraudulent claim. It was not contended that the conveyance by the debtors who organized the corporation was for their own use, or that they had retained by secret agreement an interest in the property assigned by them which it was alleged they had endeavored to place beyond the reach of their creditors.

We have not overlooked the other authorities cited by counsel for plaintiff in error in his able and exhaustive brief, but, after an examination of the same, we are of the opinion that the rule of law that a debtor who prefers certain of his creditors cannot, in doing so, retain a beneficial interest by the transaction by a secret agreement, is applicable to the case at bar, and is supported by the overwhelming weight of authorities of the American courts, and is in consonance with the utterances of the supreme court of the territory of Oklahoma in *Will T. Little Co. v. Burnham*, 5 Okla. 283, 49 Pac. 66, in which the court said: "The intention of the parties may have been absolutely fair and honest. The mortgagee may have believed that his mortgagor would appropriate the proceeds to the payment of the mortgage debt. The mortgagor may have honestly intended to do so. But the mortgage was void as a matter of law. The conclusion here arrived at is not based upon what the parties may have intended to do, but is based upon what the mortgage does, in fact, concede to the mortgagor the privilege to do. . . . The decisions of the courts of this country have condemned them with almost entire unanimity, and the instrument itself has been as uniformly held to be fraudulent and void as a matter of law, irrespective of the question as to whether any fraud or fraudulent intent did in fact exist."

And in *Bank of Perry v. Cooke*, 3 Okla. 534, 41 Pac. 628, the court said: "It does not matter whether such agreement is oral or in writing, contained within the mortgage or without, if such an agreement was had, the mortgage is fraudulent and void as to creditors."

Mr. Hoppe may have intended no wrong by his transactions, but the effect of his transactions accompanied with the agreement that he should be retained as president and manager at a salary of \$40 per month, and that \$4,000 of his assets transferred by him to the corporation should be applied in payment of his debts to certain creditors, reserved to him a beneficial interest, and these conditions were not made a part of the articles of incorporation, nor a part of the bill of sale executed by him and placed upon record. Mrs. Hoppe had actual notice of the debt of Mr. Stapleton, and, while there is no evidence that Lockwood had notice of Stapleton's debt, he does admit that he knew of all the indebtedness of Mr. Hoppe to the wholesale houses and the bank, and that he was surety on notes to other persons whose names he did not know, which was sufficient notice to him that Mr. Hoppe had other creditors than himself and Mrs. Hoppe; and it is therefore our opinion that the transfer by Mr. Hoppe of his property to the Hoppe Hardware Company was fraudulent and void, and that the judgment of the lower court should be affirmed, and it is so ordered.

Williams, Ch. J., and Dunn, Turner, and Kane, JJ., concur.

OREGON SUPREME COURT.

MARTHA V. DAVIDSON, Resp't.,
v.

A. J. RICHARDSON, Appt.

(— Or. —, 91 Pac. 1080.)

Contract — obligation — enlarged dower rights.

1. The legislature cannot enlarge the dower rights of a widow as against the rights of one who has contracted for a

judgment lien on the property of the husband in view of the constitutional provision against impairing the obligation of contracts, although the judgment is not actually entered until after the statute is passed.

Judgment — *nunc pro tunc* — intervening rights.

2. The wife of one who confesses judgment on his real estate, and whose dower rights in the property are enlarged by statute subsequently passed, is not an intervening party against whose rights judgment cannot thereafter be entered upon the confession *nunc pro tunc*.

(October 22, 1907.)

APPEAL by defendant from a judgment of the Circuit Court for Polk County assigning dower in property which had been purchased under execution. Reversed.

A decision was reached and opinion handed down in this case on April 16, 1907, affirming the judgment of the trial court, but a rehearing was granted, after which the opinion printed herewith was handed down superseding the former one.

Statement by Eakin, J.:

This is a suit for the assignment of dower. Decree for plaintiff, and defendant appeals. W. M. Davidson, plaintiff's husband, in his lifetime was the owner in fee of the donation land claim of Carter T. Davidson and wife, containing 320 acres. On November 9, 1892, defendant, A. J. Richardson, loaned \$3,550 to W. M. Davidson, who, in consideration thereof, agreed to give a judgment lien on said premises less 46½ acres theretofore sold, and, for that purpose and on the same day, duly executed and delivered to the clerk of Polk county his confession of judgment in the circuit court for that county without action. Said confession of judgment was duly entered by the clerk in the journal and in the judgment docket of said court, but he failed to enter

Case Note. — Power of legislature to increase dower rights.

The great weight of authority, although as subsequently shown there is some conflict, supports the proposition that, so far as the wife and husband, or the latter's heirs at law and devisees, are concerned, the legislature has absolute control over the subject of dower, and may enlarge the wife's dower rights in the husband's real estate as it sees fit. But, if the statutory enlargement of dower impairs the obligations of contracts, or affects rights which vested before the passage of the statute, such as those of purchasers from the husband, or of his creditors who have liens upon the land, such legislation will not be upheld by the courts.

In Noel v. Ewing, 9 Ind. 37, it was held, 17 L.R.A. (N.S.)

under a statute abolishing dower, but giving to the widow in lieu thereof one third in fee simple of all real estate of which the husband might have been seised during coverture and in the conveyance of which she had not joined, that a widow was entitled to a third of her husband's land in fee simple as against the devisees under his will, though he had acquired the land in question and had executed his will disposing of the same before the enactment of the statute. The court said that it was undoubtedly competent for the legislature to change the relative rights of husband and wife after marriage, and to substitute for dower inchoate another and larger estate, to be carved out of that of the husband after his death.

Upon the authority of the case just cited, it was held in Morton v. Noble, 22 Ind. 160,

the formal judgment on said confession, and thereafter, on December 5, 1898, on the application of defendant, such judgment was entered *nunc pro tunc*. Prior to the entry of said judgment, *viz.*, July 10, 1897, execution was issued on said confession of judgment and the judgment docket entry, which execution was duly levied on said land, and sale thereof duly made thereon to defendant on August 14, 1897. Thereafter and on December 28, 1899, a sheriff's deed was made thereon to defendant. W. M. Davidson died July 26, 1904. His wife brings this suit for the assignment of dower in said lands under the law in force at the time of the death of her husband, *viz.*, for one half thereof. Defendant concedes that she is entitled to dower therein, but only to the ex-

tent of one third thereof, according to the law in force at the time of the docketing of said confession of judgment. The statutory provision for dower at that time was § 2954 of Hill's Code: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof." This law was amended in 1893 by changing the words "one-third part" to read "one-half part." Bellinger & C. Anno. Codes and Statutes, § 5515.

Mr. W. M. Kaiser for appellant.

Mr. J. K. Weatherford for respondent.

that the enlarged right given to widows by this statute attached to the land so far as it was not curtailed by prior equities.

This statute was again considered by the same court in *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200, in which the question was as to the interest of a widow in real estate conveyed by her husband, before the passage of such statute, by a deed in which she did not join. The court arrived at the anomalous conclusion that the widow was entitled neither to dower, nor to the one-third in fee under the statute; saying that as the statute specifically abolished dower, the widow could not take under the law in force at the time of the conveyance, and, as for taking under the statute in force at the husband's death, it was beyond the power of the legislature, after the sale of the entire fee by the husband when encumbered only by a mere contingency that the wife might use one third of the land for the period that she survived her husband, to enact that one third of the fee, so vested in the purchaser, should be divested from him and vested in the widow of the deceased grantor, since such a law would divest vested rights and impair the obligation of a contract.

This decision was followed in *Logan v. Walton*, 12 Ind. 639; *Giles v. Gullion*, 13 Ind. 487; *Frantz v. Harrow*, 13 Ind. 507; *Strong v. Dennis*, 13 Ind. 514; *Bowen v. Preston*, 48 Ind. 367; and *Colman v. De Wolf*, 53 Ind. 428.

And the rule enunciated in *Strong v. Clem*, *supra*, was applied in *Hoskins v. Hutchings*, 37 Ind. 324, where a widow claimed one third in fee simple of land mortgaged by her husband alone before the passage of the statute. In reply to this contention, the court said that, when the mortgage was executed, it gave the creditor a valid lien on the land, subject only to the contingent right of the wife to dower if she should survive her husband; and that it was beyond the power of the legislature to "increase the interest of the wife, and, in the same proportion, diminish that of the mortgagee, without incurring the charge of having impaired the obligation of the 17 L.R.A. (N.S.)

contract. The creditor has here a specific lien upon the mortgaged premises, which cannot be taken away from him without an evident infraction of the Constitution of the United States, and a violation of a plain principle of justice and right."

This statute was again construed in *Taylor v. Sample*, 51 Ind. 423, and in *Carr v. Brady*, 64 Ind. 28, in both of which it was held that, upon the death of a husband after the taking effect of such statute, his widow was entitled neither to dower, nor to a fee-simple estate in one third of his land sold under execution before the passage of the act. The court said that it was clear that the legislature had no power to impair a vested right, such as that which vested in a purchaser at an execution sale, who took the property subject only to inchoate dower.

In *Davis v. O'Ferrall*, 4 G. Greene, 168, and *Moore v. Kent*, 37 Iowa, 20, 18 Am. Rep. 1, the Iowa supreme court passed upon a statute identical with the Indiana statute, except that it did not expressly abolish dower; and it was held that a widow was entitled to her dower right, and not to an estate in fee simple in land conveyed by her husband alone before the statute took effect. The court, in the first case, said that, so far as the husband and wife, or the widow and heirs, were concerned, the legislature had full control of the subject of dower; but such was not the case when the legislation would affect the rights of innocent purchasers. "Vested rights and the obligations of contracts should not be impaired." *Davis v. O'Ferrall* was followed in *Young v. Wolcott*, 1 Iowa, 174, and *O'Ferrall v. Simplot*, 4 Iowa, 381.

A statute very similar to the Iowa statute was before the Utah court in *Hilton v. Thatcher*, 31 Utah, 360, 88 Pac. 20, in which the question was as to the interest which a widow took in land conveyed by her husband by a deed in which she did not join, at a time when she was entitled only to a third interest for life therein as dower should she survive him. It was held that her interest was to be measured by, and limited in extent to, the law in force at

Eakin, J., delivered the opinion of the court:

In the original opinion we rested the case exclusively upon the fact that the legislature has control over the liens of judgments, and that, in this case, the effect of the enlargement of the dower estate was only a withdrawal of property from the lien of the judgment to the extent of the increase of the dower estate. It is insisted, however, that the effect of the amended statute increasing the dower estate is to deprive the defendant of his remedy by execution by withdrawing a portion of the debtor's property from liability, and that this impairs the obligation of his contract; and we must concede that this is the effect of the amendment.

the time of the conveyance by the husband. The court said that the legislature could not make an enlarged right effective retrospectively.

To the same effect is *Morrison v. Rice*, 35 Minn. 436, 29 N. W. 168, in which it appeared that, after a husband had conveyed land subject to dower, by a deed in which his wife did not join, an act was passed abolishing dower, and in lieu thereof giving a third interest in fee in land of which the husband died seised. It also appeared that, before the husband's death, the law was again changed so as to give the wife a third interest in fee in all the lands of which her husband was seised at any time during coverture. It was held that, by operation of the act abolishing dower, the purchaser's estate was fully discharged of all claims to dower upon the part of his grantor's wife, and that the last act could not interfere with vested rights, since it was not competent for the legislature, after the husband had conveyed land, to diminish the purchaser's estate in the land, or to give the grantor's widow any new estate or interest therein.

In *Taylor v. Stockwell*, 66 Ind. 505, a statutory provision that, in all cases of judicial sales of real estate in which a married woman had an inchoate interest by virtue of her marriage, such interest, if not directed by the judgment to be sold, should be absolutely vested in the wife in the same manner and to the same extent as upon the death of her husband, whenever, by virtue of such sale, the legal title of the husband should become absolutely vested in the purchaser, was held to apply to all sales upon judgments rendered after its passage upon contracts entered into before its passage, and was not in conflict with the provisions of the state and Federal Constitutions, prohibiting the enactment of any statute impairing the obligations of contracts. Accordingly, it was further held that, where a husband, before the passage of such law, executed his promissory note, upon which, after the passage of such act, the payee recovered judgment, to satisfy which the land was sold on execution, his wife

The case of *Watson v. New York C. R. Co.* 47 N. Y. 157, cited in the opinion, holds that the lien is subject to the control of the legislature, but it was further suggested that, though the legislature could authorize the appropriation of the land for public use free from the lien, yet the compensation paid therefore was still subject to execution; that is, the legislature did not put the debtor's property beyond the reach of his creditor. The right to the lien relates to the remedy, but the right of the creditors of a debtor to avail themselves of his property at all events for the satisfaction of his debts is not a question of remedy, but of right. The case of *McCormick v. Alexander*, 2 Ohio, 65, quoted in the opinion, and cases cited thereunder, only hold that the lien is

was entitled to the interest given her by the statute in the land sold.

And in *Green v. Estabrook*, 168 Ind. 123, 120 Am. St. Rep. 349, 79 N. E. 373, this statute was held not to be invalid as depriving the husband of his property, since it did not attach until all his interest in the premises sold on execution was irretrievably lost. The court declared that the authority of the lawmaking power over the marriage relation and its incidents was clearly sufficient to uphold the statute.

On the other hand, in *Parkham v. Vandeventer*, 82 Ind. 544, and in *Helphenstine v. Meredith*, 84 Ind. 1, it was held that this statute did not apply to a sale of land upon a foreclosure of a mortgage executed by the husband before its passage, since the execution of the mortgage gave the mortgagee a vested interest in the mortgaged premises, which could not be divested by an act of the legislature without impairing the obligation of a contract.

So, in *McCafferty v. McCafferty*, 8 Blackf. 218, it was held that a statute which gave a wife, divorced for the fault of her husband, dower in the same manner as if he were dead, could not affect a title procured from the husband prior to the enactment of the law. The court said that the purchaser held a vested right in the land conveyed, subject to the contingency of the dower right of the wife should she survive her husband. "To subject these lands, by a subsequent law, to the right of dower upon the happening of some other event, would not only be depriving the owners of a vested right, but it would also be impairing the obligation of the grant or contract under which they hold that right. To do this is beyond the constitutional power of the legislature." To the same effect is *Comly v. Strader, Smith* (Ind.) 75.

A similar act was considered in *Given v. Marr*, 27 Me. 212, in which it appeared that, after a conveyance by a husband without his wife joining therein, a new cause was authorized by statute for divorce. It was held that, where the wife secured a divorce for the new cause, she was not entitled to dower in land so conveyed, upon the ground

subject to the control of the legislature, but do not go to the extent of holding that the debtor's property may be exempted from existing debts. *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793, relates to the creation of a homestead exemption, which withdrew the property not only from the lien of judgments, but also from liability to execution, and there it is held to impair the obligation of the contract. This is also the effect of *Gunn v. Barry*, 15 Wall. 610, 622, 21 L. ed. 212, 214. The facts in the case of *Patton v. Asheville*, 109 N. C. 685, 14 S. E. 92, are parallel with those before us, so far as it affects this question, and it was held that the act of the legislature enlarging the dower estate impaired the obligation of the contract. In that case there was no lien in favor of the creditor, but, under the law at that time, the property of a debtor was subject to the payment of his debts, and the statute enlarging the dower, having the effect to withdraw a portion of the debtor's property from levy and sale, was void as to such debts contracted prior to the statute, and we conclude, without reference to the power of the legislature to modify or abolish the lien of a judgment, if the property of the debtor, or a material portion thereof, is withdrawn from the reach of pre-existing creditors, it thereby impairs the obligation of such contracts. That was the effect of the enlargement of the dower estate before

us, and such statute cannot affect defendant's judgment; and the decision of this court, heretofore rendered in this case, as to the effect of this statute, must be set aside.

It appears, however, that, when the confession of judgment by William M. Davidson on November 9, 1892, was executed and entered by the clerk, no judgment was entered thereon, but it was entered upon the judgment docket upon that date, and, on July 7, 1897, execution was issued thereon and sale of the lands in question was had thereunder on August 14, 1897. Afterwards, on December 5, 1898, by order of the said court, such judgment was entered *nunc pro tunc*, as of November 9, 1892; and plaintiff insists that such entry of judgment is not retrospective as against plaintiff's interests, and that she is entitled to dower under the statute of 1893. The office of a *nunc pro tunc* entry is to record some act of the court done at a former term which was not then carried into the record; and such entry is retrospective, and has the same force and effect as if entered at the time when rendered, except as to third parties having intervening rights. *Cleveland Leader Printing Co. v. Green*, 52 Ohio St. 487, 49 Am. St. Rep. 725, 40 N. E. 201; *McNamara v. New York, L. E. & W. R. Co.* 56 N. J. L. 56, 28 Atl. 313; *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821. It was held in

that, as a right had vested in the purchaser subject to the dower right of the grantor's wife under certain contingencies, it was beyond the power of the legislature to divest him of that right by making his title subject to dower upon another and additional contingency.

And the case just reviewed was cited in *Curtis v. Hobart*, 41 Me. 230, to support the proposition that another statute making a woman dowable who had been granted a divorce for another cause could not have a retrospective operation.

In *Bottorff v. Lewis*, 121 Iowa, 27, 95 N. W. 262, it was held that the dower interest of a widow, which had become vested upon the death of her husband, could not be increased by subsequent legislation to the prejudice of the heirs.

McCafferty v. McCafferty and Given v. Marr, supra, were cited in *Boyd v. Harrison*, 36 Ala. 533, to support a *dictum* that the alienee of a husband could not be affected by a statute increasing the dower right of a wife, which was passed after his purchase.

And in the following cases there are *dicta* to the effect that it is within the power of the legislature to enlarge the dower rights of the wife; but the court in each case was discussing the effect of statutes reducing dower rights or abrogating them altogether: *Richards v. Bellingham Bay Land Co.* 4 C. C. A. 290, 7 U. S. App. 494, 54 Fed. 209; *Henson v. Moore*, 104 Ill. 403; *Lucas v. 17 L.R.A. (N.S.)*

Sawyer, 17 Iowa, 517; *Hatch v. Small*, 61 Kan. 242, 59 Pac. 262; *Guerin v. Moore*, 25 Minn. 462.

There are a few cases, one in Maryland and the others in North Carolina, which would seem to be opposed to the general rule here discussed, and to hold that it is beyond the power of the legislature to change the relative rights of husband and wife to the extent of giving the wife enlarged dower rights, even when no rights of third persons had vested prior to the passage of the act enlarging the wife's dower rights. In fact, their language would seem to go far towards holding that any legislation which affects the rights of each in the property of the other will be invalid as regards those parties who are already married when the act takes effect.

Thus, in *Slingluff v. Hubner*, 101 Md. 652, 61 Atl. 326, under a statute enlarging the wife's right of dower so as to give her dower in the equitable estate of the husband to the same extent and with the same effect as it existed in his legal estate, it was held that, where the parties were married and an equitable estate was acquired by the husband before the passage of the act, the right of the wife to dower in such estate was not affected by such act, but her rights were to be determined by the pre-existing law; upon the ground that to apply the statute retrospectively would be interfering with the vested rights of the husband in his equitable estate. The ques-

Doughty v. Meek, 105 Iowa, 16, 67 Am. St. Rep. 282, 74 N. W. 744, that such entry validates all prior proceedings, including the issuing of execution. Los Angeles County Bank v. Raynor, 61 Cal. 145; Emrich v. Gilbert Mfg. Co. 138 Ala. 316, 35 So. 322; Lowenstein v. Caruth, 59 Ark. 588, 28 S. W. 421. Although such entry validates the execution issued therein, it could not operate to create a lien from a date earlier than its actual entry to affect intervening rights of third parties. McNamara v. New York, L. E. & W. R. Co. supra. As between Richardson and Davidson, the *nunc pro tunc* entry is retrospective, and has the same force and effect as if entered at the time the judgment was rendered [Freeman, Judgm. 3d ed. § 67], and, unless they have rights intervening prior to the date of such entry, its effect cannot be questioned by third parties.

Plaintiff's interest in the land on December 5, 1898, the date of the entry of the judgment, was not such as to make her an intervening party within the meaning of the law. Her inchoate right of dower was increased by the legislative act; but she did not act upon conditions then existing, nor did she pay value or otherwise change her condition upon faith in the record, but was only a possible beneficiary under the statute. We understand that, to be protected from the effect of the *nunc pro tunc* entry,

plaintiff must have been in the position of a bona fide purchaser for value. Freeman, Judgm. 3d ed. §§ 66, 67; Leonard v. Broughton, 120 Ind. 536, 16 Am. St. Rep. 347, 355, 22 N. E. 731. In this case it is held: "It appears, from the facts averred, that the judgments in favor of the appellants were rendered upon pre-existing obligations. Their rights were fixed prior to the rendition of the judgments, and it does not appear that they were misled, or that they parted with anything of value, or acquired any rights during the interval which elapsed between the date the judgment should have been properly entered and the making of the *nunc pro tunc* entry, except that they acquired a judgment lien; and the rule is that the general lien of a judgment creditor upon lands of his debtor is subject to all equities existing against the lands of the judgment debtor in favor of third persons at the time of the recovery of the judgment." However, independent of the effect of the entry of the judgment, the contract between Richardson and Davidson is the thing protected by the Constitution, and the act, increasing the dower, is void as to such contract without reference to the entry of judgment or the creation of a lien; and therefore it is immaterial whether plaintiff's inchoate rights under the dower act can be affected by a *nunc pro tunc* entry or not. Defendant's right antedates the judgment, and is such

tion here presented was said by the court to be settled by the decision in Harris v. Whiteley, 98 Md. 430, 56 Atl. 823. But that case involved another section of the act in question, which gave absolutely to the husband, "by virtue of his marriage, an estate for his life in one third of the lands held or owned by his wife at any time during the marriage, whether by legal or equitable title." It is submitted, however, that the validity of a statute taking property from the wife and vesting it outright in the husband presents an altogether different question from a statute giving the wife merely an inchoate dower right in the husband's estate.

The first case in North Carolina to consider the question here discussed was Sutton v. Askew, 66 N. C. 172, 8 Am. Rep. 500, in which it was held that an act giving a widow dower in all lands of which her husband was seized during coverture, instead of in the lands only of which the husband died seized, as was the law before the act was passed, could not apply to parties whose marriage was contracted before it took effect, since it was beyond the power of the legislature to increase dower rights springing from former marriages. The court reasoned that thus to increase the dower right would be interfering with the vested right of the husband. To quote from the opinion: "Here, then, was the simple case of a man owning a tract of land, absolutely and in fee simple, with full power to sell

the same, subject only to the condition that, if he did not sell it, and should die seized and possessed of it, his wife should have dower; and the legislature steps in and forbids him to sell, compels him to hold it as long as he lives, and gives his wife dower in it, in spite of him. If this be not depriving him of his vested rights, . . . we cannot understand what would be."

The case just cited was followed in *Wesson v. Johnson*, 66 N. C. 189, in which it was held that the same statute was unconstitutional so far as it applied to marriages contracted previous to its passage; and that a widow married before its enactment had no interest in land mortgaged by her husband without her joining therein. Here it appeared that the mortgage was executed before the passage of the statute, but the court did not make that a ground for its decision.

Sutton v. Askew, supra, was followed and the rule therein laid down applied, in *Jenkins v. Jenkins*, 82 N. C. 208, to a claim by a widow of dower in lands conveyed by her husband before the passage of the statute restoring her common-law right of dower.

And the conclusion reached in *Sutton v. Askew* was approved in *Bruce v. Strickland*, 81 N. C. 267, in *O'Connor v. Harris*, 81 N. C. 279, and in *Reeves v. Haynes*, 88 N. C. 310, cases not otherwise in point.

that the legislature cannot impair it, and plaintiff cannot complain of the *nunc pro tunc* entry, as the dower statute is without effect as to defendant's contract, regardless of the judgment. *Patton v. Asheville*, supra; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143; *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212.

Therefore, the decision of this court, heretofore rendered, must be set aside, and the decree of the lower court is hereby modified as follows: That the plaintiff is entitled to dower in the lands described in the complaint to the extent of one-third part thereof, and the cause will be remanded to the lower court, with directions to proceed with the assignment of such dower in manner provided by law.

VIRGINIA SUPREME COURT OF APPEALS.

WARD LUMBER COMPANY, Plff. in Err.,
v.
HENDERSON-WHITE MANUFACTURING COMPANY.

(107 Va. 626, 59 S. E. 476.)

Appeal — constitutional question.

1. Overruling a motion to reverse a judgment on the ground that it was obtained by publication only, without service of process, necessarily requires a consideration of the constitutionality of the statute authorizing such publication, subject to review by the supreme court, although the question of constitutionality is not raised in express terms.

Writ — publication — due process of law.

2. A statute permitting service of process by publication on domestic corporations in counties where the cause of action arises, but in which the corporation has no representative, does not deprive it of due process of law.

(Keith, P., dissents.)

(November 29, 1907.)

ERROR to the Circuit Court for Wise County to review a judgment overruling

Note. — The validity of statutes authorizing constructive or substituted service on domestic corporations as the basis of judgments *in personam* is treated in a subject note to *Pinney v. Providence Loan & Invest. Co.* 50 L.R.A. 588, and in the case note to *Clearwater Mercantile Co. v. Roberts, J. & R. Shoe Co.* 4 L.R.A.(N.S.) 117. The subject is also discussed in the opinion in *Nelson v. Chicago, B. & Q. R. Co.* 225 Ill. 197, 8 L.R.A.(N.S.) 1186, 116 Am. St. Rep. 133, 80 N. E. 109.
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motions to reverse a judgment and to quash the execution on the ground that the process was served by publication so that defendant did not receive due process of law. **Affirmed.**

The facts are stated in the opinion.

Mr **Aubrey E. Strode** for plaintiff in error.

Messrs. **Robertson & Wingfield** for defendant in error.

Cardwell, J., delivered the opinion of the court:

The defendant in error, a corporation organized under the laws of this state, with its home office in Danville, Virginia, having an alleged cause of action arising in Wise county, Virginia, against the plaintiff in error, also a Virginia corporation, with its home office in the city of Lynchburg, Virginia, on the 13th day of February, 1906, filed with the clerk of the circuit court of Wise county its memorandum of suit against the plaintiff in error to recover the sum of \$210.94 due on account, which memorandum directed the clerk to "have summons published in Wise News [a newspaper published in Wise county, Virginia]," and to it was appended this affidavit, to wit:

State of Virginia, County of Wise, to wit:

This day personally appeared before me, C. J. Edwards, a notary public for the county and state aforesaid, Julian P. Thomas, Jr., attorney for the Henderson-White Manufacturing Co., and made oath before me in my county that the Ward Lumber Co., Inc., of Lynchburg, Virginia, has no agent or officer in the said county of Wise, on whom legal notice can be served.

Given under my hand this 13th day of Feb'y, 1906.

C. J. Edwards, Notary Public.

Upon the completion of the publication of the summons, as prescribed by § 3225 of the Code of 1904, the plaintiff in error not appearing, the circuit court of Wise county entered its judgment in favor of defendant in error against plaintiff in error for the amount of the debt sued for, with interest from the date it was alleged to have become payable, and for costs of the suit. On this judgment execution issued and was levied by the sergeant of the city of Lynchburg upon the effects of plaintiff in error, whereupon it, on the 17th day of July, 1906, moved the circuit court of Wise county to reverse the judgment, pursuant to the provisions of § 3451 of the Code of 1904, and also to quash the execution issued thereon, pursuant to § 3599 of the Code of 1904, upon the ground that "the judgment was obtained by default and after service of

process by publication only, and not by personal service thereof," which motions were overruled.

We are asked to dismiss the writ of error awarded to the said judgment, upon the ground that the amount involved is less than \$300; the only error assigned in the petition for the writ of error being that the statute (§ 3225 of the Code, *supra*) under which the suit was brought and maintained is unconstitutional and void, and that the question was not raised nor passed on in the circuit court.

The motion to dismiss is without merit. While the jurisdiction of this court must affirmatively appear from the record, it does so appear when the court can see, as in this case, that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the Federal or state Constitution. "Any proceeding which necessarily puts their validity in issue, whether it be by a demurrer, plea, instruction, or otherwise, is sufficient to give this court jurisdiction of the case." *Adkins v. Richmond*, 98 Va. 91, 47 L.R.A. 583, 81 Am. St. Rep. 705, 34 S. E. 967, and cases there cited.

It will be observed that the judgment in this case was by default after service of process by publication only, and both the notice of the motion to reverse the judgment pursuant to § 3451 of the Code, and of the motion to quash the execution issued on the judgment, pursuant to § 3599 of the Code of 1904, state as the ground of the motion that "the judgment was obtained by default and after service of process by publication only, and not by personal service thereof." The plain meaning and effect of the notice authorized by statute was to put in issue whether or not the statute (§ 3225) under which the judgment was obtained, is repugnant to the Constitution of the state and the 14th Amendment of the Constitution of the United States; and, when the motions were overruled, the trial court necessarily reviewed the statute, ruling that it provides for "due process of law," and therefore not repugnant to the Constitution of the state or of the United States.

The error complained of, however, does not arise out of the construction and interpretation of the statute, but is to the ruling of the trial court that the statute is constitutional and valid. In the latter case this court has appellate jurisdiction, regardless of the fact that the judgment is for less than \$300, while in the former it would not have, the constitutionality of the statute as distinguished from its construction and interpretation being the source of appellate

jurisdiction. *Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 535.

Section 3225 of the Code of 1904, *supra*, after providing that process against, or notice to, a corporation (other than a municipal corporation or a bank) created by the laws of this state or some other state or country, may be served on certain named officers, etc., or in any case, if there be not in the county or corporation wherein the case is commenced any other person on whom service can be had, as aforesaid, on any agent of the corporation against which the case is, or on any person declared by the laws of this state to be an agent of such corporation, reads as follows: "And, if there be no such agent in the county or corporation wherein the case is commenced, and affidavit of that fact and that there is no person in said county or corporation on whom there can be service aforesaid, publication of a copy of the process or notice once a week for four successive weeks in a newspaper printed in this state shall be a sufficient service of such process or notice."

Section 11 of article 1 of the Constitution of Virginia [Va. Code 1904, p. ccx.], and the 14th Amendment to the Constitution of the United States, provide "that no person shall be deprived of his property without due process of law."

In determining whether or not, in a particular case, this constitutional provision is being violated, or has been violated, it is uniformly held to include private corporations, such "corporations are persons within the meaning of the 14th Amendment." *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255.

While this statute has been in force for nearly a quarter of a century, and several times amended (Acts 1885-86, chap. 146, p. 141; Acts 1893-94, chap. 565, p. 614; Acts 1895-96, chap. 416, p. 445), it has never come under review in this court, except in the case of *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77, and there the constitutionality of the statute was not called in question; the question decided being whether the defendant was a banking corporation, and therefore exempt from the operation of the statute, or to be regarded as an insurance company; and the court held that it was both a banking and an insurance company, and not a banking corporation, and therefore the service by publication of the summons as provided by the statute was good.

In *Violett v. Alexandria*, 92 Va. 507, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909, it was said: "All the authorities agree that due process of law requires that a person shall have reasonable notice and

a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his right to liberty or property." Yet it was further said in that case that, while the legislature cannot dispense with notice altogether, it may prescribe the kind of notice. There the city's charter provided for no notice whatever, and therefore the ordinance of the city, under which it was attempted to fix a charge upon the property of the appellants to meet the cost of paving the streets, was held unconstitutional and void.

Section 3225 of the Code of 1904, under review, applies to all corporations doing business in this state, except certain mentioned corporations, and the purpose of the legislature seems clearly to have been to provide against hardships arising where corporations go into various sections of the state, making contracts and carrying on their business, and then leave without closing the same satisfactorily, and thereby compelling litigants to follow them perhaps across the entire state to litigate even small matters, or abandon their claims. Any lawful business which may be conducted by an individual may be conducted by a corporation chartered under the laws of the state, and it is a matter of common knowledge that there are many of these corporations which, while having a home office at some point in the state, through their agents and others transact business and contract debts and incur liabilities in many sections of the state. It may be, as suggested by the learned counsel for plaintiff in error, that, under this statute, a domestic corporation domiciled in Norfolk, Virginia, wishing to obtain a judgment against another domestic corporation domiciled in the same city upon some cause of action, real or fictitious, and desiring to keep from the defendant corporation knowledge that a suit was being prosecuted against it, might go to Highland county and institute its suit, and making the affidavit required by statute, which it might truthfully do within the limits of the statute, and, without making oath that its claim was believed to be just, obtain an order of publication, which, under the statute, if printed once a week for four successive weeks in a newspaper printed in Lee county, however limited its circulation, would yet obtain "a sufficient service of such process." But it is to be borne in mind that, before such proceedings as suggested could be had, there must be jurisdiction in the court in which the proceedings are instituted, under § 3215 of the Code; and it would be a reflection on the judiciary of this state to say that judgment could be obtained in any county where jurisdiction is wanting.

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Section 3215, *supra*, provides: "An action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein." And § 3214 provides: "Any action at law, . . . may be brought in any county or corporation, . . . if it be to recover a loss under a policy of insurance, either upon property or life, wherein the properly insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy." It was under this latter section that this court, in *Wytheville Ins. Co. v. Stultz*, *supra*, held that the publication of the summons, as provided by § 3225, was a good and valid service of notice to the defendant.

Prof. Lile, in his *Notes on Corporations*, p. 342, discusses the statute and explains it fully, showing the difference between domestic and foreign corporations. As he shows, when the action is against a domestic corporation, the summons is published and made returnable to rules, and not to appear in fifteen days, as in other cases. He makes no suggestion of a question as to the constitutionality of the statute.

The late Judge Burks, in an article appearing in 2 Va. L. Reg. p. 545, reviews the statutes providing for the summoning of corporations by publication, but makes no suggestion of a doubt as to the constitutionality of § 3225, here in question. He calls attention to the differences in the requirements of § 3230 and the three sections following, and the provision of § 3225, and shows that the sections other than the last named do not apply to corporations, and clearly indicates an opinion that, where the provisions of § 3225 are complied with, the defendant corporation is duly summoned.

That hardships may arise out of the execution and enforcement of this statute is very probable; but the courts of the state cannot, for that reason only, declare a statute unconstitutional; "nor can a court declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution." Cooley, *Const. Lim.* 6th ed. 197.

"It is true," says this learned author, "there are some reported cases in which judges have been understood to intimate a doctrine different from what is here asserted; but it will generally be found, on an examination of those cases, that what is said is rather by way of argument and illustration to show the unreasonableness of putting upon Constitutions such a construction

as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the Constitution had imposed no restraint." On page 200 the same author further says: "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them."

In 8 Cyc. Law & Proc. p. 778, it is said that the generally accepted rule is that the courts will not declare a statute void merely because, in their opinion, it is opposed to the spirit supposed to pervade the Constitution.

And in *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648, the court said: When Congress or a state legislature "pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void merely because it is, in their judgment, contrary to the principles of natural justice," and the great weight of authority favors the rule laid down in this case.

Among the authorities relied on by counsel for plaintiff in error as supporting the contention that § 3225 of the Code does not meet the constitutional requirement of "due process of law" is the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; but in that case the court was dealing with foreign, and not domestic, corporations, and neither 17 L.R.A. (N.S.)

in that case, nor in any other that we have been able to find, was it held that the legislature has not the right to prescribe a mode of service where the statute has no extra-territorial effect. On the contrary, the authorities are in accord with what was said by this court in *Violett v. Alexandria*, 92 Va. 567, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909, that, while the legislature cannot dispense with notice altogether, it may prescribe the kind of notice. With the wisdom of the statute the courts have nothing to do, and it may be that the mode of service prescribed might have been different and for the better, in that it would have been more effective and better calculated to arrest the attention of a defendant against whom the summons published is directed, or, as in an action against an insurance company created by the laws of this state, where the statute, although the action may be brought in the county or corporation wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy, requires that process or notice shall be directed to the sheriff or sergeant of the county or corporation wherein the chief office of such company is located. But these are matters for legislative consideration, and not for the determination of the courts.

Constructive service of a summons or a notice, as authorized by the statutes, has over and over been recognized as a valid service and a reasonable exercise of legislative authority; and we can see no reason why the mode of service provided in § 3225, which was strictly followed in this case, should be regarded as either lacking "due process of law" or the reasonable exercise of legislative authority.

We are therefore of opinion that the judgment of the Circuit Court must be affirmed.

Keith, P., dissents.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,

v.

WILLIAM OZIER.

(— Ark. —, 110 S. W. 593.)

Carrier — stock — tender.

1. A sufficient tender of stock to a carrier for shipment is made by notifying the

Note. — Diligent search fails to disclose any other case determining what constitutes a sufficient tender of live stock to a carrier for shipment, although many cases may be found which turn upon the ques-

carrier of the need of cars, and placing and keeping the stock within a short distance of the station in obedience to instructions of the station agent.

Trial — instruction — issue eliminated

2. It is not error to refuse instruction requested by the carrier as to a contract to furnish a shipper with cars, where the shipper does not rely upon a contract, and its existence is eliminated from the case.

Damages — delay in shipping stock.

3. Damages for delay in furnishing cars for the shipment of stock may include a allowance for the expense of keeping it a tender the carrier had been notified that it was ready for shipment.

(May 4, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Boone County in plaintiff's favor in an action brought to recover damages for delay in furnishing cars for the shipment of live stock. Affirmed.

The facts are stated in the opinion.

Messrs. T. M. McHaffy and J. E. Williams, for appellant:

The measure of damages recoverable against a common carrier, resulting from delay in transportation of property, is the difference between its value at the time and place the delivery should have been made, and the value when the delivery was made, with interest, after deducting freight charges.

Crutcher v. Choctaw, O. & G. R. Co. 74 Ark. 359, 85 S. W. 770.

To charge a common carrier with special damages for delay in transporting freight, notice of the circumstances out of which the special damages grew must have been given to the carrier at the time of, or before, making the contract of shipment.

Ibid.; Hooks Smelting Co. v. Planters' Compress Co. 72 Ark. 275, 79 S. W. 1052.

Damages recoverable are such as may fairly and reasonably be considered as arising naturally according to the usual course of things.

Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754; Choctaw, O. & G. R. Co. v. Jacobs, 15 Okla. 493, 82 Pac. 502.

Messrs. Crump, Mitchell, & Trimble and Frank Price, for appellee:

If the language of the instructions was

tion whether there has been a delivery of cattle to a carrier.

The court, in holding that, as a matter of fact, the conduct of the defendant's agent amounted to a waiver of the necessity of a tender, in *Texas P. R. Co. v. Nicholson*, 61 Tex. 491, said that the plaintiff's cattle were tendered in a manner custom had established in that neighborhood, and that tender in any other manner would have

objectionable, appellant should have asked specifically a further explanation; and, failing to do so, he cannot complain.

St. Louis, I. M. & S. R. Co. v. Waren, 65 Ark. 619, 48 S. W. 222.

Failure to save an exception to an instruction, and to include it in the motion for a new trial, will prevent its being considered on appeal.

St. Louis & S. F. R. Co. v. Fayetteville, 75 Ark. 534, 87 S. W. 1174; McClintock v. Frohlich, 75 Ark. 111, 86 S. W. 1001; Deitz v. Lensinger, 77 Ark. 274, 91 S. W. 755.

McCulloch, J., delivered the opinion of the court:

This is an action instituted by appellee against appellant railway company to recover damages resulting from failure of the company to furnish cars for shipment of sheep and hogs from Bergman, a station on appellant's road. Appellee made the request for cars on October 19, 1906, to be furnished on the 21st day of the same month, and the cars were not furnished until October 30th; the alleged injury to the sheep and hogs occurring in the meantime on account of the delay.

Appellee lived 10 miles from the station, and communicated his request for cars by telephone. The telephone call was answered by an employee in the office named Stevenson,—not the station agent,—and appellee testified that Stevenson promised to furnish the cars on the 21st of the month. He further testified that Stevenson informed him that the company had no pens at Bergman sufficient to take care of the stock, and instructed appellee to stop outside of town, where the stock could be properly cared for until the cars arrived. Appellee then drove the sheep and hogs over to a place about $\frac{3}{4}$ of a mile from Bergman, reaching there on the evening of October 20th, where they were kept until the cars arrived. On arrival there appellee went over to Bergman and saw the station agent, who, he testified, informed him that the cars would be there the next day, and instructed him to leave the stock where they were until the cars arrived, promising to send a messenger informing appellee of the arrival of the cars. Stevenson denied, in his testimony, that he made any promise to furnish cars, but said

been unwise and injurious, where he drove his cattle to a point within 3 or 4 miles of the defendant's station on the day the agent had promised to have cars for their shipment, and, when the agent was informed that the cattle had arrived, he stated that cars could not be furnished that day, but would be on the following day, although cars were not furnished until several days later.

he merely stated to appellee that they would do the best they could to get cars, and that he communicated the request to the station agent. The station agent, Butler, denied that either he or Stevenson had authority to promise cars, or that he ever promised the cars at any specified time, but admitted that he received the request for cars and forwarded same immediately to the train dispatcher at Cotter. It is therefore undisputed that appellee made the request for cars on October 19th, and that they were not furnished until October 30th. No effort was made by appellant to explain the delay. It is also undisputed that appellant's station agent knew as early as October 20th that appellee had his consignment of sheep and hogs ready for shipment in a short distance of the station and kept them there, instead of bringing them to the station, upon instruction of the agent. This was a sufficient tender of the stock for shipment. *St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperaage Co.* 81 Ark. 373, 90 S. W. 375.

The delivery or tender of freight to the carrier for shipment may be made in accordance with such arrangement between the parties—that is, between the shipper and the carrier's agent—as they may choose to make in regard to the mode of delivery. Says Mr. Hutchinson: "They may make such stipulations upon the subject as they see fit, and when such stipulations are made, they, and not the general law, are to govern." 1 Hutchinson, Carr. § 115. A station agent has authority to consent to such arrangements. 1 Hutchinson, Carr. § 402. The court instructed the jury that, before appellee could recover damages, the jury "must find from preponderance of the evidence that the plaintiff applied to the defendant for cars in which to ship his stock, and that the defendant failed to furnish said cars in a reasonable time, and that by such failure the plaintiff was damaged." The court gave no instructions submitting the case to the jury on the question of a promise or contract to furnish cars, and that question was thus eliminated from the case. Appellant requested the giving of instructions on that subject, which the court refused, and the refusal is assigned as error. As the instructions given by the court eliminated that question from the case, appellant could not have been prejudiced by the court's refusal to give the instruction asked. Appellee did not, in the case finally submitted to the jury, rely upon any express promise or contract to furnish cars, but relied upon the duty imposed by law upon the carrier to furnish cars within a reasonable time after demand.

The verdict included special damages for expense of keeping the stock during the 17 L.R.A. (N.S.)

period of delay, and appellant contends that this was unwarranted and erroneous. Under the rule announced by this court in *Choctaw, O. & G. R. Co. v. Rolfe*, 76 Ark. 220, 88 S. W. 870, such damages are recoverable under the facts proved in this case. The facts and circumstances proved to have been brought to the knowledge of appellant's agent were sufficient to put the company on notice that special injury would result from the continued delay in furnishing cars. The evidence sustains the verdict.

Affirmed.

COLORADO SUPREME COURT.

SEVEN LAKES RESERVOIR COMPANY,
Appt.,

v.

NEW LOVELAND & GREELEY IRRIGATION & LAND COMPANY.

(40 Colo. 382, 93 Pac. 485.)

Water — appropriation — storage.

1. The owner of a prior right to make direct application of appropriated water to irrigation purposes during the irrigation season may, to the extent of his priority in volume and time, store it for later use.

On Petition for Rehearing.

Rehearing — absence of parties.

2. Want of necessary parties will not be considered for the first time on petition for rehearing.

Parties — estoppel.

3. One who has sought to have the rights as between defendant and himself adjudicated in an action cannot, after the decision, urge error because other parties whose rights may be affected by the adjudication have not been brought in.

(Steele, Ch. J., and Campbell and Caswell, JJ., dissent.)

(July 1, 1907.)

Case Note. — Right to store appropriated water.

In a note upon this subject in connection with *Water Supply & Storage Co. v. Larimer & W. Irrig. Co.* 46 L.R.A. 322, it is stated that this question has received no judicial consideration sufficient to determine the extent of the right, and that the most that has been done is to recognize the existence of the right. This statement remains true, and there appears to be but one other reported case which squarely passes upon the extent of the right to store water appropriated for irrigation purposes.

In *Williams v. Altnow* (Or.) 95 Pac. 200, in an action brought by a subsequent appropriator to restrain a prior appropriator from maintaining a dam and reservoir, it appeared that the defendant constructed the dam for the purpose of irrigating certain

APPEAL by defendant from a judgment of the District Court for Boulder County in plaintiff's favor in an action brought to enjoin the storage of water. Reversed.

Statement by Gabbert, J.:

The question presented by this appeal is the right of the owner of a priority for direct irrigation, to store the water thereby represented for use later in the season. Appellant is a corporation organized under the laws of this state for the purpose of acquiring and maintaining reservoirs for the storage of water, to supplement the water supply of its stockholders obtained through the Loveland & Greeley ditch to irrigate lands belonging to them under this ditch. Pursuant to this purpose it acquired reservoir sites, and purchased 34 shares of the Loudon Irrigation Canal Company and 50 inches in the Barnes ditch. The priorities belonging to these ditches were awarded for direct irrigation purposes. The water represented by these purchases it did not apply to lands directly, but, during the irrigating season, stored in one or more of

its reservoirs for use upon lands later to mature crops, like beets and potatoes, which it is not necessary to irrigate in the early part of the season, but which do require water about August, and later, when the direct supply belonging to its stockholders in the Loveland & Greeley ditch was insufficient for this purpose. The several ditches named derive their respective supply from the same general source. Appellee, the owner of priorities supplied from this same source, brought a suit against appellant, the object of which was to prevent the appellant from diverting the water represented by its purchases, for storage during the irrigation season. To the complaint filed the appellant filed a cross-complaint, claiming the right to divert the water represented by its purchases for storage purposes, based substantially upon the grounds above stated. There was no dispute with respect to the dates and amounts of the respective priorities of the parties to the action involved in this appeal; it being the contention on the part of plaintiff that, although the defendant was entitled to divert the water represented by its purchases

high lands which he was unable to irrigate without it, and which he did not irrigate before the holder of the subsequent right had made his appropriation. The case is somewhat complicated because of numerous accidental features, but it appears that the subsequent appropriators were injured by reason of the prior appropriator's diverting a quantity of water and storing it in his reservoir, although it does not appear that he took more water than his appropriation would permit. In granting an injunction restraining him from using any water from the reservoir on the high lands when it was needed by the plaintiffs or other parties on the stream below him, it was held that he could use the water appropriated only when necessary, and could not be permitted to obstruct or retard the natural flow of the stream, when water was not so needed, by means of dams, reservoirs, or other obstructions, to the injury of the lower proprietors. The court said: "One who, with an intention to put water to some beneficial use, existing or contemplated, diverts it from a stream or other natural source of supply, and makes an application thereof within a reasonable time, has a prior right to use a sufficient quantity of water so diverted to supply his needs, not to exceed the amount of his appropriation, superior to the right of subsequent appropriators, locators, or grantees, and he may change the point of diversion or the place of use so long as it does not prejudice the rights of subsequent claimants. . . . But when his needs, as measured by his original appropriation, have been supplied, or, when the water is not actually required or used by him, it is at the disposition of others, according to their

respective rights, and he must permit it to flow down to them as it is wont to flow."

This decision seems to be directly contrary in principle to *SEVEN LAKES RESERVOIR CO. V. NEW LOVELAND & G. IRRIG. & LAND CO.* In the latter case the storage was for the purpose of irrigating arid lands after the regular irrigation season. In the *Williams Case* the storage was for the purpose of present irrigation of lands which were not irrigated at the time of the subsequent appropriations. This latter fact may be a distinguishing feature of the case, and yet the language of the court seems broad enough to include a case of storage for later use upon the same land.

The decision in *SEVEN LAKES RESERVOIR CO. V. NEW LOVELAND & G. IRRIG. & LAND CO.* seems to be supported by the following language in *Colorado Mill. & Elevator Co. v. Larimer & W. Irrig. Co.* 26 Colo. 47, 56 Pac. 185: "Although the irrigation company could change the use of its appropriation from irrigation to that of storage, it could not divert water for that purpose, which would result in a diversion, measured by either volume or time, to the damage of plaintiff, but when the water of the stream was needed by plaintiff to supply its appropriation [the irrigation company] would be limited to a diversion for storage at such time and under the same conditions which would permit it to divert for irrigation purposes; for, unless so limited, it could divert for storage to the injury of the priority of plaintiff, which, though junior to that of the irrigation company, is entitled to be protected against any use by the irrigation company which would result in depriving it of the use of water different from that following a diversion by the irrigation com-

for the purpose of direct irrigation when needed, and that these priorities for this purpose were superior to any claimed by plaintiff, the defendant could not abandon the use of the rights purchased by it for direct irrigation during the irrigating season, and store the water thereby represented for future use in irrigating crops. The judgment of the court was in favor of the contention of the plaintiff, and the defendant brings the case here for review on appeal.

Mr. H. N. Haynes for appellant.

Mr. James W. McCreery for appellee.

Gabbert, J., delivered the opinion of the court:

The particular question presented by this appeal has not been determined in the concrete by any previous decision of this court; but it is by no means a new one, because it merely involves the application of principles which have been announced in numerous cases. A priority to the use of water is a property right, which is the subject of purchase and sale, and its character

and method of use may be changed, provided such change does not injuriously affect the rights of others. *Fuller v. Swan River Placer Min. Co.* 12 Colo. 12, 19 Pac. 836; *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; *Cache La Poudre Irrig. Co. v. Larimer & W. Reservoir Co.* 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318.

Appellant owns certain rights to the use of water, which, prior to its purchase, had been directly applied to the irrigation of lands. Instead of continuing to so use this water, it has ceased its direct application during the period it was theretofore applied, and stores the water which it would have the right to thus apply, for use later in the same season. This change is in no manner detrimental to the rights of the appellee. It is not thereby deprived of any water which it would have the right to divert and apply to lands during the irrigating season as against the rights of the appellant. By the change no greater burden is imposed upon the common source of supply of the respective ditches. It must therefore logically follow that the appellant is

pany for irrigation purposes." Although, as was suggested, this language would seem to imply a right to store water within the appropriation which was not needed for immediate irrigation purposes, yet that question was not before the court; the irrigation company attempted to divert water for storage purposes after the regular irrigation season, and by so doing deprived the plaintiff of sufficient water to satisfy his appropriation made for power and domestic purposes.

In *Water Supply & Storage Co. v. Tenney*, 24 Colo. 344, 51 Pac. 505, where there was a dispute as to whether a limitation fixed by a decree upon the priority of an appropriator in times of scarcity of water applied both to the defendant's ditch and to his reservoir, or to the latter only, the court said: "It is scarcely conceivable that the district court would deliberately enter a decree giving to a reservoir owner any priority to fill his reservoir, which would conflict with any right of a ditch owner to use water for irrigation, even though the priority of the latter was junior in time to the construction of the reservoir."

Some cases clearly recognizing the right to store may be noted, but it will be seen that none of these cases clearly define the extent of the right to store appropriated water.

Thus, in *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co.* 25 Colo. 161, 46 L.R.A. 175, 71 Am. St. Rep. 131, 53 Pac. 331, it was held that an abandonment of the use of water from a stream for mill purposes only, by which use it is returned to the stream, will not impair the right of an appropriator for reservoir purposes of the returned water by enlarging the rights of appropriators for irrigation purposes 17 L.R.A. (N.S.)

above the mill whose rights were subject to those of the mill owner. This doctrine was reasserted when the case came before the court again in 27 Colo. 532, 62 Pac. 420.

And, in *New Loveland & G. Irrig. & Land Co. v. Consolidated Home Supply Ditch & Reservoir Co.* 27 Colo. 525, 52 L.R.A. 266, 62 Pac. 366, it was held that a priority of right for the storage of water from a stream for use during the nonirrigating season was not acquired by a prior appropriator of water therefrom for immediate use by the mere intention at the time the appropriation ditch was built to construct in the future a storage reservoir as part of a general system, as against a subsequent appropriator of water from the same stream who constructed storage reservoirs and made a beneficial use of the water therefrom for irrigating purposes many years before any outward manifestation of such an intention on the part of the prior appropriator.

And in *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. 395, in an action to determine the priority between rights to fill reservoirs, it was held that a complaint which did not allege the amount of the appropriation, and the quantity of land for the irrigation of which the water was used, failed to state a cause of action.

It is a well-settled rule that the water taken under an appropriation must be devoted to beneficial uses. This rule is applied in many cases, but there appear to be none which pass upon the question whether storage for future use is a beneficial use within the rule. The language in some of these cases would seem to imply that the water must be used immediately for irrigation purposes; but, as was said, the question involved was not the right to store the water.

entitled to divert the water represented by its purchase, and store for use later in irrigating crops, measured by volume and time, which it would have the right to apply directly to lands for purposes of irrigation at the time of such diversion.

The case presented is not one, as seems to have been the view of the trial court, where appellant seeks to convert a junior reservoir right to a senior appropriation for storage, but merely involves the right of appellant to utilize a priority for irrigation by using it at a later period. It appears from the record that the stockholders of appellant, instead of planting crops which require irrigation during the early part of the season, utilize their lands by growing crops which do not require irrigation until about August, when the direct supply through the ditches is not sufficient to furnish the volume of water necessary to irrigate such crops. And so, instead of applying the water to which they are entitled for direct irrigation in the early part of the season, they store this water for use later to mature crops, like beets and potatoes, which do not require irrigation until about the month of August. It would be unfortunate indeed if the law were such that it could not be adapted to changed conditions resulting from the character of crops grown by those engaged in agricultural pursuits. If water for direct irrigation can only be utilized for that purpose, the result would be to retard agricultural progress, and limit the growth of agricultural products to those which can be matured by means of direct irrigation early in the season. If the judgment of the trial court should be sustained upon the theory that one owning a priority for direct irrigation may not cease to utilize it for that purpose upon crops in May, June, and July, and store it for use, during the same season, thereafter, the result would be to take from the owner of such a priority his rights and confer them upon others growing crops of a different nature. Such a rule would make the right to the use of water dependent upon the character of crops grown, instead of upon the right to utilize it in any manner which does not injuriously affect the vested rights of others. In principle the case is no different from that of *Strickler v. Colorado Springs*, supra, wherein the right to change the use of water from agricultural to domestic purposes was recognized. If the right to change from agricultural to domestic, and from mining to agricultural, uses, and *vice versa*, is legal, certainly no good reason can be advanced why the change from one agricultural use to another may not be allowed.

The trial court seems in a measure to

have been guided in rendering the judgment it did by § 2270, 1 Mills's Arno. Stat., which provides that persons desiring to divert water for storage may take "from any of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes." We do not think this section is involved, because appellant is not asserting any right to the water in controversy by virtue of any appropriation for reservoir purposes, but is merely seeking to utilize priorities which it is conceded it is entitled to for direct irrigation purposes, by storing the volume to which it is thus entitled for use at a later period. We are of the opinion that the appellant is entitled to so utilize these priorities, that is to say, entitled to store, during the direct irrigation season, the quantity of water, measured by volume and time, which it would be entitled to divert during that period for the purpose of direct irrigation.

The judgment of the District Court, in so far as it involved the rights of the parties to this appeal to the water represented by the stock purchased by appellant in the Loudon Irrigation Canal Company, and the purchase of water in the Barnes ditch, is reversed, and the cause remanded, with directions to the trial court to enter a judgment in favor of appellant with respect to these matters in accordance with the views expressed in this opinion.

Steele, Ch. J., and Campbell and Caswell, JJ., dissent.

A petition for rehearing having been filed, Gabbert, J., on November 4, 1907, handed down the following response:

The arguments of counsel for appellee and *amici curiæ*, in support of the petition for rehearing of appellee, are evidently based upon an erroneous assumption of what has been determined in this case. It is contended that adjudication decrees are disturbed, and that appellant, by the decree directed, will be awarded an enlarged use of water represented by its purchases, both in quantity and time. It must be borne in mind that this decision is based upon the fact, which is undisputed, that the stockholders of appellant are growing crops which do not, from their nature, require irrigation during the early part of the season, but do later, and that they desire to utilize the water in controversy for this purpose. Based upon these facts we have declared, what has time and again been decided by this court, that the character and method of use of a priority to the use of water may be changed, provided such change does not injuriously affect the rights of

others, and that appellant is entitled to divert and store the water represented by the priorities purchased for the use of its stockholders for application to crops later, but in no greater quantity and at no other or different time than could be diverted and applied to land directly to nourish crops requiring irrigation at the time of such diversion; or, otherwise expressed, appellant is permitted to divert and store the water in controversy, but this right is measured and fixed by the limitations which the law would impose upon its use for diversion and application to crops requiring irrigation at the time of such diversion. This does not conflict with any previous decisions of this court; but, on the contrary, is sustained by *Colorado Mill. & Elevator Co. v. Larimer & W. Irrig. Co.* 26 Colo. 47, 56 Pac. 185. See also *Mills's Irrigation Manual*, § 56. This does not enlarge the use of the priorities of appellant, either in time or quantity; neither does it confer upon it the right to divert and store the water represented by its priorities every day during the irrigation season, or to convert such priorities into a storage right during the nonirrigating season, as contended by counsel, but limits its rights strictly to the diversion of water, both as to volume and time, to the same quantity and the same time we have indicated. Thus it is apparent that no rights are infringed, that no one is deprived of water to which he is entitled by reason of the change in the method of use, and that, to supply appellant with the water which it will be entitled to store under the decree directed, there cannot possibly be any greater burden imposed upon the common source of supply of the respective ditches owned or controlled by the parties to this appeal. Neither are any priorities disturbed; but, on the contrary, the decree directed leaves the relative rights of the parties to this appeal precisely as they were; whereas, if the judgment of the lower court should be affirmed, the result would be, where an appropriator had no use for water represented by his priorities in the early part of the season because of the fact that he was growing crops of a character which did not require irrigation during that period, and he could not store it at that time for use upon these crops when later it was necessary to irrigate them, to take from him and give to another.

It is contended by counsel that the decision in this case is contrary to *New Loveland & G. Irrig. & Land Co. v. Consolidated Home Supply Ditch & Reservoir Co.* 27 Colo. 525, 52 L.R.A. 266, 62 Pac. 306, and *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 Pac. 37. In the *New Loveland Case* it was determined that the appropriation of 17 L.R.A. (N.S.)

water for the irrigation of lands during the irrigation season gave the appropriator no priority of right to store water during the nonirrigating season for future use. This does not conflict with the opinion in the case at bar. No right to store water during the nonirrigating season is conferred. The gist of the decision in the *Chew Case* is that the owner of a water right would not be permitted to make it do double duty. When he had applied it for the purpose for which it was appropriated, he could not loan or lease it to another for irrigation purposes; but that is not this case. The stockholders of appellant do not at once apply the water diverted; but appellant is allowed to divert and store for their use the volume of the priorities in question, which it would be entitled to divert for application by its stockholders to land directly, to mature crops requiring water at the time of such diversion, so that but one use of the appropriations in question is made, and that use does not, under the limitations we have specified, result in any greater draft upon the river than if the water had been directly applied to land at the time of diversion.

It is also urged that no decree of the character directed should be entered until all the parties whose rights might be affected thereby are before the court. No question of that character was suggested at the original hearing, and it will not be considered on an application for a rehearing. Besides we do not believe appellee is in a position to urge that question. Appellee instituted the action from which this appeal was prosecuted, making the appellant the only party. The purpose of the action was to prevent the appellant from diverting the water represented by its purchase during the irrigation season for storage as against the appellee, and hence it is not in a position to now contend that the rights which it now seeks to have determined as between the appellant and itself should not be adjudicated without the presence of other parties whose rights might be affected by such adjudication. Counsel *amici curiæ* also say, quoting from their brief: "Many members of the legal profession, and many irrigators, contend that this decision enables the holder of old decrees for excessive priorities—decrees obtained in the early days, when water rights were not so valuable as now, nor so carefully guarded—to successfully assert that the full amount of water decreed may be now used, notwithstanding that but a portion of it has ever been heretofore used. They maintain that the old priorities, whether used or not, are recognized by this decision to such an extent that the owners of those priorities

are, as against even subsequent appropriators who have used the water for years, entitled to now utilize it upon lands described in the decree, or other lands owned by them."

Such a case is not before us; but we can only say that we fail to comprehend where in the opinion is susceptible of such a construction. It would be impossible, in any one opinion, to determine all the questions which may arise with respect to water rights. Each case of this character must depend upon its own particular facts.

A majority of the court is of opinion that the petition for rehearing should be denied, and it is so ordered.

Rehearing denied.

MINNESOTA SUPREME COURT.

JOHN A. KELLY, Resp.,

v.

JOSEPH TYRA, Doing Business as
NORTHWESTERN ROOFING, COR-
NICE, & STAMPING WORKS, Appt.

(103 Minn. 176, 114 N. W. 750.)

Fellow servants — different masters.

1. Persons employed by different masters, although engaged in a common work, are not ordinarily fellow servants.

Same — act of servant.

2. Servants in the hire of a general employer and servants of his subcontractor, or of an independent contractor, are not fellow servants unless the circumstances show that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that person as his master for the purpose of the common employment.

Negligence — volunteer.

3. A "volunteer" is one who introduces

Headnotes by JAGGARD, J.

Case Note. — Servant of employer and servant of contractor as fellow servants.

The scope of the title of this note is to be taken as comprehending both the relation specifically named and the relation existing between servants of an original contractor and servants of a subcontractor, such relation being, in legal effect, the same as that between employees of the principal and of the contractor.

Like most questions relating to the general topic of master and servant, the boundaries of the question stated are not clearly marked, but the subject merges, on the one hand, into the question, Who is an independent contractor? and, on the other hand, into the question, Which of two persons is to be considered the master of one who

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himself into matters which do not concern him, and does, or undertakes to do, something which he is not legally or morally bound to do, or which is not in pursuance or protection of any interest. To such a person, in the absence of knowledge of peril, no affirmative duty to exercise care is due.

Servant — assisting another's workman — risk.

4. Where the servant of one master has an interest in the work in any proper capacity, and, at the request or with the consent of another's servants, undertakes to assist in the work, he does not do so at his own risk; and, if he is injured by their carelessness, their master is responsible in tort.

Negligence — licensee with interest — injury.

5. Here plaintiff was in the employ of a building contractor. Servants of a roofing subcontractor, using large planks of the contractor, with his consent, were about to "take them down" from the girders upon which they rested to the floor below. One of defendant's servants saw plaintiff coming and said: "Look out, Kelly (the plaintiff), and get your wheelbarrow out of the way." The plaintiff went to remove the wheelbarrow. A plank fell on him and inflicted the injuries for which recovery is here sought. It is held:

(1) That the action of the jury in finding that "he was rightfully there" as a licensee with interest will not be disturbed.

(2) That defendant was responsible for the tort of his servant.

(January 24, 1908.)

APPEAL by defendant from an order of the District Court for Hennepin County denying a motion for judgment notwithstanding a verdict in plaintiff's favor or a new trial in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

is conceded to be in the general employ of one of them? The only question peculiar to this subject is whether the fact that employees of different masters are working with a common purpose is sufficient to constitute them fellow servants within the meaning of the rule exempting the master from liability for the injury to one servant through the negligence of another. An attempt has been made, in compiling this note, to segregate the decisions bearing upon the subject under discussion according as they seem to turn upon one or another of the questions above mentioned.

As hereinbefore remarked, the question whether the servant of the employer and the servant of the contractor are to be regarded as fellow servants sometimes hinges on whether the contractor in question was in fact an independent contractor, or merely

Statement by Jaggard, J.:

This action was brought by plaintiff to recover for personal injuries as a result of defendant's alleged negligence. One Robinson, plaintiff's employer, who had the contract to construct a crematory building, sublet the roofing thereof to defendant. Defendant's servants, Michaelson and another, procured the consent of the contractor's foreman to use in their work large planks belonging to the contractor, extending from girder to girder, 22 feet from the ground, "providing you would take them down." Michaelson, on the occasion of the injury, told the men working on the floor below to look out, as he was "going to take them [the planks] down." He saw plaintiff coming, and said to him: "Look out, Kelly, and get

your wheelbarrow out of the way." Plaintiff left his place of safety and came to the point of danger under the plank. While plaintiff was under the plank for the purpose of removing the wheelbarrow, the plank fell on him and inflicted the injuries for which recovery is here sought. The jury returned a verdict for plaintiff in the sum of \$1,000. This appeal was taken from an order of the trial court denying defendant's alternative motion for judgment notwithstanding the verdict or for a new trial.

Mr. C. H. Rossman, for appellant:

Respondent was either a volunteer or a fellow servant, and, sustaining either relation to appellant, is not entitled to recovery.

an agent or servant of his principal; in the latter of which cases his employees are regarded as being in the service of, and hence fellow servants of other servants directly employed by, the principal. A very good example of cases of this sort is *Kniceley v. West Virginia Midland R. Co.* post, 370, in the case note appended to which, cases of like character have been included, the present note containing only decisions hinging on the other questions to which reference has been made, and which either assume or expressly hold that the contractor in question was exercising an independent employment.

Mere consociation as affecting legal relation.

Upon this distinctive question, the decisions are wholly in harmony; any argument that the servant is to be deemed to have contracted to assume the risk of the service in which he knows he is to be engaged being met by the rule that such assumption is available only to parties privy to the contract of hiring.

—work on buildings.

Employees of a subcontractor and of the original contractor, who are working on the same building, but not for the same master or under the same supervision, are not fellow servants. *Dale v. Hill-O'Meara Constr. Co.* 108 Mo. App. 90, 82 S. W. 1092.

The employee of a subcontractor on a building is not a fellow servant of a contractor's employees, by whose negligence he was injured, the defense of common employment not being available to exempt defendant from liability unless the injured person and the servant whose negligence caused the injury were not only engaged in a common employment, but were also in the service of the defendant as a common master. *Jansen v. Jersey City*, 61 N. J. L. 243, 39 Atl. 1025.

The employee of a contractor of plumbing work and an employee of the owner of the building are not fellow servants, not being hired by, or paid by, or subject to be dis-

charged by, the same master, and not engaged about the same work. *Fisher v. Minegaux*, 73 N. J. L. 424, 63 Atl. 902.

The employees of the owner of a building, in constructing scaffolding for the use of one contracting to do the plastering, are not fellow servants of a plasterer in the contractor's employ, who was injured because of the negligent construction of such scaffolding. *Driscoll v. Humes, C. & S. Co.* (R. I.) 69 Atl. 766.

The relation of an employee of an independent contractor to the employees of the owner of a building is not affected by the fact that the contractor instructed his foreman to obey the directions of a general superintendent employed by the owner to see that the various contracts were complied with, so as to make them coemployees within the meaning of the rule with respect to the negligence of fellow servants. *Coates v. Chapman*, 195 Pa. 109, 45 Atl. 676.

That a common object is not, of itself, sufficient to create the relation of fellow servant among persons employed by different masters, but working toward a common end, is also shown by those cases in which it has been held that persons employed on the same structure, in the service of separate contractors, are not fellow servants. See *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Burrill v. Eddy*, 160 Mass. 198, 35 N. E. 483; *Reilly v. Atlas Iron Constr. Co.* 83 Hun, 196, 31 N. Y. Supp. 618; *Eckman v. Lauer*, 67 Minn. 221, 69 N. W. 893.

—work connected with construction or operation of railways.

One employed by a contractor to load coal into the tenders of locomotives is not the fellow servant of a locomotive engineer by whose negligence, in suddenly moving a locomotive, he was injured, the mere co-operation or community of labor and purpose not being enough to establish the relation. *Union P. R. Co. v. Billeter*, 28 Neb. 422, 44 N. W. 483.

An employee of a subcontractor for the construction of an elevated railway, who is injured while at work, by the negligence of a motorman in the employ of the railway

Church v. Chicago, M. & St. P. R. Co. 50 Minn. 218, 16 L.R.A. 861, 52 N. W. 647; *Wischam v. Rickards*, 136 Pa. 109, 10 L.R.A. 97, 20 Am. St. Rep. 900, 20 Atl. 532.

If appellant's servants, without his knowledge or consent, were throwing these planks down because of the arrangements made with Robinson's servants, it being no part of their employment, they could not bind their master in so doing.

Theisen v. Porter, 56 Minn. 555, 58 N. W. 265; *Morier v. St. Paul, M. & M. R. Co.* 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952.

It was prejudicial error for the court to permit respondent to cross-examine the servant of an individual, under § 4662 of the Code.

State v. Holmes, 65 Minn. 230, 68 N. W.

company, is not, in any sense, a fellow servant of such motorman. *Wagner v. Boston Elev. R. Co.* 188 Mass. 437, 74 N. E. 919.

In *Norman v. Middlesex & S. Traction Co.* 71 N. J. L. 652, 60 Atl. 936, it was held that, where one employed as a trolley boy on a construction car, by a firm engaged in repairing the roadbed of a trolley road, was injured by a collision due to negligence of some one of the employees of the railroad company, engaged in operating passenger cars, the direction of a verdict for the railroad company, on the ground that the employees of the contractor and the employees of the defendant were all operating cars over the defendant's road and about the defendant's business, and hence were all fellow servants of the company, was error.

The employee of a contractor, engaged in repairing a railroad bridge, is not a fellow servant of a train man in the employ of the railroad, by whose negligence he was injured. Any assumption on his part of risks incident to the work not inuring to the benefit of the railroad, since there was no privity of contract between them. *Young v. New York C. R. Co.* 30 Barb. 229.

The relation of master and servant does not exist between a railroad and one in the employ of an independent contractor, who was building a fence for it. *Galveston, H. & S. A. R. Co. v. Garteiser*, 9 Tex. Civ. App. 456, 29 S. W. 939.

A woman cooking on a work train as an employee of her husband, who was the boarding contractor, is not a fellow servant of the employees of the railroad company, operating the train. *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288.

One who was found by the jury to be in the employ of a contractor to repair railroad cars, and who, while engaged in such work of inspection and repairing, was injured through the negligent starting of a train, was not a fellow servant of the employees of the railroad, who were operating the train. *Sherman v. Delaware & H. Canal Co.* 71 Vt. 325, 45 Atl. 227.

—loading and unloading.

In *Robinson v. Pittsburgh Coal Co.* 63 C. 17 L.R.A. (N.S.)

11; *State v. Stoffels*, 89 Minn. 205, 94 N. W. 675; *Re Brown*, 38 Minn. 112, 35 N. W. 726.

On reargument.

If there is error in the record, prejudice is presumed from it, unless the contrary is affirmatively shown.

Lowry v. Harris, 12 Minn. 255, Gil. 166; *Pinney v. First Div. St. Paul & P. R. Co.* 19 Minn. 251, Gil. 211; *Holden v. O'Brien*, 86 Minn. 297, 90 N. W. 531.

Messrs. Woods, Kingman, & Wallace, for respondent:

Plaintiff was a "licensee with an interest."

1 *Thomp. Neg.* §§ 520, 521; *Empire Laundry Machinery Co. v. Brady*, 60 Ill. App.

C. A. 258, 129 Fed. 324, it was held that one employed on a steamer, and who, at the time of the accident, was at the captain, trying to heave the vessel closer to the dock, was not the fellow servant of a derrick engineer in the employ of a consignee, who was unloading the vessel.

In *Ford v. Arbuckle*, 107 App. Div. 221, 94 N. Y. Supp. 1097, it was held that the employee of a third person, at work on a dock, sewing up torn bags of sugar, was not the fellow servant of men engaged in unloading the sugar from a lighter, where there was no suggestion in the evidence that the plaintiff's employers were engaged under any arrangement with the owners of the lighter or the employer of those doing the unloading which tended, in any way, to make the plaintiff, for the time being, a servant of the others or of either of them.

In *John Spry Lumber Co. v. Duggan*, 80 Ill. App. 394 (Affirmed on opinion of the court below in 182 Ill. 218, 54 N. E. 1002), it was held that the jury were warranted in finding that the employee of one who had undertaken, by contract, the job of furnishing men to unload a boat load of lumber at a fixed sum, was not a fellow servant of yard men in the employ of the lumber company, who received the lumber as it came from the boat and piled it in the yard.

Persons in the employ of a steamship company, engaged in unloading the cargo from a steamship upon a lighter, and one in the service of the owners of the lighter, in receiving the cargo, are not fellow servants, not being the servants of a common principal, in any sense, and not strictly engaged in the same employment, the duties of the one being confined to the steamship, and the other to the lighter. *Svenson v. Atlantic Mail S. S. Co.* 57 N. Y. 108.

An employee of a lighterage company, injured while at work upon a lighter, stowing away cargo which was being unloaded from a ship by stevedores, through the negligence of the employees of such stevedores, is not their fellow servant, since, although there was co-operation, there was no unity

379; *Meyer v. Kenyon-Rosing Mach. Co.* 95 Minn. 329, 104 N. W. 132.

One who, in furtherance of his own interest, or that of his master, assists the servants of another, is neither a fellow servant nor a mere volunteer, but occupies a third position.—namely, that of a licensee with an interest.

Ryan v. O'Brien Boiler Works, 68 Mo. App. 148; *Welch v. Maine C. R. Co.* (O'Donnell v. Maine C. R. Co.) 86 Me. 552, 25 L.R.A. 658, 30 Atl. 116; *McIntire Street R. Co. v. Bolton*, 43 Ohio St. 224, 54 Am. Rep. 803, 1 N. E. 333; *Dohn v. Dawson*, 90 Hun, 271, 35 N. Y. Supp. 984; *Bishop v. Leahy*, 54 App. Div. 619, 66 N. Y. Supp. 342; *Evarts v. St. Paul, M. & M. R. Co.* 56

Minn. 141, 22 L.R.A. 663, 45 Am. St. Rep. 460, 57 N. W. 459.

The cross-examination objected to was at least error without prejudice.

Dunnell's Minn. Pr. §§ 727-735; 2 Enc. Pl. & Pr. p. 505; *Fleming v. Alden*, 44 Minn. 493, 47 N. W. 157; *Lloyd v. Simons*, 90 Minn. 237, 95 N. W. 903; *Samuelson v. Hennepin Paper Co.* 101 Minn. 443, 112 N. W. 538; *Hall v. Skahen*, 101 Minn. 460, 112 N. W. 865; *Cordill v. Minnesota Elevator Co.* 89 Minn. 444, 95 N. W. 306; *Perry v. Minneapolis Street R. Co.* 69 Minn. 165, 72 N. W. 55; *Hurt v. St. Paul, M. & M. R. Co.* 39 Minn. 485, 40 N. W. 613; *Dorr v. Mickleley*, 16 Minn. 20, Gil. 8; *Lewis v. St. Paul & S. C. R. Co.* 20 Minn. 264, Gil. 234; *Nichols & S. Co. v. Hackney*, 78 Minn. 461, 81 N.

of control. *Thornton v. Hogan*, 82 App. Div. 500, 81 N. Y. Supp. 544.

A grain trimmer employed by a contractor to work in trimming a cargo of grain is not a fellow servant of the mate of the vessel, who directed the placing of the hatch covers, or of the seamen who were engaged in handling the covers at the time a cover fell and injured plaintiff. *Crawford v. The Wells City*, 38 Fed. 47.

An employee of a boss scooper, engaged in unloading grain from a vessel, is not the fellow servant of a deck hand engaged in sweeping up the decks, since, although they are engaged in a common undertaking, they have no common employer. *Kane v. Mitchell Transp. Co.* 90 Hun, 65, 35 N. Y. Supp. 581, Affirmed in 153 N. Y. 680, 48 N. E. 1105.

The employee of an iron company which was under agreement with a railroad company engaged in hauling coke for it, to have the cars, when unloaded, swept out, is not a fellow servant of operatives of a train, by whose negligence he, while boarding it to ride to the place of unloading, for the purpose of sweeping the cars, was injured. *Holmes v. Birmingham Southern R. Co.* 140 Ala. 208, 37 So. 338.

Neither the captain of a boat, who, in accordance with custom, manages the guy rope used in hoisting the cargo, nor one to whom he delegates such service, becomes the fellow servant of one employed by a stevedore engaged by the consignees to do the unloading. *Kilroy v. Delaware & H. Canal Co.* 121 N. Y. 22, 22 N. E. 192.

A truckman in the employ of the owner of goods, who was injured while assisting, at the request of the captain of a lighter, in unloading the goods therefrom, cannot be regarded as a fellow servant of the captain, so as to relieve its owners from responsibility. *Anderson v. Boyer*, 13 App. Div. 258, 43 N. Y. Supp. 87, Reversed on another ground in 156 N. Y. 93, 50 N. E. 976.

A person employed by a railroad as a station hand is not the fellow servant of an employee of an express company, by whose negligence he was injured while load-

ing express matter. *Hopper v. Southern Exp. Co.* 133 N. C. 375, 45 S. E. 771.

—miscellaneous.

In *Lookout Mountain Iron Co. v. Lea*, 144 Ala. 169, 39 So. 1017, it was held that an assistant hired by one engaged in mining coal by contract was not a fellow servant of persons operating tram cars for the purpose of hauling coal from the mine, by whose negligence he was injured.

One engaged in putting up shades in the skylight of a ferry house and an employee of a transfer company at work there are not fellow servants, not being under the control and direction of a common master. *Krulder v. Woolverton*, 11 Misc. 537, 32 N. Y. Supp. 742, Affirmed in 152 N. Y. 638, 46 N. E. 1148.

Servants in general employ of contractor or his employer as servants of the other for some special purpose.

Although there is high authority for the statement that no man can serve two masters, it is nevertheless true that the existence of a general relation of master and servant between two persons does not exclude a like relation between such servant and a third person, to the extent of a special service in which he is actually engaged. (See *Johnson v. Boston*, 118 Mass. 114; *Delaware, L. & W. R. Co. v. Hardy*, 59 N. J. L. 35, 34 Atl. 986.) But just when such special relation exists, so as to make such servant a fellow servant of those in the employ of the one to whom the service is rendered, is a question with which the courts have had no little difficulty; some proposing as a test unity of purpose and control, while others go further, requiring that the common master shall be at liberty to exercise the power of substitution as well as that of direction. It seems probable that, as some of the courts have remarked, no test can be stated in the abstract which will be wholly satisfactory in its application to various states of fact. And, as noted in *The Slingsby*, 57 C. C. A. 52, 120 Fed. 748, many apparent variances

W. 322; *Keyes v. Minneapolis & St. L. R. Co.* 38 Minn. 290, 30 N. W. 888; *Bahr v. Northern P. R. Co.* 101 Minn. 316, 112 N. W. 267.

Jaggard, J., delivered the opinion of the court:

The negligence of defendant's servants in this case was sufficiently shown. See *McCaughey v. Norcross*, 155 Mass. 584, 30 N. E. 464; *Dohn v. Dawson*, 90 Hun, 271, 35 N. Y. Supp. 984. Cf. *Hunt v. Pennsylvania R. Co.* 51 Pa. 475.

1. The principal question presented by this appeal concerns plaintiff's right to complain of that negligence. This is one of the frequently recurring cases in which servants of different masters assist each other

among the decisions are due to variances in the facts, which are not always quite fully set forth in the reports.

For a discussion of the broad question which of two or more persons is the master of another who is conceded to be the servant of one of them, see exhaustive note on that subject, appended to *Hardy v. Shedden Co.* 37 L.R.A. 33.

The following cases, bearing upon this division of the question under discussion, are grouped with reference to similarity of facts:

—persons furnished to make repairs.

One in the employ of a boiler maker by whom he had been sent to make certain repairs on a ship, the work being apparently done in the usual way, by days' work, and not by independent contract, is a fellow servant of the ship's carpenter, who was working with him upon such repairs. *The Coleridge*, 72 Fed. 676.

In *Killea v. Faxon*, 125 Mass. 485, it was held that one sent by a coppersmith to put gutters on a building was a fellow servant of an employee of the contractors to effect repairs, so as to preclude any recovery for an injury received by their negligence in putting up a staging.

In *Ward v. New England Fibre Co.* 154 Mass. 419, 28 N. E. 299, it was held that one working by the month for a firm engaged in putting a hopper into a pulp mill was, if subject to the control of the mill owner in directing the progress of the work, a fellow servant of other employees of such mill owner, notwithstanding he was, in a general sense, the servant of the firm furnishing the hopper.

A carpenter in the general employ of a firm by whom he was told to go to a certain building, where the superintendent of the building would tell him what was to be done, became, *pro hac vice*, a servant of the owner of the building, being under the control of the superintendent while engaged in the work, and was therefore the fellow servant of an elevator boy by whose negligence he was injured while fixing an ele-

vator door, the two being engaged in a common enterprise and subject to a common control. *Hasty v. Sears*, 157 Mass. 123, 34 Am. St. Rep. 287, 31 N. E. 769.

An expert machinist employed by a machine company and sent to make repairs upon plants of other persons at their request, as his services may be needed, and who is, while so employed, subject to the direction of the one seeking his services as to what should be done, although, in his method of work, he acts upon his own judgment, is, during the time so employed, a servant of the latter and a fellow servant of his employees, although he receives his wages from his own employer, who collects the pay for his time from those seeking his services. *Delory v. Blodgett*, 185 Mass. 126, 64 L.R.A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078.

But a person in the employ of one who was called upon by a mill owner whenever it had occasion to have work done about its mill, and who would send his men to do what was needed, cannot be regarded as the fellow servant of the mill owner's employees, where no testimony was introduced tending to show that he was either employed or paid or governed or directed by the mill owner or anyone in its employ. *Hoadley v. International Paper Co.* 72 Vt. 79, 47 Atl. 169.

—persons furnished to drive teams.

One in the general employ of a firm having an arrangement with stevedores to supply horses when needed to operate apparatus used in unloading vessels, and who worked under the direction of the stevedores' foreman, is a fellow servant of a longshoreman in the employ of the stevedore. *Breslin v. Sparks*, 97 App. Div. 69, 89 N. Y. Supp. 627.

A teamster in the general employment of one by whom he was directed to perform such work as might be required of him by a third party becomes a fellow servant of the employees of such third party, by whose negligence he was injured while jointly engaged in loading stone on his wagon, there

(Hardy v. Sheldon Co. 37 L.R.A. 33; Brady v. Chicago & G. W. R. Co. 57 L.R.A. 712, 52 C. C. A. 48, 114 Fed. 100; and Delory v. Blodgett, 185 Mass. 126, 64 L.R.A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078), although, they may have a common object. See Pollock, C. B., in *Abraham v. Reynolds*, 5 Hurlst. & N. 143. Ordinarily, servants in the hire of a general employer and servants of a subcontractor or of an independent contractor are not fellow servants. *Larson v. American Bridge Co.* 40 Wash. 224, 111 Am. St. Rep. 904, 82 Pac. 294; *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136; *Wagner v. Boston Elev. R. Co.* 188 Mass. 437, 74 N. E. 919; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Young v. New York C. R. Co.* 30 Barb. 229; *Dohn v. Dawson*, supra; *Bishop*

v. Leahy, 54 App. Div. 619, 66 N. Y. Supp. 342; *Norman v. Middlesex & S. Traction Co.* 71 N. J. L. 652, 60 Atl. 936; *Kilroy v. Delaware & H. Canal Co.* 121 N. Y. 22, 24 N. E. 192. The English rule accords. The controversy has been largely connected with the discussion of *Wiggett v. Smith*, 11 Exch. *832. There the defendant, having contracted to erect a tower, and having hired a subcontractor to do piecework, provided the scaffolding and tools, and kept an account of the time of employees of the subcontractor. It was held that such employees were engaged in a common employment with the contractor's other servants, and, as a matter of law, were their fellow servants. The various views and the general disapproval of this decision will be found in the note to

being a unity of service and control. *Cunningham v. Syracuse Improv. Co.* 20 App. Div. 171, 46 N. Y. Supp. 954.

In *Pioneer Fire Proofing Co. v. Clifford*, 125 Ill. App. 352, it was held that the question whether one in the employ of a person who kept teams and let, for a stipulated price, a horse and driver to haul clay from a pit, being wholly under the direction and control of the hirer, and working with the hirer's men in the pit, without any distinction, was a fellow servant of the hirer's employees, was for the jury.

In *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58, it was held that evidence that the owner of a team passed a place where it was at work several times and had been seen to speak to the teamster would warrant the jury in finding that such teamster, who was furnished with the team by the owner to haul earth for a city for a certain sum per day, was, in the management and control of the team, the representative of the owner, and not of the city, so that the owner would be liable for an injury to a laborer in the employ of the city, although such team and driver were, to a certain extent, subject to the direction of the person in charge of the work.

A servant of a truckman, who is sent with a horse by his master, by whom he is paid, to a warehouse, to use the horse in operating tackle for hoisting goods, which work is under the direction of the foreman of the warehouseman, is not a fellow servant of the warehouseman's servants, by whose negligence in putting in place the pulley blocks and tackle he is injured. *Murray v. Dwight*, 161 N. Y. 301, 48 L.R.A. 673, 55 N. E. 901.

A driver in the employ of an independent contractor, engaged in hauling steel plates, and who was injured by being struck by such plates while giving directions to employees of a mill owner as to the placing of the plates on the wagon, was not their fellow servant. *Otis Steel Co. v. Wingle*, 82 C. C. A. 62, 152 Fed. 914.

—persons furnished to operate machinery.

In *Illinois C. R. Co. v. Cox*, 21 Ill. 20, 71 17 L.R.A. (N.S.)

Am. Dec. 298, in which it appeared that a railroad company had contracted with a firm to deliver a certain quantity of wood at various stations along its line, the railroad furnishing a locomotive and cars for the purpose, certain expressions are used, indicating that the court regarded the control of the contractors over the engine and train as justifying an assumption that the engineer became the fellow servant of laborers in the employ of the contractors, and that therefore the railroad would not be liable; but, as pointed out in *Louisville, N. O. & T. R. Co. v. Conroy*, 63 Miss. 562, 56 Am. Dec. 835, such statement is at variance with others in the opinion, it being declared that, for the purpose of the case, the court would consider that all parties, as well the contractors as their hired hands, were employees of the railroad company,—which would bring the case into harmony with the general current of authorities on the subject. The decision, which was to the effect that the railroad company was not liable for an injury to a laborer in the contractor's employ, may also be justified by the finding that there was no negligence on the part of the engine driver and the conductor, but that the accident was due to the unskilful piling of the wood upon the car, in which the contractor's laborer participated.

The engineer of a gravel train which a railroad company had agreed to furnish for the use of a city, together with conductor, engineer, fireman, and brakeman, there being no evidence that the railroad company gave any directions in regard to the work, or exercised any control of the running of the train, and there being nothing in the contract which prevented the city from discharging the train men and hiring others in their place if it saw fit to incur the additional expense which would be thus caused,—is the fellow servant of an employee of the city who was injured while riding thereon. *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 218.

An engineer in the employ of a railroad company, in its pay, subject to be discharged by it, and engaged in running its locomotive and its cars upon its track in the

37 L.R.A. 52, in which the best discussion of this general subject will be found. The final conclusion is thus fairly summarized by Lord Watson in *Johnson v. Lindsay* [1891] A. C. 371, Affirmed in *Cameron v. Nystrom* [1893] A. C. 308: "I can well conceive that the general servant of A. might, by working towards a common end along with the servants of B., and submitting himself to the control and orders of B., become *pro hac vice* B.'s servant in such sense as not only to disable him from recovering from B. for injuries sustained through the fault of B's proper servants, but to exclude the liability of A. for injury occasioned by his fault to B.'s own workmen. In order to produce that result, the circumstances must, in my opinion, be such as to show conclu-

sively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that person as his master for the purposes of the common employment." And see *Cooper v. Wright* [1902] A. C. 302, and *Swainson v. North-Eastern R. Co.* 38 L. T. N. S. 201. Cf. *Bentley v. Edwards*, 100 Md. 652, 60 Atl. 283, 286, 287; *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Aldritt v. Gillette-Herzog Mfg. Co.* 85 Minn. 206, 88 N. W. 741.

The circumstances of this case render it unnecessary to resort to other tests, like payment of wages, or hiring or discharging, to determine whether or not the relationship of fellow servant existed. Plaintiff was not

performance of its contract to transport and distribute poles for a telegraph company, does not become the fellow servant of a laborer employed by the telegraph company to throw the poles from the cars, since, though such engineer was subject to certain orders from the telegraph company, these orders did not extend to the details of his vocation. *Coggin v. Central R. Co.* 62 Ga. 685, 35 Am. Rep. 132.

The engineer of a train furnished by a railroad company to one who has contracted to do certain grading for it, who is paid by the railroad company, and subject to no control by the contractor except as to the time when the train should move, is not, in operating such train, a fellow servant of a laborer in the employ of the contractor. *Louisville, N. O. & T. R. Co. v. Conroy*, supra.

One in the employ of the owner of a building as operator of an elevator, who controls the elevator while it is being used as a platform by an employee of a contractor while doing some plastering in the elevator shaft, is, for the time being, the employee of the contractor, so that his general employer is not liable for his negligence while performing such service. *Higgins v. Western U. Tele. Co.* 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500.

An engineer furnished to operate a hod elevator by one agreeing to furnish to a building contractor an elevator, boiler, and engineer for an agreed price, is not a fellow servant of an employee of the builder. *Mills v. Thomas Elevator Co.* 54 App. Div. 124, 66 N. Y. Supp. 398, Affirmed in 172 N. Y. 660, 65 N. E. 1119; *Moran v. Carlson*, 95 App. Div. 116, 88 N. Y. Supp. 520; *McDonough v. Pelham Hod Elevating Co.* 111 App. Div. 585, 98 N. Y. Supp. 90.

An engineer in the employ of one who has contracted to furnish a hod elevator for use in erecting a building is not the fellow servant of an employee of a sub-subcontractor. *Gerlach v. Edelmeyer*, 15 Jones & S. 292 (Affirmed in 88 N. Y. 645).

In *The Harold*, 21 Fed. 428, the conclusion that a winch man furnished by a vessel was the fellow servant of employees of the 17 L.R.A. (N.S.)

stevedore appears to be based upon two grounds—one, that the stevedore was not an independent contractor, the cargo being shifted by days' work at the ship's expense, so that the men employed by the stevedore were in the service of the ship; and the other, that the men so employed and the winch man were working under the common direction of the stevedore and his foreman and in a common service.

In *The Joseph John*, 30 C. C. A. 199, 52 U. S. App. 592, 86 Fed. 471, it was said that a winch man was to be considered as in the service of and under the control of the stevedores for the time being, the court saying: "As a matter of fact, all the persons employed in taking aboard, lowering, and stowing cargo were in the direct service of the stevedores, no matter by whom eventually their wages were to be paid. If, however, it should be considered that the loading was being carried on for and in the interest and service of the ship, then all the employees engaged in such loading were indirectly the servants of the ship, engaged in a common employment, using the master's appliances at the same time and under such circumstances that the negligence of one might result in injury to another; and, in that view of the case, assuming that the libellant was injured by the negligence of the winch man, it is perfectly clear that the winch man was a fellow servant, and his negligence was one of the risks of the employment assumed by the libellant when he entered upon the services."

In *The Anaces*, 87 Fed. 565 (Reversed on another ground in 34 C. C. A. 558, 93 Fed. 240), a winch man furnished by a vessel was said to be a fellow servant of a laborer in the employ of a stevedore.

In *The Elton*, 73 C. C. A. 467, 142 Fed. 367, it was held that a winch man furnished by the vessel was to be deemed the fellow servant of one in the employ of the stevedore, since the winch was operated under the direction and control of the stevedore. This case, however, may be differentiated by the fact that there was evidence that the officers of the ship had no direction or control of the winch man in the actual

under the control of the defendant's servants, and was not their fellow servant. Though they were engaged in a common employment, they had no common master. Plaintiff was in the employ of the contractor. The laborers through whose fault he was injured were in the employ of the subcontractor. Defendant's argument, however, is that plaintiff became a fellow servant by undertaking to assist defendant's servants at their request by removing the wheelbarrow. Defendant's own servant testified that he had said to plaintiff: "Kelly, get your wheelbarrow out of the way." The natural inference was that the wheelbarrow was in plaintiff's charge. The trial court properly refused to hold, as a matter of law, that plaintiff was either an assistant or a

substitute, and had submitted himself to the control of defendant or of his servants.

Nor was plaintiff, as a matter of law, a mere volunteer. A volunteer is one who intrudes himself into matters which do not concern him, or does or undertakes to do something which he is not legally nor morally bound to do, and which is not in pursuance or protection of any interest. See 8 Words & Phrases, 7357. To one who is a volunteer, properly speaking, even if assisting in the master's work at the request of a servant, no affirmative duty to exercise care is due originally, but only after knowledge of peril. *Cincinnati, N. O. & T. P. R. Co. v. Fennell*, 22 Ky. L. Rep. 86, 57 L.R.A. 266, 55 S. W. 902; *Wischam v. Rickards*, 136 Pa. 109, 10 L.R.A. 97, 20 Am. St. Rep. 900, 20

work of unloading, and that he could have, at any time, been removed from that work, and another put in his place by the stevedore.

Upon the other hand, in *The Victoria*, 69 Fed. 160, it was held that a winch man furnished by a ship, by whose negligence in not heeding a direction to "go easy" a stevedore was injured, was not a fellow servant of such stevedore.

In *The Lisnacrieve*, 87 Fed. 570, it was held that a winch man furnished by the owners of a ship, to assist in unloading, was not a fellow servant of an employee of the stevedore, since, although the winch man worked under the direction of the stevedore, the stevedore did not pay him and could not discharge him or replace him by another operator. The court said: "In any case, the ship did undertake to do a certain portion of the work of unloading. Such an undertaking is not merely loaning a servant to the stevedore. It is a co-operation on the part of the ship in the work of unloading the cargo, precisely to the same extent as if two independent stevedores had contracted for a division of labor in discharging the cargo,—one furnishing the tackle and hoisting power, and the other furnishing men and appliances for the remainder of the work. It does not change this relation that the winch man was to run his winch, or stop his winch, or graduate the speed thereof, as the stevedore's servant signaled him to do. Independent contractors and their servants are often called upon to direct and advise each other in movements and acts relating to the common work, and such often is the case between the contractor and the person with whom the contract is made. The fact that the servant of one of the parties regulates his acts by the actions of the servants of the other does not make them coservants. In the present case, the winch man was a general servant of the ship. He was put in charge of the ship's machinery, to perform a duty that the ship had assumed the duty of performing. He went to his post of duty, or left the same, by no command of the stevedore, but simply because his master or his delegated agent so 17 L.R.A. (N.S.)

directed him. True, the stevedore gave him a signal, and it was his duty to obey it; but this duty sprang from no contract of hiring, made by the winch man with the stevedore, but purely or wholly from the relation of master and servant that existed between the winch man and the shipowners."

In *The City of San Antonio*, 135 Fed. 879 (Affirmed in 75 C. C. A. 27, 143 Fed. 955), it was said, *obiter*, that a winch man furnished by a barge was not the fellow servant of an employee of the stevedore engaged in unloading it.

In *Standard Oil Co. v. Anderson*, 81 C. C. A. 399, 152 Fed. 166, it was held that a winch man furnished by the employer of a stevedore was not a fellow servant of an employee of the stevedore, although receiving signals to run the winch from the stevedore's gangway man, since the master stevedore did not pay the winch man, nor hire him, and could not discharge him if he did not suit.

A winch man furnished by the owner of a vessel is not the fellow servant of an employee of the stevedores, although under their direction as to the operation and movements of the winch in handling cargo, since the stevedores had no authority to change the character of his work, nor power to substitute another for him. *The Slingsby*, 57 C. C. A. 52, 120 Fed. 748; *The Gladestry*, 63 C. C. A. 198, 128 Fed. 591.

An employee of a firm of stevedores, who had undertaken to load a ship, was not a fellow servant of one furnished by the owner of the dock from which the load was to be taken, to operate a steam engine and apparatus used in loading the vessel. *Sanford v. Standard Oil Co.* 118 N. Y. 571, 16 Am. St. Rep. 787, 24 N. E. 313; *Lauro v. Standard Oil Co.* 74 App. Div. 4, 76 N. Y. Supp. 800.

A man furnished to operate a winch used in unloading a vessel, who is subject to the control of the stevedore only to the extent of obeying signals when to hoist or lower, is not a fellow servant of an employee of the stevedore. *Johnson v. Netherlands*

Atl. 532; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356; *Osborne v. Knox & L. R. Co.* 68 Me. 49, 28 Am. Rep. 16; *Maytton v. Texas & P. R. Co.* 63 Tex. 77, 51 Am. Rep. 637; *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62, 37 Am. Rep. 423; *Everhart v. Terre Haute & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567; *Rhodes v. Georgia R. & Bkg. Co.* 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922; *Atchison, T. & S. F. R. Co. v. Lindley*, 42 Kan. 714, 6 L.R.A. 646, 16 Am. St. Rep. 515, 22 Pac. 703; *Church v. Chicago, M. & St. P. R. Co.* 50 Minn. 218, 16 L.R.A. 861, 52 N. W. 647; *Wagen v. Minneapolis & St. L. R. Co.* 80 Minn. 92, 82 N. W. 1107; *Evarts v. St. Paul, M. & M. R. Co.* 56 Minn.

141, 22 L.R.A. 663, 45 Am. St. Rep. 460, 57 N.-W. 459; *Atlanta & W. P. R. Co. v. West*, 121 Ga. 641, 67 L.R.A. 701, 104 Am. St. Rep. 179, 49 S. E. 711. Cf. *Stevens v. Chamberlin*, 51 L.R.A. 513, 40 C. C. A. 421, 100 Fed. 378. And see *Potter v. Faulkner*, 1 Best & S. 800; *Degg v. Midland R. Co.* 1 Hurlst. & N. 773.

There is, however, an increasing class of cases in which the exercise of proportionate care is held to be due to servants of different masters who assist in the performance of a service mutually beneficial to such employers. Thus, a servant of a shipper, who to prevent delay, aids the servants of a carrier in shunting cars, is not a mere volunteer, assisting defendant's servants, although

American Steam Nav. Co. 132 N. Y. 576, 30 N. E. 505.

—miscellaneous.

One in the employ of an iron company at fixed wages, receiving all his pay from that company, and who, at the direction of his employer, temporarily assists employees of a bridge company which has contracted to construct a coal trestle for his employer, without knowing that they were not in the employ of the iron company, and without understanding that he was acting as a servant of the bridge company, or that his relations with the iron company had been changed, but considering himself at all times, as he was in fact, under the control of the superintendent of the iron company, and obeying the direction of the person in charge of the work only because told to do so by such superintendent, who might at any time have recalled him or put another workman in his place, the bridge company having no power to discharge him beyond the right to forbid him from laboring on the trestle work,—does not, as a matter of law, become a fellow servant of the representative of the bridge company, so as to preclude a recovery from the bridge company of damages for injuries occasioned by the negligence of such representative. *Brennan v. Berlin Iron Bridge Co.* 74 Conn. 383, 50 Atl. 1030.

In *Grace & H. Co. v. Probst*, 208 Ill. 147, 70 N. E. 12, where one in the general employ of a building contractor was injured while assisting men in the employ of an iron company to break an iron beam, it was held that, in view of evidence showing that the contractor was proposing to do the work, and was prevented by the steward of the labor union, and that thereupon he made an arrangement with the representative of the iron company, to furnish a couple of men to cut around the beam, after which it was planned to have some of the contractor's men assist in lifting the beam and dropping it across a steel rail, so as to break it, a bill being rendered by the iron company for such services, it could not be said, as a matter of law, that plaintiff was loaned to the iron company.

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In *Johnson v. Boston*, 118 Mass. 114, it was held that an employee of one whose business was drilling and blasting rock for all parties who chose to employ him, and who sent his workmen from place to place where he had work for them to do, retaining control of them so far that he could change them from one place of work to another and could dismiss them, is, where sent to blast rock in a sewer, under the direct charge and management of the foreman of the sewer department, a fellow servant with such foreman and other workmen engaged in excavating the sewer. The court said: "The reason usually assigned for the rule in regard to fellow servants . . . applies to the plaintiff as well as it would to his immediate or general employer, Tinkham. If his engagement with Tinkham did not contemplate the temporary transfer of his services to the control and direction of others, as his were transferred to that of the defendant's foreman upon this work, then he himself, by assenting to that transfer, and voluntarily engaging in the work as a servant of the defendant, assumed the liabilities and consequences that follow from the existence of that relation."

In *Delaware, L. & W. R. Co. v. Hardy*, 50 N. J. L. 35, 34 Atl. 986, it was held that the question whether one in the general employ of a rolling-mill company which had contracted to furnish, at a specified price, the materials for rebuilding certain railroad bridges, and skilled workmen to erect them, whose wages were repaid by the railroad company to the rolling-mill company, with some percentage added, the work to be done under the direction of representatives of the railroad company, was the fellow servant of a locomotive engineer, so as to preclude recovery against the railroad, was properly submitted to the jury, where it appeared that he had been employed by the rolling-mill company, and continued to be paid by their paymaster, and to be directed in his work by their foreman, and the agreement between that company and the railroad company, that the representatives of the latter should control the work, not having been made known to him or shown to have come to his knowledge.

on request, but is regarded as having been on defendant's premises with a purpose of expediting the delivery of his own goods. The carrier is liable to him for the negligence of its servants. *Holmes v. Northeastern R. Co.* L. R. 4 Exch. 254, L. R. 6 Exch. 123; *Wright v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 252; *Abraham v. Reynolds*, supra. And see *Hannigan v. Union Warehouse Co.* 3 App. Div. 618, 38 N. Y. Supp. 272; *Connors v. Great Northern Elevator Co.* 90 App. Div. 311, 85 N. Y. Supp. 644. Cf. *Elliott v. Hall*, L. R. 15 Q. B. Div. 315. So one with an interest, who is requested by another's servant to assist in adjusting or fixing an instrumentality, is not a mere volunteer, but is within the rule requiring the exercise of due care. *Meyer v. Kenyon-Rosing Mach. Co.* 95 Minn. 329, 104 N. W. 132; *Empire Laundry Machinery Co. v. Brady*, 60 Ill. App. 379. "The distinction running through all the cases is this: That where a mere volunteer, that is, one who has no interest in the work, undertakes to assist the servants of another, he does so at his own risk. In such a case the maxim of *respondet superior* does not apply. But where one has an interest in the work, either as consignee or the servant of a consignee, or in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible. In such a case the maxim of *respondet superior* does apply. The hinge on which the cases turn is the presence or absence of said self-interest. In the one case, the person injured is a mere intruder or officious intermeddler; in the other, he is a person in the regular pursuit of his own business, and entitled to the same protection as anyone whose business relations with the master expose him to injury from the carelessness of the master's servants." *Welch v. Maine C. R. Co.* (O'Donnell v. Maine C. R. Co.) 86 Me. 552, 25 L.R.A. 661, 30 Atl. 116. And see *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637, 48 Am. Rep. 689; *McIntire Street R. Co. v. Bolton*, 43 Ohio St. 224, 54 Am. Rep. 803, 1 N. E. 333; *Eason v. Sabine & E. T. R. Co.* 65 Tex. 577, 57 Am. Rep. 606; *Marks v. Rochester R. Co.* 77 Hun, 77, 28 N. Y. Supp. 314; *Cleveland v. Spier*, 16 C. B. N. S. 399; 2 Labatt, Mast. & S. p. 1860, § 632 (approved in *Meyer v. Kenyon-Rosing Mach. Co.* supra); 26 Cyc. Law & Proc. p. 1085. The requirement of care applies, *a fortiori*, when such person is injured in the justifiable attempt to protect the property of his master in his charge from damage by the instrumentality of another master. *Weatherford, M. W. & N. W. R. Co. v. Duncan*, 10 Tex. Civ. App. 479, 31 17 L.R.A. (N.S.)

S. W. 562. Within these principles it is clear that plaintiff was not, as a matter of law, a mere volunteer.

The jury was justified in finding that, in the words of the charge, plaintiff "was rightfully there." He was not a trespasser, for he was on the premises by virtue of the agreements between the contractor and the owner and the contractor and the subcontractor. As was said in *Heaven v. Pender*, 49 L. T. N. S. 357, per Cotton, L. J., at page 361: "The plaintiff was therefore engaged in work in the performance of which the defendant was interested." It has been said that "one who, in the furtherance of his own interest or those of his master, assists the servants of another in the performance of their work, is neither a fellow servant of such servants, nor a mere volunteer, but occupies a third position, namely, that of a licensee with an interest." *Rombauer, P. J.*, in *Ryan v. O'Brien Boiler Works*, 68 Mo. App. 148, 151. Usually, however, actions based on the negligent infringement of the rights of licensees with an interest are brought against the owner of premises. No liability of the landowner is here involved. This distinction does not relieve defendant from the duty essentially similar, nor does it deprive plaintiff of his right to recover for its violation. That plaintiff was entitled to the exercise of care, see *Pickwick v. McCauliff*, 193 Mass. 70, 78 N. E. 730; *Johnston v. Ott Bros.* 155 Pa. 17, 25 Atl. 751; *Rink v. Lowry*, 38 Ind. App. 132, 77 N. E. 967 (collecting cases at page 970); *Steele v. Grahl-Peterson Co.* 135 Iowa, 418, 109 N. W. 882 (collecting cases at page 884). And see *Power v. Beattie*, 194 Mass. 170, 80 N. E. 606; *Allis-Chambers Co. v. Reilley*, 74 C. C. A. 436, 143 Fed. 298; *Caffi v. New York C. & H. R. Co.* 49 Misc. 620, 96 N. Y. Supp. 835; 8 Current Law, 1097. It is significant that the authorities generally incline to impose a larger obligation than that of merely not setting a trap for persons who are properly at the place at which they are injured. *Harris v. Perry* (1903) 89 L. T. N. S. 174, 176. And see *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Wilson v. Olano*, 28 App. Div. 448, 51 N. Y. Supp. 109; *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350; *Elliott v. Hall*, supra; *Wagner v. Boston Elev. R. Co.* 188 Mass. 437, 74 N. E. 919; and see 1 Thomp. Neg. 2d ed. 949, § 875. The danger created by the present defendant's servants in this case was not remote nor merely negative, as occurs, for example, in cases of insecure fastenings on structures not intended to be used by persons of the injured workman's class. It was imminent and affirmative. The situation was, in morals, not at all like the setting of a trap; but in practical ef-

fect much resembled such an act. Cf. *Lottman v. Barnett*, 62 Mo. 159, 168.

2. It appears from the evidence, as previously stated, that defendant's servants were in fact, according to the verdict, engaged in their master's work at the time of the alleged negligence, and that plaintiff was injured because of the fall of an instrumentality which they were using. They did not, as a matter of law, "step aside from their master's business, for however short a time, to do an act not connected" with it. See *Theisen v. Porter*, 56 Minn. 555, 563, 58 N. W. 265. What they did may fairly be regarded as in the furtherance of their master's business and in the line of their duty; nor does it appear that it was in any wise in excess of express instructions. Defendant's title to the planks is immaterial. It is significant that those planks were being used by defendant's servants, and not by another. See *Hughbanks v. Boston Invest. Co.* 92 Iowa, 267, 60 N. W. 640.

3. The most serious question in this case arises from the erroneous cross-examination under the statute of an employee of defendant, under the mistaken impression that defendant was a corporation, whereas it was in fact a partnership. Defendant, however, expressly admits that, if plaintiff was entitled to recover anything, the verdict was reasonable. We understand, also, that he does not wish a new trial. No reason suggests itself why, under these circumstances, he should be compelled to prolong this litigation.

Order affirmed.

A reargument having been granted, the following additional *Per Curiam* opinion was handed down March 27, 1908:

Reargument in this case was allowed after the original opinion had been filed, in view of a question whether there had been misapprehension as to defendant's desire for a new trial. The following question was then fully argued and considered *de novo, viz.*: Was defendant entitled to a new trial because of error in permitting plaintiff to cross-examine a witness under § 4662, Rev. Laws 1905, under the mistaken impression that defendant was a corporation, whereas in fact defendant was an individual? The law applicable to that question is clear. The ruling of the court was erroneous. Prejudice is presumed. A new trial must be granted, unless the record affirmatively shows that the error did not in fact result in prejudice. Rev. Laws 1905, § 4198. With this in view we have carefully re-examined and reconsidered the record. The evidence introduced would have been proper on ordinary direct examination. Use of privileges peculiar to cross-examination was not 17 L.R.A. (N.S.)

made. It affirmatively appears that the error was not prejudicial.

Affirmed.

MISSISSIPPI SUPREME COURT.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,
v.

E. W. REID.

(— Miss. —, 46 So. 146.)

Carrier — refusal to listen to explanation — punitive damages.

Refusal of a conductor to listen to the explanation of a passenger on a through train as to a special contract that he should be let off at a way station where the train was not scheduled to stop, and compelling him to leave the train at the last regular stop before the station is reached, is evidence of wilfulness and wantonness which will justify the assessment of punitive damages against the railroad company.

(Mayes, J., dissents.)

(April 27, 1908.)

Case Note. — Refusal of conductor to listen to passenger's explanation as to his contract, as justification for punitive damages for passenger's expulsion.

But few cases can be found, other than *ILLINOIS C. R. Co. v. Reid*, passing upon the question whether the conductor's refusal to listen to the passenger's explanation of his contract with the company will justify the jury in imposing punitive damages on the company. But, on principle, it would seem that, if a conductor wilfully refuses to listen, he and his principal, the railroad company, ought to be charged with the knowledge that would have been acquired had he listened; and, if the conduct of the conductor in expelling the passenger would have been so oppressive as to justify punitive damages had he possessed the knowledge he would have acquired by listening, such damages would also be proper when his lack of knowledge is due to his own wrongful conduct.

The only case found which is squarely in point is *Illinois C. R. Co. v. Gortikov*, 90 Miss. 787, 14 L.R.A. (N.S.) 464, 45 So. 363. in which a ticket agent, by mistake, had punched a ticket so as to indicate that the purchaser was a woman. The passenger had at hand the necessary proofs to explain the mistake and to identify himself, and offered to explain; but the conductor refused to listen to any explanation. It was held that the facts warranted the recovery of both actual and exemplary damages.

In *Sommerfield v. St. Louis Transit Co.* 108 Mo. App. 718, 84 S. W. 172, a conductor wrongfully refused to accept a transfer

APPEAL by defendant from a judgment of the Circuit Court for Pike County in plaintiff's favor in an action brought to recover damages for alleged wrongful expulsion from a train. Affirmed.

The facts are stated in the opinion.

Messrs. Mayes & Longstreet, R. N. Miller, and H. B. Miller for appellant.

Messrs. Green & Green, for appellee.

The refusal of the conductor to listen to plaintiff's explanation as to the special contract under which he held his ticket, and requiring him to leave the train, was a wilful wrong, justifying punitive damages.

Illinois C. R. Co. v. Harper, 83 Miss. 560, 64 L.R.A. 283, 102 Am. St. Rep. 469, 35 So. 764; Kansas City, M. & B. R. Co. v. Riley, 68 Miss. 765, 13 L.R.A. 38, 24 Am. St. Rep. 309, 9 So. 443.

Whitfield, Ch. J., delivered the opinion of the court:

The only question in this case is as to the right of the appellee to recover punitive damages. The judgment in the court below was for \$438.91,—manifestly a judgment for punitive damages. The case in brief is this: E. W. Reid, desiring to go with his wife and children from Magnolia, Mississippi, to the World's Fair at St. Louis, Missouri, in September, 1904, went to the ticket agent at Magnolia to purchase a ticket to St. Louis and return,—a special excursion ticket, calling for continuous passage. The return portion of this ticket was to be signed by him before the agent of the railroad company in St. Louis, according to the custom in such cases. When he purchased the ticket from Mr. Groce, the ticket agent of the appellant at Magnolia, Mr. Groce asked him whether he wanted No. 2—that is, the fast train going north—to stop for him, and Mr. Reid told him he did, and Reid asked the ticket agent, while purchasing the ticket, whether No. 3 would stop for him on his return trip, and the agent said in substance that it would. Mr. Reid's testimony, to be exact, is as follows: "When I bought the ticket, he [i. e., Groce] asked me if I wanted No. 2 to stop, and I told him that I did; and after I signed the ticket I said: 'No. 3 will stop for me coming back, will it?' And he said, 'Yes.'" Reid further testifies that he always understood that No. 2, when going north, stopped for any passenger north

of Grenada, Mississippi. Acting on the faith of this contract made with this ticket agent, Reid purchased a special excursion ticket and went with his family to St. Louis. When he got ready to come back, he says that he went to the ticket office at St. Louis, and signed his ticket in the presence of the agent, and bought his Pullman berths to Magnolia. He states that the ticket agent of the appellant company at this uptown office asked him for his railroad ticket when he bought his berths, and directed him to sign the return portion of the ticket, which he did in the agent's presence, and the agent witnessed it and stamped it,—all as customary in such cases. He further says that he told this ticket agent of the train he wished to use this ticket on, in order to get berths in the Pullman car on that train; he wished to use his ticket on No. 3, the fast train going south by Magnolia on the Illinois Central Railroad. He further testifies that in St. Louis he presented his tickets, railroad and Pullman, at the gate of the Union Depot, and the employee whose business it was to attend to that matter asked where the tickets took him to, and he told him Magnolia, Mississippi, and the employee opened the gate and he walked in, having shown the tickets to this gateman, and that this gateman let him enter and board No. 3. He further testifies that, after he boarded the train, the conductor took up his railroad tickets and his sleeping car tickets, as is usually done in such cases, and that he then, with his family, continued without interruption on his journey until he got near to McComb City, about 7 miles north of Magnolia, his destination.

Up to this point it will be seen that every official of the appellant charged with the duty of selling the ticket, in the first place, and of accepting and stamping and witnessing the return portion of the ticket, in the second place, and the gateman on guard at the Union Depot, in the third place, and the conductor on train No. 3, in the fourth place, each and all acted in strict conformity with the special contract made between the appellee and the ticket agent who sold him the excursion ticket at Magnolia. The appellee acted manifestly on the faith of this contract, and expected to be put off in accordance with it on his return. He then proceeds to say that, when he got near

ticket on a street car, and refused, on request, to explain what was wrong with the transfer. It was held that his conduct showed such a wilful and wanton disregard of the rights of others as to authorize the imposition of punitive damages.

In *Lucas v. Michigan C. R. Co.* 98 Mich. 1, 39 Am. St. Rep. 517, 56 N. W. 1039, the conductor took up plaintiff's ticket with-

out giving him a check; plaintiff moved to another car, and, when the conductor again demanded fare, explained that it had been taken up in the other car, and offered to go with the conductor to such car and prove his statement by witnesses; but the conductor refused to investigate, and put him off. It was held that exemplary damages were proper.

to McComb City on his return, the conductor came through the car and handed him something, and that he asked the conductor what it was, and the conductor said it was his ticket. He then says: "I asked him what I wanted with it, and he said, 'You have got to get off at McComb City.' I told him I didn't think I did; that my ticket read to Magnolia. He said, 'I have heard that before,' and pitched the ticket in my lap and went on." He further states that the manner of the conductor was exceedingly discourteous; that he tried to tell him four or five times, and that the conductor refused absolutely and peremptorily to hear any explanation whatever; and that all this was witnessed by many other passengers. Further than this, it appears that Mr. Galvani, the train master, was aboard the car, and Mr. Reid testified positively that he went to Galvani and appealed to him to get the train stopped, having been introduced to him by Mr. Thad Lampton; that he explained the facts and circumstances fully to Mr. Galvani, and told him that his ticket said, take him to Magnolia, one continuous passage. He states that Galvani said that he (Galvani) did not have any authority in that line, and that he then asked him as a favor to him and to the ladies that were with him to have the train stopped at Magnolia and let them off, and that Galvani said that he did not have any authority in that line, and added, "Anyway I [Galvani] would be afraid to do it on account of the trouble you are having down there." This trouble, it very clearly appears, grew out of an effort on the part of the citizens of Magnolia, prominent among whom were the Lamptons, to force the through trains to stop at Magnolia. Mr. Galvani positively denies that Mr. Reid was introduced to him, or that any such conversation occurred. Manifestly the jury believed Reid. Mr. Reid further testifies that, about this time, in the summer of 1904, Mr. Davis went to St. Louis and came back on this No. 3, and that Mr. Butler did the same thing, and that Mr. Middleton did the same thing, and that No. 3 stopped for all these gentlemen. On cross-examination Reid was pressed to say whether the conductor did not tell him that he could not stop the train unless he got an order from a higher official to stop, to which he answered: "No, sir; he didn't say that. I don't know that he got an order, or that he had to get an order."

Dr. Felder testifies that, on his return from the World's Fair in 1904, on this same No. 3, it stopped for him to get off at Magnolia, and that this same train master, Galvani, stopped it; himself giving the order to the conductor. On cross-examination it was attempted to show by this witness that the

reason that Galvani stopped the train was that Felder's wife was suffering with a sick headache on that occasion; but Felder says this was not true, and that no such representation was made to Galvani. Galvani contradicts all this, too; but the jury accepted the statement of Felder. C. E. Davis testifies that, on his return from the World's Fair in 1904, on the same kind of excursion ticket, the defendant had its train No. 3 stop for him at Magnolia. On cross-examination he says that the conductor did this on account of old acquaintanceship with the wife of the witness Davis, without any order of any kind. W. T. Butler testifies that, on his return from the World's Fair in St. Louis in 1904, on exactly the same kind of excursion ticket the plaintiff had, this identical train No. 3 stopped for him at Magnolia, and that it was stopped without any request or order of any kind,—stopped upon his simply telling the conductor that he wanted to get off at Magnolia. J. I. Middleton testifies that he returned from the World's Fair in the fall of 1904, and that the train was stopped for him to get off at Magnolia,—this same No. 3,—and that this was done twice in the fall of 1904. Willie Morse testifies that, in the month of July, 1904, he got on this same train in St. Louis (No. 3); and, when asked on cross-examination whether he did not know that this train No. 3 never stopped at Magnolia except on special orders, said that he did not know about that,—that he knew it stopped sometimes. West Elliot testifies, also, that he bought a ticket from New Orleans to Hot Springs at Magnolia, and went to the World's Fair in 1904, and that he came back on this same No. 3, and it stopped for him to get off at Magnolia, and that this was done on orders from a local attorney from Magnolia.

In addition to all this testimony, absolutely overwhelming, on the proposition that this special train No. 3 did stop at Magnolia, on various occasions in that identical year and summer, and let passengers from the World's Fair, and other passengers, get off at Magnolia without any special order, and abundantly showing that Galvani had himself ordered this train stopped, in other cases than emergency cases, without any special order except his own order, the plaintiff introduced rule No. 403 of the appellant company, which is as follows: "Train Masters. 403. They will direct the movement of trains, make requisitions for coaches, and regulate the runs of the crews." This rule, manifestly, authorized the train master to stop the train at Magnolia; there being nothing in the record to show to the contrary. The testimony of Galvani is in flat conflict with the testimony of other

witnesses in the case with respect to what he did on various occasions, and with regard to his power to order the train stopped at Magnolia. The jury were certainly warranted, if they saw proper, in accepting the testimony of the other witnesses.

W. B. Groce, the ticket agent, and a witness for the defendant, testifies that Reid asked him if No. 3 would stop for him on his return, and that he told Reid that he did not suppose that he (Reid) would experience any trouble in getting it to stop; that it had stopped for other people on similar occasions. This is the positive testimony of the railroad ticket agent himself. Surely the jury were warranted in believing that this special contract was made, and that Reid boarded the train on the faith of this contract and this representation made by the ticket agent. Further than this, Groce says, in answer to a question as to what he meant by other persons getting off on similar occasions, that he meant that the train generally stopped to let off Chicago and St. Louis passengers; that he did not know how often they had done this; that sometimes it would be once or twice a week; and this, too, was the positive testimony of a witness introduced by the railroad company, and that witness the ticket agent himself. How it is possible for the railroad company to contend, in the face of this testimony of its own ticket agent, that this special contract was not made, and that Reid did not board this train on the faith of this representation and special contract, it is certainly difficult to understand. Galvani, in his testimony, actually testifies that he did not remember anything about Reid's being introduced to him by Thad Lampton at all, nor about Reid's having any conversation whatever with him in respect to stopping train No. 3. Thad Lampton, in rebuttal, testified that he not only introduced Mr. Reid to Mr. Galvani on this train, but that he explained to Galvani that he (Reid) was associated with them (the Lamptons), and had charge of their business in Magnolia, and that Mr. Ed. Harlan, an engineer of the railroad, living at McComb City, was with them when this occurred. Harlan was not introduced by the railroad company to contradict Lampton.

This is the case made by the testimony, except that there is a good deal of testimony, the object of which was to show that there was trouble and bad feeling between the Lamptons and the appellant company in respect to stopping this through train at Magnolia; that there had been litigation about this, and a contest before the railroad commission, etc. We say nothing as to all this. It seems to us to be utterly immaterial, in any view, for the proper decision of 17 L.R.A. (N.S.)

this cause. The question here is not what state of feeling might exist between the Lamptons and the railroad company, but whether, in this particular case, the conduct of the conductor of this appellant company in this case, as made by all the testimony which we have hereinbefore set out, was wilful and wanton. It must be too clear for any further comment that the jury were abundantly warranted in believing that the special contract was made between Groce and Reid; that the ticket agent did agree with Reid that No. 3 should stop for him on his return; that Reid acted on the faith of this special contract and the faith of this representation of this duly constituted ticket agent; and that every official of this appellant company connected with his transportation, whether in Magnolia or in St. Louis, one and all, conformed to this contract thus made until the conductor came along at McComb City. Now the precise point, therefore, on which the defendant must stand, if it can stand at all, is that this conductor, Grant Lord, was not guilty of wilful or wanton conduct in the expulsion of the appellee and his wife and children from this train; and the basis of all this reasoning is precisely the reasoning that has been three times discarded and repudiated by this court; to wit, that the conductor is not bound to listen to any explanation, and that he must go by the face of the ticket which is shown him, and that he is not required to listen to any statement setting forth special arrangements or special representations made by the duly authorized ticket agent at the time of the making of the special contract; and this is said to be because the conductor is bound by a rule of the company to act in this way, and to be governed exclusively by the face of a mere ticket, which may or may not be the whole contract.

We thought we had disposed of this with sufficient clearness and sufficient emphasis in *Illinois C. R. Co. v. Harper*, 83 Miss. 560, 64 L.R.A. 283, 102 Am. St. Rep. 469, 35 So. 764. At page 570 of 83 Miss., we said: "It is idle to argue that the conductor, flatly refusing to listen to the perfectly reasonable explanation made by this woman, and putting her off, under the circumstances detailed in the evidence, at night, was not guilty of such intentional and oppressive wrongdoing as to warrant the imposition of punitive damages. It may as well be understood, once for all, that this court proposes to stand by the doctrine announced in the *Drummond* and *Riley* Cases as the just and true doctrine." We quoted in that case from the opinion of Mr. Justice Lamar in *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. at pages 69 et seq., 36 L. ed. 78, 12

Sup. Ct. Rep. 359, the following passage, which we again repeat, in the earnest hope that we may not be called upon to state it a third time: "The grounds upon which it is insisted that the evidence referred to was inadmissible are that the ticket itself, and the rules and regulations of the road with respect to stop-over checks, constitute the contract between the passenger and the road, and the only evidence of such contract, and that no representations made by a ticket seller could be received to vary or change the terms of such contract. This contention cannot be sustained, and is opposed to the authorities upon the subject. While it may be admitted, as a general rule, that the contract between the passenger and the railroad company is made up of the ticket which he purchases, and the rules and regulations of the road, yet it does not follow that parol evidence of what was said between the passenger and the ticket seller from whom he purchased his ticket, at the time of such purchase, is inadmissible, as going to make up the contract of carriage, and forming a part of it. In the first place, passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of the conductors and other employees of the railroad companies as to the internal affairs of the company, nor are they required to know them. *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544. In this case there is no evidence, as already stated, that notice or knowledge of the existence of the rules of the defendant company, or what they were, with respect to stop-over privileges, was brought home to the plaintiff at the time he purchased his ticket, or at any time thereafter. There was nothing on the face of the ticket to show that a stop-over check was required of the passenger as a condition precedent to his resuming his journey from Olean to Salamanca after stopping off at the former place. It is shown by the evidence that Olean was a station at which stop-over privileges were allowed. Under such circumstances, it was entirely proper for the passenger to make inquiries of the ticket agent, and to rely upon what the latter told him with respect to his stopping over at Olean. *Ibid.*; *Palmer v. Charlotte, C. & A. R. Co.* 3 S. C. N. S. 580, 16 Am. Rep. 750; *Burnham v. Grand Trunk R. Co.* 63 Me. 299, 18 Am. Rep. 220; *Murdock v. Boston & A. R. Co.* 137 Mass. 293, 50 Am. Rep. 307; *Arnold v. Pennsylvania R. Co.* 115 Pa. 136, 2 Am. St. Rep. 542, 8 Atl. 213."

We expressly held in the *Harper Case* that, if the company had any such rule, as here contended for, that the conductor must be governed by the face of the mere ticket

alone, which may be but a part of the contract, then such regulation, not known to the passenger, is unreasonable and void; and we reiterate again that declaration. What was the doctrine of the *Riley Case*, 68 Miss. 765, 13 L.R.A. 38, 24 Am. St. Rep. 309, 9 So. 443, and the *Drummond Case*, 73 Miss. 819, 20 So. 7, just referred to? This, as set forth at page 770 of 68 Miss.: "The decisions are in direct and palpable conflict upon the liability of a common carrier for failure to transport a passenger under the circumstances named. In New York, Michigan, Illinois, Maryland, Ohio, Wisconsin, Connecticut, New Jersey, Massachusetts, and North Carolina it seems to have been decided that the ticket presented by the passenger is the only evidence of his right to travel upon the train which can be recognized by the conductor, and that if, by reason of the negligence of other servants of the carrier, a wrong ticket has been given to the passenger, or the right ticket has been given to him, but erroneously taken from him, the passenger's right of action is for the wrong thus committed, and that he may not insist upon his right to travel on the wrong ticket or without it, when it has been taken up, and recover damages for the refusal of the carrier to permit him to do so, and that the carrier may lawfully eject him from its train, using no more force than is necessary for that purpose. . . . On the other hand, it is held in Georgia and Indiana that the passenger is entitled to travel according to his real contract with the carrier, where the mistake in giving the proper ticket or in taking up a proper one held by the passenger is caused by the negligence of the servants of the carrier. *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464." The court proceeded, through Justice Cooper, to comment and call attention to the fact that Michigan had practically overruled its former cases, and held with Georgia and Indiana, as shown by the case of *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 634, 8 Am. St. Rep. 859, 31 N. W. 544, in which case an instruction was held to be erroneous which told the jury that if a ticket had been punched, indicating to the conductor by the punch mark that it had been used before, that would be evidence of infirmity in the ticket, and the plaintiff could not insist upon the ticket's being received. The Michigan supreme court said that instruction was erroneous, observing that "when the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he paid to the agent who gave him the ticket he presented and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no

matter what the ticket contained in words, figures, or other marks." The court then referred to *Hutchinson on Carriers*, § 571, and the authorities cited in note 2, and, in concluding, the court said: "Where, as here, the ticket in the hands of the passenger supports and confirms the truth of his statement, and no possible injury can result to the carrier by the conductor's accepting and acting thereon, he must so act, or refuse, at the peril of inviting an action for damages against his principal if the statement be true. . . . A passenger, holding and attempting to use such ticket under the circumstances disclosed in this record, and explaining to the conductor how the mistake occurred by which the ticket read in the wrong direction, makes such a reasonable and probable showing as entitles him to be dealt with as a passenger; and therefore that any regulation of the carrier authorizing the conductor of its trains to disregard such statement is unreasonable, and need not be submitted to by the passenger." Note specially this last clause. In short, the *Riley Case* aligned this court, practically, with the *Indiana* and *Georgia* courts.

The only cases relied on by the learned counsel for the appellant are *Illinois C. R. Co. v. Moore*, 79 Miss. 766, 31 So. 436, and *Vicksburg R. Power & Mfg. Co. v. Marlett*, 78 Miss. 872, 29 So. 662. A close examination of these cases will show that they have no sort of application to the case in hand. In the *Marlett Case* it appears from the opinion that no explanation was made or offered to be made to Conductor Dyer, who put *Marlett* off, of the fact that the previous conductor had failed to punch the ticket as the rule required. In the *Moore Case* the ticket had expired, as shown on its face, and, in addition to this, the ticket was unstamped. In other words, all the circumstances tended to contradict the proffered explanation of *Moore* as to how the mistake was made by the ticket agent at *Oxford*. In other words, the circumstances, instead of supporting the explanation, contradicted the explanation. That was the turning point of that case, and that fact was fully appreciated by the eminent counsel for the appellant in that case, who say in their brief, at page 770 of 79 Miss. as follows: "In the case at bar there is not one circumstance which tends in any way to corroborate the statement of the plaintiff. In fact, everything contradicted his statement. The ticket on its face had expired, and, in addition to that, it was unstamped,—nothing to show that it came from the railroad office in a lawful way, or when. There was no exhibition of any check, as in the *Holmes Case*, 75 Miss. 371, 23 So. 187, and no exhibition of the stamp coupons, as 17 L.R.A. (N.S.)

in the *Riley Case*." Obviously, neither of these cases sheds any light on the point involved in this case. As stated at the outset, this case is controlled perfectly by the *Harper Case*, the *Riley Case*, and the *Drummond Case*. In the *Drummond Case*, 73 Miss. 818, 819, 20 So. 7, it is expressly stated by the court that appellee made no "explanation to the conductor of the circumstances connected with the purchase of the ticket and of the manner in which he received from the ticket agent the ticket he had not applied for. He only says he protested against his being required to occupy a seat in the second-class coach." In other words, the *Drummond Case*, in this respect, is exactly like the *Marlett Case*. But the court further held in the *Drummond Case*, at page 819 of 73 Miss., that the passenger's ticket is not, in all cases, conclusive evidence of his contract with the carrier, yet that it is sufficient evidence to justify a conductor in acting upon it, as showing the actual contract, in the absence of any reasonable statements made to him by the passenger that, through fraud, mistake, or inadvertence, it (the ticket) does not show the real contract. In other words, the court held, squarely and properly, that it is always competent to show, by reasonable explanations made to the conductor, that the ticket, through fraud, mistake, or inadvertence, does not set out the real contract.

We think the jury were well warranted in believing from the testimony in this case that *Galvani* had full power to stop this train without any higher authority, both from the testimony of the witnesses and from the rule No. 403; that this conductor should have listened to the explanation offered to be made by *Mr. Reid*, and, having heard it, should have stopped the train for the appellee, according to the special contract. Instead of doing this, he pitches the ticket back in the lap of the appellee, tells him, "I have heard that before,"—the insultingly sinister implication involved in which is too obvious for comment; and wilfully and wantonly and peremptorily refused to hear any explanation whatever. This is the wilfulness, this is the wantonness,—the refusal to hear any explanation whatever,—which authorized the court to give the instruction regarding punitive damages.

We think the action of the court below was entirely correct in giving the instruction, and the judgment is affirmed.

Mayes, J., dissenting:

I do not think the facts warrant the allowance of exemplary damages, and for that reason dissent from the conclusion of the majority.

NEBRASKA SUPREME COURT.

GERALD M. DREW, Trustee of the Keystone Coal & Supply Company, Bankrupt,

v.

WALTER P. MYERS et al., Appts.,

(— Neb. —, 116 N. W. 781.)

Bankruptcy — action to avoid preference — jurisdiction.

1. The state and Federal courts have concurrent jurisdiction of an action brought by a trustee in bankruptcy to avoid a preference or to recover property fraudulently conveyed by the bankrupt. Of all other actions brought by the trustee to recover property belonging to the bankrupt the state court has sole jurisdiction.

Same — insufficiency of assets.

2. Where a trustee in bankruptcy seeks to recover the property of the bankrupt in an

Headnotes by CALKINS, C.

Case Note. — Effect of failure to allege and prove filing of claims by creditors and insufficiency of assets in action by trustee in bankruptcy to recover assets of estate, or to set aside preference, or recover property fraudulently transferred by bankrupt.

It will be noted that DREW v. MYERS distinguishes actions by the trustee to recover assets of the estate in the hands of third persons, and actions by the trustee to set aside preferences or fraudulent conveyances by the bankrupt, in determining the necessity of alleging and proving the filing of claims by creditors, and the want of sufficient assets to pay same. A distinction between such actions is undoubtedly a fair one to draw. As to assets of the bankrupt in the hands of third persons, it is clearly the right, if not the duty, of the trustee, to reduce them to his possession, without reference to the question of whether or not creditors have filed their claims against the estate he represents; or, if so, whether or not there are sufficient assets in his hands to pay same. This question seems to have arisen in but one case other than DREW v. MYERS. The conclusion reached by the court in that case is in harmony with the foregoing. In this case (Breckons v. Snyder, 211 Pa. 176, 60 Atl. 575), a third person, having money in his hands belonging to a bankrupt, objected to an action against him by the trustee to recover same, upon the ground that it was incumbent upon the trustee to show that there were unsatisfied creditors at the time the money was received, at the time the suit was brought, and at the time of the trial. The court, in answering this contention, and in holding that such an allegation in the pleadings and proof of such facts is not necessary, distinguished an action to recover assets

action which the bankrupt might have prosecuted but for the intervention of the bankruptcy, he is not required to allege that he has not sufficient assets of the estate in his hands to pay the liabilities thereof. Such allegation is only necessary when the action is brought to avoid a preference or fraudulent conveyance made by the bankrupt. Flint v. Chaloupka (Neb.) 115 N. W. 535, distinguished.

Trial — evidence — sufficiency.

3. Evidence examined, and held sufficient to sustain the finding of the trial court.

(May 21, 1908.)

APPPEAL by defendants from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to have certain moneys on deposit declared the property of the bankrupt. Affirmed.

The facts are stated in the Commissioner's opinion.

from one to set aside a fraudulent or preferential transfer. It said that this contention would not be without merit if a recovery had been sought because of a preferential transfer; it, however, pointed out that the only issue at the trial was whether a debt had existed and been paid. If a debt had existed and had been paid under the issue as made, no recovery could be had. If no debt existed, it could not have been given to the defendant to discharge a debt. It was therefore the bankrupt's money in the defendant's hands, to which the trustee was entitled.

So far as the question here under consideration is concerned, a preference may be said to consist in an insolvent person, within four months of his adjudication as a bankrupt, procuring or suffering a judgment to be entered against himself, or making a transfer of his property, the effect of which is to enable the preferred creditor to obtain a greater percentage of his debt than any other creditor of the same class.

In actions by a trustee to set aside preferential transfers of property, it is very generally recognized by the courts that, in order to be entitled to relief, he must allege and prove that there are creditors of the same class as the preferred creditor, and that the effect of the transfer attacked is to give the transferee a greater percentage of his debt than other creditors of the same class whose claims have been allowed against the estate. Such was the doctrine of Schreyer v. Citizens' Nat. Bank, 74 App. Div. 478, 77 N. Y. Supp. 494, wherein, in an action by a trustee to set aside an alleged preferential transfer of property, a complaint which merely alleged the insolvency of the bankrupt at the time of the transfer, and that such transfer created an unlawful preference, was said not to state a cause of action, because it failed to allege that the effect of the transfer was to give the transferee a greater percent-

Messrs. C. W. Britt and M. O. Cunningham, for appellant Myers:

The bankruptcy court had jurisdiction both of the subject-matter of this action, and, as well, of the person of this appellant, for all purposes.

Act of Congress, Feb. 1903, chap. 2, ¶ 6, § 2; Acts of 1898 and 1903, chap. 2, ¶ 7, § 2.

The relationship of parties, though calculated to awaken suspicions, is, of itself, no evidence of fraud in a conveyance of property.

McEvony v. Rowland, 43 Neb. 97, 61 N. W. 124; Curry v. Lloyd, 22 Fed. 258; Farrington v. Stone, 35 Neb. 456, 53 N. W. 389; Bleiler v. Moore, 88 Wis. 438, 60 N. W. 792; Gage Bros. v. Burns (Neb.) 111 N. W. 791.

Evidence that a man has deposited money in a bank in his own name, and drawn it out on his personal check, is presumptive evidence of the fact that the money is his.

Boatmen's Sav. Bank v. Overall, 16 Mo. App. 510.

age of his debt than other creditors of the same class.

This doctrine was also recognized in Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604, wherein a demurrer to a complaint to set aside an alleged preferential transfer, which alleged in substance that the effect of the transfer would be to enable the defendant to obtain a greater percentage of its debts than any other creditors of the same class, was held to have been improperly sustained, as this allegation was sufficient.

Where a petition in an action by a trustee to recover a preferential transfer did not in substance allege that, if the transfer were permitted to stand, the creditor would receive a greater percentage of its debt than other creditors of the same class, a demurrer thereto was said, in West v. Bank of Lahoma, 16 Okla. 328, 85 Pac. 469, to have been properly sustained.

As to the proof in such a case, the court, in Baden v. Bertenshaw, 68 Kan. 32, 74 Pac. 639, said that, among other things, it must be made to appear that the alleged preferential payment had the effect of giving to the preferred creditor a greater percentage of his debt than other creditors of the same class; and an instruction to the jury, which placed the burden on the defendant of showing that, at the time of the transfer, sufficient property had been provided by the insolvent to pay other creditors of the same class an equal percentage, was erroneous, the burden being upon the trustee to prove this fact.

To the same effect also is Kimball v. Dresser, 98 Me. 519, 57 Atl. 787, wherein it is said that it is incumbent upon the trustee to show affirmatively that the payment made to the defendant gave him an opportunity to obtain a greater percentage of his debt than any other creditor of the same class.

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An agent paying his principal's debt is presumed to do so with his principal's money, in the absence of evidence to the contrary.

Schwartz's Estate, 2 Woodw. Dec. 393.

Where an agent receives money for his principal, to which a third person is entitled, and pays it over to the former, before demand or notice from the latter, such payment discharges the agent from all liability.

Upchurch v. Nersworthy, 15 Ala. 705; La Farge v. Kneeland, 7 Cow. 456; Duffy v. Buchannan, 1 Paige, 453.

Messrs. Richard S. Horton and Gerald M. Drew, for appellee:

The district court had jurisdiction.

Bankruptcy act, §§ 23b, 60b, 67b.

Calkins, C., filed the following opinion:

The Keystone Coal & Supply Company was a corporation doing business in the city of Omaha, and was, by the district

A conveyance made by an insolvent to defraud his creditors is valid as between the parties, and, except as the right is given to the trustee, who represents the creditors, can be attacked only by creditors who have placed themselves in a position to question its validity. It is well settled that, when such a conveyance is attacked by a trustee, he must allege and prove, among other things, that claims of creditors have been filed and allowed against the estate he represents, and that he has not sufficient assets in his hands belonging to the estate to pay such claims. Shelley v. Nolen, 39 Tex. Civ. App. 307, 88 S. W. 528; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Flint v. Chaloupka (Neb.) 115 N. W. 535 (petition by trustee to intervene in a suit by a judgment creditor to set aside fraudulent conveyances); Crary v. Kurtz, 132 Iowa, 105, 119 Am. St. Rep. 549, 105 N. W. 590, 109 N. W. 452; Lesser v. Bradford Realty Co. 47 Misc. 463, 95 N. Y. Supp. 933; Roney v. Conable, 125 Iowa, 664, 101 N. W. 505; Seager v. Armstrong, 95 Minn. 414, 104 N. W. 479; Leavengood v. McGee (Or.) 91 Pac. 453.

On this subject, the court, in Mueller v. Bruss, supra, said: "The trustee has no right superior to that of the creditors he represents. If we admit that the facts stated show such transfers to have been fraudulent, still no right to avoid them exists unless it appears that someone was harmed. It seems quite evident, without argument, that, unless it is made to appear that the property so conveyed is needed to pay the claims filed against the debtor, the trustee has no right to set such conveyances aside. The complaint is insufficient in this respect. It ought to show the amount of claims filed, and the value of the assets in his hands, so that the court may determine the necessity of resorting to this proceeding."

court of the United States for the district of Nebraska, adjudged a bankrupt upon an involuntary petition filed December 1, 1905. The plaintiff, who is the trustee appointed in said bankruptcy proceedings, brought this action against the defendant Myers and the City Savings Bank, charging that a deposit made by Myers in said bank was the property of said bankrupt. He alleges the insolvency of the defendant Myers, and asks to have said moneys declared the property of such bankrupt, and the defendant Myers restrained from withdrawing such funds from the bank, and the bank from paying out the funds to the defendant Myers or his order. The district court found for the plaintiff, and entered a decree in his favor, from which this appeal is prosecuted.

1. The defendant contends that the state court had no jurisdiction of this suit. Unless there is some provision in the bankruptcy act depriving the state courts of such jurisdiction, it must be assumed. Until the amendment of 1903 to the bankruptcy act such actions could only be brought in the state courts. *Hicks v. Knost* (D. C.) 94 Fed. 625, Affirmed in 178 U. S. 541, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1006. Since the amendment of 1903 (act July 1, 1898, chap. 541, 30 Stat. at L. 562 [U. S. Comp. Stat. 1901, p. 3445] as amended by act Feb. 5, chap. 487, § 13, 32 Stat. at L. 799 [U. S. Comp. Stat. Supp. 1907, p. 1031]) suits for the recovery of property under § 60, subdiv. b, and § 67, subdiv. e, may be brought in either the state or the Federal courts. Subdivision b of § 60 relates to the recovery of property conveyed by the bankrupt in violation of the provisions of the act forbidding preferences, and is as follows: "(b) If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Section 67e of the bankruptcy act refers to fraudulent conveyances made by the bankrupt, and provides that any state court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction of such actions. It is plain from the reading of these sections that, if this action was to avoid a preference or to recover property fraudulently conveyed by the bankrupt, the state court would have concurrent jurisdiction with the Federal court of the same. Of all other ac-

tions brought by the trustee to recover property belonging to the bankrupt, the state court retains sole jurisdiction.

2. It is contended that the petition fails to state facts sufficient to constitute a cause of action, in that it does not allege that the property in the hands of the trustee is insufficient to discharge the debts of the bankrupt; and the case of *Flint v. Chaloupka* (Neb.) 115 N. W. 535, is cited to sustain that position. The rule enunciated in *Flint v. Chaloupka* and the cases cited to support the same is restricted to cases brought by the trustee to avoid preferences or to recover property conveyed by the bankrupt in fraud of the creditors. The reason for the rule is that such actions are essentially in the nature of creditors' bills, and that the insufficiency of the property left in the debtor's hands after making fraudulent conveyances is an essential element of the right of the creditor to question such conveyances. Here the plaintiff claims that defendant's father, who was an officer of the bankrupt corporation, taking advantage of this position, withdrew or possibly embezzled some \$500 of its funds, which he turned over to the defendant, his son, and which was by him deposited in the defendant bank. In such a case the bankrupt, but for the appointment of the trustee, could have maintained this action to recover such money. We think it safe to say that the trustee of a bankrupt may maintain any action which the bankrupt might have maintained but for the intervention of the bankruptcy, and that it is not necessary in such a case for him to state that the property already in his hands is insufficient to pay the debts of the bankrupt. It is only when he brings an action which is in the nature of a creditors' bill that he is required to make such allegation.

3. The defendant insists that the evidence is insufficient to sustain the finding of the district court. It appears that J. F. Myers was the secretary of the corporation, and that his son, the defendant Walter P. Myers, was an employee thereof; that during the last days of the existence of the corporation, and while its financial dissolution was imminent, J. F. Myers overdrew his account with the corporation some \$500 or \$600; and that he paid practically the same sum to his son Walter, who deposited a like amount in the defendant bank. It is claimed that J. F. Myers was indebted to his son, the defendant, and that this money was paid in the discharge of such debt. It was also claimed that J. F. Myers received money from other sources; but, after making all possible allowances for money so received, the evidence is irresistible that the amount for which the district court finally rendered

judgment, to wit, \$433.12, was taken by J. F. Myers from the funds of the company, paid to his son, the defendant Walter, and by him deposited in the defendant bank. That this money was wrongfully taken from the corporation cannot be questioned, and that the defendant received the same, knowing the source from whence it came, can reasonably be inferred from the circumstances; and this inference is not satisfactorily overcome by the testimony of the defendant himself. We therefore recommend that the judgment of the district court be affirmed.

Fawcett and Root, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

OHIO SUPREME COURT.

CYRUS SEARS et al., Pliffs. in Err.,
v.

BENJAMIN SEARS et al.

(77 Ohio St. 104, 82 N. E. 1067.)

Will — execution — compliance with statute.

1. In the interpretation of the statute regulating the execution of wills the intention of the legislature controls, and a will that is not executed as required by statute is invalid, notwithstanding the intention of the testator.

Same — validity — printing.

2. A will is not invalid because it is partly in print. The word "writing," in § 5916, Rev. Stat. 1892, includes printing.

Same — place of signature.

3. A will is not signed at the end thereof by the party making the same, when it is

Headnotes by the COURT.

Case Note. — When will deemed to have been signed or subscribed at the end.

This note is confined to the question when a will is deemed to be signed or subscribed by the testator at the foot or end thereof in compliance with a statutory requirement; and, for the purpose of this note, it assumes that in all the cases herein cited the formal requisites of due execution have been complied with, the only question being whether the testator's signature was written in the proper place. Cases are excluded where the testator adds a clause to his will after the execution thereof.

The statutes of several states require that a will shall be signed or subscribed by the testator at the end thereof; while the statute of 1 Vict. chap. 26, § 9, requires the 17 L.R.A. (N.S.)

written by the party making it upon a printed blank form containing a *testimonium* clause with blanks for the name of the place and the date of execution, which he fills, and immediately following this a blank line for the signature of the maker, which he leaves blank, although he has written his name in the attestation clause, immediately following the *testimonium* clause, in a blank left for the name of the testator, and may have intended such act as a signing.

Trial — defective will — directed verdict.

4. On the trial of an action to contest the validity of a will, when it appears on the face of the will that it was not signed at the end thereof as required by statute, it is not error for the trial judge to direct a verdict that the writing is not a valid will.

(November 19, 1907.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment reversing a judgment of the Court of Common Pleas in plaintiffs' favor in an action brought to set aside the probate of a will. Reversed.

Statement by Summers, J.:

On the 6th day of June, 1903, Arminda S. Nicholson, of Lakewood, Cuyahoga county, Ohio, wrote her last will and testament on a printed blank form of will. Following the last item of the will is a blank space the full width of the paper and about 6 inches in length. Following this blank space is a printed blank *testimonium* clause, as follows:

"In testimony whereof, I have set my hand to this my last will and testament, at, this day of, in the year of our Lord One Thousand Hundred and"

Then follows a blank line extending about half way across the width of the page for the signature of the testator. Then there

testator's name to be subscribed at the foot or end of the will; as it was held that the requirements of the latter statute must be strictly complied with, it led to the adoption of the remedial statute of 15 Vict. chap. 24, which permitted great latitude in determining what would constitute the foot or end of a will. For convenience, the English cases are grouped together. No general rule can be laid down as to what will or will not be a sufficient compliance with such statutes, as each case must depend upon its own facts.

The decisions of the New York court of appeals as to what constitutes a sufficient compliance with the statute of that state requiring that a will shall be subscribed by the testator at the end thereof, with the exception of *Sisters of Charity v. Kelly*,

is a heavy line extending clear across the page, and following this heavy line appears the following printed blank attestation clause:

"The foregoing instrument was signed by the said in our presence, and by published and declared as and for last will and testament, and at request, and in presence, and in the presence of each other, we hereunto subscribe our names as attesting witnesses, at, this day of, A. D. 1....

"....., resides at
"....., resides at"

The blanks in this *testimonium* clause and attestation clause she filled in, and they then read as follows, including the signatures of the two witnesses:

"In testimony whereof, I have set my

67 N. Y. 409, are sufficiently set out in the opinion of SEARS v. SEARS.

Signature in body of will.

Wills have been held to have been signed or subscribed at the end thereof, within the meaning of such a statute, under the following circumstances:

Where the testator's name was written in the caption of a holographic will. Johnson's Estate, Myrick Prob. Ct. Rep. (Cal.) 5; Barker's Estate, Myrick Prob. Ct. Rep. (Cal.) 78; Donoho's Estate, Myrick Prob. Ct. Rep. (Cal.) 140. *Contra*. Armant's Succession, 43 La. Ann. 310, 27 Am. St. Rep. 183, 9 So. 50; Funston's Estate, 24 Pa. Co. Ct. 135.

Where the testator's signature was written in the body of the *testimonium* clause of a will. Re Acker, 5 Dem. 19; Re Noon, 31 Misc. 420, 65 N. Y. Supp. 568 (holographic will).

But the testator's signature in the caption of a will was held, in Jones v. Jones, 3 Met. (Ky.) 266, not to be a sufficient compliance with such a statute.

Name following attestation clause.

A will is signed at the end where the testator's signature follows the attestation clause, and is written either above or below the names of the witnesses. Younger v. Duffie, 94 N. Y. 535, 46 Am. Rep. 156; Re Laudy, 78 Hun. 479, 29 N. Y. Supp. 136, affirmed without opinion in 147 N. Y. 699, 42 N. E. 724; Re Cohen, 1 Tucker, 286.

Blank space above testator's signature.

The court said, in Re Blake, *infra*, that it was not necessary that the testator's signature should be upon the first or second line below the testamentary clause if no dispositive provisions follow the signature.

And it was said in Re Gilman, 38 Barb. 364, affirming 1 Redf. 354, that a will was signed at the end when nothing intervened between the instrument and the subscrip-

tion, as the distance from the last line thereof to the testator's signature is not fixed by statute; and that the end of the instrument commences and continues until some other writing occurs.

"The foregoing instrument was signed by the said Arminda S. Nicholson in our presence, and by her published and declared as and for her last will and testament; and at her request, and in her presence, and in the presence of each other, we hereunto subscribe our names as attesting witnesses, at Lakewood, Ohio, this sixth day of June, A. D. 1903.

"J. W. Southern, resides at Lakewood, O.

"Julia K. Southern, resides at Lakewood, O."

On the 30th day of April, 1904, she died, and on the 3d day of May, following, her

tion, as the distance from the last line thereof to the testator's signature is not fixed by statute; and that the end of the instrument commences and continues until some other writing occurs.

And it was said, although *obiter*, in Soward v. Soward, 1 Duv. 126, that no general rule could be laid down as to what would constitute unnecessary and unreasonable blank space between the conclusion of a will and the testator's signature, as each case must depend upon its own particular facts and circumstances.

Thus, a will has been held to have been signed at the end under the following circumstances:

Where the testator's signature was placed at the top of the reverse side of the paper upon which the will was written. Morrow's Estate, 204 Pa. 479, 54 Atl. 313.

Where a blank page intervened between that on which a codicil was completed, where the testator placed his signature, and the page on which the codicil began. Re Gilman, *supra*.

Where the testator's signature to a will which was written on a printed form was placed at the end of a printed *testimonium* clause, and a blank space of more than one half of a page intervened between the end of the testamentary provisions and such clause. Re Blake, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827.

Where the testator's signature was written upon the outside of a four-page form of will, beneath a printed portion intended to constitute the face of the instrument when folded, and all of the dispositive portions were written on one half of the first and second pages with transverse red lines drawn therefrom to the bottom of the pages, and the third page contained an unfilled form for the appointment of an executor, the revocation of former wills, and *testimonium* and attestation clauses. Re Seaman, 146 Cal. 455, 106 Am. St. Rep. 53, 80 Pac. 700.

In Re Seaman, *supra*, the court said:

will was presented to the probate court of Cuyahoga county for admission to probate, and it was admitted to probate by that court. In June, 1904, the plaintiffs in error filed their petition in the court of common pleas of that county, asking that the will be set aside for the reasons, among others, that it was not handwritten or typewritten; that it was not signed by the said Arminda S. Nicholson; that it was not signed by her at the end thereof, nor by any person in her presence by her express direction. Answers were filed, and on January 4th, 1905, the court made the following order:

"January 4, 1905. The Court: The motion by the defendants to require the plaintiff to make his petition more definite and certain, and praying for an order directing an issue to be made upon the record in this

cause, is heard and refused as to the request to make more definite and certain, and granted as to the request to direct an issue to be made upon the record. Wherefore, it appearing to the court that the plaintiff in this case seeks to set aside a certain paper writing purporting to be the last will and testament of Arminda Nicholson, deceased, late of the county of Cuyahoga, Ohio, which has been admitted to probate in said county, according to the statute in such case made and provided, and no issue being made up by the pleadings, it is now ordered that the validity of said will be, and it hereby is, put in issue between the parties hereto, and that it be ascertained by the verdict of a jury whether said writing is or is not the last will and testament of said Arminda Nicholson, deceased."

"The provision that the will must be subscribed at the end thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The 'will' at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary dispositions, and the 'end thereof' is not the foot or physical end of the sheet of paper upon which the 'will' is written but is the physical termination of the testamentary provisions which constitute the will."

There is a sufficient signature at the end of a will where a testator drew three checks on one sheet of paper, payable to his daughters, and signed them without removing them from his check book, and wrote upon the stub of the book the statement: "Drawn to order of . . . [his daughter], being exceedingly ill at the time the checks were drawn,—if I get well they may not get the money; if I do not, I will be most glad if they come into their possession." *Lambert's Estate*, 10 Pa. Co. Ct. 10.

Matter following testator's signature.

On the ground that the additional matter following the testator's signature was no part thereof, wills have been held to be signed or subscribed at the end thereof, within the meaning of such a statute, under the following circumstances:

Where an unsigned clause, to the effect that the executor of the will was not required to give bond, follows the testator's signature and the attestation clause. *Baker v. Baker*, 51 Ohio St. 217, 37 N. E. 125.

Where a testator's signature was followed by a date, together with his place of residence. *Flood v. Pragoff*, 79 Ky. 607.

Where some calculations in figures followed below the testator's signature, which had no relation to the writing. *Fouche's Estate*, 147 Pa. 395, 23 Atl. 547.
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Where the testator's signature was followed by additional matter stating that erasures and alterations in his will were made by him, and that he desired the will carried out as though it had not been altered, which was followed by his signature, and further directions were added as to his funeral and burial, as to the amount of insurance that would be due at his death, and a direction to pay the amount mentioned in the will to legatees; as such matter is to be treated as an unexecuted codicil which will not affect the validity of the will. *Smith's Estate*, 9 Pa. Co. Ct. 333.

Where an unsigned addition to a will, following the testator's signature and the attestation clause, gave the date the will was begun and the fact that it was added to from time to time as occasion occurred, before its execution. *Wikoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597.

As there is no connection between the will proper and a clause written and signed by the testator, following the attestation clause, requesting, if a certain sum is received for his home, that a designated amount be given to each of two persons, the will may be given effect by rejecting such clause. *Conboy v. Jennings*, 1 Thomp. & C. 622.

And, on the ground that the appointment of an executor is no part of a will, the testator's signature is at the end of a will where it is followed by a clause appointing an executor. *McCullough's Estate*, Myrick Prob. Ct. Rep. (Cal.) 76.

Or when followed by a clause appointing executors, and empowering them to sell and dispose of the testator's property, as well as by an unsigned codicil. *Ward v. Putnam*, 119 Ky. 889, 85 S. W. 179.

But, on the other hand, on the ground that the appointment of an executor is an important part of a will, it has been held that such a statute is not complied with where it is preceded by the testator's signature. *McGuire v. Kerr*, 2 Bradf. 244; *Baird's Estate*, 3 Pa. Dist. R. 514; *Wine-*

In October, 1905, the case was tried by a jury. The defendants offered in evidence the will and a certified copy of the order of probate, and rested. The plaintiffs then requested the court to direct the jury to return a verdict that the writing produced as the last will of Arminda S. Nicholson is not her valid last will and testament, for the reason that the testimony is insufficient to sustain the alleged will. The defendants then asked leave to withdraw the submission of the case for the purpose of offering additional evidence, and they then offered to prove that the words, "Arminda S. Nicholson," in the attestation clause, were the handwriting and signature of Arminda S. Nicholson, and that after her death the said will was found among her private pa-

pers, in a box, and inside of an envelope upon which was indorsed in her own handwriting the words "Last Will and Testament of Arminda S. Nicholson." This testimony the court rejected, and, upon the plaintiffs renewing their motion, the court directed the jury to return a verdict finding that the paper is not the last will and testament of Arminda S. Nicholson, and the jury returned a verdict as directed. Motion for a new trial was then filed and overruled, and judgment entered that the paper writing was not the last will and testament of said Arminda S. Nicholson. On error the circuit court reversed.

Messrs. Thomas Beer and S. W. Bennett for plaintiffs in error.

land's Appeal, 118 Pa. 37, 4 Am. St. Rep. 571, 12 Atl. 301.

Or where the testator's signature is followed by an appointment of an executor and an unsigned *testimonium* clause. Re Nies, 13 N. Y. S. R. 756; Re Gedney, 17 Misc. 500, 41 N. Y. Supp. 205; Re Jacobson, 6 Dem. 298.

Or where the testator's signature is written in the middle of a clause appointing an executor, which is followed by a revocation and a regular *testimonium* clause. Sisters of Charity v. Kelly, 67 N. Y. 409.

In Sisters of Charity v. Kelly, supra, in answer to the contention that, as the whole testamentary disposition preceded the testator's name, the clause appointing an executor might be rejected and an administrator with the will annexed be appointed, the court said: "We cannot be sure that such was the purpose of the testator. There are cases in which quite a material part of the intention and forecast of the testator centers in the selection of persons to execute his testamentary purpose; where important trusts are created in behalf of natural persons, important charitable institutions are founded, or other large and far-reaching designs are shaped, and the administration and execution of them committed to the executors of the will, who are not named until the including clause of it. Indeed, it is not an unknown thing that the sole object of the making of a last will has been to appoint an executor, giving no testamentary disposition of the estate, but leaving the executor to dispose of it according to the statute of distribution; and such a will must be proved. . . . So, the clause of revocation of all former wills is sometimes of much import, and it is usually the final provision in a will. . . . To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is, there shall be the name. It is to make a new law to say that where we find the name, there is the end of the will."

And, on the ground that the matter fol-

lowing the testator's signature was properly a part of the will, wills have been held not to be signed or subscribed at the end thereof under the following circumstances:

Where an unsigned clause "cutting out" any legatee who should contest a will was written on the margin thereof, the testator's signature being written at the *testimonium* clause on the face of the will, as such clause was of a dispositive character and might change the course of distribution of some of the testator's property. Irwin v. Jacques, 71 Ohio St. 395, 69 L.R.A. 422, 73 N. E. 683.

Where, after the testator's signature, there was a signed direction to pay his debts and funeral expenses before the payment of legacies. McGuire v. Kerr, supra.

Where, after testator's signature, on a following page, there was an unsigned dispositive clause, not referred to in the body of the will. Demett v. Taylor, 5 Redf. 561; Frazier's Estate, 8 Pa. Co. Ct. 306.

Where, after the testator's signature and before the attestation clause, there followed an unsigned clause directing the sale of real and personal property, and as to the disposition of the proceeds, together with a further bequest. Re Sanderson, 9 Misc. 574, 30 N. Y. Supp. 848.

Where, following the testator's signature, there was an unsigned provision for an unborn child. Glancy v. Glancy, 17 Ohio St. 134.

Where the testator's signature was followed by an unsigned clause giving his reasons for making the will. Hays v. Harden, 6 Pa. 409.

Where the testator's signature to a will, written upon a blank form consisting of four pages, was placed at the end of the form on the second page, and part of the dispositive portions of the will were written upon the first and third pages thereof, with no attempt to make them a portion of the will. Re Donner, 37 Misc. 57, 74 N. Y. Supp. 828.

Where, after a devise consisting of two and one half lines, there was attached with pins to a printed form of will a double sheet of legal-cap paper upon which were writ-

Messrs. Finley & Gallenger, Carr, Stearns, & Chamberlain, Smith, Taft, & Arter, M. B. Johnson & H. H. Johnson, Hogan & Parmely, Weed, Miller, & Nason, R. V. Sears, and Treadway & Marlatt for defendants in error.

Summers, J., delivered the opinion of the court:

In this state the right of disposing of property by will is given, and the manner of exercising it is prescribed, by statute. The provisions of the Revised Statutes of 1892 bearing upon the questions to be determined may be briefly summarized as follows: Section 5914 prescribes who may make a will. Section 5916, providing how a will shall be executed, is as follows: "Every last will

and testament (except nuncupative wills hereinafter provided for) shall be in writing, and may be handwritten or typewritten; and such will shall be signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed, in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge the same." Section 5926 provides, when application has been made to admit a will to probate, that the probate court shall cause the witnesses to such will, and such other witnesses as any person interested in having the same admitted to probate may desire, to come before it, and that the witnesses shall be examined in open

ten ten additional bequests, the testator's signature being affixed to the foot of the printed form. *Re Fulda*, 42 App. Div. 593, 59 N. Y. Supp. 766.

—reference in body of will to matter following signature.

On the ground that a reference in the body of a will to additional matter following the testator's signature brought such additional matter into the will, the following wills have been held to be signed at the end:

Where, in the body of a will, above the testator's signature, there appeared the following: "I give and bequeath to . . . our son two hundred—see next page," and, after the testator's signature, the bequest was completed by devising a sum of money, which was followed by an additional bequest to another; as such instrument, although not signed at the end thereof in point of space, is signed at the end in point of fact. *Baker's Appeal*, 107 Pa. 381, 52 Am. Rep. 478.

Where the will referred to an attached paper, marked "schedule A," which contained a number of bequests. *Re Brand*, 68 App. Div. 225, 73 N. Y. Supp. 1073.

Where the will, which was subscribed by the testator at the end of the written portion, in the body referred to an annexed copy of a recorded map, which showed the location of the testator's property by numbers, which he used in the will to designate the same. *Tonnele v. Hall*, 4 N. Y. 140.

—effect of signature to codicil.

An unsigned addition to a will, following the testator's signature and the attestation clause, consisting of several sheets of paper dated at different times, which give the date the will was begun and state the fact that it was added to from time to time, by virtue of a republication clause contained in an attached codicil, becomes a part of the will. *Wikoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597. The court, in answer to the contention that the will was not signed at the end, said: "If this memorandum . . . actually preceded the codicil of republication 17 L.R.A. (N.S.)

in point of time, it became incorporated in the body of the will; and the signature to the codicil became the signature at the end of the will."

So, where a duly executed codicil referred to an attached unsigned will, which it reaffirmed and republished, it was signed at the end. *Re Douglass*, 38 Misc. 609, 78 N. Y. Supp. 103.

English cases—1 Vict. chap. 26, § 9.

The following cases, decided prior to *Smee v. Bryer*, *infra*, hold the following wills to have been subscribed at the foot or end thereof in compliance with the statute of 1 Vict. chap. 26, § 9:

Where the testator's signature was placed upon the second sheet of a will, which was written upon two sides of a sheet of letter paper, with one bequest extending over upon the third sheet, opposite which a further bequest was written, it was held good as to all except that portion written upon the third page. *Jones's Goods*, 1 Rob. Eccl. Rep. 424.

Where the testator's signature was placed upon the third page of a will the disposing part of which covered the first side of a sheet of paper, with the second page blank; as, while not signed at the foot, it was sufficiently signed at the end of the will. *Gore's Goods*, 3 Curt. Eccl. Rep. 758.

Where the testator's signature was placed at the end of a printed form, and the disposing part of the will covered the first page without leaving room for the testator's signature thereon. *Carver's Goods*, 3 Curt. Eccl. Rep. 29.

While the following wills were held not to be signed at the foot or end thereof under the statute of 1 Vict. chap. 26, § 9:

Where the testator's signature was placed at the bottom of the first page of a will, which ended with an unfinished sentence which was completed upon the other side of the sheet. *Milward's Goods*, 1 Curt. Eccl. Rep. 912.

Where the testator's signature was placed upon the third page, two lines from the top, of a will which was written upon the first and second pages of a sheet of letter paper

court and their testimony reduced to writing and filed. Section 5929 is as follows: "If it shall appear that such will was duly attested and executed, and that the testator, at the time of executing the same, was of full age and of sound mind and memory, and not under any restraint, the court shall admit the will to probate." Section 5930 provides that, when admitted to probate, the will shall be filed in the office of the probate judge, and recorded, together with the testimony. Section 5933 provides that, if no person interested shall contest the will within two years, the probate shall be forever binding, saving to infants and persons of unsound mind or in captivity a like period after the disabilities are removed. Section 5936 enacts that, whenever the pro-

bate court shall receive from the clerk of the court of common pleas a certificate that a petition has been filed in the court of common pleas to contest the validity of any will recorded in the probate court, the probate court shall forthwith transmit to the court of common pleas will, testimony, and all papers relating thereto, with a copy of the order of probate and a certificate under the seal of the court. Section 5858 provides that a person interested in a will admitted to probate may contest the validity thereof in a civil action in the court of common pleas of the county in which such probate was had. Section 5859 provides who shall be parties. Section 5861 provides how an issue shall be made up, whether the writing produced is the last will or codicil of the

with sufficient space upon the second page for the testator's signature. *Willis v. Lowe*, 1 Rob. Eccl. Rep. 618, note b.

Where a blank space intervened between the dispositive portions of a will and the testator's signature, and the will did not dispose of the residue of the testator's estate. *Ayres v. Ayres*, 1 Rob. Eccl. Rep. 466.

The court, in *Ayres v. Ayres*, supra, said that in some instances instruments have been admitted to probate where they were signed in places one would not expect to have found the signature; yet in all of these there was a disposition of the entire property, which was not the present case; and, as there might possibly be a residue of the testator's estate, he might have intended at some subsequent time to make an additional disposition thereof without the knowledge of the witnesses.

In 1848 the privy council held, in *Smee v. Bryer*, 6 Moore, P. C. C. 404, where the testator's signature was placed half way down the fourth page of a will which was written upon three pages of foolscap paper, there being sufficient space for his signature at the bottom of the third page, that it did not comply with 1 Vict. chap. 26, § 9.

And, since the date of *Smee v. Bryer*, the following wills have been held to comply, in this respect, with 1 Vict. chap. 26, § 9:

Where the testator's signature was placed upon the third page of a will opposite the attestation clause, although there was sufficient space for his signature to have been written beneath the end of the will upon the second page. *Derinzy v. Turner*, 1 Ir. Ch. Rep. 341.

Where the testator's signature was written partially across, next to the last line of a will, with one letter thereof touching the last line. *Woodley's Goods*, 3 Swabey & T. 429.

Where the testator's signature was written upon a piece of paper which was affixed to the will by wafers. *Coek v. Lambert*, 32 L. J. Prob. N. S. 93; *Gausden's Goods*, 31 L. J. Prob. N. S. 53.

And where the testator's signature was written upon the first page of a will, there

being an additional portion thereof written on the third page, the first page only is admissible to probate under 1 Vict. chap. 26. *Millward v. Buswell*, 20 Times L. R. 714; *Royle v. Harris* [1895] P. 163.

—statute of 15 Vict. chap. 24.

This construction of the act of 1 Vict. chap. 26, § 9, in *Smee v. Bryer*, led to the adoption of the act of 15 Vict. chap. 24, providing that no will shall be affected by the circumstance that the testator's signature does not follow, or be immediately after, the foot or end of the will; or that a blank space intervenes between the concluding words thereof and the signature; or that the signature is placed among the words of the *testimonium* or attestation clause, or follows or is after or under the latter clause, either with or without a blank space intervening; or that it follows or is after, or under, or beside, the names, or one of the names, of the subscribing witnesses; or that it is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph, or the disposing part, of the will shall be written above the signature; or where there appears to be sufficient space on or at the bottom of the preceding side, or page, or other portion, of the same paper on which the will is written, to contain the signature; but no signature shall be operative to give effect to any disposition or direction which is underneath, or which follows, it, nor to any disposition or direction inserted after the signature shall be made.

Wills have been held to have been subscribed in compliance with 15 Vict. chap. 24, under the following circumstances:

Where the testator's signature was written opposite the clause appointing an executor. *Williams's Goods*, L. R. 1. Prob. & Div. 4.

Where the testator's signature to a will which was written on two sides and at the top of the third page of a sheet of note paper was placed at the bottom of the second page with the last two letters thereof extending over and upon the third page. *Powell's Goods*, 34 L. J. Prob. N. S. 107.

testator or not, and that this issue shall be tried by a jury, and that the verdict therein shall be conclusive, unless a new trial be granted or the judgment be reversed or vacated. Section 5864 provides that "the party sustaining the will shall be entitled to open and close the evidence and argument; he shall offer the will and probate, and rest; the opposite party shall then offer his evidence; the party sustaining the will shall then offer his other evidence; and rebutting testimony may be offered as in other cases." Section 5862 provides that, on the trial of such issue, the order of probate shall be prima facie evidence of the due attestation, execution, and validity of the will or codicil.

The first contention is that the will is

Where the last sentence of a will began immediately above the testator's signature, and was completed in three short lines at the left thereof, the last two lines being somewhat below the signature. *Ainsworth's Goods*, L. R. 2 Prob. & Div. 151.

Where the *testimonium* clause and the testator's signature were written crosswise along the middle of the second page near the foot of the paper, of a will which entirely filled the first and third pages of a sheet of foolscap paper. *Coombs's Goods*, L. R. 1 Prob. & Div. 302.

Where the testator's signature was written along the side of the third page of a will which filled the first and second pages of a sheet of note paper without leaving room at the bottom of the second page for his signature. *Wright's Goods*, 34 L. J. Prob. N. S. 104.

Where a testator's signature to a codicil was written crosswise in a blank space at the right-hand side of the last devise. *Re Jones*, 34 L. J. Prob. N. S. 41.

Where the testator placed his signature transversely along the left-hand margin of the sheet of paper upon which his will was written, there not being room for his signature at the end thereof. *Collins's Goods*, Ir. L. R. 3 Eq. 241.

Where the testator's signature was written, not at the end of the disposing part of a will, but at the foot of a notarial minute immediately following the will. *Page v. Donovan*, 3 Jur. N. S. 220.

Where a will concluded as follows: "And a receipt to be provided by the receiver from all further claim upon the estate of our departed brother, Joseph Shidmore." *Trott v. Trott*, 29 L. J. Prob. N. S. 156.

—blank space between end of will and signature.

The statute 15 Vict. chap. 24, has been held sufficiently complied with under the following circumstances:

Where the testator's signature was written at the top of the fourth page, as well as at the foot of the first and second pages, but not the third, of a will which ended in 17 L.R.A. (N.S.)

not a valid will because it is partly in printing. "Part third" of the Revised Statutes includes § 5916, and § 4947 provides that, in the interpretation of part third, unless the context shows that another sense was intended, the word "writing" includes printing. Before the amendment of § 5916, in 1895 (92 Ohio Laws, p. 189), that section did not contain the words "and may be handwritten or typewritten," and the law then was that a will might be written or printed. Counsel contend that since the amendment the context shows that another sense was intended, and that "writing" means only handwritten or typewritten, and that the effect of the amendment was not merely to authorize a typewritten will, but also to exclude a printed will. Typewriting has

the middle of the third page, with the lower half remaining blank. *Hunt v. Hunt*, L. R. 1 Prob. & Div. 209.

Where a will ended in the middle of the second page, and the testator's signature was placed upon the third page, opposite a clause appointing an executor. *Williams's Goods*, supra.

Where the testator's signature to a will, which ended near the bottom of the page, was placed at the top of the reverse side of the paper. *Horsford's Goods*, L. R. 3 Prob. & Div. 211.

Where the testator's signature was placed upon the fourth page of a will with the dispositive portions thereof occupying all of the first page, leaving the second and third pages blank. *Rice's Goods*, Ir. Rep. 5 Eq. 176; *Fuller's Goods* [1892] P. 377.

Where the testator's signature was written across the top of the first and fourth sides of a will which was written upon the second and third sides of a sheet of note paper with the lower portion thereof left blank. *Archer's Goods*, L. R. 2 Prob. & Div. 252.

Where the testator's signature was placed on the second page of a will which was written upon the first and third pages of a sheet of foolscap paper. *Stoakes's Goods*, 23 Week. Rep. 62.

Where the testator's signature was placed at the end of the third page of a will, and the dispositive part ended upon the second page of the paper, leaving sufficient space for the testator's signature. *Lewis's Goods*, 2 Rob. Eccl. Rep. 140.

Where the testator's signature was placed at the bottom of the first page of a printed form of will, and the dispositive portions occupied the second and third pages thereof. *Wotton's Goods*, L. R. 3 Prob. & Div. 159; *Gilbert's Goods*, 78 L. T. N. S. 762.

It was said in *Wotton's Goods*, supra, that, although such will was begun on the second and continued on the third page of the paper, those must be taken as the first and second pages respectively; and the court is thus brought around to what, under ordinary circumstances, would be called the

come into general use since the revision of the statutes in 1880, and the manifest intention of the legislature was to authorize its use in addition to handwriting and printing in the making of wills, and not to substitute typewriting for printing; so that a will is not invalid because it is partly in print.

The next question is: Is the will signed at the end thereof by the party making the

first page, but which, upon these facts, must be treated as the last page thereof.

—matter following signature.

And the statute of 15 Vict. chap. 24, is sufficiently complied with under the following circumstances:

Where a codicil to a will, which had been folded so as to make four quarters to the sheet of paper, was begun on the last quarter of the last page thereof, and, there not being space enough to complete the codicil, the scrivener finished it above on the third quarter of the sheet, underneath which the testator signed his name; as it clearly appeared from the context that that portion anterior to the testator's signature ought to be considered as following that context, although occupying different positions. *Kimpton's Goods*, 3 Swabey & T. 427.

Where, after the testator's signature, were placed the words "turn over," and on the next page he wrote and signed a clause containing many directions as to the management of his estate, it was held that what was written above his signature would be admitted to probate, as the further sheet was in no sense testamentary and did not affect the will. *Dearle's Goods*, 47 L. J. Prob. N. S. 45.

Where the testator's signature to a will written on four loose sheets of paper, which were pinned together, was subscribed at the foot of the first sheet, as the sheets were evidently misplaced. *Madden's Goods* [1905] 2 Ir. K. B. 612.

Where the testator's signature was written at the bottom of the first page of a will, and, after an incomplete sentence in the body of the will on the first page, the testator placed an asterisk and the words "see over," and on the second page placed another asterisk and words "see over," which was followed by the remainder of the incomplete devise, the words upon the second page being treated as an interlineation and a formal part of the will. *Birt's Goods*, L. R. 2 Prob. & Div. 214. The court said that 15 Vict. chap. 24, provided that no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, but these words, although, as written, they follow the signature, yet must be read in the place in which the testator intended they should be, and therefore precede the signature.

Where the testator's signature was followed by an unsigned clause appointing an executor, such clause may be rejected without affecting the portions of the will written 17 L.R.A. (N.S.)

same? By the act of 1816 (2 Chase's Stat. chap. 367, p. 929), and the act of 1831 (29 Ohio Laws, p. 242), wills were required to be in writing and signed by the party making the same; and not until the act of 1840 (38 Ohio Laws, p. 120) took effect were wills required to be signed at the end thereof. This requirement is assumed to have been suggested by the English statute of wills, passed in 1837, although such a requirement

above the testator's signature. *Dallow's Goods*, L. R. 1 Prob. & Div. 189; *Woods's Goods*, L. R. 1 Prob. & Div. 556; *Howell's Goods*, 2 Curt. Eccl. Rep. 342.

And, where a will was written upon a sheet of foolscap paper, covering the first two and part of the third page thereof, with the testator's signature at the bottom of the first page, which was duly attested, and also signed at the end of the second page, in the presence of two witnesses, pages one and two were admitted to probate. *Wray's Goods*, 31 Week. Rep. 476.

And so the first page only of a will was admitted to probate where the first page, which was signed by the testator, concluded with an unfinished sentence, which was completed upon the second page and was followed by additional bequests. *Gee's Goods*, 78 L. T. N. S. 843.

So, the signature of a testator at the bottom of the first page of a will, immediately after an unfinished sentence, which was completed upon the following page, is sufficient to admit to probate the first page thereof. *Anstee's Goods* [1893] P. 283.

But the following wills have been held not to comply with the provisions of 15 Vict. chap. 24:

Where the testator placed his name upon the first five sheets, but did not sign the sixth, of his will; and the fifth sheet ended in the middle of a sentence, which continued on the sixth page and contained a formal *testimonium* clause. *Sweetland v. Sweetland*, 34 L. J. Prob. N. S. 42.

Or where the testator's signature, by mark, was placed at the middle of a short will. *Margary v. Robinson*, L. R. 12 Prob. Div. 8.

Or where a codicil was written upon the third page of the will, and the testator placed his signature in the margin of the will upon the first page of the sheet of foolscap, upon which the will was written. *Hughes's Goods*, L. R. 12 Prob. & Div. 107.

—signature in *testimonium* clause.

Where the testator's signature is written in the *testimonium* clause of a will, it is a sufficient compliance with the statute of 1 or 15 Vict., in *Mann's Goods*, 28 L. J. Prob. N. S. 19; *Walker's Goods*, 2 Swabey & T. 354; *Pearn's Goods*, L. R. 1 Prob. Div. 70; *Dinsmore's Goods*, 2 Rob. Eccl. Rep. 641; *Woodington's Goods*, 2 Curt. Eccl. Rep. 324 (holographic will).

had been previously enacted by statute in New York and in Pennsylvania. The English statute is to be found as Stat. 1 Vict. chap. 26. Section 9 of that act provides that no will shall be valid unless "it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction." In *Williams on Executors*, 7th Am. ed. vol. 1, p. 107, the learned author, speaking of this requirement, says: "The will is required by that act to be signed 'at the foot or end thereof.' The statute of frauds merely requires that the will shall be 'signed;' and it was held that a will in the testator's own handwriting, commencing, 'I, John Styles, do declare this to be my last will,' etc., was sufficiently 'signed,' within that statute, although not subscribed with his name. With a view, perhaps, to prevent future controversy as to whether a will so signed is a complete and perfect instrument, the statute of Victoria required that the signature of the testator shall be at the foot or end of the will. But questions of this kind do not appear to be altogether excluded by the operation of this enactment; and a new ground of contest arose out of it, as to what may be considered a signing of the will at the end or foot thereof. Doubts arose whether a signature by the testator in the body of the *testimonium* or attestation clause was sufficient; and also whether a signature below the latter clause, when it runs beneath the conclusion of the will, was a compliance with the act. On the question whether the will was well executed, if there was a blank space between the conclusion of the will and the signature of the testator, a lamentably large number of points and decisions occurred. In the earlier cases Sir H. Jenner Fust put a very liberal construction on this part of the act. But afterwards that learned judge, in concurrence with the judicial committee of the privy council, felt it necessary to take a more rigid view of this enactment, on the ground that it was intended to prevent any addition being made to the will after the deceased had executed it, and, accordingly, probate was refused in a great number of subsequent cases on this objection, and the intention of a great many testators unfortunately defeated. This led to the passing of Stat. 15 Vict. chap. 24."

The amendatory act passed in 1852 (Stat. 15 Vict. chap. 24) specifies with much particularity what shall be, respecting the position of the testator's signature, the foot or end of the will; but, as no similar changes were made here, the provisions of that act cannot aid in the interpretation of our statute. The object of this requirement was the same here as in England,—to insure the

identity of the instrument, and to prevent fraudulent additions to, or alterations of, the instrument. *Glancy v. Glancy*, 17 Ohio St. 136; *Baker v. Baker*, 51 Ohio St. 222, 37 N. E. 125. Following the English statute, many of the states enacted similar requirements. In Pennsylvania the earlier statute of 1833 contains such a requirement, and in *Wineland's Appeal*, 118 Pa. 37, 4 Am. St. Rep. 571, 12 Atl. 301, where a will signed by the testator, but containing a clause immediately following the signature and appointing executors, was under consideration, Paxson, J., says: "Our act of 1833, as well as the statute of Victoria, are in part borrowed from the British statute of frauds, two sections of which have been so evaded by judicial construction as to be practically repealed. We do not propose that the act of 1833 shall meet with the same fate. The legislature have laid down a rule so plain that it cannot be evaded without a clear violation of its terms. No room is left for judicial construction or interpretation. It says a will must be signed at the end thereof, and that's the end of it."

The statute of New York enacts that every last will and testament of real or personal property, or both, shall be subscribed by the testator at the end of the will. In reviewing the decisions in that state in *Re Andrews*, 162 N. Y. 1, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 529, Bartlett, J., says: "*In Sisters of Charity v. Kelly*, 67 N. Y. 409, it was held that the provision of the statute requiring the testator to subscribe 'at the end of the will' means the end of the instrument as a completed whole; and, where the name is written in the body of the instrument, with any material portion following the signature, it is not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will. In *Re O'Neil*, 91 N. Y. 516, a printed blank was used, and the formal commencement was printed on the first page, and the formal termination printed at the foot of the third page. The entire blank space was filled with writing, and, apparently for want of room, a portion of a paragraph containing material provisions was carried over to, and the paragraph finished at, the top of the fourth page. The two portions were not, however, sought to be connected by means of a reference, or anything indicating their relation to each other. The name of the testator was written at the end of the printed form, and the names of the witnesses written below the formal attestation clause on the third page. This court held that there was no legal subscription of the will, and affirmed the judgment denying probate. . . . In *Re Conway*, 124 N. Y. 455, 11 L.R.A. 796, 26 N. E.

of the testator, and in no manner connected with the body of the instrument by any words, marks, or character, as a reference to indicate where the marginal matter is to be read in relation to the other provisions of the will, evidence is necessary in order to determine the end of the will; but, where there is no ambiguity that may be explained, but only an omission that cannot be cured, a defendant cannot be benefited by testimony or prejudiced by its rejection.

The judgment of the Circuit Court is reversed, and that of the Court of Common Pleas is affirmed.

Shauck, Ch. J., and Price and Davis, JJ., concur.

VIRGINIA SUPREME COURT OF APPEALS.

SOUTHERN RAILWAY COMPANY, Appt.,
v.
COMMONWEALTH OF VIRGINIA.

(107 Va. 771, 60 S. E. 70.)

Railroad — state commission — car service — interstate commerce.

A rule of a state-railroad commission imposing a penalty upon railroad companies for failure to furnish, within four days from demand, cars which are needed for interstate shipments, is an invalid interference with interstate commerce, although it reserves power to suspend the operation of the rule if justice demands,—at least when applied to a state of facts which, because of shortage of cars, due to unprecedented demand, renders it impossible to comply with the rule without disobeying it in other parts of the state, or disobeying the rules of other states.

(January 23, 1908.)

APPPEAL by defendant from a judgment of the State Corporation Commission

Case Note. — *State regulations requiring carriers to furnish cars to shippers as interference with interstate commerce.*

It was held in *Patterson v. Missouri P. Coal Co.* (Kan.) 15 L.R.A.(N.S.) 733, 94 Pac. 138, that a statute imposing a penalty of \$1 a day for each car for delay in furnishing freight cars ordered, unless prevented by strikes, unavoidable accidents, or other public calamities, was valid as a reasonable police regulation, and imposed no considerable burden upon interstate commerce.

But a statute imposing an absolute duty upon intra and inter state carriers to fur-

imposing upon it a fine for violation of a rule as to furnishing cars on demand. Reversed.

The facts are stated in the opinion.

Messrs. Alfred P. Thom, Robert B. Tunstall, and John K. Graves for appellant.

Mr. William A. Anderson, Attorney General, for the Commonwealth.

Cardwell, J., delivered the opinion of the court:

The rules established by the State Corporation Commission for the regulation of transportation companies and shippers doing business in this state came under review in *Atlantic Coast Line R. Co. v. Com.* 102 Va. 599, 46 S. E. 911, and it was held that, while said rules and regulations, as applied to transportation companies and shippers doing business in this state, are reasonable, just, and valid, whether said rules and regulations do, in their operation, directly infringe upon the commerce clause of the Constitution of the United States, or violate some right of such companies or shippers protected by that instrument, can be properly determined only as the questions arise in concrete cases, and upon the particular facts of each case; the court saying: "The State Corporation Commission has no authority to make any rule or regulation in conflict with the Constitution of the United States, and, if any such rule or regulation is made, which, in its application to the facts of a particular case, violates any right of a defendant protected by the Constitution of the United States, he may have its validity tested by an appeal to this court, notwithstanding its refusal to pass on the abstract proposition presented on the present appeal."

A concrete case is presented on this appeal, and arises out of an alleged violation on the part of appellant of rule 1 of the series of rules and regulations established by the State Corporation Commission for the government of transportation companies

nish freight cars to shippers was held, in *St. Louis, I. M. & S. R. Co. v. Hampton*, 162 Fed. 893, to be an unconstitutional interference with interstate commerce.

As to the validity of statutes imposing a penalty upon a railway company for the failure or neglect to furnish freight cars to shippers, as applied to interstate traffic, see *Patterson v. Missouri P. Coal Co.* 15 L.R.A.(N.S.) 733, and note.

As to the statutory duty of a carrier to furnish freight cars to shippers, see the notes to *DiGiorgio Importing & S. S. Co. v. Pennsylvania R. Co.* 8 L.R.A.(N.S.) 108, and *Houston, E. & W. T. R. Co. v. Campbell*, 43 L.R.A. 225.

and shippers doing business in this state, which rule is as follows:

"When a shipper makes verbal or written application to a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight and its final destination, the railroad company shall furnish same within four days from 7 o'clock A. M. the day following such application.

"Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than four days' notice thereof, computing from 7 o'clock A. M. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

"For failing to comply with this rule, the company so offending shall forfeit and pay to the shipper applying the sum of \$1 per car per day, or fraction of a day's delay after expiration of free time, upon demand in writing, made within thirty days thereafter by the shipper:

"Provided, however, that this rule shall not apply to shipments of coal and coke from mines and ovens."

Appellant was cited to appear before the State Corporation Commission, at its court room in the city of Richmond, on the 2d day of May, 1906, to show cause, if any it could, why a fine should not be imposed upon it for its violation of law and its public duty, in that it had failed and refused to furnish to one M. W. Cutshall, at Rapidan station, on the line of appellant's railway, in Virginia, certain cars alleged to have been properly ordered by Cutshall for loading, at Rapidan station; the number of cars ordered and the dates on which they were ordered in each instance being stated, and the period of appellant's delinquency in each case named, and all of the nine delinquencies alleged, except one, consisting of a delay in furnishing cars for loading telegraph or telephone poles for shipment, either to Calverton station, Baltimore, Maryland, to Dover, Pennsylvania, Camden, New Jersey, or to North Philadelphia.

On the day named in the citation, appellant appeared and made answer thereto, making objection to the proposed imposition of a fine upon it mainly on the ground that the order of the commission to show cause why a penalty should not be imposed upon it was based upon an alleged failure of appellant to furnish a car or cars for the loading of freight for interstate shipment, and that the rule of commission alleged to have been violated is, as applied to an interstate shipment or interstate shipments, *ultra vires*, void, and of no effect, 17 L.R.A. (N.S.)

because it amounts to a regulation of interstate commerce, or to an unreasonable burden thereon; in either of which cases it is an infringement upon the powers of Congress under subsection 3 of section 8 of article 1 of the Constitution of the United States, which confers upon Congress the exclusive power to regulate commerce with foreign nations and among the states, etc.

The commission, having considered the testimony adduced, and the objections made by the appellant to the right of the commission to take action in the case, though finding difficulty, as its order states, in arriving at a satisfactory conclusion, overruled the objections made to rule 1, *supra*, as applied to interstate shipments, held the rule valid, imposed upon appellant a fine of \$50, and ordered that the fine, together with the costs of the proceeding, be paid to the clerk of the commission within thirty days from the entry of the order.

The assignments of error present for our determination the paramount question whether or not the application of rule 1 to the facts of this case brings it in conflict with the interstate commerce clause of the Constitution of the United States, *supra*, and so renders the rule void and of no effect.

The subject of this litigation is of the greatest importance to the transportation companies of the state engaged in the transportation of freight, as well as to shippers of freight, and requires the careful consideration here which the order appealed from indicates was given it by the State Corporation Commission, charged, as is the commission, by the Constitution and statutes of the state, with the duty of fixing and prescribing storage, demurrage, and car-service charges which may be collected by railroad and other transportation companies on freight transported or to be transported by them, and to be paid by them on freight delayed and cars not furnished or placed by them when required, with rules and regulations governing the same. Atlantic Coast Line R. Co. v. Com. *supra*.

That shipments of freight from this state into other states is interstate commerce requires no argument or citation of authority; but the learned attorney general contends that the furnishing of empty cars to shippers to be sent into other states is not interstate commerce, nor, indeed, commerce at all, for the reason that, "as a matter of fact and in legal intentment also, 'commerce' does not begin certainly until the car has been loaded, probably not until its custody has been yielded by the shipper to the transportation company."

It would seem quite difficult, if not impossible, to maintain a distinction between

interstate commerce as applied to the article to be transported and interstate commerce as applied to the instrumentalities by which such commerce is carried on,—especially in view of the fact that it is not questioned that empty cars furnished shippers to be sent into other states are, after they are loaded and put into the custody of the carrier, instrumentalities of commerce, and therefore commerce itself, the exclusive control of which is in Congress.

That cars engaged in interstate traffic, although unloaded and not in motion, are instrumentalities of commerce, seems clearly settled in *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, where the question arose whether a dining car regularly engaged in interstate traffic ceased to be so when waiting for the train to make the next trip, and it was held that it did not; the opinion of the court, after reviewing the contentions of counsel and authorities cited, saying: "Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and, in our judgment, it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

Instrumentalities of commerce are, *ex necessitate*, a part of commerce, and, if a car for an interstate shipment is to be regarded as a necessary instrumentality by which an interstate shipment is to be carried, and in fact a part of the interstate commercial duty of the carrier to furnish, then interstate commerce cannot be confined to the mere act of transit, since receiving, loading, unloading, switching, and delivery are as essentially parts of interstate commerce as the act of transit. It would not be contended that a state could forbid any of these things, as a more effectual way of prohibiting interstate commerce could not be devised; and if, instead of undertaking to forbid the furnishing of cars for interstate shipments, or the loading, or switching, or delivery, the state should undertake to regulate all these things, clearly, as it would seem upon reason and authority, that would be a regulation of an essential part of interstate commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 214, 29 L. ed. 165, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Stanley v. Wabash, St. L. & P. R. Co.* 100 Mo. 435, 8 L.R.A. 549, 3 Inters. Com. Rep. 176, 13 S. W. 709.

A later case more directly in point is *Houston & T. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491, (spoken of hereafter in this opinion as the "Texas Case"), in which a provision of the Revised Statutes of Texas of a similar char-

acter and import to rule 1, *supra*, was declared void when applied to interstate commerce, on the ground that it was in conflict with the commerce clause of the Federal Constitution.

A comparison of rule 1 in question with the Texas statute condemned in the case just cited discloses that the rule is more unreasonable and imposes even a greater burden on interstate commerce than the provisions of the Texas statute. While that statute limited the number of cars that might be required, allowed a longer time within which the carrier should furnish them, the time fixed being according to the number of cars applied for, the applicant to deposit with the agent of the carrier one fourth of the amount of the freight charge for the use of the cars applied for, unless the carrier agreed to waive this requirement, and the provisions of the statute "not to apply in cases of strikes or other public calamity," rule 1, under consideration, is absolute in its requirements, making no exception for sudden congestions of traffic occasioned by wrecks or other causes mentioned by the court in the Texas Case, which would excuse the carrier. No allowance is made, as in the Texas statute, for the failure to furnish cars within the required time occasioned by a strike or other public calamity; nor does it allow more free time for the furnishing of fifty cars than for one; and no deposit is required to insure the good faith of the shipper. The application may be verbal, or even by telephone, and the shipper not required to designate a point, such as a side track, where loading is practicable, and the number of cars he may order is not limited. Under the requirements of the rule, the equipment of the carrier from other states might have to be withdrawn to an extent necessarily and directly obstructing the movement of interstate commerce originating in such other states.

The rule is not rendered less absolute and inexorable, as contended on behalf of the commonwealth, by rule 20 of the series of rules established by our State Corporation Commission, whereby the commission reserves the right at all times and under all circumstances, "whenever justice demands such action, to suspend the operation of these rules, or any one or more of them, in whole or in part." Whether or not the commission would have had the right to exercise their discretion in the enforcement of the rule in such cases as this, had not rule 20 been embraced in the series of rules, need not be here determined. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may be done. *Stuart v. Palmer*, 74

N. Y. 191, 30 Am. Rep. 289; *Violett v. Alexandria*, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909.

In the Texas Case the syllabi are as follows:

"An absolute requirement that a railroad engaged in interstate commerce shall furnish a certain number of cars on a specified day to transport merchandise to another state, regardless of every other consideration except strikes and other public calamities, transcends the police power of the states, and amounts to a burden upon interstate commerce; and articles 4497-5000, Tex. Rev. Stat. [1895], being such a requirement, are, when applied to interstate-commerce shipments, void as a violation of the commerce clause of the Federal Constitution.

"Such a regulation cannot be sustained as to interstate-commerce shipments as an exercise of the police power of the state."

In the counsel's argument it is said: "The intention of the Constitution was to confer the power to regulate interstate commerce exclusively upon Congress, and not to divide the power between the state legislatures and Congress. One of the chief objects of the Constitution was to rid commerce of the conflicting vexatious and burdensome restrictions which, under the Articles of Confederation, had been imposed by the various states."

In a more recent case (*McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722), the question involved was whether or not an order of the North Carolina Corporation Commission, requiring the defendant railway company, upon payment of freight charges, to make delivery beyond its right of way and on a private siding of the Greensboro Coal & Ice Company of certain cars consigned to the latter company at Greensboro, North Carolina, from points without the state of North Carolina, was repugnant to the commerce clause of the Federal Constitution; and, by a unanimous court, the order was held to be invalid, the ruling being rested on the same grounds upon which the appellant here relies as invalidating rule 1 of our State Corporation Commission, *viz.*, that the order imposed a burden on interstate commerce, and that it conflicted with those provisions of the act to regulate commerce which prohibit unjust discrimination. Among the authorities cited in that case is the Texas Case, *supra*.

It is further contended in the argument of the learned attorney general that the Texas Case is to be distinguished from the case at bar on the ground that the Texas Case was a suit by a shipper to redress a private wrong, and the Texas statute prescribed a

penalty of \$25 for each day's delay in furnishing empty cars after the expiration of free time; and, in addition thereto, the shipper was entitled to recover the actual damages he sustained, while the penalty prescribed by rule 1, *supra*, is only \$1 for each day's delay after the expiration of free time. Nothing, however, appears in the decided cases referred to indicating that the effect of the rule upon the conduct of the carrier in conducting its interstate business is to be measured or determined by either the mode of procedure or the amount of the penalty prescribed for a violation of the statute or rules. True, a penalty may be so great as to invalidate a statute which otherwise would be valid; but, so far as this case is concerned, the amount of the penalty is a minor consideration, and nothing appears to show that it was not so regarded in the Texas Case. It is also true that in the Texas Case the statute under review, which is similar, in so far as it is an attempt to regulate interstate commerce, to rule 1, *supra*, was held invalid on the declared ground that exceptions were not made for cases which might occur rendering the carrier unable to furnish cars within the time specified; but a careful examination of the printed record in that case fails to disclose any evidence of a wash-out or sudden congestion of traffic, or unavoidable detention of cars in other states or in other places in the same state, or any other circumstances which the court declared should excuse the railroad company from furnishing cars applied for. In other words, the court took judicial notice of the fact that such conditions might arise, and, for that reason, the statute was "likely" to do great injustice to the roads; and therefore declared that the statute was an unreasonable burden upon interstate commerce, and invalid so far as interstate shipments were concerned, reversing the judgment of the Texas court that the railroad company should pay the penalties demanded by *Mayes*, as well as actual damages.

In the case before us circumstances of which the court took judicial notice in the Texas Case as likely to arise, and which should excuse the carrier, are affirmatively established by appellant's uncontroverted testimony. This testimony shows that appellant operates a continuous line of railroad through Virginia, North and South Carolina, Georgia, Alabama, Mississippi, Tennessee, Florida, Kentucky, Indiana, and Illinois, and that it operates its freight trains no farther north than Alexandria, Virginia, so that a large part of its interstate traffic originating in Virginia destined to northern points moves only a short distance over its rails, being delivered at Alex-

andria to its connections for transportation to destination; that, at the time the cars were demanded by Cutshall, there was an "unprecedented movement of lumber in open cars;" that Cutshall's freight consisted of telegraph and telephone poles, which required a special class of equipment with special appliances, viz., flat cars of the same height, fastened together with chains; that the demand was "tremendously active," and that a "very serious shortage in flat cars" had resulted; that the appellant did not have the cars and could not get them, although it used every effort to do so; that the appellant had ordered a large number of cars which it was unable to secure, owing to the fact that the car builders were far behind in filling their orders. It is made further to appear that, if the cars required by Cutshall had been furnished in the time prescribed by rule 1, *supra*, if they could have been furnished at all, they would have had to be taken from other parts of appellant's line of railway, where engaged in interstate or intrastate traffic, and handled empty to Rapidan station, and in all probability a great distance, whereby appellant might have been subjected, not only to like penalties to those prescribed by the rule for failure to furnish empty cars, and imposed in this case, but even larger penalties for violation of a statute or rule of another state from which the cars would have had to be withdrawn. It is thus made to appear that the penalty imposed was for a failure to do the impossible, or to obey a rule which, when applied to the facts and circumstances made to appear by the proof in the proceeding, imposes not only a direct, but an unreasonable, burden upon the movement and conduct of interstate shipments.

It is not controverted that the authorities maintain the right of a state, in the absence of action by Congress, to pass laws or to confer upon an administrative agency the power to make reasonable regulations, which, though incidentally affecting commerce, are not intended to prescribe rules for the conduct of that commerce, but are passed or established in the exercise of the police power (called the reserve power) of a state to promote the welfare and convenience of its citizens, subject always to the condition that such legislation be not inconsistent with the national Constitution, nor in derogation of any right granted or secured by it.

Many instances of statutes which have been held within the competency of the state, though affecting interstate commerce indirectly, are mentioned in the opinion by Buchanan, J., in *Atlantic Coast Line R. Co. v. Com.* 102 Va. 590, 46 S. E. 911; but none of the statutes referred to undertake to

control the conduct of the carrier with respect to interstate commerce in a case similar to the one we are considering.

Calvert, in his very recent treatise on the Regulation of Commerce, at pages 93 et seq., after declaring that, while the power of the state to adopt police regulations which may incidentally burden commerce is admitted, the power is occasionally so exercised as to be an aid to, rather than a burden on, commerce, and that there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce; and especially is this so with respect to regulations having in view the convenience of the public, as in enforcing track connections between two railroads, and rules for the safety of persons and property, which are to be regarded as legislation in aid of commerce, and are considered with special favor by the courts,—further says: "But, when a state statute has been enacted which may be said to have relation to the public morals, the public health, the public safety, or the public convenience, the subject of which is not within the exclusive power of Congress, or which in its operation does not conflict with an act of Congress, the last and supreme test is that of reasonableness. . . . A statute passed in pursuance of any of the purposes for which this power may be exercised must have a real or substantial relation to the object for which it was enacted, and, if it unreasonably or unnecessarily hampers commerce between the states, or fails to make allowance for the practical difficulties in the administration of the law, it cannot be approved,"—citing, among others, the *Texas Case*, *supra*.

In *Western U. Tele. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934, the statute of Georgia required, under a penalty, prompt delivery and transmission of interstate messages. Yet the Supreme Court of the United States declared it valid, on the ground that it did not require of the telegraph company any duties in addition to those imposed upon such companies by the common law, and therefore the statute was not a regulation of interstate commerce, because it did not prescribe a rule by which the telegraph company's conduct with respect to interstate messages was to be governed, but simply imposed a penalty upon the company for failure to perform its common-law duty. In the opinion stress is laid upon the fact that the statute contained no regulation of a nature calculated at all to embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages.

To the same effect is the opinion of this court in *Postal Teleg. Cable Co. v. Umstadter*, 103 Va. 742, 50 S. E. 259, where the imposition of the penalty prescribed by § 1291 of the Code of 1887 [Code 1904, p. 693] for a failure to transmit from Norfolk, Virginia, a message to be delivered in Baltimore, Maryland, was upheld on the ground that the statute, as applied to the facts of the case, was not a violation of the commerce clause of the Constitution of the United States. In the opinion it is said: "It is settled law that a telegraph line is an instrument of commerce, and that telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate business."

The reasoning upon which the authorities agree that a state statute, in so far as it imposes a penalty for failure to deliver a message, where the delivery is to be made in another state, infringes upon the exclusive power of Congress to control commerce, is that conflict and confusion would follow the attempted exercise by several states of such a power. The same reasoning applies with equal, if not with greater, force to the case before us. In the proof it appears that other states through which appellant's railway is operated have a similar statute or rule of regulation to rule 1, *supra*, intended to control transportation companies with respect to their duty in furnishing cars for interstate as well as intrastate shipment of freight; the duty imposed and the penalty for a violation of the prescribed duty being different and in one or more of these states much greater than that provided for in rule 1.

When unprecedented conditions arise, as they will in the future, as in the past, whereby appellant cannot possibly furnish cars to meet the demands of the shippers in each of these states, will it not be natural—in fact, a necessity—for it to withdraw the cars in use or needed in this state, and send them for the use of shippers in another state, where, for a failure to furnish cars, the penalty to be suffered is much larger than that incurred by a failure to furnish required cars in this state, whereby conflict and confusion in the conduct of appellant's interstate traffic would not only be brought about, but a direct and unreasonable burden imposed upon interstate commerce? Clearly, such a condition of things is not only possible, but "likely" to happen, as said in the *Texas Case*. Would not the application of a statute or rule to such a state of facts and circumstances as appear in this record necessarily, directly, and unreasonably operate as a hindrance to and interfere

ence with interstate commerce? This question has been fully answered in the affirmative by the decisions of the Supreme Court of the United States, to which we have adverted, and "to which we must look in determining questions of this character." *Southern Exp. Co. v. Goldberg*, 101 Va. 619, 62 L.R.A. 669, 44 S. E. 893.

There is nothing in the opinion of the court in the *Texas Case*, *supra*, which denies the right of a state to prescribe a reasonable rule or regulation of transportation companies and shippers in the matter of furnishing and loading cars for interstate as well as intrastate shipments of freight, provided the rule or regulation be reasonable and just, and does not in its application directly infringe upon the commerce clause of the Constitution of the United States, or violate some right of such companies or shippers protected by that instrument; but the *Texas* statute is declared invalid upon the ground that it was unreasonable, in that exceptions were not made for cases which might occur rendering the carrier unable to furnish cars within the time specified, thereby imposing an unreasonable burden upon interstate commerce. The opinion in that case concludes as follows: "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise which good management and a desire to fulfil all its legal requirements cannot provide for, and against which the statute in question makes no allowance. Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

Whether or not Congress has exercised its jurisdiction in the matter of furnishing cars to shippers to be sent to destinations without the state, in the act known as the "Act to Regulate Commerce," as suggested in the argument, whereby the several states of the Union are precluded from prescribing any rule or regulation relating to the subject, is a question we could not consider upon this record. *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350.

We are of opinion, for the reasons stated, that rule 1 of the series of car service and

demurrage rules established by the State Corporation Commission for the government of transportation companies and shippers doing business in this state, here in question, as applied to this case, is invalid and void, because in conflict with the commerce clause of the Constitution of the United States. Therefore, the judgment of the commission appealed from will be reversed and annulled, and this proceeding dismissed.

Whittle, J., concurring:

I concur in the opinion of Judge Cardwell in this case, namely, that rule 1, in question, is not a reasonable exercise of the police power of the state with respect to furnishing cars for interstate shipments; but I desire to emphasize the fact that I am of opinion that it is within the competency of the State Corporation Commission, in the absence of legislation by Congress or action by the Interstate Commerce Commission, to establish and enforce reasonable rules and regulations requiring railroad companies, on application of intending shippers, to supply adequate car service, whether the freight be intended for intrastate or interstate shipment; and that, in the present state of the decisions of the Supreme Court of the United States on the subject of interstate shipments (the controlling influence of which is conceded), the crucial test of the validity of such rule is its reasonableness.

Buchanan and Harrison, JJ., concurring:

We concur in the conclusion reached by the other members of the court that rule 1 of the State Corporation Commission is invalid, but do not concur in the reasoning by which they reach that conclusion. Their reasoning, if followed to its logical result, as we understand it, would not only render the rule in question invalid, but would make it impossible for the State Corporation Commission to make any valid rule on the subject.

We base our conclusion in the case upon the principles announced and the reasons given in the opinion of the Supreme Court of the United States in the case of *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491, which clearly recognizes, as we understand it, the right of the state, under its police or reserved powers, to make reasonable regulations as to the furnishing of cars by railroad companies, not only for intrastate, but also for interstate, shipments.
17 L.R.A. (N.S.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

F. U. KNICELY

v.

WEST VIRGINIA MIDLAND RAILROAD COMPANY, Plff. in Err.

(— W. Va. —, 61 S. E. 811.)

Master — employee — contractor or servant.

1. When a question arises as to whether a person performing work or doing business for another is a contractor for whose negligence the employer is not liable, or a servant for whose acts the employer is responsible, the character of the contract of employment, the nature of the business, and all the circumstances are to be considered in determining it.

Same — independent contractor — what constitutes.

2. Though payment for work "by the job," and the right and power of the person doing the work to employ assistants, to be paid by himself, are circumstances tending to prove the relation of contractor and contractee, and so make him an independent contractor, they are not conclusive, and must yield, if it appears that he is merely working under a general employment, having no dominion or control over the premises, is subject at all times to the orders of the employer as to when and how he shall work and the results to be accomplished, and may be discharged at any time. Under such circumstances, the relation of master and servant exists.

Servant — assistant.

3. An assistant employed by a servant, paid according to the work done, not the time of service, is a servant of the person in whose business his immediate employer is engaged. As there is no direct contract between him and the master, he is a sort of voluntary servant of the latter.

Master — fellow servant.

4. Under the law relating to negligence in the work of operating or prosecuting the master's business, not provision or maintenance of a safe place in which to work or suitable machinery and appliances with which to work, all persons engaged in the business of a common master, and so related that each, in the exercise of ordinary sagacity, ought to foresee, when accepting his employment, that he would be exposed to injury in the event of negligence on the part of the others, and they to injury from his, are fellow servants.

Pleading — immaterial variation.

5. In an action for damages resulting from injury by negligence, a variance of the evidence from the declaration in respect to specification of mere matters of detail concerning the manner, not the time or place

Headnotes by **POFFENBARGER, P.**

at which, or the instrumentalities by which, the injury was inflicted, is immaterial.

(March 31, 1908.)

ERROR to the Circuit Court for Braxton County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries. Reversed.

The facts are stated in the opinion.

Messrs. Jake Fisher and Brown, Jackson, & Knight, for plaintiff in error:

Plaintiff's evidence should have been stricken out on the ground of a variance between the evidence and the declaration.

Hawker v. Baltimore & O. R. Co. 15 W. Va. 628, 36 Am. Rep. 825; Snyder v. Wheeling Electrical Co. 43 W. Va. 664, 39 L.R.A.

Case Note. — Who is an independent contractor?

The present note contains only cases subsequent to a note to Richmond v. Sitterding, 65 L.R.A. 445, on the same question, and is intended to be supplementary thereto. In this series the question has been in part covered with reference to particular states of fact, by a case note to Frerker v. Nicholson, 13 L.R.A.(N.S.) 1122, on, Who is responsible for acts of driver furnished with a hired vehicle? and a case note to Burns v. Michigan Paint Co. 16 L.R.A.(N.S.) 814, on, Cartmen as independent contractors, the decisions contained in which it is therefore deemed unnecessary to restate in this note.

While in the majority of cases in which the question, Who are independent contractors? is involved, the ultimate inquiry is the liability for some act of negligence on the part of the contractor or his servant, it should be noted that the question also arises in connection with an inquiry into the liability to the contractor's servant for negligence on the part of the principal or his employee, in which case it becomes a branch of the question as to which of two parties is to be deemed the master of the servant of one of them, and of the question when servants of the principal employer and the contractor are to be deemed fellow servants. Both classes of cases are included in this note.

In general.

Where one person contracts with another to do and perform certain work or labor, and the person so contracting has no control or management of the work, in such case the one who undertakes the work becomes an independent contractor. Falender v. Blackwell, 39 Ind. App. 121, 79 N. E. 393.

An independent contractor is one who undertakes to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work. The test to be applied is whether the employee represents his employer as to the result of the 17 L.R.A.(N.S.)

499, 64 Am. St. Rep. 922, 28 S. E. 733; Richmond R. & Electric Co. v. West, 100 Va. 184, 40 S. E. 643; Eckles v. Norfolk & W. R. Co. 96 Va. 69, 25 S. E. 545; Richmond R. & Electric Co. v. Bowles, 92 Va. 738, 24 S. E. 388.

The plaintiff and the servants of the defendant who were operating the train were fellow servants.

Jackson v. Norfolk & W. R. Co. 43 W. Va. 380, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258; 16 Am. & Eng. Enc. Law, 2d ed. p. 187; Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906; Philadelphia, W. & B. R. Co. v. Hahn, 9 Sadler (Pa.) 364, 12 Atl. 479; Holmes v. Tennessee Coal, Iron & R. Co. 49 La. Ann. 1465, 22 So. 403; The Harold, 21 Fed. 428; Killea v. Faxon, 125 Mass.

work, or as to the means. If the former, he is to be regarded as an independent contractor, but, if the latter, merely an agent or servant. Parrott v. Chicago G. W. R. Co. 127 Iowa, 419, 103 N. W. 252.

When one contracts to do and deliver certain specific work which is not unlawful, and the manner of the doing of which, including the employment, payment, and control of the labor, is left entirely to him, he is an independent contractor. Robideaux v. Hebert, 118 La. 1089, 12 L.R.A.(N.S.) 632, 43 So. 887.

An independent contractor is one who carries on an independent business, and in the line of his business is employed to do a job of work, and in doing it does not act under the direction and control of his employer, but determines for himself in what manner the work shall be done. Keyes v. Second Baptist Church, 99 Me. 309, 59 Atl. 446.

An independent contractor is one who undertakes to produce a given result, but so that, in the actual execution of the work, he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified. Gay v. Roanoke R. & Lumber Co. (N. C.) 62 S. E. 436.

Employment will be considered independent when the contractor renders service in the course of his occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished. Where the work is done, however, in the manner and by the means contemplated in the contract of employment, and the contractor is performing the work strictly in the manner expressly or impliedly directed by the employer, the latter cannot escape liability by the plea that an independent contractor committed the act. Drennon v. Patton-Worsham Drug Co. (Tex. Civ. App.) 109 S. W. 218.

An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means by

485; *Ewan v. Lippincott*, 47 N. J. L. 192, 54 Am. Rep. 148; *Illinois C. R. Co. v. Cox*, 21 Ill. 20, 71 Am. Dec. 298; *Johnson v. Boston*, 118 Mass. 114; *Saunders v. Cole-ridge*, 72 Fed. 676; *Hasty v. Sears*, 157 Mass. 123, 34 Am. St. Rep. 287, 31 N. E. 759; *Cerrillos Coal R. Co. v. Deserant*, 9 N. M. 49, 49 Pac. 807; *Hoar v. Merritt*, 62 Mich. 386, 29 N. W. 15; *McCafferty v. Dock Co.* 11 Ohio C. C. 457; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 34 L. ed. 440, 10 Sup. Ct. Rep. 175; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Cooley, Torts*, p. 1076; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

Messrs. Morrison & Rider for defendant in error.

which it is to be accomplished. *Texas & N. O. R. Co. v. Parsons* (Tex. Civ. App.) 109 S. W. 240.

The general test which determines the relation of independent contractor is that he shall exercise an independent employment, and represent his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. The chief consideration is that the employer has no right to control as to the mode of doing the work, but a reservation by the employer of the right to supervise the work for the purpose of merely determining whether it is being done in accordance with the contract does not affect the independence of the relation. *Larson v. American Bridge Co.* 40 Wash. 224, 111 Am. St. Rep. 904, 82 Pac. 294.

Presumptions as to character of contract.

Where a person entered into a written contract for the construction of a wagon road for a certain specified price, employing the hands who were to do the work, and having full control over it, the circumstance that, while the work was progressing, his employees were paid by checks of the corporation for whom the work was being done, the circumstances that such person had formerly been in the employ of the corporation as its foreman and as such foreman had worked for it on other roads, and the circumstance that the foreman of the corporation occasionally visited the road while the work was being done, and made some suggestions as to certain features of the work, but did not attempt to control any of the employees, and did nothing more than he had a right to do in seeing that the work was being done according to the contract;—are insufficient to raise such a conflict of evidence on the point as would justify a jury in finding that such a person was not an independent contractor. *Houghton v. Loma Prieta Lumber Co.* 152 Cal. 574, 93 Pac. 377.

A plumber engaged to make repairs upon premises must be regarded as the servant of the owner, where it does not appear that any contract has been let to him as an in- 17 L.R.A. (N.S.)

Poffenbarger, P., delivered the opinion of the court:

F. U. Knicely, injured while unloading lumber from a car of the West Virginia Midland Railroad Company on its tracks by the jarring or removal thereof without notice, recovered a judgment against said company for damages resulting from the injury, amounting to \$3,250, to which a writ of error was allowed.

The principal inquiry is whether the plaintiff and the switching crew of the defendant, who ran a train of cars against the standing car on which the former was at work when injured, were fellow servants. This relationship, if it existed, precludes recovery, and renders practically unnecessary the consideration of every other question

dependent contractor, or the premises surrendered to his control. *Anderson v. Moore*, 108 Ill. App. 106.

The facts that one was employed for a stated sum per day, and directed to employ other hands, for a certain rate, to repair a bridge, are not so necessarily inconsistent with the independent character of his employment as to preclude a jury from finding that he was an independent contractor. *Karl v. Juniata County*, 206 Pa. 633, 56 Atl. 78.

No inference that one employed in unloading supplies for a company, hiring his own help, is an independent contractor, arises from the fact that his compensation is at a fixed amount per car load. *Foster v. National Steel Co.* 216 Pa. 279, 65 Atl. 618.

See also *Finkelstein v. Balkin*, 103 N. Y. Supp. 99, *infra*, sub tit., Independence of contract inferable where for performance of entire piece of work at specified price.

See also subdivision, "Nature of contract determined with reference to various factors," *infra*.

Independence of contract for the performance of entire piece of work at a specified price.

—persons who undertake the construction of entire buildings, or specific portions thereof.

One agreeing to furnish all the necessary materials and perform all the labor required in the plastering of a building in accordance with the plans and specifications, having the entire charge of that part of the work and sole control of the workmen engaged therein, is, as a matter of law, an independent contractor. *Green v. Soule*, 145 Cal. 96, 78 Pac. 337.

A stone company which agreed to furnish all the materials and labor necessary to do all the stone work in and about a building for a specified sum, in accordance with the plans and specifications, was an independent contractor, although the owner was at the same time doing the woodwork on the building, and inspected the progress of all the work to see that it was done accord-

raised. The defendant company's road is a narrow-gauge railroad, connecting with the Baltimore & Ohio, a standard-gauge road, about a mile from the small town called Palmer. At Palmer it has an extensive lumber yard, in which the vast quantities of lumber carried by it as a common carrier are transferred to cars of the Baltimore & Ohio, which are run into the yard on a three-rail track for both narrow and standard gauge cars and engines laid on the premises of the defendant. The transfer is effected by running the empty standard-gauge cars alongside of the loaded narrow-gauge cars, from which men remove the lumber by hand, using a pointed stool or stand called a "jack," and the point of which operates as a pivot on which the man bal-

ances the board and swings one end of it from one car to the other. A switching crew, kept at the yards for handling the loaded and empty cars, shifts them as occasion requires, and independently of any direction or control by the men who actually transfer the lumber from one car to the other. The plaintiff had no direct contract of employment with the defendant. He was employed by one Cowgill, whom the company had employed to transfer the lumber, paying him for the service a certain price per 1,000 feet, or who, in another view, was removing the lumber as a contractor, and not as a servant of the company. The evidence leaves the manner of the injury somewhat in doubt; but there is evidence tending to prove that plaintiff had removed prac-

ing to the plans and specifications, where he did not direct the stone company's workmen in their work, or interfere with them in any way. *Johnson v. Helbing* (Cal. App.) 92 Pac. 360.

One undertaking to do brick and stone work on a building at an agreed price per cubic foot, to be paid upon estimates as the work progresses, the owner furnishing all the material, but having nothing to do with the work except to see that it is completed in accordance with the plans and specifications, having no control over the workmen employed, is an independent contractor. *Chute v. Moeser* (Kan.) 95 Pac. 398.

A construction company contracting to erect a building according to drawings and specifications, under the direction of an architect, and which hired and discharged its employees at will, pursued its own methods, and was not subject to the control of its employer, except as to the results of the work, was an independent contractor. *Scharff v. Southern Illinois Constr. Co.* 115 Mo. App. 157, 92 S. W. 126.

One contracting to make an excavation and construct the foundation walls for a pumping station, according to specifications prepared in advance, for a specified sum of money, is an independent contractor. *Kelly v. New York*, 106 App. Div. 578, 94 N. Y. Supp. 872.

A competent person who undertakes to construct the brickwork on a building with his own employees and according to his own discretion is, as to such work, an independent contractor. *Richmond v. Sitterding*, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562.

One who enters into an agreement to purchase material, employ labor, and superintend and erect a building in accordance with certain plans, to use his best efforts to secure material and labor at the lowest cost, and to render his employer a true account thereof, and not to exceed the estimated cost without consent of the owner, guaranteeing that the workmanship shall be first-class and satisfactory in every respect, the owner of the property agreeing to pay the 17 L.R.A. (N.S.)

net cost of material and labor, together with a commission to the contractor, is an independent contractor. *Veitch v. Jenkins*, 107 Va. 68, 57 S. E. 574.

—persons engaged to execute repairs or improvements on a building.

One is an independent contractor who, for what the job is reasonably worth, undertakes to overhaul the awnings on another's building, the latter expressing no direction, judgment, or discretion in the matter. *McHarge v. Newcomer*, 117 Tenn. 595, 9 L.R.A. (N.S.) 298, 100 S. W. 700.

In *Meyers v. Syndicate Heat & Power Co.* 47 Wash. 48, 91 Pac. 549, it was held that evidence, the nature of which is not set out, was sufficient to warrant a finding that a master steam fitter, maintaining a workshop and having men regularly in his employ, was not, in making certain alterations in a heat, light, and power plant, an independent contractor.

—painters and decorators.

A painter employed for a lump sum to paint a house, employing in the work means of his own choosing and entirely within his control, is an independent contractor. *Francis v. Johnson*, 127 Iowa, 391, 101 N. W. 878.

A boss painter undertaking to paint a building, the general supervision being entrusted to an architect, but the manner of doing the work being left to him, is an independent contractor. *Metzinger v. New Orleans Bd. of Trade*, 120 La. 124, 44 So. 1007.

One who agrees to do a job of whitewashing for a lump sum was an independent contractor, where there is no evidence that the owner exercised, or assumed to exercise, any control over the work or the appliances to be employed in its prosecution. *Finkelstein v. Balkin*, supra.

A decorator employed to do certain work for a lump sum, furnishing all materials and tools and employing his own help, is an independent contractor, although his employer's representative directs him to work

tically all the lumber from the car on which he was working, and the train with loaded cars, one of which was to take the place of the car from which he had made the transfer, was coming in on the track as he stooped and lifted the end of a board, and, while he was engaged in transferring it, the train struck the car and caused him to fall therefrom, in doing which his foot was caught between a wheel and the reach or sidebar of the car, and his leg broken over the wheel. Plaintiff's face was, at the time, turned away from the approaching train, and no warning was given him.

Want of power in the plaintiff and his immediate employer to supervise and control the work and operations on the premises on which he was working, and the form of said

employer's contract, are the facts mainly relied upon as the basis of the contention against the existence of the fellow-servancy relation. All the cars and servants in charge of them were paid by, and subject to the orders and control of, the railway company, as were also the lumber the plaintiff was handling, and the grounds upon which the operations were conducted. The plaintiff was paid for his services by Cowgill, who was paid by the railway company for the handling of the lumber at a certain price per 1,000 feet. The work in which all were engaged was the transportation of lumber, the business of the defendant, all conducted and carried on confessedly in accordance with its orders and directions. Plaintiff's immediate employer had no con-

in this or that room for the purpose of preventing as far as practicable an interference with business. *Southwestern Teleg. & Teleph. Co. v. Paris*, 39 Tex. Civ. App. 424, 87 S. W. 724.

—architects.

The work of an architect in preparing plans and specifications for a building is that of an independent contractor. *White v. Green* (Tex. Civ. App.) 82 S. W. 329.

—persons engaged in other kinds of construction work.

A firm having sole charge of the work of constructing steel storage tanks, controlling the method of doing it and employing the men for that purpose, are independent contractors. *Larson v. American Bridge Co.* 40 Wash. 224, 111 Am. St. Rep. 904, 82 Pac. 294.

—persons undertaking various kinds of work on highways.

One undertaking to lay a cement sidewalk, furnishing material and labor, for a stated sum per yard, according to specifications of the city's engineer, the owner reserving no control and not assuming to direct the work in any way, is an independent contractor. *Massey v. Oates*, 143 Ala. 248, 39 So. 142.

Property owners engaged in working on a city or borough street in front of their properties in obedience to the requirements of an ordinance are not contractors exercising an independent employment, over whom the municipal authorities have no control. *Meyers v. Philadelphia*, 217 Pa. 159, 10 L.R.A. (N.S.) 678, 66 Atl. 251.

—persons operating mills.

The owner of a plant who agreed to operate it for the following two years exclusively for the making of machinery for another company, to keep it in repair and not permit it to be sold for taxes or property encumbrances, to pay all expenses, to do the work as directed by such company so that it would be satisfactory; such company

agreeing on its part to pay all expenses of every kind incurred by the owner, and then, for the use of the plant, furniture, and tools, to pay a gross sum based upon the number of days' work done by employees, and to furnish materials on the requisition of the owner, such agreement containing no provision that the company should hire, pay, or discharge employees, or that the owner should do so as the servant or agent of the company; although there were provisions as to the owner's following the directions of the company as to the number of men employed and what work they should do and the rate of wages to be paid them,—was an independent contractor. *Kirby v. Lackawanna Steel Co.* 109 App. Div. 334, 95 N. Y. Supp. 833.

One who entered into an oral contract with the owner of a shingle mill wherein it was agreed that he should take charge of said mill, employ and pay all the laborers and make all necessary repairs to machinery, and manufacture shingles out of timber which was to be furnished by the owner, for a stipulated sum per thousand for all shingles manufactured, was an independent contractor. *Ziebell v. Eclipse Lumber Co.* 33 Wash. 591, 74 Pac. 680.

In *Giacomini v. Pacific Lumber Co.* 5 Cal. App. 218, 89 Pac. 1059, it was held that, where the evidence showed that, although certain persons were engaged in manufacturing shingles for a specified amount per thousand, the owner to furnish material, power, and machinery, and keep the machinery in repair, their compensation was subject to change at any time; that the agreement was for no definite term and could be terminated at any time by either party; that the shingle machinery was installed as a part of the owner's main saw-mill; that the persons so employed to manufacture shingles at times worked in the main mill; and that their employees were carried on the owner's pay roll,—there was sufficient to warrant the jury in finding that such persons were not independent contractors.

See also *Barclay v. Puget Sound Lumber Co.* (Wash.) 93 Pac. 430, *infra*.

trol of the yard, the cars, the men, nor, indeed, of the lumber. He unloaded such cars and in such manner as the defendant company directed, and placed it where he was ordered to put it. Had he performed this work with his own hands, he would personally have worked on the company's premises and cars among its servants, and without the slightest dominion or authority over any of them, or over himself or any of its property, beyond the mere handling of such lumber as he was directed to handle. If, in addition to all this, he had been paid daily, weekly, or monthly wages, instead of so much per 1,000, it would be extremely difficult to conceive even a pretext upon which he could have been regarded as an independent contractor, within the meaning of the

law of the subject under consideration. What better situation can his employee occupy? Is his position higher than that of his employer would have been, had he been standing in the shoes of the former and suffered the injury himself? Can a stream rise higher than its source? Can a man confer upon another a greater right or more power than he himself possesses? In the lack of power of the plaintiff and Cowgill over his surroundings, and subserviency to the orders of the railway company while engaged in the transaction of its business, lies the very basis of the relationship he denies, and the lack of the independence he asserts on behalf of Cowgill. It shows the latter was not, in any substantial or practical sense, master. He was wholly without dominion or power,

—persons who undertake various operations connected with handling of timber.

One who undertakes to cut and load logs, the owner agreeing to furnish him a locomotive, logging cars, horses, harness, and such light rails as shall be necessary, and to pay him a certain price per thousand for all timber logs, the contract providing that he shall have the full and complete control over the cutting and getting out of said timber, doing such work in a good and workmanlike manner, is, where such contract is made in good faith and not for the purpose of avoiding responsibility, an independent contractor. *Young v. Fosburg Lumber Co.* (N. C.) 60 S. E. 654.

A firm contracting to cut and deliver logs, agreeing to load a certain quantity per day, cutting the timber in a proper and workmanlike manner, and to pay for any delays or damage incident to their failure to perform the contract, for a specified sum per thousand feet for merchantable logs so cut, hauled, and delivered, the owner agreeing to furnish a locomotive and all the railroad iron and logging cars necessary to do the work, is an independent contractor. *Gay v. Roanoke R. & Lumber Co.* (N. C.) 62 S. E. 436.

Where one, for a stipulated price per piece, contracts to procure timbers for a mining company for use in its mine from lands of the company, and the company retains no supervision of the work or control of the manner of the doing it, and the contractor is responsible to the company only to the extent of procuring satisfactory timber and delivering it at such times and places as needed, and employs and pays his own help, in doing so such contractor exercises an independent employment. *Anderson v. Tug River Coal & Coke Co.* 9 W. Va. 301, 53 S. E. 713.

—stevedores.

A stevedore engaged in unloading a vessel is, as a matter of law, an independent contractor. *Sullivan v. New Bedford Gas & Edison Light Co.* 190 Mass. 288, 76 N. E. 1048.

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—miscellaneous.

One who, having contracted to sink a shaft for the owner of a coal mine, also undertakes, at the request of the company's superintendent, to unload certain boilers, using his own men in so doing and receiving no instructions as to the mode of doing the work, charging a lump sum for such service, is an independent contractor, even though no fixed price was agreed upon in advance. *Galatia Coal Co. v. Harris*, 116 Ill. App. 70.

A firm undertaking to make repairs on a vessel, having entire control of the work and the persons engaged thereon, is an independent contractor. *Nelson v. Richardson*, 108 Ill. App. 121.

One who undertakes to move a building from one site to another, furnishing all needed materials and labor, the means and appliances employed being left wholly to him, for an agreed lump sum, is an independent contractor. *Wilbur v. White*, 98 Me. 191, 56 Atl. 657.

Liability arising out of certain other contracts of an independent nature.

In *Wilmot v. McPadden*, 78 Conn. 276, 61 Atl. 1069, it was held that allegations that defendant had sold a certain two-story frame building to his codefendants, who were to demolish and remove said building from defendant's premises in a safe and proper manner; that codefendants were masons and builders by trade, and competent and experienced in the kind of work involved; that defendant did not reserve or exercise any direction or control over said work or in the selection of the servants and the agents by whom said work was in fact performed, but was only interested in the result contracted for,—would, if proved, fully sustain his denial of the negligence charged against him, and justify the jury in returning a verdict in his favor.

And, upon a subsequent appeal, it was held that, upon the sale of a house standing upon the vendor's land, to a suitable person for the purpose and upon the conditions

the very essence of mastery, and, unless the mere fact that he was paid by the piece, and not by the day, made him an independent contractor, he was a servant of the company along with its other employees. What sort of a contract had Cowgill? He had no engagement to handle any specific or any stipulated quantity of lumber, or lumber generally, for any agreed period of time. The scope of his powers and the tenure of his position were the same as if he had been working by the day, except that he had the right to employ assistants and was paid by the piece, not by the job, for he had not even a job so far as the evidence discloses. In assuming that he was the servant of Cowgill, and that Cowgill was an independent contractor, the plaintiff totally denies

the relation of servant to the railway company. The present inquiry is not whether he was a fellow servant with the other railway men, but whether he was a servant at all; and that depends upon whether Cowgill was a servant. If he was, he could not have a servant as against the railway company. If he was not a servant, he was an independent contractor, and, having been master of the work, could have had a servant. In the law of liability for negligence independency of contract and servancy bear to each the relation of opposition. They are incompatible. Where the one exists, the other cannot. *Shearm. & Redf. Neg. § 181.*

The courts have prescribed several rules for guidance in seeking the true relation of the parties. In *Singer Mfg. Co. v. Rahn*,

above stated, neither the vendee nor his agents, while engaged in removing the property sold, are the servants of the vendor, for whose careless conduct the vendor can be held liable under the doctrine of *respondet superior*. *Wilmot v. McPadden*, 70 Conn. 367, 65 Atl. 157.

The seller of machinery which is not to become the property of the buyer until finally accepted as satisfactory in compliance with the contract, is, in installing and testing it, an independent contractor, although the power used on the trial test is furnished by the buyer. *Brown v. Rockwell City Canning Co.* 132 Iowa, 631, 110 N. W. 12.

A sheriff who agrees to commission deputies and station them in a railroad yard, the amount of their salary being paid by checks to the sheriff, which are delivered for convenience directly to the deputies, the railroad being free to direct the details of the service rendered and having power to discharge them when it sees fit, does not occupy a position akin to an independent contractor, so as to exempt the railroad from liability for acts of such deputies. *Texas & N. O. R. Co. v. Parsons* (Tex. Civ. App.) 109 S. W. 240.

Where, under the regulations of the state railroad commissioners, a railroad company is required to issue a bill of lading for cotton in exchange for compress-company receipts, such bill of lading providing that each carrier carrying the cotton shall be entitled, at its own cost, to compress the same for greater convenience in handling and forwarding, the compress company, which provides its own platform, its own machinery, its own employees, and determines for itself the manner and time for preparing the cotton for shipment, is a separate, independent contractor, for whose negligence the railroad company is not liable. *Arthur v. Texas & P. R. Co.* 71 C. C. A. 391, 139 Fed. 127 (Reversed on another ground in 204 U. S. 505, 51 L. ed. 590, 27 Sup. Ct. Rep. 338).

Ordinarily, a trained nurse performing her usual duties with the skill which is the result of training in that profession does not come within the definition of a servant, but 17 L.R.A. (N.S.)

rather is one who renders personal services to an employer in the pursuit of an independent calling; and therefore any liability on the part of her employer for her misconduct, resulting in a scandal causing loss of patronage of plaintiff's hotel, cannot rest upon the responsibility of a master for the acts of a servant. *Parkes v. Seasongood*, 152 Fed. 583.

Effect of reservation of a limited power of control.

In *Kansas City, M. & O. R. Co. v. Loosley*, 76 Kan. 103, 90 Pac. 990, it is held that it is not essential that one who engages a contractor to produce a given result should reserve, or should interfere and take, complete or exclusive control over all features of the work, to render him liable as master of the contractor's servants; but the fact that he possesses a limited or partial control to the extent of conditioning the work in many respects will not entail such liability if the contractor is left free to exercise his own will generally respecting methods and means.

Provisions in a contract subletting construction work which the contractor has undertaken to perform for the construction company, placing the work under the supervision of the engineer of the construction company, who has power to discharge employees as the interests of the construction company demand, and to require the increase of the working force and direct its application; and requiring the contractor to furnish tools; and empowering him to suspend work and pay the employees as protection against liens; and requiring the subcontractor to save the contractor harmless from the claims of third persons,—do not create the relation of master and servant between the contractor and subcontractor, as distinguished from that of independent contractor. *Good v. Johnson*, 38 Colo. 440, 8 L.R.A. (N.S.) 896, 88 Pac. 439.

One who contracted, for a certain sum, to furnish all the material and labor for, and erect, the floors and roof of a building in accordance with the plans and specifica-

132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175, Mr. Justice Gray said: "And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'" See the application of this test in *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall. 649, 21 L. ed. 220, in which the person held to be a servant had a contract to build a wharf, furnishing all the materials and labor. In *Clapp v. Kemp*, 122 Mass. 481, the plaintiff had been injured by falling through a coal hole connected with defendant's store while a teamster, employed by a coal dealer, was delivering coal for the store,

and the following instruction was approved: "That the defendants, if they were occupants of the store, would not be liable for the negligence of carelessness of the teamster, if, as the servant of A, he had the exclusive possession or control of the premises so far as was necessary to enable him to deliver the coal. But, if the jury are satisfied that the defendants were at the time the occupants of the store, and, as such occupants, had the right to direct or control the mode or manner of said delivery, then the teamster would be the servant of the defendants so as to render them liable for injuries occasioned by his negligence or carelessness in the delivery of the coal." We quote here the remarkably clear statement of the rule by Bigelow, Ch. J., in *Brackett v. Lubke*, 4

tions, within two weeks after notice to proceed with the work, with the stipulation that, on failure to complete it within the period specified, he should be subject to a penalty, and the owner might complete the work at his expense, or might re-award the contract and hold him for damages; such contract further providing that the owner should have the right to change any part of the plans during the progress of the work, and that the direction of the owner's superintendent of construction as to the time and manner of performing the work and precautions to be taken and the quality of the materials and workmanship should be followed,—was an independent contractor. *Miller v. Merritt*, 211 Pa. 127, 60 Atl. 508.

One who contracts to construct bridge abutments according to plans and specifications already prepared, for one who has taken the contract for the construction of the bridge, is an independent contractor for whose acts the employer is not responsible, although his agent exercises some kind of general supervision for the purpose of seeing that the work is done according to the contract. *Salliotte v. King Bridge Co.* 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378.

One contracting with a body corporate having charge of the public roads of a county, to repair a section thereof, furnishing all materials, work, and labor, and assuming all risk and liability for accident and damages to persons or property that may result from negligence in the prosecution of said work, subject to the supervision of the state engineer and inspector as required by law, is an independent contractor. *Symons v. Road Directors*, 105 Md. 254, 65 Atl. 1067.

One who undertakes to construct a sewer, employing and paying his own workmen, the municipality furnishing an inspector whose sole duty is to see that the tile are laid to a proper depth and in a proper manner after the trench is dug, no control being exercised in any way over the workmen or over the method used in digging, is an independent contractor. *Lenderink v. Rockford*, 135 Mich. 531, 98 N. W. 4.

One who entered into a contract with a city to construct a cement sidewalk and

certain other improvements, such contract containing stipulations that the work should be under the superintendence of the city engineer, that any order or directions given by him should be immediately obeyed, and that, if any person employed on the work should refuse to obey the directions of the city engineer or board of public works in anything relating to the work, or should appear to be incompetent, disorderly, or unfaithful, he should, upon requisition of the engineer, be at once discharged, was an independent contractor. *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136.

One undertaking to grade and repair a part of the roadbed for a railroad track, the railway company having no control of the means by which the work is to be accomplished, and having only a right of general supervision and inspection to see that the contract is properly performed, is an independent contractor. *Boyd v. Chicago & N. W. R. Co.* 217 Ill. 332, 108 Am. St. Rep. 353, 75 N. E. 496.

One who has undertaken to construct a railroad trestle in accordance with plans and specifications and to the satisfaction and acceptance of the chief engineer of the railroad, agreeing not to transfer or sublet any part of the work without written consent, and not to retain in his employ in the prosecution of the work any person or persons to whom the said chief engineer should object; the railroad having no authority or control as to the manner of performing the work, and having power to direct as to the results only,—is an independent contractor. *Omaha Bridge & Terminal Co. v. Hargadine*, 5 Neb. (Unof.) 418, 98 N. W. 1071; *Hargadine v. Omaha Bridge & Terminal Co.* 76 Neb. 729, 107 N. W. 864.

The relation of one undertaking certain work for a railroad, consisting of the reduction of grades and taking out curves on a section thereof, as an independent contractor, is not destroyed by provisions of the contract that the labor, teams, tools, engines, machinery, and materials are to be furnished, and the work to be done, to the satisfaction of the engineer of the railroad, according to plans and specifications fur-

Allen, 138, 81 Am. Dec. 694, a case in which the plaintiff's house had been injured by the falling thereon of that of the defendant while a carpenter was engaged in putting an additional story under the latter, pursuant to a contract specifying what was to be done and how: "The distinction on which all the cases turn is this: If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer, by which he has agreed to do the work on certain specified terms, in a particular manner, and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work

is parted with by the employer, and given to the contractor. But, on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation, or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient." The carpenter was held to be a contractor, not a servant, and right of recovery against the owner denied. In *Vogel v. New York*, 92 N. Y. 18, 44 Am. Rep. 349, Earl, J., said: "To make the city liable, it must have the power to direct and control the manner of performing the very work in which the carelessness occurred." See also *Kelly v. New York*, 11

nished; that said engineer shall have the right to make any alteration deemed necessary or desirable in the location, line, grade, plan, form, or dimensions of the work; that the engineer shall decide on the quality and quantity of the work done; that the contractors shall not let or transfer the contract, nor any part thereof, to any other person (except for the delivery of material) without written consent; that they will discharge any disorderly persons from employment when directed to do so by the engineer; and that whenever the contractors shall not prosecute the work with such a sufficient force as, in the opinion of the engineer, shall be necessary for its completion within the time specified, that the engineer in charge may proceed to employ such persons as he may deem proper for such wages as he may find it expedient to pay, and charge the amount so paid to the contractor; and that the railroad company shall furnish without charge necessary rails, switches, etc., for temporary track to be used in connection with steam shovel work. *Louisville & N. R. Co. v. Cheatham*, 118 Tenn. 160, 100 S. W. 902.

The fact that a construction company's trains were under the jurisdiction of the superintendent of the railroad company, and subject to the time card and rules and regulations of such company to the extent necessary to prevent conflict and confusion from the joint use by the two companies of the same tracks and yards, does not, as a matter of law, show that the construction company was not an independent contractor, for the negligence of a brakeman in whose employ the railroad would be liable, where it appeared that all the details of the prosecution of the work of construction were left to the full discretion of the construction company, that the superintendent could not say when the train should take out material, or when it should return to the material yards, or prohibit it from going or returning, or say how it should be handled, or who should handle it. *Kansas City, M. & O. Co. v. Loosley*, supra.

The owner of a dredging machine, who places it at the disposal of one who has 17 L.R.A. (N.S.)

undertaken the performance of a particular piece of work, the dredge to be paid for at a certain price per day, the contract to be terminated upon the dissatisfaction of the one hiring it, and the crew to be efficient and diligent, where the entire supervision of the crew is under control of the owner of the dredge, except as to the mere direction where the service is to be performed, is an independent contractor. *Teller v. Bay & River Dredging Co.* 151 Cal. 209, 12 L.R.A. (N.S.) 267, 90 Pac. 942.

A contract for the hiring, for a certain time at a certain price, of a team and carriage, which, by its terms, is one of bailment, is not converted into a contract of service, so as to render the owner liable for the acts of the hirer, by the facts that the contract provides for the rates to be charged upon subletting the outfit, limits the territory in which it can be used and the kind of work which can be done, and that the owner employs an agent to supervise this branch of his business, secure men to undertake the work, and make contracts with them, and enforce their terms and conditions, which may be done by cancellation of the contract. *McColligan v. Pennsylvania R. Co.* 214 Pa. 229, 6 L.R.A. (N.S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792.

No relation of master and servant is created by an agreement between the owner of cabs and horses whereby they are let to drivers for a specified rental, such drivers agreeing not to use the horses for more than a certain number of hours, to wear a particular uniform, to abstain from liquor, conform strictly to prescribed rates and other regulations, the agreement being subject to cancellation on violation of any of these conditions, there being no limitation upon the discretion of the driver as to the manner in which he shall use the property, and the fares earned belonging to him. *Connor v. Pennsylvania R. Co.* 24 Pa. Super. Ct. 241.

One engaged in operating a lath mill for a compensation proportioned to the quantity of lath produced, having the right to employ the persons needed to carry on the work, whose wages are paid by the owner

N. Y. 432, *Pack v. New York*, 8 N. Y. 222, and *Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262. In *Donovan v. Laing*, W. & D. Constr. Syndicate [1893] 1 Q. B. 629, Lord Esher said: "Whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Company, and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that em-

ployment." In *Johnston v. Hastie*, 30 U. C. Q. B. 232, a man having a contract to clear land at a certain price per acre put out fire, by direction of his employer, which spread onto the lands of the plaintiff, destroying his fences; and it was held that the man so employed was a mere servant, because his employer had the power of direction and control over him. For additional cases, see 16 Am. & Eng. Enc. Law, p. 187, note 6. And, if the right of control is in the employer, it is immaterial whether he actually exercises it. 16 Am. & Eng. Enc. Law, p. 188, and cases cited. Whether the premises are surrendered to the workman is regarded as important. *Mumby v. Bowden*, 25 Fla. 454, 6 So. 453; *Jefferson v. Jameson*, & M. Co. 165 Ill. 138, 46 N. E. 272. Nor is

out of such agreed compensation, the owner retaining control as to the manner and mode of doing the work and control over the workmen employed, is not an independent contractor. *Barclay v. Puget Sound Lumber Co.* (Wash.) 93 Pac. 430.

A firm undertaking to fill mattresses for a manufacturer with such material as shall be directed, the manufacturer furnishing the empty ticks and the material to be used, and paying such firm a fixed price for each mattress turned out which, on inspection, is found to be properly filled, such firm occupying and doing the work in a portion of the manufacturer's factory, and having the sole authority to hire and discharge employees in their work, and being subject to no control except that involved in the act of the manufacturer's foreman in delivering empty ticks and material with directions as to the material with which the ticks shall be filled, and examining the ticks when filled for the purpose of determining whether they shall be accepted or rejected, is an independent contractor, the contract looking to the result, and not to the means or methods employed. *Kelleher v. Schmitt & H. Mfg. Co.* 122 Iowa, 635, 98 N. W. 482.

A decorator employed to do certain work for a lump sum, furnishing all materials and tools and employing his own help, is an independent contractor, although his employer's representative directs him to work in this or that room for the purpose of preventing, as far as practicable, an interference with business. *Southwestern Teleg. & Teleph. Co. v. Paris*, 39 Tex. Civ. App. 424, 87 S. W. 724.

In *Northrup v. Hayward*, 99 Minn. 299, 109 N. W. 241, where there was conflicting testimony as to whether the owner of a building who had let the work of shingling, retained the right to direct and control the manner and method of doing the work, and did so, it was held that there was evidence, the character of which is not stated, sufficient to sustain a verdict against the owner.

Effect of reservation of full power of control.

One engaging to fill the approaches of a 17 L.R.A. (N.S.)

railroad bridge with material to be taken from cuts designated by the chief engineer of the railroad, for a specified sum per cubic yard, under the direction and to the satisfaction of the chief engineer of the company and his assistant, no plans and specifications being attached to the contract, and nothing in it indicating the condition to which the work was to be brought, and it being agreed that the contract might be terminated by said chief engineer whenever he should deem it for the best interests of the company so to terminate it, was not an independent contractor, but the servant of the railroad company. *Parrott v. Chicago G. W. R. Co.* 127 Iowa, 419, 103 N. W. 352.

Matters negating independence of contractor.

—effect of specific terms of contract.

A complaint alleging that one employed to break up machinery by the use and means of dynamite does not show that such a person was an independent contractor, the contract of the employment as disclosed by the complaint not looking merely to the result to be attained, but also to the means and method by which the work was to be done. *Falender v. Blackwell*, 39 Ind. App. 121, 79 N. E. 393.

—effect of direct evidence that employer exercised control over the work.

A ruling involving the determination that one who proposed to a committee having charge of the work of alterations in a church, to furnish a competent man to take charge, and men for the work, for certain sums per day, no specification being made as to what the work was, or how it should be done, or the time in which it should be completed; the evidence showing that the plans were not made in advance, but grew as time and work went on, and that the committee and their architect directed the work, was not an independent contractor,—was sustained in *Keyes v. Second Baptist Church*, 99 Me. 309, 59 Atl. 446.

A boss roller employing his own assistant

the manner in which the compensation is to be determined conclusive. If payment is made "by the job," it is evidence of an independent contract, but only a circumstance. 16 Am. & Eng. Enc. Law, p. 189, citing cases fully sustaining the text, and, among others, *Holmes v. Tennessee Coal, Iron & R. Co.* 49 La. Ann. 1465, 22 So. 403, in which a person employed by a coal company to unload its coal at a stipulated price per car load was held to be, not an independent contractor, but a servant of the company. How many conceivable instances of employment in which compensation is determined by the amount of work done, instead of by the time employed, are there? Hundreds of thousands of "piece workers" in factories, coal miners paid by the bushel, railway engineers

paid according to mileage, and thousands of others. If that made an employee an independent contractor, it would be possible for employers to farm out all their work, and with it their liability, by a very simple operation. Nor is it more than a mere circumstance, having more or less probative force, that the general employer has not, or has delegated, the power to hire and discharge the men. *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 380, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258.

These propositions are stated in *Shearman & Redfield on Negligence*, §§ 164-166, and fully discussed. They are fundamental, and application thereof to the facts in this case

roller and the roughers and heaters, the employer paying an agreed price per ton for finished work, of which sum he received a stated percentage out of which he paid his assistant and laboring men employed, the roughers and heaters receiving their percentage from the company, it being the duty of the company to furnish all the machinery and keep it in repair, such company exercising supervision of the work through a general superintendent, there being no definite time for the continuance of the work, which was entirely subject to the control of the company in that regard, the company having the power and authority to dismiss at any time the boss roller or any of his assistants, although the boss roller could discharge the men engaged by him and hire others at his pleasure, was not an independent contractor. *Andrews Bros. Co. v. Burns*, 22 Ohio. C. C. 437.

In *James McNeil & Bro. Co. v. Crucible Steel Co.* 207 Pa. 493, 56 Atl. 1067, it was held that repairs on boilers, made by a mechanic in the employ of an independent firm of boiler makers, who worked under the direction and supervision of the chief engineer of the owner, could not be said to have been made by an independent contractor.

—effect of character of stipulated work.

One whose contract to put in a skylight does not cover the removal of the *débris* occasioned by its construction is, if he removes such old material at the request, or in obedience to the directions, of the owner, the agent or employee of such owner, for whose negligence in such removal the owner is liable. *Swart v. Justh*, 24 App. D. C. 596.

—absence of regular vocation.

In *Mullich v. Brocker*, 119 Mo. App. 332, 97 S. W. 551, it is said: "We find no countenance for the proposition that a person not especially qualified for a particular service, but ready to undertake any job which may be offered to him that he thinks himself able to perform, becomes, when hired for some job, an independent contractor, 17 L.R.A. (N.S.)

simply because the employer relinquishes control over the work and trusts to the employee's discretion. It looks like the employee must have a calling in which it is fair to presume he has developed skill, before he will be regarded otherwise than as a servant. We do not say he must have a trade or profession,—be a skilled mechanic, doctor, or lawyer; but he must hold himself out as having an occupation with which he is familiar."

One who has no regular vocation, and who agrees to break in a pony for a stated sum, taking it out of the owner's stable during the daytime and returning it at night, is not, as a matter of law, an independent contractor. *Ibid*.

Nature of contract determined with reference to various factors.

—reservation of right to terminate contract of employment.

One who undertakes to remodel a building, raise the roof, and add another story under the direction and to the perfect satisfaction and approbation of the architect, under a contract containing the provision permitting the owner to terminate the employment and enter upon possession of the building upon the refusal or neglect of such contractor to supply a sufficiency of properly skilled workmen, or material of proper quality, or failure in the performance of any of the agreements contained in the contract, is an independent contractor. *Smith v. Humphreyville* (Tex. Civ. App.) 104 S. W. 495.

One engaging to fill the approaches of a railroad bridge with material to be taken from cuts designated by the chief engineer of the railroad, for a specified sum per cubic yard, under the direction and to the satisfaction of the chief engineer of the company and his assistant, no plans and specifications being attached to the contract, and nothing in it indicating the condition to which the work was to be brought, and it being agreed that the contract might be terminated by said chief engineer whenever he should deem

make Cowgill, plaintiff's employer, a servant of the railway company. That being so, what was the status of the plaintiff? As to the railway company a voluntary servant. "One who, without being requested or authorized by the master to do so, assists his servants to serve him, is deemed to be so far their fellow servant as to limit the liability of the master to him, even though he would not be regarded as a servant so far as to make the master liable to strangers for his negligence. This is so where such assistance is given at the request of the servants; and it can make no difference in his favor that the person rendering such assistance does so unasked, or even against the will of the master or of the servants, or both. In such case he may be a trespasser;

and, if so, he diminishes his right to recover for an injury received under such circumstances by his contributory fault. On the other hand, if his assistance is rendered at the request of the master or his authorized agent, he becomes for the time a servant in every legal sense, with the benefits as well as the burdens of that position." Shearm. & Redf. Neg. § 182. *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637, 48 Am. Rep. 689, is a good illustration of this. A Baltimore & Ohio Railroad Company servant called his son to his assistance in repairing a car, and, while doing so, the son was injured by servants of the Pennsylvania Railway Company in backing a train. The court said the son was a fellow servant of the father in the employment of the Baltimore

it for the best interests of the company so to terminate it, was not an independent contractor, but the servant of the railroad company. *Parrott v. Chicago G. W. R. Co.* supra.

—basis on which the compensation of the employee is calculated.

The fact that a teamster is employed at a certain rate per foot for hauling piles will not constitute him an independent contractor. *Macdonald v. O'Reilly*, 45 Or. 589, 78 Pac. 753.

—provisions in contract that employer shall be indemnified for all losses caused by the negligence of the person employed.

Provisions in a contract subletting construction work which the contractor has undertaken to perform for the construction company, placing the work under the supervision of the engineer of the construction company, who has power to discharge employees as the interests of the construction company demand, and to require the increase of the working force and direct its application, and requiring the contractor to furnish tools, and empowering him to suspend work and pay the employees as protection against liens, and requiring the subcontractor to save the contractor harmless from the claims of third persons,—do not create the relation of master and servant between the contractor and subcontractor, as distinguished from that of independent contractor. *Good v. Johnson*, 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439.

In *Kirby v. Lackawanna Steel Co.* 109 App. Div. 334, 95 N. Y. Supp. 833, the fact that the owner of a plant, contracting to operate the same for the following two years exclusively for the making of machinery for a certain company, agreed to assume all liability for personal injuries at the plant, and save such company harmless from such liability, such company, however, paying premiums on any insurance taken out to cover such risks, and both companies being named as the assured in such policies, was 17 L.R.A.(N.S.)

held not to affect the position of the owner as an independent contractor.

A company which agrees to become the general constructor and repairer for another company, and to assume all risks in reference thereto, is an independent contractor. *Munroe v. Fred T. Ley & Co.* 84 C. C. A. 278, 156 Fed. 468.

—the furnishing by the employer of the appliances or materials for the work.

Where one agreed to do a job of white-washing for a lump sum, the fact that his employer loaned him a scaffolding with which to do the work did not affect his status as an independent contractor. *Finkelstein v. Balkin*, 103 N. Y. Supp. 99.

One employed to do editorial work, agreeing to devote his whole time during his employer's regular office hours to work, for compensation based on the number of pages of his contributions accepted by the employer, who furnished him all materials and all the assistance for the performance of his work, and who was to be the sole owner of the copyrights thereon, although not a servant in the ordinary sense of the term, was not an independent contractor. *Edward Thompson Co. v. Clark*, 109 N. Y. Supp. 700.

One who undertakes to cut and load logs, the owner agreeing to furnish him a locomotive, logging cars, horses, harness, and such light rails as should be necessary, and to pay him a certain price per thousand for all timber logs, the contract providing that he shall have the full and complete control over the cutting and getting out of said timber, doing such work in a good and workmanlike manner, is, where such contract is made in good faith and not for the purpose of avoiding responsibility, an independent contractor. *Young v. Fosburg Lumber Co.* (N. C.) 60 S. E. 654.

No such relation exists between the owner of a sawmill and one engaged to move lumber from the mill to the yard and stack it for a stated sum per thousand feet, having the right to employ such help as he needs at such prices as he may choose to pay, the owner reserving and exercising the right to discharge any objectionable person whom he

& Ohio road, and was not a trespasser. That Knicely was paid by Cowgill makes no difference. The railway company contemplated the employment of assistants, and, when employed, they were rightfully on the premises, and rendering service to the company as if employed by it. As to it, they were voluntary servants, but servants nevertheless. In *Ewan v. Lippincott*, 47 N. J. L. 192, 54 Am. Rep. 148, the servant of a machinist had been injured by the servant of the owner of a mill on which the mechanic was working as the paid servant of the machinist. The court said: "The owner of the mill had the control of the workmen to the same degree that he would

have had over the masters of the workmen had they done the work personally. He had the power to direct the work in regard to the extent and character of the alterations and in respect to the time at which, and the circumstances under which, it was to be done. He had the power to change, terminate, or suspend the work at any moment. Had an injury resulted to a third person by reason of the negligent act of such workman while acting within the line of the employment for which Derby & Weatherby had been engaged, there could be no doubt that the defendant would have been liable to the injured person." Parallel cases are those of *Killea v. Faxon*, 125 Mass. 485;

may employ, such assistants being paid by the owner, and their pay deducted from the stipulated compensation, the owner owning and maintaining all the means for moving the lumber, except the labor, and directing how and when the work shall be done,—as will exempt the owner from liability for an injury to an assistant due to the condition of the appliances furnished, and not to any negligence on the part of such contractor. *Wm. Cameron & Co. v. Realmuto* (Tex. Civ. App.) 100 S. W. 194.

One who is employed to sell certain articles on commission, and who is furnished with certain sheets or cloths to be used as covering for his horses, which bear advertising matter, cannot be said, as a matter of law to be, so far as the use of the trappings for the horses is concerned, an independent contractor. *Drennon v. Patton-Worsham Drug Co.* (Tex. Civ. App.) 109 S. W. 218.

See also *Chute v. Moeser* (Kan.) 95 Pac. 398, and *Gay v. Roanoke R. & Lumber Co.* (N. C.) 62 S. E. 436, supra, sub. tit., Independence of contract usually inferable where for performance of entire piece of work at specified price; also *Andrews Bros. Co. v. Burns*, 22 Ohio C. C. 437, supra, subtit., Matters negating independence of contract.

—intimacy of business relations between contractor and employer.

Evidence that business relations between a company and a firm contracting to do its teaming were intimate, and that a member of the firm was employed as a salesman by the company, does not show that the employment of the firm by the company was a mere device to shift responsibility for the torts of the teamsters, it appearing that the firm did a separate and independent business of its own. *Chicago Hydraulic Press Brick Co. v. Campbell*, 116 Ill. App. 322.

The fact that a boss cartman under contract to do trucking for a firm, and who is at the same time engaged in similar work for other firms, owning his own wagons and teams and employing his own drivers, has a place of business on the premises of such firm, does not affect his relationship as an 17 L.R.A. (N.S.)

independent contractor. *Moore v. Stainton*. 80 App. Div. 295, 80 N. Y. Supp. 244 (Affirmed in 177 N. Y. 581, 69 N. E. 1127).

The facts that, subsequently to entering into a contract for the construction of a pipe line, the contractor becomes a stockholder in and officer of the company for which the work is to be done, and that the money with which the workmen are paid is received weekly by him from the company, where it is paid to him as money due to him on his contract, and not as money due the workmen for their wages, do not constitute his employees, employees of the company. *Cole v. Louisiana Gas. Co.* 121 La. 771, 46 So. 801.

Estoppel to deny existence of relation of independent contractor.

Paying employees of a subcontractor with its own checks, which show on their face that they are on account of the pay roll of the subcontractor; and the facts that a contractor runs a boarding house in which employees of the subcontractor are permitted to take their meals, and that some of the pay of such employees is applied toward the expense of a hospital maintained by the contractor for the benefit of all parties working on the job,—will not estop the contractor from asserting the relation of a subcontractor as an independent contractor, where there is nothing to show that the subcontractor's employee was misled thereby. *Good v. Johnson*, 38 Colo. 440, 8 L.R.A. (N.S.) 896, 88 Pac. 439.

Province of court and jury.

The relation created by a written contract between the parties thereto is exclusively a question for the court. *Good v. Johnson*, and *Young v. Fosberg Lumber Co.* supra; *Larson v. American Bridge Co.* 40 Wash. 224, 111 Am. St. Rep. 904, 82 Pac. 294.

Where there is no conflict in the evidence with respect to the terms of a contract, and such terms are not in any respect ambiguous or uncertain so as to require any fact to be established in order to determine its effect, the meaning and effect of the contract, and the relation of the parties to it thereby created, is a question of law, to be de-

Johnson v. Boston, 118 Mass. 114; Hasty v. Sears, 157 Mass. 123, 34 Am. St. Rep. 267, 31 N. E. 759; Saunders v. Coleridge (D. C.) 72 Fed. 676.

Having thus determined that the plaintiff was a servant of the defendant, we inquire whether he was a fellow servant with the switching crew. They were all engaged in the service of a common master, about the same business, and in such close proximity as to influence and conduct of, and be subject to injury by, one another. Under the rule prevailing throughout the country, and adopted in this state, were they not fellow servants? They are obviously within the rule prescribed in Jackson v. Norfolk

& W. R. Co. supra, for determining who are fellow servants. "Under the generally prevailing rule fellow servants are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that his negligence would probably expose them to the risk of injury." Shearm. & Redf. Neg. § 236. In Jackson v. Norfolk & W. R. Co. abundant authority showing different train crews on the same railroad are fellow servants is cited. How much closer is the relation of two sets of men handling freight on the same yard and from same cars in differ-

cided by the court. Green v. Soule, 145 Cal. 96, 78 Pac. 337.

The mere fact that a contract is verbal does not require the submission of the question of the relation of the parties to the jury, although the only evidence introduced as to the contract is the testimony of the contractor himself, where it is clear, unambiguous, and undisputed. Smith v. Humphreyville (Tex. Civ. App.) 104 S. W. 495.

Where a licensed expressman had undertaken to deliver goods for a certain amount per week, furnishing his own horse and wagon, and who was at liberty to determine the route he was to take, to do the work himself, or by employees selected by him, and who was free to do and did similar work for others, evidence that, while he was so engaged in delivering goods, his wagon had attached to it a sign bearing the name of the shop that sold the goods, and his declaration, immediately after the plaintiff was injured, that he was working for the owner of such shop, was insufficient to carry to the jury the question whether such expressman was the servant of the owner of the shop. Burns v. Michigan Paint Co. (Mich.) 16 L.R.A.(N.S.) 814, 116 N. W. 182.

Evidence that a firm was employed in repairing a railway roadbed under an oral agreement by which the firm agreed to do the work on a percentage basis, the company to pay the cost and to pay 10 per cent over the cost of material and labor, will warrant a jury in finding that, in the doing of the work, such firm was an independent contractor; and the direction of a verdict for defendant was held error. Norman v. Middlesex & S. Traction Co. 71 N. J. L. 652, 60 Atl. 936.

In Moore v. Stainton, supra, testimony that a boss cartman carried receipts in which the consignee receipted to a firm for which he did trucking, that a part of the shipping clerk's office of such firm was set apart for such cartman for the attendance on their business, and that a member of the firm testified that such cartman had to do the work not only to their satisfaction, but according to their direction, was held insufficient to carry the question of the liability of such firm for the negligence of a driver, 17 L.R.A.(N.S.)

to the jury, where it appeared that such boss cartman was at the same time engaged in similar work for others, employing his own subordinates, and subject to no directions except as to the destination of the goods.

Where, from the evidence, it is to be determined whether or not one is an independent contractor, and the evidence is so conflicting as to support a finding of the jury, then it is purely a question for their determination; but, if the evidence is without conflict, it then becomes a question of law as to whether or not an independent employment has been established. Anderson v. Tug River Coal & Coke Co. 59 W. Va. 301, 53 S. E. 713.

Although the owner's superintendent testified that the contract was to the effect that one engaged to do some excavating was to do the work on his own responsibility, being responsible only for its results, the submission to the jury of the question whether such person was an independent contractor was not erroneous, his credibility being within the province of the jury, especially where the contract as related by the witness was so incomplete—providing that the owner should furnish powder, tools, and helpers at his own expense without placing any limitation on the quantity of powder, character of the tools, the number of helpers, or the amount of their wages, and at the same time fixing the compensation at a lump sum—as to lead to the conclusion that it was a mere subterfuge to avoid liability, or an afterthought on the part of the witness. Johnson v. Great Northern Lumber Co. (Wash.) 93 Pac. 516.

In Decola v. Cowan, 102 Md. 551, 62 Atl. 1026, it was held that the question whether one employed by a principal contractor to lay bricks for so much per thousand, where no written or verbal contract was proven definitely giving such person complete control of the erection of the walls of the building and of the persons employed by him to do the bricklaying, and there was evidence that the principal contractor had nothing to do with laying the bricks, except to see that they were properly laid, was an independent contractor,—was for the jury.

ent capacities? Except in a few of the states in which the rule in force in this state is not recognized, common employment "includes all employed in the same factory, mill, shop, warehouse, or office, all employed in operating the same mine, whether above or below, all persons employed upon the trains, yards, stations, and depots of the same railroad, and certainly all co-operating in a single piece of work or the construction of a single thing, such as a building, no matter how different their special lines of work may be." *Shearm. & Redf. Neg. § 239*. At § 241 of the same work the following illustrations of nonliability are given: "For the negligence of a locomotive engineer or electric motorman causing injury to a conductor, brakeman, fireman, or other servant on the same train, or on any other train of the same master on the same road, or on a hand car, or employed in any capacity upon the track, or to a switch tender, a car coupler, a car repairer, a section boss, a yard master, a station agent, or a general superintendent. Nor is the common master liable for the negligence of a brakeman injuring a switchman, a car inspector, or car repairer, a station master, a train loader, or any servant on his train; nor for the negligence of a man watching the track injuring an engineer, fireman, or conductor of a train, a switchman or a laborer upon the track; nor for the negligence of a switchman injuring an engineer, a fireman, a flagman, car repairer, or train loader; nor for the negligence of a fireman on an engine injuring a brakeman or track repairer; nor for the negligence of a baggage master injuring a conductor; nor for that of a car repairer (otherwise than in omission to repair) injuring a yard master." An authority relied upon by the attorney for the defendant in error is 12 Am. & Eng. Enc. Law, 2d ed. p. 995, saying: "Servants of an independent contractor, and servants of the principal by whom the contractor is employed, are not fellow servants, although they may work side by side in a common employment, if they are not under the control of a common master." Cowgill having been a servant, this has no application. Another is *Dixon v. Chicago & A. R. Co.* 109 Mo. 413, 18 L.R.A. 792, 19 S. W. 412. That case arose under the "department rule" of fellow servancy, overthrown in this state by the decision in *Jackson v. Norfolk & W. R. Co.* cited. It is not law in this state. The *Jackson Case* says: "A master's liability to one servant for the negligence of another is not dependent on the grade of the servants, nor on the fact that one has authority over the other, but on the character of the negligent act." For a clear statement of the dis-

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inction between that rule and ours, see *Shearm. & Redf. Neg. §§ 238, 239*.

We are not called upon to say whether the evidence should have been excluded on the ground of variance, because it shows the injury to have been inflicted in a manner somewhat different from that stated in the declaration. This difference relates to mere matter of detail. The declaration says the collision caused lumber to be thrown on the plaintiff, while the proof is that it caused him to fall from the car. There are other general averments of negligence. This is mere erroneous matter of specification, and the variance, if any, is immaterial. *Hanley v. West Virginia, C. & P. R. Co.* 59 W. Va. 419, 53 S. E. 625, and cases there cited. For the position of the attorneys for plaintiff in error *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825, is cited; but it was radically different from the present case in this: That it charged negligence at a particular time, and the court gave instructions authorizing the jury to find the defendant guilty of negligence at a different time.

For the reasons stated, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

Petition for rehearing denied June 10, 1908.

WASHINGTON SUPREME COURT.

CLARENCE E. WILLIAMS, Respt.,
v.

ELBERT PEDERSEN, Appt.,
and

CHARLES F. HANSEN, Respt.

(47 Wash. 472, 92 Pac. 287.)

Partnership — inequality of services.

One member of a partnership which conducted a logging business is not, in the absence of an agreement to that effect, entitled to a greater share of the partnership earnings than the other by reason of the fact that the latter was frequently away from the field of operations, and, in consequence, the former did the greater amount of the work in connection with the firm's business.

(November 5, 1907.)

APPEAL by defendant Pedersen from a judgment of the Superior Court for Pacific County in favor of plaintiff in an action for the dissolution of a copartnership and an accounting. Affirmed.

The facts are stated in the opinion.

Mr. W. H. Abel for appellant.

Messrs. Welsh & Welsh, for respondent:

In the absence of a specific agreement to that effect, one copartner is not entitled to compensation for services rendered for the partnership in an amount greater than his copartner, or by reason of being more active in the management of the business than his copartner. It is the duty of each partner to devote his time and attention to the partnership business, and, if he fails to do this, his copartners have their remedy, which is an action for dissolution.

Wisner v. Field, 11 N. D. 257, 91 N. W. 67; Evans v. Warner, 20 App. Div. 230, 47 N. Y. Supp. 16; Smith v. Brown, 44 W. Va. 342, 30 S. E. 160; Scott v. Boyd, 101 Va. 28, 42 S. E. 918; Lamb v. Wilson, 3 Neb. (Unof.) 505, 97 N. W. 325; Whitney

v. Whitney, 27 Ky. L. Rep. 1197, 88 S. W. 311; Anderson v. Taylor, 37 N. C. (2 Ired. Eq.) 420, 38 Am. Dec. 689; Reybold v. Jefferson, 1 Harr. (Del.) 401, 26 Am. Dec. 401; Maynard v. Richards, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138; Parsons, Partn. § 155; Heckard v. Fay, 57 Ill. App. 20; Cook v. Phillips, 16 Ill. App. 446; Lee v. Lashbrooke, 8 Dana, 214; Mills v. Fellows, 30 La. Ann. 824; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Reily v. Russell, 34 Mo. 524; Coddington v. Idell, 29 N. J. Eq. 504.

Hadley, Ch. J., delivered the opinion of the court:

This is an action between partners for

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 1. Express contract, 409.
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I. Scope.

This note is limited to a consideration of the right of a partner to compensation for services rendered by him to the partnership. Cases involving a claim to compensation for services rendered by one of several persons associated together in a joint undertaking have been excluded where the relation between them was other than that of partnership, except where the parties, at the time the services were rendered, contemplated the formation of a partnership, or had made an inchoate agreement to form one.

The limits thus set obviously exclude those cases where the controversy is simply as to the proportionate interest of the members of the partnership in the profits of the busi-

ness, when not awarded as compensation for services; nor have cases been taken which involve merely the right of the partnership to share in the profits derived by a partner from a separate business, or from services individually rendered by him to a third person.

Nor are questions of remedy, such as the necessity of an accounting as a preliminary to the right to recover compensation, within the scope of the note.

II. Right to compensation.

a. General rule.

The general rule is that a partner is not entitled to any compensation for services rendered by him to the copartnership. Nevills v. Moore Min. Co. 135 Cal. 561, 67 Pac. 1054; Osment v. McElrath, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731; Wisner v. Field, 11 N. D. 257, 91 N. W. 67; Younglove v. Liebhardt, 13 Neb. 557, 14 N. W. 526; Hellman v. Mendel, 6 Ohio Dec. Reprint, 829; Drew v. Ferson, 22 Wis. 651.

Thus, a person is not entitled to compensation for pasturing stock owned by himself and another as copartners. Nodine v. Shirley, 24 Or. 250, 33 Pac. 379.

And a partner is not entitled to claim compensation for personal services rendered in the defense of a suit against the firm, which it was as much his duty to look after as it was that of the other partner. Drew v. Ferson, supra.

A partner required by the articles of copartnership to allow a specified sum out of his share of the dividend on the final settlement unless he furnishes labor to that amount at his own expense is not entitled to share in such allowance as a partner, since he might as well charge for the labor if he rendered it. Frederick v. Cooper, 3 Iowa, 171.

The rule denying compensation to a partner is broad enough to include a husband who represents his wife in the business of a firm in which she is a partner, and obliged by the articles of copartnership to employ a suitable person to aid in carrying on the

an accounting, settlement, and dissolution. The partners conducted a logging business upon the Nema river in Pacific county, Washington. The partnership at first consisted of the plaintiff, Williams, and the defendants Pedersen and Hansen. After the firm business had continued a few weeks, Hansen dropped out, and it is conceded that thenceforward he was not of the firm, and that during the time he was with them the partnership, composed of the three, cut and placed in the river 78,000 feet of logs, one third of the net proceeds of which each of the three partners is entitled to receive. After Hansen left, Williams and Pedersen continued operations as a firm. The court found that they cut 330,800 feet board measure of saw logs, and that of the net proceeds

from the last-mentioned logs each of the two last-named partners is entitled to receive one half. It is conceded that Hansen received his share of the proceeds from the first-mentioned lot of logs, and that he is not entitled to any share in the proceeds from the logs cut after he left. Pedersen was to receive \$1 per 1,000 stumpage for the logs cut. The logs were sold to the Day Lumber Company, and Pedersen collected the proceeds of the sales, with the exception of \$140 collected by Williams. The court found that Williams had also received in other ways the further sum of \$107.50, making in all \$247.50 received by him. After allowing Pedersen for stumpage, towage, and expenses, the court found that there is a balance in his hands belonging to Wil-

business of the firm; and he is not entitled to recover for services performed, any more than the wife would have been if she had in person assumed the management of the firm's business. *Dupuy v. Sheak*, 57 Iowa, 361, 10 N. W. 731.

An ampler statement of the rule is that one partner is not entitled to compensation for his services while employed in the partnership business, in the absence of an agreement to that effect. *Glover v. Hembree*, 82 Ala. 324, 8 So. 251; *Haller v. Wilamowicz*, 23 Ark. 506; *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850, affirming 24 Ill. App. 656; *Brownell v. Steere*, 128 Ill. 209, 21 N. E. 3, affirming 29 Ill. App. 359; *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138, affirming 61 Ill. App. 336; *Street v. Thompson*, 229 Ill. 613, 82 N. E. 367; *Gerard v. Gateau*, 15 Ill. App. 520; *Cook v. Phillips*, 16 Ill. App. 446; *Lassiter v. Jackman*, 88 Ind. 118; *Young v. Seoville*, 99 Iowa, 177, 68 N. W. 670; *Boyd v. Tabb*, 5 Ky. L. Rep. 516; *Glenn v. Sims*, 5 Ky. L. Rep. 775; *McBride v. Stradley*, 103 Ind. 465, 2 N. E. 358; *Sims v. Banta*, 9 Ky. L. Rep. 286; *Herndon v. Terrell*, 12 Ky. L. Rep. 96; *Hayden v. Crouch*, 12 Ky. L. Rep. 893; *Tilford v. Forsythe*, 14 Ky. L. Rep. 335; *Whitney v. Whitney*, 27 Ky. L. Rep. 1197, 88 S. W. 311; *Caldwell v. Lang*, 31 Ky. L. Rep. 237, 101 S. W. 972; *Hill v. Matta*, 12 La. Ann. 179; *Smith v. Smith*, 51 La. Ann. 72, 24 So. 618; *Bevans v. Sullivan*, 4 Gill, 383; *Randle v. Richardson*, 53 Miss. 176; *Frank v. Webb*, 67 Miss. 462, 6 So. 620; *Cramer v. Bachmann*, 68 Mo. 313; *Gaston v. Kellogg*, 91 Mo. 104, 3 S. W. 589; *Coddington v. Idell*, 29 N. J. Eq. 504; *Caldwell v. Leiber*, 7 Paige, 483; *Eckert v. Clark*, 14 Misc. 18, 35 N. Y. Supp. 118; *Cameron v. Francisco*, 26 Ohio St. 190; *Myers v. Kirby*, 9 Ohio Dec. Reprint, 297; *Marsh's Appeal*, 69 Pa. 30, 8 Am. Rep. 206; *Piper v. Smith*, 1 Head, 93; *Berry v. Jones*, 11 Heisk. 206, 27 Am. Rep. 742; *Hooker v. Williamson*, 60 Tex. 526; *Stebbins v. Willard*, 53 Vt. 665; *Forrer v. Forrer*, 29 Gratt. 134; *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918; *Roots v. Mason City Salt & Min. Co.* 27 W. Va. 483; *Emerson v. Durand*, 64 Wis. 111, 17 L.R.A. (N.S.)

54 Am. Rep. 593, 24 N. W. 129; *Lyman v. Lyman*, 2 Paine, 11, Fed. Cas. No. 8,628.

Thus, the devotion of time to the business by a partner cannot be made the basis of compensation in the absence of an express contract to that effect. *Thompson v. Noble*, 108 Mich. 19, 65 N. W. 503.

A member of a partnership, both of the members of which devote their time, services, and teams to the work, is not entitled to compensation for his services and those of his teams, where there was no agreement between the partners that these matters were to be charged. *Bowen v. Day*, 71 S. C. 492, 51 S. E. 274.

Neither one of two partners working a farm in common is entitled to change the other or the partnership for his labor, care, and diligence in attending to the partnership business, there being no proof of any special agreement among the partners entitling either party to such compensation. *Roach v. Perry*, 16 Ill. 37.

A partnership is, by law, and in the absence of a provision to the contrary, presumed to be equal, and from this it follows that, without special agreement, a partner is not entitled to other remuneration for his services than that derived from his share of the profits.

So, it has been held that a partner is not entitled to claim compensation for keeping the books of the concern, in the absence of an express agreement. *Mills v. Fellows*, 30 La. Ann. 824.

In the absence of any evidence of a contract to the contrary, the legal presumption is that each copartner is entitled to an equal share of the profits of the joint concern, and that each is to contribute whatever of personal services and proper assistance he reasonably can, to sustain and promote the business of the partnership. In such a case, it is the general rule, as fixed as it is just, that neither of the partners will be entitled to compensation from the others for any services voluntarily rendered by him in the firm business. To bring a case within any exception from this general rule, resulting from the nature and objects of general partnership, and the implied un-

liams as follows: From the Pedersen, Hansen, and Williams logs, \$114.92; and from the Pedersen and Williams logs \$425.76; in all the sum of \$540.68. Judgment was entered in favor of Williams against Pedersen for the last-named sum and for the dissolution of the partnership. Pedersen has appealed.

It is contended that the court erred in its findings. This contention arises chiefly from appellant's claim that respondent was away much of the time while the Pedersen and Williams logs were being cut, and appellant urges that respondent is not entitled to share in logs cut while he was away. The evidence sharply conflicts as to the amount of time respondent was absent in person. His testimony was to the effect that he was there

practically all the time, and that when he was away his brother worked in his place. Nothing in the record indicates that the court should not have accepted respondent's testimony as true, and, if true, he reasonably did his share of the work, or caused it to be done. The partnership had not been dissolved, and its work continued, even under appellant's theory, at such times as respondent was present and assisted therein. Appellant seems, however, to adopt the view that the partnership work was so intermittently done that it ceased when respondent was away, and that appellant then cut logs at the same place on his own account, and not that of the partnership. We think the evidence does not justify the appellant's position. The partnership undertook to cut

understanding of the copartners, there must be either a special agreement, or some other special and peculiar state of facts. *Lee v. Lashbrooke*, 8 Dana, 214.

In the absence of a stipulation to that effect, a partner is not entitled to compensation for any services in conducting the trade, beyond his share of the profits. *Anderson v. Taylor*, 37 N. C. (2 Ired. Eq.) 420, 38 Am. Dec. 689.

And a partner entitled to a coequal share of the profits of the joint concern is not entitled to an allowance for extra services, where he did no more than was expected when the partnership commenced, and there has not been any unusual or unexpected change in the condition or attitude of any of the partners since that time, by contract or otherwise. *Lee v. Lashbrooke*, supra.

The privilege of profit sharing imposes upon a partner the duty of devoting his best efforts to the partnership business without other remuneration, in the absence of a stipulation therefor.

It is an elementary proposition in the law of partnership that, in the absence of an agreement to the contrary, each member of the firm assumes the duty of giving to its business all of his time, skill, and ability, so far, at least, as the same is reasonably necessary to the success of the common enterprise; and for this service a share of the profits is his only compensation. *Roth v. Boies* (Iowa) 115 N. W. 930.

The general rule has been stated in different cases in slightly varying language, but the holdings in final analysis amount to the same thing.

Thus, it is the duty of a partner to devote his services to the business of the firm without compensation, except such as arises from the profits, unless there is some stipulation to the contrary. *McBride v. Stradley*, supra.

A partner is bound to use his best efforts and judgment in promoting the common enterprise without further compensation than his share in the profits, in the absence of any agreement to the contrary. *Heath v. Waters*, 40 Mich. 457.

One of several persons engaged in the 17 L.R.A. (N.S.)

operation of a grain elevator on joint account is not entitled to salary or personal compensation for his time or services, which were, by the terms of the contract between the parties, to be employed in the enterprise. *Warren v. Raben*, 33 Neb. 380, 50 N. W. 257. The court observed: His compensation was to be found in the account of the net profits and commissions.

Concerning share of profits to partner acting as executor, see *Allen's Appeal*, infra, II., g, 2.

As to compensation dependent on profits, see *Dumont v. Ruepprecht*; *Bonis v. Louvrier*; *Bradley v. Chamberlin*; *Hasbrouck v. Childs*; *Luce v. Hartshorn*,—infra, II., h, 1.

As a general rule, during the existence of a partnership, it is the duty of each partner to devote himself to the interests of the concern, and promote, by his labor and skill, the common benefit of the partnership without any reward or compensation, unless there is an express stipulation to that effect. *Griggs v. Clark*, 23 Cal. 427.

In general partnerships, where there is no special agreement as to the services to be rendered by the partners respectively, the presumption is that each is to do what he can for the common benefit, and no one of several partners is entitled to compensation for services to the firm without a special agreement. *Boyd v. Tabb*, 5 Ky. L. Rep. 516.

As there is an implied obligation on every partner to exercise due diligence and skill, and to devote his services and labor for the promotion of the common benefit of the concern, it follows that he must do it without any reward or compensation, unless there is an express stipulation for compensation. *Denver v. Roane*, 99 U. S. 358, 25 L. ed. 477; *Gerard v. Gateau*, 15 Ill. App. 520; *King v. Hamilton*, 16 Ill. 190; *Askew v. Springer*, 111 Ill. 662; *Zimmerman v. Huber*, 29 Ala. 379.

Neither member of a partnership engaged in the operation of a sawmill is entitled to charge for his time or skill devoted to the business of the firm, where no agreement was made that there should be any such

the timber, and there had been no agreed cessation of its work as such. The partnership operations therefore continued, although respondent was for a time away from the work. Even if it be true that appellant did the greater amount of work about the firm's business, still no agreement between the partners is shown that one was to receive a greater share of the partnership earnings for his services by reason of the absence of the other. In the absence of such an agreement, one partner is not entitled to recover from the other by reason of inequality of services. In *Wisner v. Field*, 11 N. D. 257, 91 N. W. 67, the court said: "We find no case in which it has been held that a mere inequality of services by partners is alone ground for compensating the one doing the greater part of the work, in the absence of an agreement, express or implied." See also *Smith v. Brown*, 44 W.

Va. 342, 30 S. E. 160; *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918; *Lamb v. Wilson*, 3 Neb. (Unof.) 505, 97 N. W. 325; *Whitney v. Whitney*, 27 Ky. L. Rep. 1197, 88 S. W. 311; *Mills v. Fellows*, 30 La. Ann. 824; *Coddington v. Idell*, 29 N. J. Eq. 504; *Major v. Todd*, 84 Mich. 85, 47 N. W. 841; *Reily v. Russell*, 34 Mo. 524.

There are instances where the course of dealing of the partners is such, and also where the services rendered are of such an extraordinary character, that the law implies a contract to pay one partner for extra services; but such facts are not established by the evidence here. The findings are sustained by the evidence in the record, and we see no reason for disturbing them.

The judgment is affirmed.

Fullerton, Rudkin, Crow, Foot, Dunbar, and Mount, JJ., concur.

charges, and since, according to the law governing partnerships, the presumption is that each is required to use his skill, time, and labor for the promotion of the interests of the firm, unless it is otherwise provided by agreement of the parties. *Ligare v. Peacock*, 109 Ill. 94.

A partner rendering services to the partnership in the discharge of his duty as a partner is not entitled to compensation, for while he is taking care of the joint property he is also attending to his own interest, performing duties implied in, and constituting a part, at least, of, the consideration for the others to engage in the partnership. *Levi v. Karriek*, 13 Iowa. 344.

Neither partner is entitled to payment for personal services unless by express agreement. The partners are presumed to have worked for their own as well as the common interest, and not at the expense of the firm. *Tucker v. Judd*, 3 Haw. 180.

A partner in a military bounty-brokerage business, appointed to represent the interest of himself and his copartners in necessary litigation to compel the payment by a city of certificates issued by it in consideration of enlistments in the Federal Army, is not entitled, as against his copartners, to claim compensation for his services in the absence of an agreement therefor. *Coddington v. Idell*, 29 N. J. Eq. 504. The court observes: He was, of course, acting in his own interest as well as theirs.

A partner authorized by the terms of the partnership agreement to draw a specified sum weekly out of the profits is not entitled to compensation for his services as a partner, on the principle of *quantum meruit*, in the absence of a specific agreement. *Delp v. Edlis*, 190 Pa. 25, 42 Atl. 462. The court cited *Lindsey v. Stranahan*, 129 Pa. 635, 18 Atl. 524, in which it is said: "The reason is that the partner is attending to his own affairs."

One who acts as secretary and treasurer of an unincorporated company organized for 17 L.R.A. (N.S.)

the purpose of trading in lands is not entitled to compensation for services performed by him, although his duties were somewhat onerous, where no fixed compensation was ever voted him by the board of directors, since the members of such a company are partners to the world, and his rights are governed by the well-settled principle that, in the absence of an agreement between the partners, neither is entitled to compensation for services performed in furtherance of the partnership interests as connected with the business of the firm. *Re Fry*, 4 Phila. 129. The court observed: What each partner does for himself, he does for others associated with him.

As to implied agreement for compensation to partner trading in lands, see *Sheridan v. Healy and Wisner v. Field* infra, II., h, 2.

Concerning waiver of compensation, see *Askew v. Springer*, infra, II., j.

Joint owners or partners of a ship or cargo are not entitled to charge each other for services rendered in the care and maintenance of the joint property, unless there is a special agreement for that purpose. *Franklin v. Robinson*, 1 Johns. Ch. 157.

The same rule applies to mining as to other partnership contracts. Thus, a partner and owner in common of an interest in mining property is not entitled to receive compensation for services rendered by him in and about the mine, in the absence of a special agreement to that effect. *Galigher v. Lockhart*, 11 Mont. 109, 27 Pac. 446.

So, a partner in a mining enterprise is not entitled to a commission for selling silver bullion produced by the firm, in the absence of an express agreement providing therefor. *Salomon v. Shinner*, 5 N. Y. Week. Dig. 491.

As to compensation for services rendered mining partnership, see *Peck v. Alexander*, infra, II., d, 2; *Weaver v. Upton and Galigher v. Lockhart*, infra, II., h, 1.

Concerning implied agreement for compen-

sation, see *Gaston v. Kellogg*; *Mackey v. Magnon*; *Levi v. Karrick*; *Mann v. Flanagan*,—*infra*, II., h. 2.

One partner cannot charge the other partner for services rendered in the business of copartnership, unless there is an express agreement to that effect, or where such an agreement may be implied from the course of business between the partners, or from the nature of the services performed, being such as are not usual for one partner to render without receiving a compensation therefor. *Emerson v. Durand*, 64 Wis. 111, 54 Am. Rep. 593, 24 N. W. 129; *Young v. Scoville*, 99 Iowa, 177, 68 N. W. 670; *Marsh's Appeal*, 69 Pa. 30, 8 Am. Rep. 206; *Whitney v. Whitney*, 27 Ky. L. Rep. 1197, 88 S. W. 311; *Caldwell v. Leiber*, 7 Paige, 483; *Caldwell v. Lang*, 31 Kv. L. Rep. 237, 101 S. W. 972; *Gaston v. Kellogg*, 91 Mo. 104, 3 S. W. 589; *Haller v. Willamowicz*, 23 Ark. 566.

Persons generally engaged in carrying on the lumber business are not entitled to charge, as against each other, commissions for making collections on account of the joint business, where the relation existing between the parties, if not that of partnership, was one not in any manner implying such liability, and no express contract to that effect is shown. *Hopkins Mfg. Co. v. Ruggles*, 51 Mich. 474, 16 N. W. 862.

A member of a partnership engaged in the operation of a flouring mill is not entitled to compensation for his services at the mill, in the absence of an agreement that he should be paid for services, or of facts authorizing the presumption that compensation was contemplated by the parties. *Chamberlain v. Sawyers*, 17 Ky. L. Rep. 716, 32 S. W. 475.

A partner bound to attend personally to the business of the firm by the articles of copartnership, which did not provide for compensation, is not entitled to receive remuneration for doing that which he agreed to perform, and which it was his duty, as partner, to transact. *Buford v. Neely*, 17 N. C. (2 Dev. Eq.) 481.

So, a partner is not entitled to compensation for services alleged to have been rendered in the care, management, and development of the interest of a copartnership in the firm, where the claim for compensation is not founded upon any promise, express or implied, and the terms of the partnership agreement required each of the partners to devote all his time to the business of the firm without compensation, save his share of the earnings of the firm. *Eckert v. Clark*, 14 Misc. 18, 35 N. Y. Supp. 118.

The rule that a partner is not entitled to compensation for services rendered by him in behalf of the firm does not prevail when there is an agreement for such compensation, either express, or which may be fairly implied from the acts of the partners or from their course of dealing with each other in the conduct of the business, or from the circumstances under which extra services are rendered by a partner, for which compensation is claimed. *Adams v. Warren* (Ala.) 11 So. 754, 17 L.R.A. (N.S.)

Not only by express contract may all the parties to a partnership agree that a partner may receive compensation for such services as he may render, but the law will imply an agreement to compensate him under certain circumstances. *Nevills v. Moore* Min. Co. 135 Cal. 561, 67 Pac. 1054.

That partners whose interest in the partnership is not publicly known procured large orders for the firm which they might have filled themselves from a similar business which they were conducting as ostensible competitors does not entitle them to remuneration therefor, in the absence of express agreement, or the existence of circumstances from which such agreement may be implied. *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243.

The rule is well settled that, unless the partnership agreement provides otherwise, it is the duty of each partner to devote his time and endeavors to the business and interests of the firm, and neither of them is entitled to remuneration for so doing. *Adams v. Warren*, *supra*.

A member of a copartnership formed for the purpose of buying and selling cattle, but who contributed no capital to the enterprise, is not entitled to an allowance for his time, efforts, and skill in the management of the business of the firm, unless compensation is provided for by the partnership articles. *Hanks v. Baber*, 53 Ill. 292.

The general rule is stated in *Barber v. Murphy*, 23 Ky. L. Rep. 286, 62 S. W. 894, to be that neither partner is entitled to compensation for his services unless the articles so provide.

And in *O'Brien v. Hanley*, 86 Ill. 278, it is said that a partner is not entitled to compensation for his services in and about the partnership business in the absence of an express stipulation to that effect in the articles of copartnership. But this statement of the rule is too narrow, since it is everywhere asserted that the right of a partner to remuneration for services rendered to the partnership may rest upon a special agreement therefor, or upon circumstances from which such an agreement may be implied.

b. Services rendered before or in anticipation of partnership.

It seems that one who performs services in anticipation of a contemplated partnership may recover therefor in the event of an express agreement, or of the existence of circumstances from which an agreement for compensation may be implied.

Thus, a stone mason who performs labor in the construction of a lime kiln, as a preliminary to and for the purpose of launching a partnership in the business of burning lime, in which he was to have an interest, is entitled to recover, in an action at law, the amount which it was agreed that he should receive, less that part of it which he agreed to contribute to the undertaking. *Waugh v. Eden*, 12 Colo. App. 158, 54 Pac. 853. The court did not view the services rendered as forming part of a partnership

transaction, but as labor performed under an agreement upon which an action at law would lie.

And it is said that one who renders services to another in anticipation of the formation of a partnership with him, the articles of agreement for which were never executed, may claim compensation for his services on the footing of a *quantum meruit*. *Lane v. Roche, Riley, Eq. 215.*

The rule that one partner in a joint adventure cannot charge a compensation for his services in the joint business is not applicable where parties desirous of obtaining and working a gold-mining property appointed another their agent to investigate mines, and agreed to pay his expenses; and further provided that the question of his salary should be left open, to be decided upon when the mill and property chosen should be placed in working order. *Duff v. Maguire, 107 Mass. 87.* In this case the associates in the enterprise had not become partners when they deputed one of their number to act as their agent in obtaining the information upon which they subsequently acted. It was considered that payment of compensation ought to be necessarily and equitably implied under such a special arrangement, just as if they had employed a stranger.

As to agency of partner, see *Phillips v. Turner; Bradford v. Kimberly; Butner v. Lemly, —infra, II., c.*

Compensation has also been awarded a prospective partner for services rendered by him, where he was subsequently excluded from the partnership.

Thus, one who purchases a half interest in a private school, and expends money in advertising, and renders services in the school on the faith of the anticipated partnership, is entitled, after his exclusion from the school by his copartner, to recover the purchase money paid by him, but is not entitled to an allowance for his services and expenditures. *White v. Rodemann, 44 App. Div. 503, 60 N. Y. Supp. 971.*

One who enters into business with others with the expectation of becoming a partner, and with the promise on their part that he shall be a partner, but is unceremoniously ejected by them after their refusal any longer to treat him as a partner, is entitled to compensation for services. *Williams v. McKee, 13 Ky. L. Rep. 143.*

As to exclusion from partnership, see *Hannaman v. Karrick, infra, II., d. 2; Frazier v. Frazier, infra, II., g. 2.*

But one who assumes the attitude of a partner in the operation of a grist mill and cotton gin, and accepts his share of the profits of the business, is not entitled to recover for services rendered by him to the firm, although when he entered into the partnership he expected to become part owner of the machinery by which the business was conducted, but failed to do so because of inability to agree with his copartner as to the details of the transaction. *Gullich v. Alford, 61 Miss. 224.*

Nor is one who, before the formation of a

partnership with another, rendered valuable services of which the firm, when formed, took advantage, entitled, upon dissolution of the firm, to compensation therefor, in the absence of any agreement to that effect. *Dunlap v. Watson, 124 Mass. 305.* The reason given for this rule is that the previous services rendered by the partner may have induced his copartner to join in the undertaking.

c. Services rendered in other capacity than that of partner.

The rule of law which denies compensation to a partner for skill and labor in the promotion of the common objects of the partnership, in the absence of a stipulation therefor, has several well-defined exceptions growing out of the rendition by a partner of beneficial services not required of him in fulfillment of the duties which the partnership relation imposes, but performed outside of that relation and in another capacity than that of a partner.

Thus, a member of a partnership which purchased land for the purpose of raising poultry, and who, in addition to managing the poultry business, performed a great deal of work in clearing and grubbing the land, which was covered with timber and undergrowth, is entitled to compensation for work done which enhanced the value of the land. *Stone v. Fowlkes, 29 App. D. C. 379.*

A partner may be engaged by his copartners to perform clerical services in carrying on the business of the firm, and is, of course, entitled to receive the compensation agreed upon therefor.

Thus, a partner in a business venture involving the purchase and development of gypsum beds and the operation of a plaster mill, who, it was agreed by the other partner, should be steadily employed and paid, and who was actually employed for a series of years as a general clerk in performing duties which were not such as a partner would have been expected to perform as such, rather than any other person, is entitled, beyond his share of the profits, to receive clerk's wages, where the other partners were engaged in other pursuits, and did not make the business their personal charge. *Godfrey v. White, 43 Mich. 171, 5 N. W. 243.*

A fortiori, the rule that one partner cannot recover for services rendered for the firm in the absence of an agreement that compensation is to be made therefor does not apply to services performed under a written contract for a stipulated sum per month, and which did not relate to the partnership business. *Lell v. Hardesty, 23 Ky. L. Rep. 2073, 66 S. W. 643.*

There can be no doubt that an individual may employ his copartner to do work for him outside of and independent of the copartnership, and become personally liable therefor.

So, the fact that an attorney was in partnership with another attorney, who acted as executor of an estate, does not necessarily

preclude him from recovering compensation for services rendered to the estate, and which he was requested to perform by his copartner. *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046, reversing 12 Misc. 510, 33 N. Y. Supp. 676, which held that a partner in a law firm will be held to have performed services rendered by him for an estate as a copartner, rather than upon an implied promise of his copartner, as executor of the estate, to pay him therefor, where the work done was treated as firm business, and money received from the estate was entered upon the firm books and divided between the partners.

If a partner is appointed an agent for a special purpose, he may be entitled, as against the firm, to the usual compensation in relation to the subject of such agency. *Phillips v. Turner*, 22 N. C. (2 Dev. & B. Eq.) 123.

In *Bradford v. Kimberly*, 3 Johns. Ch. 431, it was held that, where several joint owners of a cargo appoint two of the part owners their agents to receive and sell the cargo and distribute the proceeds, these latter are entitled, under such special agency, to a commission or compensation for their services as factors or agents, in the same manner as a stranger. The ground upon which this decision was based is that this special agency was altogether distinct from their ordinary powers as part owners, and the persons so appointed were to be considered, for this purpose, as agents of the company. In such case a compensation is necessarily and equitably implied in and by virtue of the special agreement.

A member of a partnership engaged in the purchase and sale of land for their joint benefit is not entitled to compensation for buying and selling land for the firm, in the absence of an agreement therefor, or of proof that he was appointed a special agent to manage the business, in which capacity only he could have claimed a salary or wages beyond his necessary expenses and disbursements in relation to it. *Butner v. Lemly*, 58 N. C. (5 Jones, Eq.) 148.

As to agency of partner, see *Duff v. Maguire*, supra, II., b.

A partner skilled in the repairing and fitting of mills and machinery, and in superintending their operation, is not entitled to compensation for services of that nature, rendered to the partnership, in the absence of an agreement or understanding that he should receive pay therefor, or when the services were not rendered by him in any other relation than that of a copartner. *Cunliff v. Dyerville Mfg. Co.* 7 R. I. 325.

Partners exempted by the terms of partnership from rendering services to the firm may demand pay for services rendered. *King v. Hamilton*, 16 Ill. 190.

One who agrees, in lieu of his services, to furnish a foundry and machine shop, free of charge, for the manufacture of patented articles in which a partnership of which he is a member intends to deal, is entitled to compensation for services rendered the firm at its request, in taking orders and in selling

ing patent rights. *Lewis v. Moffett*, 11 Ill. 392.

That a partner is a member of a firm selling goods of the partnership on commission ought not to deprive the house of its proper and customary commission charges. *Shirk's Appeal*, 3 Brewst. (Pa.) 119.

As to commission charges, see *Jardine v. Hope*, infra, II., d, 1.

Commission to liquidating partner, see *Cothran v. Knox*; *Stidger v. Reynolds*; *Wood v. Wood*; *Hutchinson v. Onderdonk*; *Shelton v. Knight*,—infra, II., g, 1.

Commission to surviving partner, see *Cooper v. Merrihew*; *Johnson v. Hartshorne*; *Re Curlee*; *Com. v. Bracken*; *Washburn v. Goodman*; *Thayer v. Badger*,—infra, II., g, 2.

Commission to partner acting as executor, see *Ames v. Downing*; *Re Harris*; *Cockerell v. Barber*; *Crow v. Weidner*; *Roberts v. Hendrickson*; *Re Tutt*; *Gregory v. Menefee*; *Scudder v. Ames*; *Re Dummett*; *Frazier v. Frazier*,—infra, II., g, 2.

As to waiver of commission, see *Askew v. Springer*, infra, II., j.

Concerning implied agreement for compensation for outside services, see *Levi v. Karrick*, and *Butcher v. Auld*, infra, II., h, 2.

d. Unequal services.

1. In general.

The general rule undoubtedly is that a partner is entitled to nothing extra for any inequality of services rendered by him, as compared with those rendered by his copartner. *Gray v. Hamil*, 82 Ga. 375, 6 L.R.A. 72, 10 S. E. 205; *Wisner v. Field*, 11 N. D. 257, 91 N. W. 67; *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Taylor v. Dorr*, 43 W. Va. 351, 27 S. E. 317; *Justice v. Lairy*, 19 Ind. App. 272, 65 Am. St. Rep. 405, 49 N. E. 459; *Paine v. Thacher*, 25 Wend. 450; *Heckard v. Fay*, 57 Ill. App. 20; *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 180; *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138, affirming 61 Ill. App. 336.

In the absence of any special agreement between partners as to the division of labor, each should give his time and attention to the conduct of the business without compensation and without regard to the relative value of the services of the several parties. *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, 39 Pac. 713.

A partner in a transaction involving the purchase and development of gypsum beds is not, in the absence of an agreement therefor, entitled to compensation for special services rendered, of which no account was kept or charge made, although he did some work that no other member of the firm could have done. *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243.

And in *Gilhooly v. Hart*, 8 Daly, 176, the principle is recognized that, if a partner seeks an allowance for his superior abilities, he must bargain for it.

One partner cannot, without an express agreement to that effect, charge the other, or the partnership, with anything for extra value of his services over that of the other, rendered during the existence of the partnership. *Reily v. Russell*, 34 Mo. 524.

The practical impossibility of measuring the relative value of unequal services performed by different partners has given rise to the rule denying the more active partner compensation for his labors in the absence of an agreement therefor. "The law," says Judge Story in his work on Partnership, at § 182, "never undertakes to measure and settle between the partners the relative value of their various and unequal services bestowed on the joint business, for the obvious reason that it is impossible to see how far, in the original estimate of the parties when the connection was formed, the relative experience, skill, ability, or even the known character and reputation, of each entered as ingredients into the adjustment of the terms thereof."

But, though the courts will not undertake to adjust the respective equities of partners in this respect, there is no reason why the parties themselves cannot and should not do so by their own voluntary agreement. In fact, the courts have left the whole matter to be regulated by contract between the persons interested. In the absence of a special agreement for compensation, unequal services will be presumed to have been rendered without expectation of reward.

By the well-settled law of partnership every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartner, and without comparison of value; for services to the firm cannot, from their very nature, be estimated and equalized by compensation of differences. *Marsh's Appeal*, 60 Pa. 30, 8 Am. Rep. 206.

The law is that, as between themselves, the contract of partnership being silent, partners are entitled to share equally in the compensation for their labor. The courts decline to look into the question which performed the more onerous duties, and whether one was more skilful or more industrious than the other. An adjustment of that nature is not demanded by the nature of the contractual association, and would often prove to be impracticable. *Miller v. Hale*, 96 Mo. App. 427, 70 S. W. 258; *Murray v. Johnson*, 1 Head, 353; *Kaiser v. Wilhelm*, 2 Mo. App. 596. Appx.; *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850, affirming 24 Ill. App. 656.

After a sale of a portion of the partnership business by one partner to another has been annulled by the court, and an accounting ordered, the partner who purchased the business cannot claim compensation for personal services rendered by him in carrying it on. *Baker v. Cummings*, 8 App. D. C. 515. In this case the decree of the court annulling the assignment or sale was viewed as effecting a reinstatement of the partnership as it existed prior to the sale, and as 17 I.R.A. (N.S.)

continuing the partnership until its complete or general dissolution. The claim of the purchasing partner was treated as that of one member of an active existing partnership for an extra share of the profits realized from the joint business, on the ground of contributing to that business a greater amount of time and service than his copartner, and was denied in accordance with the general rule on that subject.

In the absence of a previous arrangement between parties who consolidate projects for the construction of a railway along similar routes, the remuneration to be paid to either for personal labor exceeding that contributed by the other must be left to the honor of the other. *Webster v. Brav*, 7 Hare, 159. But the court intimated that nothing could be more unjust, morally speaking, than that one party should receive half of the profits without allowing the other a percentage upon the work done by him exclusively.

But one induced by another to enter into the purchase of a sawmill and gristmill with him, and to advance money therefor, and to expend a good deal of his personal labor on the mills, has a strong equity for compensation which should be satisfied before his ejection from the premises under a title purchased by his copartner after the dissolution of the partnership. *Eakin v. Shumaker*, 12 Tex. 51. The court intimated that, under such circumstances, it would be a fraud in the copartner to put the whole loss on the partner rendering the services, and himself recover all the benefit.

And an agreement to allow one partner compensation for his services because the other, by the excessive use of stimulants, has voluntarily disabled himself from performing service in the firm affairs, and thus cast upon his copartner more than a due share of labor, made after dissolution, but before full settlement and final division of the assets, and by the terms of which the copartner is to receive out of the assets a specific sum per month for a definite number of months for past service, so as to equalize to that extent the difference resulting from the failure of one to do his part, is not without consideration, but is supported by a strong moral obligation, which, under the Code, is sufficient to render the agreement obligatory as a contract. *Gray v. Hamil*, 82 Ga. 375, 6 L.R.A. 72, 10 S. E. 205.

While it is clear that an express agreement made by the partners with each other, either in the partnership articles, or upon a valid consideration outside of them, for an allowance on the ground of inequality of service, can be enforced, yet it has been intimated that no claim for compensation for such service can arise out of anything less than an express contract to that effect. *Ibid*.

So, also, it is said in *Caldwell v. Leiber*, 7 Paige, 483, that the law implies no agreement to compensate either of the copartners for their various and unequal duties and

services in the management of the business of the firm.

Subsequently, however, in *McAllister v. Payne*, 108 Ga. 517, 34 S. E. 165, the supreme court of Georgia suggested the possibility of the existence of peculiar circumstances from which a promise might be implied, and laid down the proposition that a partner is not entitled to extra compensation for services rendered by him to the partnership in the absence of an express contract between the parties on the subject, or the existence of circumstances from which the law would imply a contract by one of the partners to pay the other for extra services, conceding that there may be cases in which the law would imply such a promise.

The rule that compensation for extra services rendered by a partner is not allowable in the absence of a stipulation therefor is applicable to legal partnerships, whether general or limited to one transaction. It is considered that nothing that either partner may do which is necessary to the proper transaction of the business in hand can be regarded as extra services; that, while one partner may do less, the other cannot do more, than his duty.

Attorneys jointly employed by a township in a certain county to defend the county against suits instituted on bonds issued by the township in favor of a railroad company are special or limited partners, and neither, without an agreement to that effect, can charge the other for extra services. *Henry v. Bassett*, 75 Mo. 89.

Two solicitors who undertake a matter of business on behalf of a client enter into a limited partnership for that particular business; and it will be presumed that the profits are to be equally divided between them if nothing is said upon the subject, although one may do more business and exert himself more than the other. *Robinson v. Anderson*, 20 Beav. 98.

That one member of a partnership for the practice of law did more of the partnership work than his copartner, or that his labors were of a more valuable or profitable character, is not sufficient ground upon which to base a demand for a higher share of the income than is provided for in the partnership contract. *Roth v. Boies* (Iowa) 115 N. W. 930.

Concerning compensation to surviving law partner, see *Denver v. Roane*; *Osment v. McElrath*; *Little v. Caldwell*; *Lamb v. Wilson*; *Justice v. Lairy*; *Starr v. Case*,—*infra*, II., §. 2.

The rule which, in the absence of a distinct agreement, denies to a person the right to claim an allowance on the ground that his services have been greater than those of his associates, also precludes him from claiming an allowance or deduction for the absence of a copartner. As the court observes in *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243: Failure in duty may be a cause of dissolution, but it is no ground for compensation to the diligent.

A charge for loss of time by one partner, 17 L.R.A. (N.S.)

which is, in effect, an allowance to his copartners for additional compensation for their services in conducting the partnership business, is not permissible in the absence of an agreement for compensation. *Kimball v. Lincoln*, 5 Ill. App. 316, affirmed in 99 Ill. 578.

So, it is held in *WILLIAMS v. PEDERSEN*, that one member of a partnership which conducted a logging business is not, in the absence of an agreement to that effect, entitled to a greater share of the partnership earnings than the other, by reason of the fact that the latter was frequently away from the field of operations, and, in consequence, the former did the greater amount of work in connection with the firm's business.

But a charge made against a partner for loss of time should not be rejected, as matter of law, as being in the nature of an allowance to his copartners for their services, where it is stipulated in the articles of copartnership that all the partners shall devote and give all their time to the business and interest of the firm; since such a stipulation is different in effect from the implied obligation that the law imposes upon a partner to devote his time and services to the business, and it binds the partners expressly to devote their time to the business of the firm, and this express obligation may be considered as equivalent to an agreement to account for any loss of time. *Leighton v. Hosmer*, 39 Iowa, 594.

In a suit to dissolve a copartnership, a charge by one partner against the other, in the company's books, for loss of time in the business of the firm, was allowed; but an additional charge for the same loss, made after the institution of the suit, was disallowed. *Rohr v. Pearson*, 16 Or. 325, 14 Pac. 297.

The salary and board of a clerk employed by a firm should not, in the absence of an agreement to that effect, be charged to one of the partners who gave but little attention to the business while his copartner devoted his entire time thereto; but such expenses should be borne by the firm. *Adams v. Ringo*, 79 Ky. 211.

The right to claim compensation for extra services is sometimes conditional.

Thus, one partner is not entitled to charge for extra services without accounting for interest upon money contributed by the other partners. *Lee v. Lashbrooke*, 8 Dana. 214.

But a partner's delay in objecting to a claim for compensation, made by a copartner, does not necessarily preclude him from thereafter contesting the claim.

Thus, the fact that one engaged with others in a partnership venture in the purchase and sale of hops did not object for three months to a charge for commission, made by one of the parties, who disposed of the hops, and stated in the accounts rendered by him, will not debar him from setting up an objection thereto in a suit brought to settle the accounts. *Jardine v. Hope*, 19 Grant, Ch. (U. C.) 76.

As to commission charges, see *Shirk's Appeal*, *supra*, 11., c.

2. Managing or active partner.

The law is well settled that one partner is not entitled to claim compensation for his services in business without a special contract therefor, although he attends almost exclusively to the business. *Taylor v. Dorr*, 43 W. Va. 351, 27 S. E. 317.

A managing partner is not entitled to compensation for services rendered by him in the absence of an agreement therefor. *Pierce v. Pierce*, 89 Mich. 233, 50 N. W. 851; *Lyon v. Snyder*, 61 Barb. 172; *Kimball v. Lincoln*, 5 Ill. App. 316, affirmed in 99 Ill. 578; *Evans v. Warner*, 20 App. Div. 230, 47 N. Y. Supp. 16; *Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. 446; *Taylor v. Ragland*, 42 La. Ann. 1020, 8 So. 467; *Weaver v. Upton*, 29 N. C. (7 Fred. L.) 458.

A partner in a newspaper venture is not entitled to claim anything for his services as editor or manager as against his copartners, in the absence of any contract therefor, express or implied. *Pierce v. Scott*, 37 Ark. 308.

So, a partner engaged in the management and superintendence of a mining enterprise cannot recover from his copartner for services in partnership affairs without express contract to that effect between them. *Peck v. Alexander*, 40 Colo. 392, 91 Pac. 38.

A member of a partnership engaged in the business of distilling whisky is not entitled to any compensation for his services in superintending the running of the distilleries, or for purchasing grain or other supplies, during the continuation of the partnership, in the absence of any special agreement to that effect. *Atherton v. Cochran*, 11 Ky. L. Rep. 185, 9 S. W. 519, 11 S. W. 301.

The active partner in the management of a wine business, upon whom fell the duty of treating and entertaining customers, which was found to be necessary in that trade, is not entitled to an allowance unless it is stipulated for in the articles of copartnership, although it was originally intended that both partners should reside on the premises and jointly support the expense of entertaining their customers. *Thornton v. Proctor*, 1 Anstr. 94.

A resident partner in a distillery concern is not entitled to an allowance for managing the business and treating the customers, in the absence of an agreement to that effect between the partners, or when it is not shown that such an allowance is usual in the trade. *Hutcheson v. Smith*, 5 Ir. Eq. Rep. 117.

Under a partnership by the terms of which the partners are to share equally any profit and loss, one of them, who is given the management, superintendence, and employment of men in and about the business, is not entitled to payment for his services as against the other, in the absence of an agreement therefor, express or implied. *O'Brien v. Hanley*, 86 Ill. 278.

But, under a written contract of partner-

ship in the distillery business, by the terms of which each of the partners is to perform services and to render that assistance necessary to the proper conduct of the concern, if one of the partners, who renders no services in operating, taking care of, or managing the business, is allowed to share the profits as if he had been an active partner, his copartner, who conducted the business with his own capital, labor, and skill, is entitled to a reasonable compensation for managing and conducting it. *Mattingly v. Stone*, 18 Ky. L. Rep. 187, 35 S. W. 921.

Even when the services of the respective partners have been very unequal, or are all rendered by one partner, if there is no agreement that such services shall be remunerated, no charge in respect to them can be allowed in taking the partnership account. *Cook v. Phillips*, 16 Ill. App. 446.

That one member of a firm had general charge of the business, giving it his whole time and attention, while the other partners gave their attention mainly to other pursuits, does not give him a right to special compensation, unless there was an agreement to that effect. *Strattan v. Tabb*, 8 Ill. App. 225.

That an active partner for over twenty years operated iron furnaces, sawmills, and other concerns belonging to the partnership, devoting his time thereto with fidelity and energy, and greatly increasing the value of the property, while his copartner, who removed to another place, gave little or no attention to the business, does not entitle the former to compensation for his services, in the absence of an agreement therefor, or of any claim made therefor during the existence of the partnership. *Forrer v. Forrer*, 29 Gratt. 134.

That a partner in a retail boot and shoe business furnished one half the capital and managed the affairs of the concern, while his copartner gave but little time or attention to the business, does not entitle him to extra compensation for his services in behalf of the firm, in the absence of a special agreement therefor. *Brownell v. Steere*, 128 Ill. 209, 21 N. E. 3, affirming 29 Ill. App. 358.

A son who continued to conduct the business of a partnership in which he was engaged with his father, after the latter's removal to another county, cannot claim compensation for his services where his father provided most of the capital and employed and paid an assistant, although he stated to the latter that he did not consider her services a suitable equivalent for the services of his son, and that he should have compensation. *Myers v. Kirby*, 9 Ohio Dec. Reprint, 297.

That one member of a partnership engaged in the business of slaughtering cattle transacted the entire business of the concern without any interference or attention on the part of his copartner does not entitle the active partner to compensation for his services, in the absence of a special agreement. *Reybold v. Jefferson*, 1 Harr. (Del.) 401, 26 Am. Dec. 401.

A joint owner who acts as supercargo is not entitled to charge for his services, except under a special agreement. *Franklin v. Robinson*, 1 Johns. Ch. 157.

If one of several owners of a ship acts as ship's husband, it seems that he is not entitled to have, as against his partners, the whole amount of the ordinary rate of commission for so acting, without any consent, either express or implied, of the others. *Miller v. Mackay*, 31 Beav. 77, 34 Beav. 295.

A part owner who manages a ship is entitled to some remuneration which is usually fixed by an agreement among the part owners; there is, however, no hard and fixed practice as to the amount which a manager should receive. *The Meredith*, L. R. 10 Prob. Div. 69.

A partner who takes the full charge of the affairs and business of a partnership is not entitled to compensation for his services in the absence of an agreement therefor, —especially where he has excluded his partner from his rights, and rejected his proffered assistance. *Major v. Todd*, 84 Mich. 85, 47 N. W. 841.

And a partner who has forcibly expelled his copartner and assumed control of and continued to carry on the business himself is not entitled to compensation for his services, thus performed of his own volition, in the absence of an express stipulation therefor, except in cases where complete justice between the parties requires such allowance. *Hannaman v. Karrick*, 9 Utah, 236, 33 Pac. 1039.

As to exclusion from partnership, see *White v. Rodemann*, and *Williams v. McKee*, supra, II., b; *Frazier v. Frazier*, infra, II., g, 2.

e. Extra services necessitated by partner's illness.

So long as a partnership continues the sickness or inability of a partner is one of the risks incidental to the business, and works no forfeiture or deduction as against the disabled partner. *Heath v. Waters*, 40 Mich. 457.

A partner is not entitled to compensation for taking entire charge of the business during the sickness or inability of a partner, when compensation in that event is not provided for in the articles of copartnership. *Ibid.*

And an executrix is without right to transfer a claim to the surviving partner of the decedent in compensation of services rendered by the latter during the decedent's sickness, even if there were reasons which would have operated on the generosity of the disabled partner, and would have led him to present the active partner with a gratuity for his services. *Ibid.*

But a member of a banking and stock commission firm, who agreed to attend to all the business of the firm upon the New York Stock Exchange while another partner gave his time and attention to the office business, should be personally charged with sums necessarily paid to brokers who performed the duties upon the stock exchange 17 L.R.A. (N.S.)

which he had covenanted to perform, but was prevented from rendering because of serious illness. *Hart v. Myers*, 25 Abb. N. C. 478, 12 N. Y. Supp. 140, judgment affirmed in 59 Hun, 420, 13 N. Y. Supp. 388. Concerning this case, it should be said that the court expressly disclaims an intent to make an allowance of extra compensation to the partners for increased labor cast upon them by their copartner's illness. The decision is based upon the ground that the partner covenanting to attend to the firm's business upon the stock exchange was not absolved by his sickness from his agreement. The court considered that the covenant was one to render personal services, which could be performed quite as well by another person; and that it imposed upon the covenantor the duty of performing through a substitute, if for any reason he was disabled from performing personally.

Right of partner to stipulated compensation for services which illness disabled him from performing, see *Hunter v. Little*, infra, II., h, 1.

f. Compensation because of partner's misconduct.

Partners may agree among themselves what duties each will perform in the common business, and, if one wilfully fails to perform his agreed part, an allowance should be made to the other therefor. *Miller v. Hale*, 96 Mo. App. 427, 70 S. W. 258.

In *Airey v. Borham*, 29 Beav. 620, on the dissolution of a partnership which had been entered into by medical practitioners, the court directed that, in case it should appear that one of the partners had, during the existence of the partnership, discontinued his services at the surgery of the partnership, in violation of a stipulation in the partnership articles that he should devote his whole time to the business, an inquiry should be made as to what would be proper to be allowed the copartnership by reason of the business having been exclusively conducted by the other partner during that period.

It is held in *Marsh's Appeal*, 69 Pa. 30, 8 Am. Rep. 206, that a partner who neglects and refuses, without reasonable cause, to perform the services which he has stipulated to render the partnership, is liable to account to the firm for the value of the services in the settlement of partnership accounts; and that such an allowance is not precluded by the rule denying a partner recompense for individual or unequal services. In this case the master and the court below refuse to charge the delinquent partner with what would have been the value of his services to the firm if they had been rendered as agreed, on the ground that, in the absence of an express stipulation, partners are not entitled to compensation for their services, however unequal in value or amount; and that to require the defendant to account for the value of his services would be, in effect, allowing compensation to the other members of the firm for the

services they rendered. The supreme court, while admitting that the principle on which the master and the court below refused to charge the delinquent partner was too firmly inbedded in the law of partnership to admit of question, expressed a doubt as to its applicability to the facts of the case. The court pointed out that the partners making complaint were not seeking compensation for the services they rendered the partnership; that they were simply seeking to charge their copartner with the loss occasioned the partnership by his refusal to render the services which he agreed to perform. They pertinently asked why, if the partnership has suffered loss by breach of his agreement, he should not make good the loss and put the firm in the same condition in which it would have been if he had not broken the agreement. They further pointed out that, if the delinquent partner should be compelled to make good the loss, each member of the firm, including himself, would receive his proportion of the amount in the distribution of the partnership assets, and that in no just sense could this be regarded as compensation for the services individually rendered.

So, it is said that the rule denying compensation to either of the copartners for their various and unequal duties and services in the management of the business of the firm does not absolve from liability one of them, whose fraudulent misconduct in violation of his duty as a partner has resulted in injury to the partnership. *Caldwell v. Leiber*, 7 Paige, 483.

If two persons undertake to gather and market on shares a crop of peaches grown in the orchard of one of them, the owner of the orchard is not chargeable with the expense of furnishing boxes and packing the fruit, where it is agreed that such expense and labor shall be performed by the other party, who fails to do so, and are necessarily performed by the owner of the orchard in order to save the crop. *Stegman v. Berryhill*, 72 Mo. 307.

One induced by false and fraudulent representations to enter into a partnership with another is entitled to avoid the contract for the fraud practised on him, to receive back the money which he has paid, and to receive a reasonable compensation for his time spent in the service of the firm. *Richards v. Todd*, 127 Mass. 167.

So, a partner induced by false and fraudulent representations to enter into a partnership agreement is entitled to have the agreement canceled, and to recover not only the value of his investment in the business, with interest, but the reasonable value of his services in attending to the business. *Caplen v. Cox*, 42 Tex. Civ. App. 297, 92 S. W. 1048.

See also *Eakin v. Shumaker and Gray v. Hamil*, supra, II., d, 1.

As to implied agreement for compensation in case of misconduct, see *Shumard v. Gano* and *Lyghtel v. Collins*, infra, II., h, 2.

For forfeiture of compensation by misconduct, see, generally, infra, II., i. 17 L.R.A. (N.S.)

g. Services in winding up firm business.

1. Liquidating partner's right to compensation.

The rule denying compensation to a partner for inequality of services rendered before the dissolution is applicable thereafter, since the winding up of partnership affairs is but the consummation of the contract and its business, and is as much an affair of the firm as an original operation. *Beatty v. Wray*, 19 Pa. 516, 57 Am. Dec. 677.

Therefore, as a general rule, in an ordinary partnership, a person is not entitled to compensation for services rendered in closing up the partnership business. *Justice v. Lairy*, 19 Ind. App. 272, 65 Am. St. Rep. 405, 49 N. E. 459; *Brown's Appeal*, 89 Pa. 139; *Inglis v. Floyd*, 33 Mo. App. 565; *Coursen v. Hamlin*, 2 Duer, 513; *Galbraith's Estate*, 12 Phila. 20; *Cameron v. Francisco*, 26 Ohio St. 190; *Lesserman v. Bernheimer*, 10 N. Y. S. R. 47; *Dougherty v. Van Nostrand*, Hoffm. Ch. 68; *Shriver's Appeal*, 118 Pa. 427, note, 12 Atl. 553; *Osment v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731; *Shelton v. Knight*, 68 Ala. 598.

A partner is not entitled to compensation for services in the partnership affairs, either before or after dissolution of the firm; nor is the rule affected by the fact that he is a special partner. *Hellman v. Mendel*, 6 Ohio Dec. Reprint, 820.

The rule denying compensation to a liquidating partner has even been extended to the husband of a deceased partner, acting as natural tutor to his minor children in the liquidation of the partnership. It seems that he can claim only the compensation allowed by law to tutors: a claim to be made against his wards in his account of tutorship. *McMichael v. Raoul*, 14 La. Ann. 305.

A member of a partnership engaged in the business of banking is not entitled to compensation for his services in liquidating the business after the dissolution of the firm. *Gyger's Appeal*, 62 Pa. 79, 1 Am. Rep. 382. In this case Judge Sharswood applied the general rule denying compensation, although recognizing that it worked a hardship as against the liquidating partner, upon whom the whole trouble and responsibility of closing up the partnership affairs were thrown, and who, by skill and diligence, so managed matters that circumstances which might have resulted in a considerable deficit were made to yield a substantial profit.

So, a cashier of a banking partnership, who, after the insolvency of the partnership, does not stop work, but continues for a year and a half longer without being discharged or re-elected, cannot be compensated out of the partnership funds, since a partner is not entitled to compensation for services in liquidation. *Stockdale v. Maginn*, 207 Pa. 226, 56 Atl. 439.

But, on the dissolution of a banking firm by reason of the insanity of one of the partners, an allowance for their personal su-

perintendence and management of the business was made his copartners, who continued the business. *Mellersh v. Keen*, 27 Beav. 236.

The courts have recognized that the rule forbidding compensation to a partner for services rendered creates hardship, especially in the winding up of a partnership; and it is generally obviated by express agreement. *Hyre v. Lambert*, 37 W. Va. 26, 18 S. E. 446.

A partner is not entitled to charge for services in closing the partnership matters, in the absence of any agreement to support the charge, or of any necessity appearing for services to such an extent, although he gave more time to settling the debts of the partnership than his copartner did. *McFarland v. McCormick*, 114 Iowa, 368, 86 N. W. 369.

If the business of winding up a firm after a voluntary dissolution is apportioned between the partners, and each undertakes to perform the share allotted to him, one of them cannot afterwards claim to be paid a salary, or other remuneration, in the absence of an agreement therefor, express or implied, merely for the reason that his share of the work has been more laborious or difficult than that performed by his copartners. *Liggett v. Hamilton*, 24 Can. S. C. 665. The court remarked: The partner must be understood as having undertaken the duty on the implied understanding that he was to do it gratuitously.

If an agreement is made, he can make such charge. *Garretson v. Brown*, 185 Pa. 447, 40 Atl. 293.

Under an agreement that a partner settling up the affairs of the concern should receive a reasonable compensation for his services, he is entitled to recover such compensation,—its amount to be determined by the jurv. *Pierce v. Cubberly*, 19 Ind. 157.

But one who enters into an oral partnership agreement with another, by the terms of which each is to devote his whole time and labor to the business of the firm, and to pay his own personal expenses, the profits to be divided equally between them, is not entitled, in the absence of an agreement therefor, to compensation for services rendered in closing up the business of the firm after dissolution. *Dunlap v. Watson*, 124 Mass. 305. The court considered that the service rendered in closing up the business was only that which was due from the defendant under the partnership agreement; that the partnership continued between the parties in a qualified and limited sense until its affairs were fully closed up, and that the obligation of each to contribute his service continued unless changed by a new agreement.

So, it is held that, where partners, or those who represent them after the dissolution of the partnership, continue the business without any new agreement, they will be presumed to continue the business under the original agreement; and neither can demand payment for services rendered dur-

ing the partnership. *Smith v. Smith*, 51 La. Ann. 72, 24 So. 618.

And a provision in articles of copartnership, that one of the members should be the acting partner and receive a certain yearly compensation for his services in superintending and managing the copartnership business, is not applicable to the interim management of the business between the dissolution of the partnership and the sale and distribution of the effects. *Tibbits v. Phillips*, 10 Hare, 355.

The rule denying a partner compensation for services rendered in the partnership business applies after a dissolution, on the demand of one of the partners. *Lyman v. Lyman*, 2 Paine, 11, Fed. Cas. No. 8,628. This decision is based on the ground that each member of a dissolved partnership becomes, with respect to the property in his hands, a trustee, and that a voluntary trustee is not entitled to compensation for his personal services, but only to just allowances for actual charges and expenses in managing the trust. The court considered the rule to be especially applicable to the partner at whose instance the partnership was dissolved, where it was in his power immediately to have settled the partnership concern, and to have discharged himself from all care and attention to that which belonged to his partner.

But *Bradley v. Chamberlin*, 16 Vt. 613, held that a partner, although precluded by the articles of copartnership from claiming compensation for his personal services during the existence of the partnership, may receive a reasonable compensation for his time spent in closing up the business of the firm, after its dissolution.

And a partner who, after his copartner has left the country, has to wind up the business of the firm, which is in effect dissolved, should be allowed a reasonable compensation. *Clement v. Ditterline*, 11 Ky. L. Rep. 294, 11 S. W. 658.

It has been held in Canada that the rule that a partner cannot charge for extra services rendered during the continuance of the partnership does not apply to extra services performed after a dissolution, in closing up the affairs of the firm. *Liggett v. Hamilton*, *supra*.

The English rule is that a partner is not entitled to commissions for collecting partnership debts. *Whittle v. M'Farlane*, 1 Knapp, P. C. C. 311. The court observed: How can a partner charge commission against a partner for the collection of a partnership debt in which both of them are interested? It is a misapprehension entirely, and there does not appear any pretense for saying that there is any local usage in the Island to sanction such a charge.

So, it is said that a liquidating partner is not entitled to compensation or commissions on collections and disbursements of partnership assets, in the absence of a statute allowing them, or of any agreement between the parties to that effect. *Cothran v. Knox*, 13 S. C. 511.

But, on the contrary, it has been held that, after the dissolution of a partnership by mutual consent, a partner is entitled to a commission for collecting debts due the partnership. *Stidger v. Reynolds*, 10 Ohio, 351. This decision is based on the ground that, when the partnership was dissolved, the uncollected debts might have been divided; but if, instead of doing so, one of the partners assumes the labor of collecting them, he may properly charge the firm for his trouble.

So, a partner is entitled to commissions on moneys collected by him for the firm, where the services were rendered by him after the firm was dissolved, and while his copartner was doing nothing for its benefit, and under an agreement with the latter that he should proceed to make collections at the proper costs and charges of both partners. *Wood v. Wood*, 26 Barb. 356.

In *Hutchinson v. Onderdonk*, 6 N. J. Eq. 277, which was an action for a partnership accounting, the master refused to allow a commission of 5 per cent, claimed as compensation by one of the partners, who was engaged for about six months in settling up the business of the firm, on the ground that there was not only no express agreement therefor, but because such partner had agreed, in the deed of dissolution, to pay over to his copartner one half of the surplus, without making any reservation for commissions or other remuneration. The master, however, considered the claim a meritorious one if it could be allowed, and counsel urged the existence of an exception to the rule denying compensation to a partner closing up the affairs of the firm, where his labors constitute extra services, or may be regarded a distinct business from that of the joint parties. The chancellor directed an allowance of 3 per cent to be made by way of compensation for services rendered in settling the business of the firm.

But commissions for selling cotton consigned to a firm of commission merchants which had been dissolved by mutual consent and was being closed up by one of the partners do not belong to him, in the absence of any agreement authorizing such compensation, but should be divided between the persons in accordance with their respective interests. *Shelton v. Knight*, 68 Ala. 598.

Partners are not entitled to charge for services rendered after dissolution, for repairing the partnership property, against the consent of the other partners, but they can, for preserving the property. *Stebbins v. Willard*, 53 Vt. 665.

So, a partner who collects and preserves the property belonging to the firm, after the destruction of the mill owned by it, is entitled to compensation therefor, but not for repairing, against the consent of his copartners, the boiler, engine, and other property after the dissolution of the firm. *Ibid.*

One associated with others in an enterprise for the carrying on of a manufacture which was abandoned while the building

designed therefor was in process of erection is not entitled to an allowance for services rendered and sums advanced after the abandonment of the enterprise, to preserve the property and enhance its value, where he proceeded not only without authority from the other partners, but with their known dissent and against their will. *Skinner v. White*, Hopk. Ch. 107.

Nor is an attorney at law who was a partner in a mercantile firm at the time of its dissolution entitled to charge commissions for collecting the notes and accounts of the firm as against his copartner, in the absence of any special agreement to that effect. If, however, it is necessary to institute suits for the collection of the debts, and such suits are instituted by him as an attorney at law, he may be allowed for his necessary professional services the same commission as would have been paid to some other attorney at law for the same services, in the absence of any evidence that his professional services as an attorney were to be rendered for the benefit of the firm under the copartnership contract. *Vanduzer v. McMillan*, 37 Ga. 299.

Law partnerships.

The applicability to professional partnerships of the rule of law denying compensation to either member of a dissolved firm for service rendered in winding up the partnership affairs has been doubted. It is apparent that there is no value in an unfinished case, to an attorney, except the value of professional services to be rendered. Whether the case shall have any value depends entirely upon the professional skill of the attorney rendering the services. This fact would seem to entitle the partner closing up the business to compensation for his services, to be paid out of the profits created by his skill and labor.

In *Osment v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731, a partner who, after the dissolution of the law firm of which he was a member, and the removal of his copartner to another state, closed up the unfinished business of the partnership, some of which consisted of cases in which the fees were contingent on success, was allowed compensation for his services by the court.

Legal services rendered by two of the members of a partnership in closing up a case after the dissolution of the partnership constitute a proper charge against the firm; and the partners performing the services are entitled to reasonable compensation therefor, out of the profits created by their skill and labor, and varying according to the nature of the business, the difficulties and results of the undertaking, and its necessity or desirability. *Lamb v. Wilson*, 3 Neb. (Unof.) 496, 92 N. W. 167.

On the dissolution of a legal partnership, its members may properly apportion among themselves the unfinished business of the firm to be closed up by the former partners respectively; and such an agreement is as

obligatory upon them as though they had not previously been partners; and, if some of them take charge of and close up the business which had been assigned to another, they are entitled to charge him for their services as rendered in his behalf and for his benefit. *Lamb v. Wilson*, 3 Neb. (Unof.) 505, 97 N. W. 325.

But attorneys composing a law firm, who, upon its dissolution, assigned certain cases to one of the partners, and who later, becoming dissatisfied with the progress which he was making in reference thereto, voluntarily took hold and closed up the business, are not entitled to recover compensation for their services, which must be regarded as gratuitous, in the absence of proof that the partner to whom the business was assigned was not in good faith carrying out his part of the agreement. *Lamb v. Wilson*, 3 Neb. (Unof.) 496, 92 N. W. 167.

If the fees received from a suit which was closed up by attorneys after the dissolution of a partnership of which they were members, and which had originally instituted the suit, are less than the reasonable value of the combined services of the old firm and of themselves, the fees received should be divided between them and the old firm *pro rata* with the value of the services performed by each. *Ibid.*

When an attorney at law, who is a member of a law firm, becomes a judge, the partnership is dissolved, and he can have no interest in any fees for services thereafter rendered by a remaining member of the firm in concluding pending business. *Justice v. Lairy*, 19 Ind. App. 272, 65 Am. St. Rep. 405, 49 N. E. 459.

Neither is a partner in a law firm entitled to compensation for his services rendered after a dissolution of the partnership, in settling up the business, where it is not shown that he performed more labor in that respect than his copartner did. *Redfield v. Gleason*, 61 Vt. 220, 15 Am. St. Rep. 889, 17 Atl. 1075.

The rights and duties of former partners in the practice of the law, in respect to compensation for services rendered in the care or improvement of real estate acquired by them without the scope of their partnership business and of which they are joint owners, are not governed by the law relating to services performed by a partner after the dissolution of the firm, but by the rules governing compensation for services rendered by a cotenant. *Ibid.*

Trustee, agent, or receiver.

A member of a limited partnership association, who is appointed one of the liquidating trustees after the dissolution of the partnership, is entitled to receive compensation for his services. *Jennings's Case*, 157 Pa. 630, 27 Atl. 532, 535. The court said: It is contended that, because he was a member of the partnership, he cannot claim for services. Ordinarily, in the settlement of partnership business, this objection would be good. But, the partner-

ship being dissolved, and liquidating trustees appointed, the amount charged does not go to him as a partner, but as a liquidating trustee, just the same as though he had never been a member of the firm. We cannot see by what principle of law he can be deprived of compensation as liquidating trustee.

A member of a firm appointed, after its dissolution, to collect and settle debts and close the affairs of the firm, may be properly compensated for his services in case they are faithfully rendered, and no particular cause exists for refusing compensation. *Honore v. Colmesnil*, 1 J. J. Marsh. 524. The court observed: Upon the dissolution of the copartnership it would have been most regular to have appointed a disinterested person as agent to collect and settle debts and close the affairs of the concern. Such agent would be entitled to such compensation for his services without doubt. As this was not done, but a member of the firm appointed, there would have been no impropriety in making him compensation.

But compensation should not be allowed a partner for his service where, after terminating the partnership, he procured his own appointment as receiver of the partnership property. *Brien v. Harriman*, 1 Tenn. Ch. 467. The court considered the order appointing a partner as receiver to be an unusual one, which could be sustained only upon the implied condition that he would discharge the duties devolving upon him, free of cost.

In *Todd v. Rich*, 2 Tenn. Ch. 107, a partner was appointed receiver of the partnership property after dissolution, on condition, among other things, that he undertake to act without compensation.

2. Surviving partner's right to compensation.

The rule denying compensation to a partner for his personal services in managing the partnership business applies to surviving partners while engaged in winding up the business and disposing of the partnership assets. *Kimball v. Lincoln*, 5 Ill. App. 316, affirming 99 Ill. 578.

As a general rule a surviving partner is not entitled to compensation for personal services in winding up the business of the firm. *Hite v. Hite*, 1 B. Mon. 177; *Coakley v. Hazelwood*, 21 Ky. L. Rep. 40, 49 S. W. 1067; *Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 505, on second appeal. 63 Mich. 355, 29 N. W. 867; *Slater v. Slater*, 78 App. Div. 449, 80 N. Y. Supp. 363, judgment modified on another point in 175 N. Y. 143, 61 L.R.A. 796, 96 Am. St. Rep. 619, 67 N. E. 224; *Clausen v. Puvogel*, 114 App. Div. 455, 100 N. Y. Supp. 49; *Godfrey v. Templeton*, 86 Tenn. 161, 6 S. W. 47; *Patterson v. Calhoun*, 4 Gratt. 138; *Beatty v. Wray*, 19 Pa. 516, 57 Am. Dec. 677; *Miller v. Anspach* (Phila. D. C.) *Purdon's Dig. Supp.* 1850, p. 317, cited in *Beatty v. Wray*, supra; *Brown v. McFarland*, 41 Pa. 133, 80 Am. Dec. 598; *McCullough v. Barr*, 145

Pa. 459, 22 Atl. 962; Lennig v. Lennig, 11 W. N. C. 18; Tillotson v. Tillotson, 34 Conn. 335; Robertson v. Schwenk, 18 Pa. Co. Ct. 577; Galbraith's Estate, 12 Phila. 20; Maynard v. Richards, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138, affirming 61 Ill. App. 336; Burgess v. Badger, 82 Hun, 488, 31 N. Y. Supp. 614; Piper v. Smith, 1 Head, 93; Berry v. Jones, 11 Heisk. 206, 27 Am. Rep. 742; Frazier v. Frazier, 77 Va. 775; Gregory v. Menefee, 83 Mo. 413; Roberts v. Hendrickson, 75 Mo. App. 484; Colgin v. Cummins, 1 Port. (Ala.) 148.

The reason of the rule is that the law enjoins such duty under the contract of partnership. Smith v. Knight, 88 Iowa, 257, 55 N. W. 189.

So, in Justice v. Lairy, 19 Ind. App. 272, 65 Am. St. Rep. 405, 49 N. E. 459, it is said: The rule that no compensation is allowed a surviving partner in closing up the business is based upon an implied, if not an expressed, agreement that, should the partnership be terminated by some involuntary event, the other will close up the business for the benefit of both. Each partner necessarily incurs such risks with reference to which the partnership contract was made.

Contrary to the rule announced in the preceding cases, it is held in Royster v. Johnson, 73 N. C. 474, that a surviving partner should be allowed reasonable compensation for his services in winding up the affairs of the partnership. This case is really a protest against the English doctrine that executors, trustees, surviving partners, etc., are not entitled to commissions or compensation for their services. The court considers this doctrine not suited to this country. Its decision was largely controlled by a comment of Chief Justice Ruffin in Boyd v. Hawkins, 17 N. C. (2 Dev. Eq.) 199, to the effect that the persons acting in a fiduciary capacity are not, in England, practically at any trouble or expense about their trust because they manage the whole business through attorneys, while it is entirely different here. The court also considered itself justified, in view of state legislation providing compensation for executors, administrators, etc., in awarding reasonable compensation to a surviving partner for his labor in closing up the affairs of the firm.

There is a *dictum* in Colgin v. Cummins, *supra*, which denies the cogency of the last-mentioned ground on which the preceding decision is based. The court remarked: If the current of authority sustains the position that the surviving partner is not to be allowed compensation except as an indemnity for actual expenditure, I would not feel authorized to abandon it, because a preponderance of the authority is in favor of such allowance to executors, administrators, and trustees generally, other than surviving partners. Nor would I be concluded in relation to the case of executors, administrators, and trustees generally, having no interest in the subject-matter of the trust, by refusing compensation to a surviving partner for his time and labor in winding up the business of the firm in which his in-

terest, by his own act, has been complicated for purposes of advantageous traffic with that of another.

In Cooper v. Merrihew, Riley, Eq. 166, the chancellor allowed a surviving partner commissions on receipts and expenditures made after the dissolution of the copartnership, on the ground that he was a trustee. The reasons for this decision are thus stated: In England trustees are not allowed commissions unless so stipulated in the trust deed, nor are executors entitled to commissions. In this country a different policy has been pursued. Commissions are allowed to all persons who are called upon to act for others in any confidential situation, whether executors, administrators, trustees, agents, attorneys, or others. This was doubtless on the principle that the laborer is worthy of his hire, and that the business of the employer will be more diligently performed when a reasonable compensation is allowed than when it is done gratuitously. A surviving partner winding up and settling the affairs of a concern forms no exception to the rule. It requires time, care, and industry to wind up old commercial affairs, and that is so much taken off from the power and opportunity of the surviving and acting partner of pursuing his own private affairs. But, on appeal to the court of appeals, it was held that a surviving partner winding up and settling the affairs of the firm is not entitled to commissions unless stipulated for by contract. The court said: No doctrine seems to be better established than that no trustee is entitled to compensation unless provided for in the instrument creating the trust, or allowed by statute.

In conformity with the English rule, it was held in Butler v. Butler, 29 N. S. 145, that a surviving partner is not entitled to remuneration for his services in winding up the business of the firm. This decision rests upon the following reasons: The relationship which exists between the surviving partner and the estate of his deceased partner is that of a trustee. He alone, in point of law, has a right to collect in the assets and wind up the business, and no remuneration was ever allowed, except by statute, to a person holding such a fiduciary position. It does not appear that the business was carried on for the benefit of the estate, but the claim is solely put forward for services in winding up the business, for which he clearly cannot be further remunerated.

A surviving partner is not entitled to compensation in the nature of commissions; his services in winding up the business are regarded the same as during the partnership. Johnson v. Hartshorne, 52 N. Y. 178.

A surviving partner is not entitled to commissions for services in winding up the affairs of the partnership within the scope of his duties as liquidator. Re Curlee, 118 La. 563, 43 So. 165. This decision is governed by La. Civ. Code, art. 1142, providing that a surviving partner who has administered the partnership concerns and liqui-

dated them has no right to any commission therefor. "Assuming," the court remarks, "there may be services rendered by the liquidating partner outside of those referred to, which would entitle him to remuneration, such services have not been shown to have been rendered, and their value declared nor proved."

Nor is a surviving partner entitled to a commission for settling up the partnership business, in the absence of some extraordinary occasion, since it is but the duty of the surviving partner in his own interest. *Com. v. Bracken*, 17 Ky. L. Rep. 785, 32 S. W. 609.

Surviving partners are not entitled to a commission for their services in collecting debts and settling the business of the copartnership where the indenture of copartnership provides that the survivors are to make a true, just, and final account of all things relating to the firm, and to truly adjust the same. *Washburn v. Goodman*, 17 Pick. 519.

But it cannot be said, as matter of law, that a surviving partner has no right to turn over merchandise of the late firm to a new firm of which he is a member, to be sold upon commission by the latter, and that the commission charged, or at least the surviving partner's share, should not be allowed in an accounting between him and the executor of his deceased partner. *Thayer v. Badger*, 171 Mass. 279, 50 N. E. 541. This case, while recognizing the disinclination of the courts to allow pay to a surviving partner for winding up the affairs of the firm, discloses a tendency to deal with such questions on their particular circumstances, rather than by absolute rules.

Upon the death of either partner, it is the survivor's duty to liquidate and wind up the affairs of the partnership so dissolved by death. It is a duty presumed to be contemplated by all entering into the relation of partners, and it is a duty for which the law makes no provision for compensation in the absence of an express agreement between the parties. *Re Dummett*, 38 Misc. 477, 77 N. Y. Supp. 1118.

The law will not imply or presume the existence of a contract to compensate a surviving partner for services rendered, merely on a showing that the labor performed is worth a certain amount. *Robertson v. Schwenk*, 18 Pa. Co. Ct. 577.

If there was an express contract that the partner should have compensation, this agreed compensation may be allowed for services rendered after the copartner's death. *Griffey v. Northcutt*, 5 Heisk. 746.

An agreement by which each of the partners is allowed a salary is terminated on the dissolution of the partnership by the death of one of them; and the survivors are not entitled to compensation for services rendered by them in closing up the partnership affairs. *Comstock v. McDonald*, 126 Mich. 142, 85 N. W. 579.

So, a surviving partner is not entitled, after the dissolution of the copartnership, to receive for the care and management of

the business the salary to which he was entitled, under the articles of copartnership, in each and every year of the partnership. *O'Neill v. Duff*, 11 Phila. 244.

A surviving partner may properly be denied compensation for his services which resulted in loss to the partnership, and which were a violation of his duty as liquidating partner under the articles of copartnership. *Ibid.*

But surviving partners entitled by the articles of copartnership to a reasonable compensation for closing the business should not be denied the benefit of this express stipulation, although, while winding up the affairs of the firm, they formed a new partnership and continued the same business at the same place,—especially where, in their efforts to pay off the debts of the old firm, they devoted a portion of their own means to the purpose, and thereby brought about their own financial failure and ruin: but in the adjustment of this compensation no commission or percentage should be allowed on the amount advanced by them to pay the debts, since such services are not within the terms of the articles. *Sangston v. Hack*, 52 Md. 173.

Extraordinary services.

Extraordinary or unusual services have been compensated by the courts on the theory of an implied contract.

Thus, a surviving partner has been allowed remuneration for services rendered in winding up the affairs of the firm, when they were of such a nature, or were performed under such circumstances, as would necessarily raise an implied understanding that he should be paid. *Hanks v. Wilcox*, 2 Haw. 509.

A member of a partnership for the acquisition of western lands, upon whom, on the death of two of his copartners, the whole labor devolved, of superintending and managing the estate, of paying taxes, prosecuting and defending lawsuits for a series of years, selling and disposing of parts of the lands, and collecting the proceeds and applying them in discharge of the indebtedness, should be allowed compensation for the extraordinary and perplexing services which devolved on him, and which could not have been performed by the infant heirs of his deceased copartners,—especially where the partners themselves had formerly agreed in allowing compensation for extraordinary services by one of them. *Hite v. Hite*, 1 B. Mon. 177. But the court, in its opinion, thought it proper to give the following admonition: Yet, the compensation should not be so liberal as to inspire cupidity, or stimulate avarice, or tempt to the procrastination of the business of the firm, with a view to profits, in the compensation to be received, but should be restricted to an amount barely sufficient to remunerate the partner for the actual services necessarily rendered, or such as would save him from actual loss.

A partner of a firm engaged in the trans-

perhaps most of the other states, it has not been relaxed so far as to allow compensation to one who has abused his trust.

According to *Thornton v. Proctor*, 1 Anstr. 94, a universal usage to allow a surviving partner for his agency in trading with the joint capital after the death would enter into the original contract of partnership, and be one of the conditions of it; from which the inference is legitimate that, if there is no such usage, the law enters into it, and disposes of the contingency differently.

A surviving partner who has successfully continued the business, keeping and using in it the larger capital of the deceased partner as well as his own smaller capital, may be allowed a reasonable sum for the management of the business, to be deducted before the ascertainment of the profits. *Yates v. Finn*, L. R. 13 Ch. Div. 839.

Profits earned by a surviving partner who continues the business after the death of his copartner, and with the aid of the capital contributed by the latter, should generally be divided in accordance with the shares of the partners in their lifetime, subject, however, to a due consideration of the nature of the trade, the manner of carrying it on, the capital employed, and the personal skill and conduct of the survivor. *Willett v. Blanford*, 1 Hare, 253.

In *Featherstonhaugh v. Turner*, 25 Beav. 382, it is stated that the interest of a deceased partner, which was sold upon the refusal of the surviving partner to purchase it, should be computed by ascertaining the amount of the net profits made by the concern down to the date of the sale, after making a liberal allowance to the surviving partner for his knowledge, time, and trouble in carrying on the business, and then dividing the net result according to the division of profits under the partnership agreement.

If a surviving partner continues to use the capital of a deceased partner in the business, the representatives of the latter are entitled to a division of the profits according to the amount of the capital which each partner had in the business after deducting such share of the profits as is attributable to the skill and services of the surviving partner. *Robinson v. Simmons*, 146 Mass. 167, 4 Am. St. Rep. 299, 15 N. E. 558.

While surviving partners, in closing up the affairs of the firm, are not entitled to compensation for services, yet, when those interested in the estate elect to demand not only the fair value of their interest, but also a share in the profits earned by the use of the whole property, a court of equity will inquire to what extent the profits of the business are attributable to the personal services of those conducting it, and, if some share or sum is proved so to be, with reasonable certainty, will allow that on the theory that those who seek equity must accord it; also that profits due to such services are not due to the property. *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473.

But in *Patton v. Calhoun*, 4 Gratt. 138, a surviving partner who continued the business for about eight months after the death

of his copartner was denied compensation for his services in carrying on the business and for closing it up, where the deceased partner had put in all the capital, and the surviving partner had, alone, attended to the business.

Remuneration to a surviving partner continuing the business has been made dependent upon whether profits have resulted from his conduct of affairs. Thus, a surviving partner who carried on the business for nearly two years after the death of the copartner, who alone had provided the capital, is not entitled to remuneration for his services, where no profits were derived from the business. *Re Aldridge* [1894] 2 Ch. 97. The court said: He carried on the business quite as much in his own interest as in that of the executors. He was at no risk of loss if any loss was sustained, and I do not see how I can allow him any remuneration. There is no agreement in the articles that he shall have remuneration for his services after the dissolution of the partnership, although he would be entitled to remuneration out of the profits of the business if there had been profits; but there were none. If he were now allowed remuneration, it must be paid out of the testator's capital. In the cases in which such remuneration was allowed, profits had arisen from the carrying on of the business.

While, as a general rule, a surviving partner is entitled to no salary for managing the partnership business when not expressly provided for, yet an allowance may be made him where he profitably conducted the affairs of the firm, which dealt in nursery stock, for some time after the death of his copartner. *McElroy v. Whitney*, 12 Idaho, 512, 527, 88 Pac. 349, 354.

Surviving members of a partnership engaged in the operation of a marble quarry, who, in pursuance of an authorization in the will of a deceased partner, and with the consent of his administrator with the will annexed, conduct the business for several months in a profitable manner, should be allowed, as compensation for their services, the same salaries which they had been paid as active members of the firm during the lifetime of the deceased partner, where there is nothing to show an intent on the part of the testator that their salaries should not be continued as authorized by his will. *Godfrey v. Templeton*, 86 Tenn. 161, 6 S. W. 47.

A partner in a firm engaged in the purchase and sale of cattle, who, upon the death of his copartner, which occurred at a time not the most advantageous for the sale of cattle, retained the stock for a year, during which time they largely increased in value, is entitled to compensation for such services as he may have rendered in the business after the death of the deceased partner, to be deducted out of the profits realized by the continuance of the business. *Griggs v. Clark*, 23 Cal. 427.

A surviving partner who continues the business for the purpose of preserving the

good will, which, owing to the peculiar nature of the business, was of greater value than all the other assets, and is thereby enabled to sell the establishment as a going concern, greatly to the advantage of all parties, should be deemed to have profitably conducted the business, and should be allowed a deduction from the amount realized from the good will, in conformity with the rule which, in case strict profits had been made, would have entitled him to a deduction therefrom by way of compensation. *Cameron v. Francisco*, 26 Ohio St. 190.

As to right of surviving partner to compensation for continuing the business in order to effect an advantageous settlement of its affairs, see case note appended to *Condon v. Callahan*, 1 L.R.A. (N.S.) 643.

If, in ordinary cases, a salary could be allowed a surviving and managing partner, he is not entitled thereto, where, after excluding the other surviving partners from the management or control of the business, he maintained a large and expensive domestic establishment for fifteen years, from the proceeds of the business. *Frazier v. Frazier*, 77 Va. 775.

A managing partner who, after the death of one of the partners, would not suffer any of his copartners to take any part in the control or management of the business, and refused to allow them to employ another person to represent them in the management, is not entitled to receive a salary as compensation for his services, in the absence of any agreement therefor. *Ibid*.

Nor are surviving partners who, after the death of their copartner, conducted the business in all respects as it had been during his lifetime, without performing extra services, entitled to compensation in the absence of an agreement therefor, where no special circumstances intervened rendering their duties more arduous or their services more valuable than they were prior to the death of the copartner. *Kimball v. Lincoln*, 5 Ill. App. 316, affirmed in 99 Ill. 578.

As to waiver of compensation by surviving partner continuing business, see *Condon v. Callahan*, *infra*, II., j.

Completion of business on hand.

It has been said that the surviving partner must complete all executory contracts of the firm which remain in force after the death of a partner, and must settle the business of the partnership without charge against the partnership for his personal services. *Little v. Caldwell*, 101 Cal. 553, 40 Am. St. Rep. 89, 36 Pac. 107. This obligation of the surviving partner is regarded as one of the risks assumed by him in entering into the partnership, unless otherwise specially agreed.

So, a son who was in charge of a business which he conducted as a partner of his father, who resided elsewhere, is not entitled to compensation for services rendered in carrying on the business of the firm after his father's death, where it was contemplated between the partners that the business of 17 L.R.A. (N.S.)

the partnership would continue until the completion of certain contracts between the father and the partnership, which had not been performed at the time of the latter's death. *Porter v. Long*, 124 Mich. 584, 83 N. W. 601.

But it is said in *Justice v. Lairy*, 19 Ind. App. 272, 65 Am. St. Rep. 405, 49 N. E. 459, that, where a surviving partner carries on the partnership business in order to complete the enterprise in which the partnership is engaged, he will be allowed compensation.

So, in *Condon v. Callahan*, 115 Tenn. 285, 1 L.R.A. (N.S.) 643, 112 Am. St. Rep. 833, 89 S. W. 400, it is held that the rule that a surviving partner is not entitled to compensation for winding up the affairs of the partnership does not apply where the affairs are not immediately wound up, but the work in which the partnership is engaged is carried to completion with the consent of the personal representatives of the decedent.

All that can be required of a surviving partner is that he proceed at once to wind up the partnership and account with the legal representative of the deceased, and, in the absence of any agreement, he is entitled to no pay for his personal services in the strict discharge of this duty; but if, with the assent of the administrator of the deceased partner, he employs extra labor to finish existing contracts; if he enters upon new contracts, employing the machinery, patents, and property of the firm therein,—then, to the extent of his personal services devoted to such extra work, he is entitled to compensation. *Schenkl v. Dana*, 118 Mass. 236. The property of this firm consisted of patent rights for valuable improvements in weapons of war, with the machinery, tools, and stock required for their manufacture, and of certain unfinished government contracts for the supply of the same. The war was in full progress. The court would not undertake to say, in view of the peculiar character of the assets, that it was not wise and prudent for the surviving partner, in order to close the concern to the best advantage and to realize the most for the property, to complete existing contracts, and use the tools and consume the stock, if necessary, in filling further government orders. The court regarded the position of the surviving partner as similar to that of a trustee who has managed an estate for the benefit of another with his approval, and who is entitled to compensation when the *cestui que trust* seeks to avail himself of the benefits of such management.

But an agreement made by the executor of a deceased partner with the surviving partners, that the latter shall work up the stock on hand and account for the profits after paying all expenses, costs, charges, and services, if an attempt to authorize a charge for their services in closing up the business of the partnership, is beyond the power of the executor, although he was empowered by the will to co-operate with the surviving partners in carrying on the business in such manner, as should be decided best for the in-

terests of the firm. *Brown v. McFarland*, 41 Pa. 133, 80 Am. Dec. 598.

Where the survivor is under no obligation to continue the business, but does so at his own peril, if the representatives of the deceased partner elect to share in the profits, a reasonable allowance may be deducted as a compensation to the survivor for his services. *Cameron v. Francisco*, 26 Ohio St. 190.

And, where partners who have undertaken to perform a construction contract have agreed that each shall contribute his services without compensation, one who, upon the other's death, performs the entire work of supervision, is entitled to compensation for that part of the work which deceased would have contributed had he lived. *Condon v. Callahan*, supra.

Continuance under testamentary direction.

One who, after the death of his copartner and in accordance with the will of the latter, carries on the business of working a plantation forming part of the assets of the partnership, should not be allowed compensation for services rendered, in the absence of any agreement with his co-owners, or expectation on his part that he should receive pay, and when he regarded himself as acting in the capacity of surviving partner while rendering the services. *Tillotson v. Tillotson*, 34 Conn. 335.

A surviving partner in an enterprise contemplating the purchase, improvement, and cultivation of waste land is not entitled to compensation for services rendered by him subsequent to the death of his copartner, where, under the original agreement of partnership, no charge could have been made for services rendered by the surviving partner in the lifetime of the decedent, and the will of the latter, although providing for a continuation of the business, is silent as to compensation for services to be rendered by the surviving partner. *Berry v. Folkes*, 60 Miss. 576.

Surviving partners appointed, under the will of a deceased partner, trustees of his interest in the partnership, to hold the same in trust for the equal benefit of the testator's wife and son, and who continued the business for fourteen years without charging for their services, are not entitled to compensation where no provision was made therefor in the will. *Evans v. Weatherhead*, 24 R. I. 394, 53 Atl. 286. The court said: The expectation of the testator seems to have been that the trustees would accept the trust and continue the business with his capital in it. Their duties required nothing more of them than the carrying on of their own business, except the keeping of an account of profits and disbursements, and for this they received their share of the benefits accruing from such an increase of their capital.

Surviving partners, appointed trustees of his interest, by the will of a deceased partner, for the equal benefit of his wife and son, are not entitled to compensation for the loss of his services, since this is something of which they knew when they accepted the trust and assumed the discharge of its du-

ties, presumably for the benefit of continuing their own business without diminution of capital. *Ibid*.

But an executor authorized by the will of the testator to continue a business in which the latter was a partner, on such terms as shall be deemed just and proper, may agree in good faith to allow the surviving partner a specified sum annually for the loss of the services of the testator. *Re Bach*, 2 Connoly, 490, 12 N. Y. Supp. 712.

That the executors of a deceased partner consented to a charge made against the estate which was in effect an allowance to copartners of additional compensation for their services will not sustain the charge, where the will of the deceased partner under which they acted did not, either in terms or by implication, authorize the executors to consent to such a charge. *Kimball v. Lincoln*, 5 Ill. App. 316, affirmed in 99 Ill. 578.

In *Barber v. Murphy*, 23 Ky. L. Rep. 286, 62 S. W. 894, a surviving partner, who, in pursuance of a direction in the will of his deceased copartner, and with the consent of the latter's heirs, continued the business, giving his whole time and attention to it, was allowed compensation for his services, although the business was operated at a loss, and without deciding whether the case was such an exceptional one as to bring it within the exception to the rule, since the allowance was not questioned by the heirs of the deceased partner.

Continuance with representative of deceased.

A surviving partner, who, with the administrator of the deceased partner, continued the business of the partnership for a short time, is not entitled to compensation for services which, under the partnership contract, he was required to render. *Hancock v. Hancock*, 24 Ky. L. Rep. 664, 69 S. W. 757.

Partner acting as executor.

A surviving partner who is also executor of his deceased partner is not entitled to compensation from the estate of the latter for services rendered in winding up the partnership business and ascertaining the decedent's share. *Pickens's Estate*, 14 W. N. C. 407.

The surviving partner of a special partnership, who is also executor of the deceased special partner, cannot, as surviving partner, charge commissions for the collection of the debts, since it is his legal duty to collect the assets and wind up the business of the firm.—a duty the law imposes upon him as an incident to the contract of partnership, and for the performance of which no remuneration is promised or implied. *Ames v. Downing*, 1 Bradf. 321.

An executor who is also the surviving partner of the decedent is entitled to no remuneration for performing the duties incident to his contract of partnership, of winding up the business of the firm, and, in fixing the amount of his commissions in comparison with those awarded to his

coexecutors, everything done by him which he was bound to do as the decedent's surviving partner should be eliminated from the *quantum* of his services. *Re Harris*, 4 Dem. 463.

No allowance will be made to an executor for his services where the entire fund is in his hands as surviving partner, since, as such, he is entitled to no compensation for his trouble or services in settling up the business. *Dodson v. Dodson*, 6 Heisk. 110.

A surviving partner who is also executor of the estate of his copartner is not entitled, in the absence of any agreement authorizing it, to compensation for services rendered in winding up the affairs of the firm, although he mainly attended to it, where the business of the firm was not carried on after the death of the copartner. *Terrell v. Rowland*, 86 Ky. 67, 4 S. W. 825.

Nor for managing and carrying on the partnership trade subsequent to the death of his copartner. *Burden v. Burden*, 1 Ves. & B. 170. In this case Lord Chancellor Eldon said: I take it that the executor must be considered as carrying on the trade for himself and his copartners. Even if he had carried on the trade under articles, he would not, without any express stipulation, have been entitled to an allowance for his management and time. On the other hand, what is urged as to his expenses appears material, as he proceeded on a mistake, considering himself as sole owner of the trade. I consider him as entitled to those expenses, but not to any allowance for his own time and labor. I take this to be the distinction, and that, if a man enters into articles of copartnership, and the children are to succeed to the share of their parent, a surviving partner is not entitled to an allowance for carrying on the trade. What is this but a case of voluntary management by a surviving partner for himself and the children of a deceased partner?

The authority of *Burden v. Burden*, supra, was contended by counsel in *Colgin v. Cummins*, 1 Port. (Ala.) 148, to have been destroyed by the decree subsequently pronounced by the same chancellor in *Brown v. De Tastet*, Jacob. 284. The court said: I have examined the latter case, and cannot assent to the conclusion drawn from it by the counsel. It would, indeed, be a fact somewhat remarkable, to say the least of it, that a chancellor, and that chancellor Lord Eldon, should have thus overruled the doctrine which he himself has solemnly declared, without even adverting to his former adjudications. But I do not think he has done so. In the last decree which the report of this case discloses, a reference is ordered to the master, directing him to permit such claims for the management, transacting, and carrying on of the business to be submitted to him as the surviving partner was advised he ought to have; and directing him, further, to state the facts and reasons upon which he shall have adjudged any allowances to be just allowances, if, on behalf of plaintiff, he shall be requested to do so; and state the facts and reasons upon which

he shall adjudge any allowance prayed not to be just, if he shall be requested by defendant so to do. It is not apparent from the case what was the nature or extent of the allowances contemplated; for the chancellor expressly says, in answer to an objection to a former order, making allowance to De Tastet for his personal services and credit: "I do not mean to intimate whether the master should allow wages, as they are called, or compensation; but it cannot be denied that, if the business be such that, on the death of the party, other persons are concerned in aiding it by the application of their skill, their services, and their money, a great deal may be included under the head of just allowances, which, till the master has thoroughly sifted it, the court cannot determine." The vice chancellor's order, commanding the master so to take the account as to show what was reasonable compensation for the personal services and attention of the survivor, was reversed by the chancellor, and another account ordered, as above stated, which should disclose the grounds upon which any allowance claimed should be either admitted or rejected by the master. If I were to concede that the allowance here contemplated by the chancellor was for the personal services of De Tastet, and not for those of other persons who were also engaged in the transaction of the business, carried on with the funds of the deceased, yet the facts of the case are so variant from those of *Burden v. Burden*, and of the case before us for adjudication, that the concession would not be material. The business in that case was a dealing upon money and bills of exchange, and was carried on by making new adventures on the funds after the death of a partner, in which case his representatives might either have claimed the money of the deceased, with interest, or his share of the profit made by the use of that money; and, if the whole profits were claimed, as was done by his representatives, the question would well arise, whether allowance should not be made to all who, by their labor and skill, wielded the fund, so as to make it productive of the profits claimed. An allowance for the personal services of De Tastet would not be at all decisive in favor of an allowance of that character in the case before us; in which, like that of *Burden v. Burden*, the only business done after the dissolution was such as was necessary to winding up the concern.

As to the alleged conflict between these two cases, it was further said in *Beatty v. Wray*, 19 Pa. 516, 57 Am. Dec. 677: In *Burden v. Burden*, supra, a surviving partner, though allowed his expenses, was not allowed for his trouble, Lord Eldon remarking that, had he carried on the trade for the benefit of the children under the articles, but without an express stipulation for it, he would have been entitled to no more. But services in winding up are rendered for the benefit of the firm, under an implied covenant in the articles, or an implied promise where the contract is a parol one, as much as services after the death, under an

express covenant or promise. Yet, in the subsequent case of *Brown v. De Tastet*, supra, the survivor was allowed to charge for his management. Surely that case was not thoroughly considered.

Burden v. Burden was followed in *Stocken v. Dawson*, 6 Beav. 371.

A surviving partner who is appointed administrator of the estate of his deceased copartner is not entitled to compensation for his services rendered in carrying on the business in good faith, although his services resulted in a profit, and even though he had been allowed a salary during the existence of the partnership, where no consent on the part of the next of kin that he should continue the business or draw a salary is shown. *Clausen v. Puvogel*, 114 App. Div. 455, 100 N. Y. Supp. 49.

But it seems that a surviving partner acting as administrator of his deceased partner, who successfully continues the business at the request of all the parties in interest, provided they are competent to consent, will be entitled to receive a salary justly earned by him in conducting the business. *Ibid.*

And it has been held that a son in partnership with his father, and entitled to receive one fifth of the net profits, and who, after his father's death, acts as his executor and continues the business under authority conferred by the will, is entitled to receive not only his share of the profits, but also a weekly salary and a certain share of the net profits, designated in the will as compensation to the executor carrying on the business, although he had not been admitted to partnership with his father at the time the latter made his will. *Allen's Appeal*, 125 Pa. 544, 17 Atl. 453.

As to the right of a surviving partner, acting as executor or administrator of his deceased copartner, to claim commissions, it has been held that an executor in India is entitled to 5 per cent commission upon the assets of the testator, arising from debts due him, or consisting of money in the hands of the executor and his partners in trade, of which the testator had been one. *Cockerell v. Barber*, 2 Russ. Ch. 585.

In *Crow v. Weidner*, 36 Mo. 412, it appears that a surviving partner who had given the statutory bond and administered the partnership took credit for commissions, but the right to take such credit was in no way considered or passed upon by the court.

A surviving partner who administers upon the effects of the copartnership is entitled, under Mo. Rev. Stat. 1889, § 222, to a commission of 3 per cent on the interest of the deceased partner as full compensation for his services and trouble; but a claim for services beyond that amount is forbidden by the common law. *Roberts v. Hendrickson*, 75 Mo. App. 484.

But a surviving partner who administered upon the partnership estate, and whose final settlement was filed before Mo. Rev. Stat. 1879, § 229, took effect, is not entitled to a commission of 3 per cent allowed by that act to the surviving partner for his services and 17 L.R.A. (N.S.)

trouble in administering upon the effects of the copartnership. *Re Tuttle*, 41 Mo. App. 662.

A surviving partner who has given the statutory bond and administered the partnership effects is not entitled, either at common law or under the statutes of the state of Missouri, to receive a commission allowed to administrators, or any other commission, on the ground of the partnership assets which passed through his hands on winding up the partnership affairs. *Gregory v. Menefee*, 83 Mo. 413.

A surviving partner who administers on the partnership estate under the common law is not entitled to commissions. *Scudder v. Ames*, 89 Mo. 496, 14 S. W. 525. The court said: The effect of the statutory requirement as to giving bond being only to impose the burden of giving security on the surviving partner, but not bestowing any emolument upon him, leaving him, in this respect, as he was at common law, bound to discharge his duties in relation to preserving and caring for the partnership estate without extra compensation; duties which the common law implies are incident to the contract of copartnership,—duties which remain in the absence or disability of the copartner, whether occasioned by causes of a temporary nature, as, for instance, sickness, or a permanent nature, as for instance, death.

The rule that an executor is not entitled to receive as compensation for services rendered the estate more than his commissions allowed by statute, however meritorious or extraordinary his services may have been, is not changed by the fact that he was a copartner of the decedent, and authorized to continue the business by the testator's will, which made no provision for additional compensation. *Re Dummett*, 38 Misc. 477, 77 N. Y. Supp. 1118.

A surviving and managing partner who is also administrator of his deceased partner is not entitled to commissions on sums advanced to himself, as administrator, from the funds of the partnership. *Frazier v. Frazier*, 77 Va. 775. The court remarked: It seems that a profit might be thus made by this administrator in that way if the charge should be so made.

Partner acting as receiver.

A surviving partner appointed receiver of the firm assets, who discharges no duties in the settlement of the firm business other than, as surviving partner, he is bound to do without compensation, is not entitled to compensation for his services. *Berry v. Jones*, 11 Heisk. 200, 27 Am. Rep. 742. The court observed: We think, as the defendant insisted upon his right as surviving partner to settle the business, he must be held to have done so under the same rule applicable in other cases,—that is, without compensation.

A surviving partner appointed receiver of the firm property with a specified compensation cannot thereafter claim compen-

sation to which he was entitled under the partnership articles of agreement. *Lennig v. Lennig*, 11 W. N. C. 18.

But a surviving partner appointed receiver of the partnership to collect the partnership assets for the convenience of both parties, and on the terms that he should be paid a certain remuneration, will be allowed to deduct his remuneration out of the moneys in his hands as receiver, although he is shown by the partnership accounts to be a debtor to the firm in a much greater amount, which he is wholly unable to pay. *Davy v. Scarth* [1906] 1 Ch. 55. The court stated: This was an arrangement between the parties with the sanction of the court. The honor of the court is involved in seeing that the arrangement is fulfilled with the utmost punctuality. Moreover, it is not suggested but that he has done the work properly. I think that, irrespective of his duty to the partnership, he is entitled to have the remuneration paid to him in order that he may be able to keep himself alive while he is doing his work as receiver.

See also *Jennings's Case*; *Honore v. Colmesnil*; *Todd v. Rich*; *Brien v. Harriman*,—*supra*, II., g. 1.

h. Contractual right to compensation.

1. Express contract.

The general rule governing the subject of this note has been outlined under II., a, *supra*. Its usual statement is that a partner is not entitled to compensation for services rendered to the partnership in the absence of an agreement therefor, express or implied. Claims for compensation, based on contractual right, constitute the leading exceptions to the operation of the general rule. Cases of express contract are treated in this subdivision. Those involving implied contracts for compensation are considered under the following subdivision, II., h. 2.

A partner is entitled to compensation for services rendered to the firm under an agreement with his copartner that he shall be paid therefor. *Shirk's Appeal*, 3 Brewst. (Pa.) 119; *Lassiter v. Jackman*, 88 Ind. 118; *Wisner v. Field*, 11 N. D. 257, 91 N. W. 67; *Robinson v. Green*, 5 Harr. (Del.) 115; *Lee v. Davis*, 70 Ind. 464.

An agreement between partners for the payment of salaries to themselves in consideration of their doing more work for the firm is a matter of management or administration of the partnership business, and, as such, by the terms of the statute, binding upon an assignee of the share of a partner. *Garwood v. Paynter* [1903] 1 Ch. 236.

Partners who manage the firm business under an agreement with the third partner that they will give their personal attention to it and receive therefor a specified yearly allowance are entitled to the stipulated compensation as against one to whom such third partner sold his interest, after which event the business was continued as before, without interruption or any new agreement. *Wilson v. Lineberger*, 83 N. C. 524.
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But one who purchases an interest in a mining partnership is not liable for services rendered by one of the partners prior to the time he came into the partnership, unless he assumes and agrees to pay the same. *Galigher v. Lockhart*, 11 Mont. 109, 27 Pac. 446.

Under an agreement that a partner taking general charge of the business and giving it his whole time and attention, while the other partners give their attention mainly to other pursuits, shall receive special compensation, the amount of which is not fixed, he is entitled to receive the reasonable value of his services. *Strattan v. Tabb*, 8 Ill. App. 225.

But, under articles of copartnership stipulating that a partner shall devote his entire time, skill, and attention to the prosecution of the firm business, but not providing for the payment of any compensation or salary therefor, a further stipulation that the partners, during the first five years of the copartnership, shall draw no more money out of their business for their own personal use than shall be absolutely necessary for the support of their families, which shall not exceed a specified sum per month, the residue of the profits to be applied to the business of the firm, is in no sense an agreement for the payment of a compensation or salary, but rather constitutes a division between the partners *pro tanto* of the partnership assets, and acts as a limitation, for the period of five years, upon their division of the profits. *Gerard v. Gateau*, 15 Ill. App. 520.

Nor is a partner who covenants in the agreement of copartnership to devote his time exclusively thereto for a stipulated compensation, irrespective of profits to be charged as wages or expenses, entitled to such compensation when unable to perform the anticipated services by reason of illness. *Hunter v. Little*, 17 N. Y. Week. Dig. 500. The ground of this decision is thus stated: A partner is not required to devote all his time personally to the management of the business, in the absence of a covenant to that effect. There is a general obligation upon the partners to devote themselves to the interests of the firm; apart from that, a partner may engage in as many businesses as he pleases. The covenant in question, therefore, adds to the general requirement of services to be rendered by partners. There is an agreement to devote his time exclusively to the partnership business by one partner, and an agreement in return by the partnership to pay for such services irrespective of profits. No reason is perceived why the party who is to furnish services for compensation shall receive the compensation without furnishing the services. The general liability to sickness by partners is considered in the formation of the agreement. If there is no covenant, sickness will not generally be charged against a partner. In the present case the agreement to furnish labor is specific, and it must be furnished.

Under a partnership agreement contain-

plating the operation of two distilleries, one to be managed by each of the partners, and allowing each of the partners a specified sum for his services in the business, one of them is not entitled to a monthly compensation where he performed no services, although he was ready to do so, and did not because it was agreed that it would be unprofitable to operate more than one of the distilleries. *Stone v. Mattingly*, 14 Ky. L. Rep. 113, 19 S. W. 402.

If a partner who was to have charge of the business and give his personal attention to its management for a stipulated compensation did not attend thereto as faithfully and continuously as he was required to do under the partnership articles, the loss to the business by reason of his inattention should be computed at the stipulated amount. *Brandt v. Edwards*, 91 Minn. 505, 98 N. W. 647.

Under articles of copartnership providing that a special partner in a firm carrying on business as contractors and builders shall receive a specified sum per day and one fourth of the net profits in addition, such *per diem* allowance should be deducted from the gross earnings of the business when computing the net profits. *Cook v. Phillips*, 16 Ill. App. 446.

It is competent for partners to agree that one shall render extra services, taking his risk of compensation out of anticipated profits, and that such compensation shall be one half of the profits if any are made. *Hasbrouck v. Childs*, 3 Bosw. 105.

Failure to realize profits does not necessarily preclude a partner from receiving compensation. Thus, under articles of partnership providing that the resident and active partner should receive one fourth of the net profits, and that, in case they should not amount to the sum of \$3,000 at the close of each year, the copartner would pay the sum required to make up that amount, such resident partner was entitled to receive his stipulated minimum share in a year in which no profits were realized. *Dumont v. Ruepprecht*, 38 Ala. 175.

A partner who brings into the firm nothing but his industry and his knowledge of business, and who is authorized by the articles of copartnership to take out of the funds of the firm a specified sum each month for his personal expenses, such amount to be deducted from his share of the profits, cannot be compelled, after dissolution of the firm, to refund to his copartner the amount received, on the ground that no profits had been made, where the failure to make profits was caused by the want of capital which the copartnership had agreed to furnish, but failed to do so. *Bonis v. Louvrier*, 8 La. Ann. 4.

But the active partner of a firm formed for a term of one year, who, it is stipulated in the articles of copartnership, shall not be entitled to compensation for his personal services if the firm makes no profits, cannot claim compensation for the second year of the existence of the firm, where no new agreement is entered into and no

profits are made. *Bradley v. Chamberlin*, 16 Vt. 613. The reason given for this ruling is that, since the parties continued their mercantile business by mutual consent after the expiration of the year, without anything being said as to the terms upon which it should be continued, it must be understood that it was but an extension of the time of the original articles of copartnership.

An agreement that the business of a partnership shall be carried on by one partner, and that he shall receive three fourths of the profits of the partnership, intends that he shall have one half of the profits for his extra services if profits are made, and no compensation for such services except in that way. *Hasbrouck v. Childs*, *supra*.

Under an agreement that a partner who is to act as treasurer of the copartnership and keep the books shall "receive for his services 10 per cent on the business" he is entitled to receive 10 per cent of the profits, rather than the gross amount of the business,—especially where that view is in consonance with all the provisions of the partnership articles, and is in accordance with the practical construction put upon them by the parties. *Funck v. Haskell*, 132 Mass. 580.

The rule that the property of a partnership shall be first applied to the payment of the debts of the concern before there can be any division of the assets is applicable when a member of the firm is to be compensated for his services out of the profits, since there would be difficulty in ascertaining such profits until the claims against the firm was adjusted. *Luce v. Hartshorn*, 7 Lans. 331, affirmed in 56 N. Y. 621.

As to share of profits as compensation, see *Mills v. Fellows*; *Lee v. Lashbrooke*; *Anderson v. Taylor*; *Roth v. Boies*; *McBride v. Stradley*; *Heath v. Waters*; *Warren v. Raben*,—*supra*, II., a.

A salary payable out of profits yearly may be recovered at law, if profits are proved sufficient to pay. *Robinson v. Green*, 5 Harr. (Del.) 115.

One entering into a partnership for a term of years, and entitled by the articles of copartnership to receive a specified yearly salary in addition to sharing the profits, is entitled to claim such salary for years subsequent to the expiration of the term of the partnership as originally fixed, where the business was continued without any new agreement. *Gresham v. Harcourt* (Tex. Civ. App.) 50 S. W. 1058.

Under a partnership agreement providing that, in settling the affairs of the partnership, one of the partners is to receive for services a specified salary per year for attending to the business, to be taken out before a division, such partner is entitled to the stipulated amount for past services, and is not restricted to payment for services in making settlement. *McCullough v. Barr*, 145 Pa. 459, 22 Atl. 962.

But a partner entitled by the articles of partnership to receive a specified yearly salary, after the payment of which the profits are to be divided equally between the

partners, extinguishes his right thereto where he subsequently assigns to his copartner all his interest in the business and all such sums of money as are owing to him, in consideration that the latter shall save him harmless from all debts and liabilities of the partnership, and further stipulates that the partnership be dissolved, and that the articles of agreement therefor be canceled. *Wright v. Troop*, 70 Me. 346.

An article in a partnership agreement by which one of the partners binds himself not to take out of the business or stock in trade of the firm more than a specified sum per annum, in goods, or money, or both, does not entitle such person to the sum specified in addition to his share of the profits, and in consideration of his giving his undivided personal attention to the business of the firm. *Baltzell v. Trump*, 1 Md. Ch. 517, affirmed in 3 Md. 295.

Under articles of copartnership providing that one of the partners shall receive a specified sum monthly as payment for his services, to be paid from the principal if the profits are not sufficient, and, if the principal is not sufficient, by the other partner; such salary to be treated as an expense of the business necessarily incurred and to be paid before profits can be divided, —the salary is not payable unless such partner renders the contemplated services. *Kinney v. Maher*, 156 Mass. 252, 30 N. E. 818. The court said: This sum was to be paid as *quid pro quo* for services actually rendered, and, if no services were rendered, the payment was not to be made.

A partner furnishing the capital invested in the business, and entitled by agreement to receive a specified monthly salary, but a portion of which was credited to him on the firm books, and the balance to another partner under a secret agreement with the latter that the whole amount should belong to the former, is not entitled to take from the firm assets, after dissolution, a larger sum than that credited. *Keiley v. Turner*, 81 Md. 269, 31 Atl. 700.

So, a partner who, by the direction of his copartner, given to the bookkeeper, is credited on the books of the firm with a certain amount for each day that he works, is bound by such amount, although it is a very small compensation considering the character of his services to the firm, where, as a partner, he had a right to examine the books of the partnership, and made no objection to the amount entered therein in his favor. *Bales v. Ferrell*, 20 Ky. L. Rep. 1564, 49 S. W. 759.

An agreement made by a partner entitled to draw a specified amount in weekly sums, and to receive a certain percentage of the gross receipts of the business as salary, that, if he should be chosen president, at a certain salary, of a corporation to which a substantial part of the firm's business was transferred, and should be given a certain percentage of the net profits, his copartner should be released from all liability by reason of the percentage provided for in the partnership articles, con-

templated a continuance of the business of the partnership, and that its provisions should govern the rights of the parties, except under the circumstances mentioned. *Hagenbuehle v. Schultz*, 69 Hun, 183, 23 N. Y. Supp. 611.

A salary payable to one of the members of a partnership, under the terms of the articles of partnership, is terminated upon a dissolution of the firm by the death of a copartner, by which event the salaried partner becomes a surviving partner with the duty resting upon him to wind up the business and settle its accounts. *McCullough v. Barr*, *supra*.

That, by a secret arrangement between two out of three partners when salaries theretofore paid to the members of the firm were discontinued, it was understood that the salary of one of them should be continued, does not entitle the latter to still claim the stipulated amount after dissolution of the firm. *Keiley v. Turner*, *supra*.

That a widow of a deceased partner, when notified by the surviving partner of his intention to charge for half the value of his services in managing the business of the partnership since its dissolution, replied that she did not think it was right, but that, if it was right, she would pay it, does not show an acquiescence on her part equivalent to an agreement between the partners to pay for the services. *Smith v. Smith*, 51 La. Ann. 72, 24 So. 618.

A statement by a partner that he was willing to compensate his copartner liberally for his services in a certain transaction of the firm is not binding, if it can be construed into a promise at all, since it was not made to the partner, and did not purport to be an agreement between all the partners, and could, at most, be construed only as a promise on a past consideration. *Butner v. Lemly*, 58 N. C. (5 Jones, Eq.) 148.

Under a written contract between partners in the distillery business, providing that one of them is to furnish all the warehousing and to receive all storage for his own account, the latter is not entitled to charge storage on whisky while in the warehouse and before its sale, where the evidence shows that it was the understanding of the parties, at the time the contract was executed, that he should not do so. *Edelen v. Walker*, 21 Ky. L. Rep. 839, 53 S. W. 38.

One of the partners in a transaction involving the purchase, management, and sale of real estate may properly, in pursuance of an agreement between them, be allowed compensation for services performed in making repairs, buying material, superintending the work, and collecting rents. *Hoag v. Alderman*, 184 Mass. 217, 68 N. E. 199.

One jointly interested with two others in real estate, who, at their request, took charge of the property, making improvements thereon and superintending the building and management of a mill, is entitled to compensation for his services whether he was regarded as a partner or a tenant in common, where one of the owners gave

no attention to the business, and the other, whom it was expected would devote his services to the enterprise, died,—especially where it was definitely understood or agreed that the persons actively conducting the business should be paid. *Sears v. Munson*, 23 Iowa, 380.

An agreement between partners in a mining venture, that one of them shall receive a specified sum for managing the business, entitles such partner to a payment of the stipulated amount out of the funds of the copartnership. *Weaver v. Upton*, 29 N. C. (7 Ired. L.) 458.

One who, with others, purchased real and personal property, including a newspaper, from an estate, with the intention of jointly publishing the paper, and who was allowed to retain a piece of land as compensation for his work in negotiating for the property, upon his representation that it was worth but a certain amount, when it was in fact worth four times that sum, will be required to divide his property with his associates according to their respective interests. *Huiskamp v. West*, 47 Fed. 236.

2. Implied contract.

The general rule denying any remuneration to a partner for services rendered in the business of the copartnership, unless there is an express agreement to that effect, like all general rules, has its exceptions, as where such an agreement may be implied from the course of business between the copartners, or from the nature of the services rendered in connection with the duties and obligations imposed by the partnership articles upon the several members of the firm.

If the partnership agreement is silent on the subject of compensation, the law implies no agreement between the parties to that effect, unless it can be fairly inferred from the course of the business or the nature of the services performed. *Sheridan v. Healy*, 15 Chicago Leg. News, 104.

In the management of the copartnership business each partner is attending to his own interest therein as well as to the interest of his copartner; and the law implies no agreement to compensate either of them for their various and unequal duties and services in the management of the business of the firm. *Caldwell v. Leiber*, 7 Paige, 483.

The rule is that, if an agreement that a partner shall be paid for his services can be fully and justly implied from the course of business between the copartners, he is entitled to recover. *Morris v. Griffin*, 83 Iowa, 327, 49 N. W. 846; *Cramer v. Bachmann*, 68 Mo. 313; *Mann v. Flanagan*, 9 Or. 425; *Lassiter v. Jackman*, 88 Ind. 118; *Roth v. Boies* (Iowa) 115 N. W. 930.

The question is one of evidence or contract, and, whether the right to recover is established by necessary implication, or from express stipulation, the rule is the same. *Levi v. Karrick*, 13 Iowa, 344.

If the conduct of the partners and their course of dealing in reference to the part-

nership are such that it may be fairly and justly implied from such conduct, course of dealing, or situation of the partners, that it was the understanding between them that compensation was to be given to a partner, then such compensation should be allowed. *Wisner v. Field*, 11 N. D. 257, 91 N. W. 67.

Monthly salaries credited or shown by the books and pay rolls in favor of the two active partners should be allowed as against the estate of a deceased partner who, in his lifetime, was about the office of the partnership, and had access to its books and pay rolls, and must have known of the payment of the salaries. *Godfrey v. Templeton*, 86 Tenn. 161, 6 S. W. 47.

Where the question as to whether or not a partner is entitled to a salary when no profits are made is left open to doubt by the partnership articles, if he is credited with salary at such times for a series of years on the books of the concern, with the knowledge of the other partner, who makes no objection thereto, such interpretation by the parties themselves of the partnership agreement will be conclusive; and the claim for salary at such times must be allowed upon a winding up of the concern. In like manner, failure by one partner to object to an increase in the salary paid the other will make such increase binding on him. *Winchester v. Glazier*, 152 Mass. 316, 9 L.R.A. 424, 25 N. E. 728.

In *Folsom v. Marlette*, 23 Nev. 459, 49 Pac. 39, the general rule that one partner is not entitled to charge the other compensation for his services without special agreement was enforced as to charges for services made by one partner without special agreement; but one member of the court dissented on the ground that the charges were made during the course of business, in the firm books, which were accessible to the party charged, and a statement containing the charges was delivered to him upwards of two years prior to the dissolution of the firm, and that, as he made no objection thereto, then or afterwards, until an action for an accounting was commenced, he should be deemed to have acquiesced in the charge.

An allowance to a resident partner, which was entered in the books of a distillery concern, for managing the business and treating the customers, does not disclose an agreement between the partners for such an allowance, where the books remained together under the dominion of the resident partner, and no account was ever furnished the copartner, or settled, and it does not appear that the latter ever saw the books. *Hutcheson v. Smith*, 5 Ir. Eq. Rep. 117.

A member of a partnership engaged in the book and stationery business, who takes entire control of the affairs of the firm, is not entitled to receive compensation for services rendered in the business of the partnership, in the absence of an agreement therefor; and none will be implied from the fact that he took credit for his services, from time to time, on the books of the firm, which were open to the inspection of

his copartner. *Lindsey v. Stranahan*, 129 Pa. 635, 18 Atl. 524. The court said: It is conceded that there was no express contract that he should be paid for his services, and there is no principle better settled than that the law will not imply a contract in such cases. The reason is that the partner is but attending to his own affairs. This rule is inexorable,—as much so as that between parent and child; were it otherwise, we might have a contest between the partners upon the settlement of every partnership account as to the value of their respective services. It is true, this principle may work hardship in particular cases; almost every general rule does; but that is a weak argument against the soundness of the rule. When the partnership agreement contemplates that one partner shall manage the business or demand more than his share of the work, it is easy to provide for his compensation in the agreement itself. And, if no such stipulation is then made, as before said, the law will not imply one.

That a partner received some allowances on the books of the firm, by consent, for extra work on some special occasions, does not show an agreement entitling him to an allowance for personal services rendered by him to the firm at other times. *Heckard v. Fay*, 57 Ill. App. 20.

A partner who, after the death of his brother, who was his copartner, continued the firm business upon the understanding that the deceased partner's interest was to belong to his mother and single sisters, is not entitled to compensation for managing the business, in the absence of an express agreement therefor, and when he never made such claim to the parties in interest prior to a dissolution of the partnership, and did not indicate an intention to make such a charge by the manner in which he kept the books, particularly for the first few years after his brother's death. *Caldwell v. Lang*, 31 Ky. L. Rep. 237, 101 S. W. 972.

A partner having the immediate and active charge of the business of the firm, and devoting his whole time and attention thereto, and authorized at the beginning of the business to charge \$1,000 per year therefor, will be allowed compensation at a larger amount for subsequent years, where it appears that the business increased in proportion; that the increased salary was entered on the books; and that the copartners had knowledge of the fact and did not make objection to the increase. *Gage v. Parmelee*, 87 Ill. 329.

A young and inexperienced man who, while out of employment, was taken into partnership by a well-known and active business man with an established insurance business, is not entitled to compensation in addition to his share of the profits of the partnership business, although he did the greater part of the clerical and other work of the firm, and had the active management of its business, while the senior partner devoted his time to the duties of his position as city assessor, but used his official position to good effect in obtaining business

for the firm. *Whitney v. Whitney*, 27 Ky. L. Rep. 1197, 88 S. W. 311. The court remarked: The evidence in this case does not show an agreement for compensation between the partners, nor does it raise the implication that such an understanding existed between them; therefore the chancellor did not err in refusing the additional compensation asked.

The law does not ordinarily imply an agreement on the part of a firm to pay a member thereof for work and labor performed by him in the business of the firm, although there may be circumstances from which the law would imply such an agreement. *Lee v. Davis*, 70 Ind. 464.

An attorney who is a partner in a manufacturing business is not entitled to compensation for attending suits of the firm, without any employment from them, except what is inferable from his being a partner and necessarily interested in the result. *Pierce v. Daniels*, 25 Vt. 624.

A member of a partnership which purchases land for the purpose of improving and reselling it is entitled to compensation for services rendered under an implied agreement therefor, inferable from all the circumstances, where he was requested by the written agreement of partnership to build houses, borrow the necessary money, sell and convey the property, and do all the partnership business, and devote all his time to the business, to which he contributed more capital than did his copartner, who did nothing to promote the interests of the partnership. *Sheridan v. Healy*, 15 Chicago Leg. News, 104. The ground of this decision is thus stated by the court: The understanding that one partner should do all the work is quite unusual, as ordinarily each of the partners devotes his services in promotion of the interests of the firm, and that is the reason why the law will imply no agreement by one for compensation of the other. This case is therefore removed from the reason of the rule, and should be taken out of it. It would work great injustice to the defendant to allow plaintiff an equal share of the profits of this venture for the mere use of the money advanced, and equity and justice require that an agreement should be implied from all the circumstances for the payment of the defendant for his services.

But one who entered into a partnership with another for the purchase and sale of lands, under a written contract entirely silent upon the question as to the person by whom the sale of lands was to be made, and entirely silent upon the question of compensation, is not entitled to claim a commission for his services, although he had the sole management, control, and sale of the lands by reason of his residing in their vicinity, while his copartner did not, where such fact was known to the party performing the services when he entered into the partnership, and when he was permitted to engage in that venture without investing any money at the time, and at a very reasonable rate of interest, and he made no

claim for compensation until after the partnership had continued for eighteen years. *Wisner v. Field*, 11 N. D. 257, 91 N. W. 67. In this case the partner claiming commissions contended that the circumstances were so peculiar and unusual that it should be implied therefrom that it was the intention and understanding of the parties that he was to be compensated for his services on behalf of the partnership.

Under a contract of partnership in a mining venture, providing for the expenditure of a definite amount, and containing a stipulation that a certain portion of it shall be paid by a designated person in work performed by himself, there is an implied agreement that, if the latter performs labor in excess of the specified amount, he is entitled to compensation therefor. *Gaston v. Kellogg*, 91 Mo. 104, 3 S. W. 589.

A member of a partnership for the purchase and sale of mining property, in which partnership both parties are equally interested, can claim at the utmost from his copartner, on account of expense and time devoted to the business, but one half of the excess of his outlay over that of his copartner. *Mackey v. Magnon*, 12 Colo. App. 137, 54 Pac. 907.

A member of a mining partnership who acts as superintendent with the knowledge and consent of all the partners should be allowed compensation for his services, where the position requires a large amount of skill and business capacity in the superintendence of books, the supervision of valuable machinery, the employment and payment of a large number of hands, and in looking generally after the interests of the concern, which at times is operated by night as well as by day, thereby frequently requiring the attendance of the superintendent at the mine at all hours of both day and night. *Levi v. Karrick*, 13 Iowa, 344.

A member of a partnership organized for the purpose of mining and selling coal and dealing in merchandise, who lived in a city where the coal was marketed, and gave his attention to that particular duty, is entitled to a commission or special compensation for services rendered, where his copartners, who lived at the point where the mine was operated and the merchandise business conducted, occupied houses and lands of the firm, rent free, and supplied themselves and their families with goods and groceries from the company's store without cost or charge, while he was not in a position to avail himself of such privileges; but he should not be allowed commissions from the time his copartners removed to the city in which he resided, thus equalizing conditions as between them. *Mann v. Flanagan*, 9 Or. 425.

If a member of a firm is employed to render services which neither the law nor the agreement of the parties imposes upon him, an agreement is implied that he shall be paid. *Levi v. Karrick*, supra.

But that each of two partners with equal interests in the business drew from the firm monthly an equal amount does not imply the 17 L.R.A. (N.S.)

existence of an agreement for compensation for excessive services rendered by one of them. *Smith v. Knight*, 88 Iowa, 257, 55 N. W. 189.

That one of two equal partners in the operation of a paper mill did but little work for the concern does not entitle his copartner, who managed the business of the partnership, to any compensation over and above his equal share of the profits for his personal services rendered the firm, where it does not appear but that the little performed by the one partner may have been just as valuable as that performed by the other, and no claim for compensation was made until after the dissolution of the partnership, and the party making such claim was not at the mill more than half of his time. *Boardman v. Close*, 44 Iowa, 428.

That partners in the operation of a paper mill were in the habit of charging each other for absent time does not imply, as against one subsequently coming into the firm, and who had no knowledge of the fact, and who was frequently absent, an agreement to pay a copartner for personal services rendered to the firm, where no charge was made against such absent partner on the books. *Ibid*.

It will be presumed that it was intended that compensation should be made an active partner who took entire charge of the work of erecting and operating a mill for the manufacture of linseed oil, attended to the selling of the oil and to the finances of the firm, while his copartner devoted his time to a separate business; and the law will imply a contract to compensate him for his services in the management of the business. *Emerson v. Durand*, 64 Wis. 111, 54 Am. Rep. 593, 24 N. W. 129.

On the dissolution of a partnership engaged in grape culture and wine making, an agreement by one partner, whose time was almost exclusively occupied in an independent business of his own, to compensate his copartner, who was thoroughly familiar with the details of the business and gave his entire time to it, will be implied where a contract to that effect was drawn up between the partners, but not signed by the active partner, who considered the compensation specified therein to be insufficient. *Cramer v. Bachmann*, 68 Mo. 313.

A member of a partnership for grazing and selling sheep, who was to take possession of and manage the flock so long as it should be mutually agreeable and satisfactory to the partners, and who was to receive for his services in the general control of the flock such remuneration as he and his partners should agree upon, is entitled to a reasonable compensation, although no specified agreement in that regard was ever entered into, where the parties became separated by the existence of the Civil War, and could make no agreement. *Garrett v. Bradford*, 28 Gratt. 609.

A member of a partnership formed for the purpose of buying and running a farm, who devotes his time and attention to the firm at the instance of his copartner,

while the latter is devoting his attention to his individual business, should have compensation for his services. *Hooker v. Williamson*, 60 Tex. 526. The court said: It is now claimed that one partner is not entitled to compensation for time and attention devoted to the firm business, without an agreement to that effect. But, conceding that to be the general rule applicable to partnerships, that existing between these parties was not an ordinary partnership like those pertaining to trade and the professions, where, in the absence of an agreement upon that subject, each partner is presumed to devote his time and attention to the common business. We have no doubt the law would imply a promise that he should have compensation for his services.

A member of a partnership admitted without putting in any capital, but obligated by the articles of agreement to devote his services to the firm as bookkeeper and accountant, will be held to have rendered such extraordinary assistance in the winding up of the partnership business after its dissolution by the death of one of the partners as creates an implied agreement that he should be paid therefor, where, for some months after the dissolution, he was the only member of the partnership present at the place where its business was located, and, for nearly a year and a half after dissolution, devoted considerable time to its affairs, without which services on his part a receiver must have been appointed at the expense of the estate, or else the other surviving partner, who was much of the time absent, would have been under the necessity of remaining constantly in the place where the business of the firm was carried on. *Hanks v. Wilcox*, 2 Haw. 509.

A member of a partnership for the sale of agricultural implements, who agreed to devote his entire time to the business without charge, in view of his copartner's entering the service of another firm for nine months of the ensuing year, is entitled to reasonable compensation for his services during subsequent years, where the copartner continued his relations with such other firm for eleven years, and devoted but three months in each year to the partnership business. *Morris v. Griffin*, 83 Iowa, 327, 49 N. W. 846.

In *Butcher v. Auld*, 3 Kan. 217, in an action for an accounting between partners who had been engaged in the construction of a railroad as contractors, one of them, who testified that he kept a boarding house for the firm, and that he was to receive a specified sum per month for his services, was held entitled to prove the value of those services, since testimony might be given overcoming the proof of a contract, in which event the party rendering the services would be entitled to what they were reasonably worth.

One who agrees to go into partnership with another, and to furnish a specified amount of capital, and to take charge of the business, is not entitled to recover for services performed by him, where, after taking

control of the affairs of the firm and advertising himself as a partner for a period of three months, the arrangement is discontinued because of his inability to furnish the stipulated capital. *Shumard v. Gano*, 18 Ohio C. C. 871. The court said: There is no claim that there was any agreement to pay him for such services at any time, and the agreement of partnership not having been fully consummated, by his fault and failure to comply with his contract, we cannot see that the law would imply a promise on the part of his associate in business to do so.

A minor who purchased an interest in a business and thereafter rescinded his contract is entitled to recover back what he paid into the business, less sums received by him; but he is not entitled to receive anything for services rendered. *Lyghtel v. Collins*, 11 Ohio Dec. Reprint, 161. The court observed: There can be no implied contract for services when the express contract negatives such an inference; as the express contract was for a partnership, if he revokes that contract he cannot, by implication, substitute another contract, such as an implied promise to pay for services, when no such obligation was contemplated by either party.

4. *Forfeiture of compensation by misconduct.*

Fraud or other misconduct is sufficient to deprive a partner of compensation to which he might otherwise be entitled. Thus, one jointly interested with another in the purchase and resale of lands, and entitled to an equitable interest therein, may forfeit his right to stipulated commissions on sales by fraudulent misconduct in performing the duties required of him by the contract, whether he was or was not a partner. *Blair v. Shaeffer*, 33 Fed. 218, reversed on appeal on other grounds in 149 U. S. 248, 37 L. ed. 721, 13 Sup. Ct. Rep. 856.

If debts due to a firm which has been dissolved are lost by the negligence of a partner appointed as agent of the firm to collect and settle the debts of the partnership and close up its affairs, such negligence will furnish a good reason for refusing to pay him for his services. *Honore v. Colmesnil*, 1 J. J. Marsh. 524.

A partner who voluntarily assumed entire control of the firm business and excluded the copartner from its management is not entitled to an allowance for his services, where he neglected and mismanaged the business, by reason of which the partnership sustained loss. *Young v. Berryman*, N. B. Eq. Cas. 110.

But compensation for services rendered by a partner who conducted the firm business during the greater part of the year without the aid of his copartner will not be denied on the ground that the services were valueless, where the accounts of the partnership became confused for the want of proper books, when the responsibility therefor was not alone due to the managing partner,

but both were undoubtedly negligent in the management of the business, in spite of which, however, it appears that they built up and conducted a large trade. *Morris v. Griffin*, 83 Iowa, 327, 49 N. W. 846.

An active member of a partnership, who believes, and has a right to believe, that the original partnership has been extended by agreement for a term of years, is entitled to reasonable compensation by way of salary, where it is not shown that he abused the trust reposed in him, or that he converted or wasted the assets of the firm confided to his keeping and management. *Swepson v. Davis* (Tenn. Ch. App.) 37 S. W. 896.

A member of a partnership for the operation of a farm, who agreed to devote his entire time to the partnership business, is not entitled to compensation for such portion of the time as he is shown to have been otherwise employed. *Lay v. Emery*, 8 N. D. 515, 79 N. W. 1053.

J. Waiver of compensation.

The right of a partner to receive compensation or commissions for services rendered to the firm may be abandoned or waived. But a partner entitled, by the express terms of the copartnership agreement, to receive a salary, does not waive his right thereto because a copartner having general control of the office business, including the books of account, neglected to credit him with the salary,—especially where the omission was not long continued or repeated. *Price v. Wilson*, 67 Barb. 9.

But a partner in charge of the business during the absence of his copartner, who failed to have entered on the books an agreed credit of \$50 a month to the firm to compensate for the absent partner's loss of time, is not entitled, after an unconditional purchase of the business, to recover the amount. *Pierce v. Ten Eyck*, 9 Mont. 349, 23 Pac. 423.

A member of a partnership formed for the purpose of purchasing land to be subdivided and sold as building lots, who has contributed as much capital to the venture as his copartner, and who performed all the labor and contributed all the effort and skill in selling the property under an agreement that he should receive commissions for his services, will not be presumed, on slight evidence, to have abandoned the agreement for commissions. *Askew v. Springer*, 111 Ill. 662.

That an equal partner in an undertaking for the purchase and sale of real estate, who performed all the labor and contributed all the effort and skill in selling the property under an agreement with his copartner for commissions, made no claim therefor during the continuance of the partnership, does not preclude him from claiming them under the agreement. *Ibid.*

Nor does the fact that a settlement was made of all other prior transactions, without including his claim for commissions, preclude him from asserting his claim on final settlement, where other land remained

to be sold, and the affairs of the firm were not closed. *Ibid.*

A rejected offer by a surviving partner to take a certain amount in payment for his services in completing the enterprise in which the partnership was engaged does not prevent his requiring a reasonable allowance therefor in case he applies to the courts, although it is in excess of the amount named in his offer. *Condon v. Callahan*, 115 Tenn. 285, 1 L.R.A.(N.S.) 643, 112 Am. St. Rep. 833, 89 S. W. 400.

One who entered into a partnership with others, and agreed to manage and superintend the business and give it his undivided attention in consideration of a specified monthly salary, is entitled to receive the stipulated amount, although he did not give the business his undivided attention and time as he agreed to do, but was absent a large portion of the time, where his copartners knew how he was managing the business, but made no complaint. *Weeks v. McClintock*, 50 Ark. 193, 6 S. W. 734. The court said: He had a right to presume from their silence that they approved his course of conduct, and to continue to act upon that presumption. They accepted his services, acquiesced in his conduct, and waived their contract with him to the extent of requiring him to give their business his undivided time and attention. It is too late for them to dispute his right to his wages after they have silently accepted his services for the period of twenty-eight months.

But a member of a partnership engaged in operating a mill for planing lumber, and entitled by the terms of the partnership agreement to draw a specified yearly salary in addition to his share of the profits, for personally superintending the mill, is not entitled to such compensation, where, by a subsequent agreement, he relinquished, with the assent of his copartner, the personal management of the mill, and engaged in other business, which fully occupied his time. *Anderson v. Taylor*, 37 N. C. (2 Ired. Eq.) 420, 38 Am. Dec. 689. The court remarked: Here, it is true, there was a stipulation for compensation; but that was abandoned or waived, and, the services as there specified not having been rendered so as to entitle the defendant to claim under the agreement, the case stands precisely as if the article had been silent on the subject. The defendant did not act as managing partner as contemplated in the agreement, but another person supplied his place, and afterwards he acted as any and every partner would, simply from his interest in the concern.

III. Conclusion.

The general rule that one partner is not entitled to compensation for his services while employed in the partnership business is well established. The reasons for this rule, as stated by the commentators and judges, are, first, that each partner, in taking care of the joint property, is in fact tak-

ing care of his own interest, and is but performing his own duties and obligations growing out of the partnership. These duties and obligations are supposed to enter into and constitute a part of the consideration for others to engage in the business with him. The partners are considered as meeting on a common ground, each engaging to do all he can for the common good. In the second place, the law cannot undertake to measure and settle between the partners the relative value of the various and unequal services bestowed on the joint business, for the obvious reason that it is impossible to see how far the relative experience, skill, and ability, or even known character and reputation, of each, entered as ingredients in the adjustment of the terms of partnership. *Forrer v. Forrer*, 29 Gratt. 134; *Hellman v. Mendel*, 6 Ohio Dec. Reprint, 829.

It follows that inequality of services is not a ground for compensation. in the absence of an agreement therefor, however superior the ability or industry of one partner may be to that of the other. The courts, finding it impracticable to measure the relative value of service rendered by partners to the firm, wisely leave them to regulate the matter by contract. If they fail to do so, the greater services will be presumed to have been gratuitous. This rule is applicable to legal partnerships, whether general or limited. It has also been applied where one of the partners absents himself, or gives but little attention to the business. The rule has further been applied, with seeming harshness, to active or managing partners upon whom the burden of transacting the partnership business is largely or wholly laid. They, too, must stipulate for extra compensation or forego it. But, in support of the rule, it may be said that, as soon as the courts undertake, upon a mere estimate of a partner's services, to award compensation in one case, they must do so in all cases where skill and labor and diligence are unequally bestowed. This would be simply to abolish the rule of law, and to place the right of compensation, not upon contract, but upon the principle of *quantum meruit*.

The subject of compensation for unequal services is admirably summed up by Vice Chancellor Willard in *Caldwell v. Leiber*, 7 Paige, 483, where he says: "Where there is no special agreement to that effect, partners are not entitled to charge each other for their services in the management of the concern; and the law never undertakes to settle between them their various and unequal services in the transaction of their private affairs. . . . The attempt would be altogether impracticable. One man may possess advantages over his partner in one respect, which may be made up to the latter in the possession of some quality in which the former is deficient. One may have an established reputation in the neighborhood in which he lives for honesty and fair dealing; he may be surrounded by nu-

merous and powerful friends; he may enjoy in an eminent degree the confidence of his fellow citizens; he may possess wisdom and sagacity in directing the general management of his affairs. Another, though destitute of some of these advantages, may nevertheless be a valuable partner for his activity in business, his knowledge and skill as an accountant, or his tact as a salesman. These things are all taken into the account by the parties when they form a connection. They deal with each other, in making the bargain, at arm's length, and each trusts to his own wisdom to secure as many of the advantages resulting from the copartnership as he can. A bill in equity could not be sustained by a partner, at the close of the concern, to compel a copartner to make up deficiencies arising from his want of business talent. I apprehend nothing short of a breach of good faith, amounting to fraud, will justify the interference of the court in estimating the value of a partner's services to the firm."

Sickness of a partner may cast increased and unusual labors upon his copartner, but even in that event the latter cannot claim compensation therefor, unless it is provided by agreement. A partner is regarded as assuming the risk of disproportionate labor arising from casualty or illness suffered by his copartner.

A liquidating partner is not allowed compensation for closing up the affairs of the partnership, in the absence of contract, although there is a tendency to allow for labors which constitute extra services, or which may be regarded as a distinct business from that of the partnership. This rule undeniably works hardship in many cases. It is said to be inapplicable where a partner is appointed liquidating trustee. And its unlimited applicability to professional firms, such as law partnerships, has been doubted.

It is well settled that a surviving partner is not entitled, in the absence of contract, to compensation for personal services while engaged in winding up the business and disposing of the partnership assets. This subject was considered in *Beaty v. Wray*, 19 Pa. 516. 57 Am. Dec. 677, where it is said: At the formation of a partnership, its dissolution by death is rarely contemplated; it is an unwelcome subject; for no man who enters on a speculation can bear to think he may not live to finish it. Hence, the contract is usually framed for operations during the proposed period; and, when the parties anticipate the expiration of it, they dispose of the unfinished business by a new arrangement. Consequently, in articles or a parol contract of partnership, there is seldom, if ever, an express provision for compensation to a surviving partner; and, where compensation is not allowed by commercial custom, the contract, based on the law of partnership, binds him by an implied covenant or promise to settle the accounts, pay the debts, and hand over a proportionate part of the capital and profits as his proper business. As each partner is

clothed with all the power of the firm, each is burdened with all the duties of it; and, when one of them dies, this power and these duties devolve on the survivor as the representative of the firm, or, rather, as the firm itself. The difficulty is to conceive how a party can entitle himself to a reward for doing what the law and his contract had bound him to do. At first view, it might seem unjust that a co-operator should contribute more than his share to the success of an enterprise, without remuneration for the excess; but his share depends upon the nature of the bargain. By the contract of association, every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartners, and without comparison of values; for services to the firm cannot, from their very nature, be estimated and equalized by compensation of differences. They are inappreciable and unsusceptible of specific charge. A partner could not keep an account of every hoop or nail driven by him; and, if this is the nature of services to the firm before dissolution, it is the nature of services to the firm after it. A partner might as well pretend to charge for doing his partner's duties during sickness or temporary insanity, which does not necessarily work a dissolution of the partnership, as to charge for doing what his dead partner might have possibly done had he lived. The difference is, that the disability is temporary in the one case and perpetual in the other; but the legal consequences of it, between the partners, are the same.

It is asserted in *Lennig v. Lennig*, 11 W. N. C. 18, that a contrary rule would lead to a prolonged winding up of the affairs of the partnership, and in many instances to an exhaustion of a large share of the property.

The case of a surviving partner is said, in *Colgin v. Cummins*, 1 Port. (Ala.) 148, to be that of a man whose rights and whose duty too, it is, in consequence of his property being mingled by his own act with that of another, to take care of it and to do certain acts in relation to it for his own and that other's interest, until a separation is made, which, in contemplation of law, can be done only by his own action. Every act which a surviving partner can lawfully do is emphatically for himself,—so much so that he could refuse to the representative of the deceased any participation in it.

The winding up or settling of the partnership affairs after the death of one of the partners may be said to consist, as a general thing, in settling the property, receiving moneys due the firm, paying the firm debts and the advances of the partners, returning the capital contributed by each partner, and dividing the profits. Where, however, the surviving partner renders services in excess of the mere winding up of the partnership affairs, he will, under certain circumstances, be entitled to compensation for such excess. The most usual cases where the surviving partner is allowed compensation are those where he successfully continues the business of the firm, or success-

fully completes an enterprise in which the firm has been engaged, so that a substantial benefit is received from his efforts. The amount of compensation will vary according to the state of the accounts, the nature of the business, the difficulty and results of the undertaking, and its necessity or desirability. If he performs such extra services with the consent of the representatives of the deceased partner, such consent is sometimes an important factor in determining the question whether he is entitled to compensation. His claim to compensation will, in connection with the circumstances already mentioned, be looked upon with favor, if the representatives of the deceased partner elect to share in the profits realized from the services as surviving partner. While it is true that compensation will ordinarily be denied to a surviving partner in the absence of an agreement therefor, yet an agreement will sometimes be implied where the services are extraordinary and unusual, and such as could not reasonably have been contemplated. *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138.

The rule denying compensation to a surviving partner includes commissions. Even an agreed salary allowed a partner in the lifetime of his copartner is terminated by the latter's death.

The desirability of softening the rigor of the general rule in the case of legal or professional partnerships has been repeatedly suggested. It is said in *Lamb v. Wilson*, 3 Neb. (Unof.) 496, 92 N. W. 167: It seems that the rule should not be extended beyond the requirement of merely winding up the partnership affairs by collecting its outstanding claims, paying debts, and distributing the surplus among the members; and that, when it appears that time, skill, and labor have been expended by a partner in the continuance of a partnership business which inures to the general benefit, he ought to receive from the profits from his skill and labor a reasonable compensation, varying according to the nature of the business, the difficulties and results of the undertaking, and its necessity or desirability. While few cases are found which directly support this view, it seems to us to be founded upon the plainest principles of equity and justice,—especially when applied to partnerships among professional men, where the profits are almost wholly the result of professional skill and labor.

So, it is said in *Sterne v. Goep*, 20 Hun. 396: It would seem to be a harsh rule which would require the surviving partner of a law firm to take upon himself, solely, the conduct of all pending litigations in the office at the time of his partner's decease, and devote his professional skill and labor through a possible period of years to the conducting and closing up of such litigations, for the benefit equally of the estate of his deceased partner, and with the obligation ultimately to account to his representatives for an equal share of all the profits or results so earned. It would seem

that equity might discern some juster rule by which to ascertain and determine the rights of the parties in such a case.

That a business is continued by the survivor under a testamentary direction in the will of his deceased copartner does not entitle the former to compensation when it is not provided for in the will. And the rule denying compensation to a surviving partner for trouble or services in winding up the partnership affairs is applicable although the survivor is the executor of the deceased partner. When the business is continued by one acting in the double capacity of surviving partner and executor or administrator of his deceased copartner, the courts have refused to compensate the survivor in his representative capacity for services due from him as survivor, and for which the law would deny him compensation if they were rendered by him as surviving partner. But, of course, compensation may be allowed him under an agreement therefor with the parties in interest. The payment of commissions in such case is sometimes authorized by statute. But compensation has been denied a surviving partner appointed receiver of the firm assets, who acted as such in closing up its affairs.

As has been seen, the general rule denying compensation to a partner for his services to the firm is not of universal application. Aside from the exceptions already stated in the case of a surviving partner, claims for compensation based on contractual right, express or implied, should be noted. These are so frequent that their possibility is suggested in every full and accurate statement of the general rule. An agreement for compensation may be implied from the nature of the partnership or the course of dealing between partners, or from circumstances of equivalent force, or from the nature of the services rendered in connection with the duties and obligations imposed by the copartnership articles upon the several members of the firm.

Partners may also receive compensation for services rendered to the firm in another capacity than that of partner, or in pursuance of a direct employment by the firm, or when they are vested with a special agency. In the latter event they may be entitled, as against the firm, to the usual compensation in relation to the subject of such agency. Persons who have stipulated for exemption from partnership services are, of course, equally entitled to compensation with strangers.

In case one partner fails to perform stipulated services, or is guilty of other misconduct, an allowance to the partnership, or to his copartner, therefore, is not precluded by the rule denying a partner compensation for individual or unequal services. One induced to enter into a partnership by fraud, on avoiding the contract, may receive a reasonable compensation for services rendered. Even stipulated compensation may be forfeited by fraud, and negligence or abuse of trust is sufficient ground for refusing remuneration to which a partner

would be otherwise entitled. And a partner's right to remuneration or commissions on account of labor performed for the partnership may be waived or abandoned.

Even prospective partners have been allowed compensation for services rendered under an agreement, express or implied, or when wrongfully excluded from the enterprise, but not after acceptance of profits, or when the services were performed as an inducement to the formation of the contemplated partnership. A. W. R.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

DALHOFF CONSTRUCTION COMPANY,
Plff. in Err.,
v.
OCTAVE BLOCK et al.

(— C. C. A. —, 157 Fed. 227.)

Vendor — misrepresentation — total cost.

Misrepresentation as to the amount an order for a specified number of steel bars at a specified price per pound will come to is not a ground for avoiding the sale, where there is no trust relation between the parties, and the buyer is experienced in the business and can easily ascertain for himself what the steel will weight and therefore what it will cost.

(October 19, 1907.)

Case Note. — Right of purchaser of personality to rely on seller's computation of price, or estimate of quantity.

This note is confined to cases in which the vendor has erroneously computed the total amount of the price of several articles sold, or has made an erroneous estimate of quantity, and excludes cases in which a vendor falsely misrepresents the value or quantity of personality sold, or mistakenly places a lesser price than he intends upon the subject of sale; or in which a sale is made of a quantity as "more, or less," or "about," an estimated quantity. No case has been found which presents the question of the right of an intending purchaser to rely upon the vendor's estimate—proved by the purchaser to be such—of what the amount of the purchase would be.

It was held in Griffin v. O'Neil, 48 Kan. 117, 29 Pac. 143. Reversing on rehearing 47 Kan. 116, 27 Pac. 826, that, if the vendor of personality erroneously computed the amount of the various items, he could not recover from the vendee the difference between the amount of the erroneous computation and the correct amount, unless the mistake was mutual, or the vendee knowingly took advantage of the vendor's error.

In E. S. Adkins & Co. v. Campbell (Del. Super. Ct.) 64 Atl. 628, a nisi prius case, where a vendor erroneously computed the

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment in plaintiffs' favor in an action brought to recover the purchase price of goods sold and delivered. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn and Hook, Circuit Judges, and Philips, District Judge.

Mr. H. F. Auten for plaintiff in error.

Mr. J. W. Blackwood, for defendants in error:

The neglect to make reasonable examination or investigation will preclude a purchaser from rescinding a contract of purchase, on the ground of false representations.

Farnsworth v. Duffner, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; *Slaughter v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *Clark v. Reeder*, 158 U. S. 505, 39 L. ed. 1070, 15 Sup. Ct. Rep. 849; *E. Bement & Sons v. LaDow*, 66 Fed. 189; *Crocker v. Manley*, 164 Ill. 282, 56 Am. St. Rep. 196, 45 N. E. 580; *Mahaffey v. Ferguson*, 156 Pa. 156, 27 Atl. 23; *Ludington v. Renick*, 7 W. Va. 273; 1 *Bigelow*, Fr. 473; *Hemmer v. Cooper*, 8 Allen, 334; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Hauk v. Brownell*, 120 Ill. 163, 11 N. E. 416; *Medbury v. Watson*, 6 Met. 246, 39 Am. Dec. 726; *Bishop*, Contr. § 664; 2 *Pom. Eq. Jur.* § 893; *Gordon v. Butler*, 105 U. S. 553, 26 L. ed. 1166; *Mooney v. Miller*, 102 Mass. 217; *Dillman v. Nadlehoffer*, 119 Ill. 567, 7 N. E. 88.

Hook, Circuit Judge, delivered the opinion of the court:

Octave Block and Paul Block, partners doing business at Mulhouse, France, under

amount of the various items of an estimate of lumber, which was submitted to and accepted by the vendee, the trial court, in an action to recover the difference between the erroneous and the correct amount thereof, instructed the jury that they must consider not only the aggregate sum as shown by the addition of the various items of the bill, but each item itself, because they all entered into and went to the making of the completed estimates; and, if the vendee, at the time he received the estimates and made the contract of purchase, knew, or from information in his possession should have known, that the correct aggregate charge was greater than that stated, he would be liable for the correct amount notwithstanding the vendor's addition indicated that the amount was less, provided the seller did not know of the mistake in the addition, as, if he had knowledge thereof, and offered and

the tradename of Universal Metal Company, sued the Dalhoff Construction Company, an Arkansas corporation, for the price of a shipment of steel bars. The defense was that the order for the steel was procured by fraud and deceit of plaintiffs' traveling salesman; that defendant refused to accept the steel on arrival, and therefore was not indebted. At the conclusion of the evidence the trial court directed a verdict for the plaintiffs, and judgment followed.

The material facts from defendant's standpoint are as follows: One Dreyfus, the plaintiffs' traveling salesman, called at defendant's office in Little Rock, Arkansas, and sought of Dalhoff, its general manager, an order for steel bars. The price named was 39 cents per pound, and the quality was shown by samples. After some solicitation by Dreyfus, and praise of his wares, Dalhoff finally said he would use a small order, and that Dreyfus might send enough to make a certain number of drills and tools for which the steel was especially adapted. Dreyfus made a memorandum of the items, and figured up the cost. To an inquiry of Dalhoff he replied it would amount to about \$200. Dalhoff then turned to the secretary and treasurer of his company and told him that Dreyfus would dictate to him an order for some steel, and to sign it when finished. The order as dictated, written out, and signed was as follows:

Universal Metal Co.,
Mulhouse, France.

Gentlemen:—

Please ship us, by freight, the following order of Metalos Steel: 3 bars 1¼" Octagon; 3 bars 1½" Octagon; 3 bars 4" square for pins; 3 bars 2½" square for tools; 3 bars 1" x 8" square for bushings; 3 bars 1½" square for sets; 3 bars 1¼" square for sets—bars 12 to 18 feet long. Terms 3 per

intended to furnish the materials at the amount indicated, the purchaser would be liable for that amount only.

A purchaser could rely on the estimate of one not a dealer in lithographing stone, that a quantity thereof which the latter had for sale consisted of 2 or 3 tons, which was purchased at a specified rate per pound, notwithstanding it afterwards appeared that the quantity on hand weighed about 10 tons; and, although all had been delivered before the weight was ascertained, the purchaser was not bound to accept more than 3 tons thereof. *Lamb v. Traitel*, 12 Misc. 140, 32 N. Y. Supp. 1075.

As to the right of one to rely upon representations made to effect a contract, as a basis for a charge of fraud, see note to *Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co.* 37 L.R.A. 593.

cent against bill of lading. Price 39c per pound, f. o. b. Little Rock, Ark

Your truly,

Dalhoff Construction Co.,

Per John A. Mitchell,

Secretary and Treasurer.

The steel described in the order arrived in Little Rock in due time. It weighed 5,561 pounds, and, at the agreed price, came to \$2,168.79. There was no claim by defendant that the steel was not of the quality ordered, that it was not in all respects as specified in the order, or that it was more than sufficient in quantity to make the drills and tools mentioned by Dalhoff. Nor was it claimed that Dreyfus, in dictating the order, changed the items as verbally agreed upon. The narrow compass of the defense is shown by the averment of the answer that Dreyfus "wrote up the order which defendant signed for a certain number of bars of each kind, and represented to defendant that the order as drawn would amount to only \$200." In other words, the defense rests upon the claim that the order as drawn, drawn as verbally agreed upon, was induced by misrepresentation as to the amount it would come to. Since the price of the steel per pound was agreed on, the misrepresentation made was substantially one as to the weight of 21 bars of steel of the lengths and thicknesses specified in the order. There was no complaint of an undue proportion of the longer bars. The actual weight was more than ten times that contemplated by Dalhoff. The case turns upon the question whether Dalhoff had a right to rely on the statement of Dreyfus.

Dalhoff was a man of large experience in handling steel. For twenty-eight years he had been engaged in railroad building, and was fairly familiar with the weights of steel used in such construction, and of the tools and machinery employed in it. He knew there were tables obtainable by him from which he could have learned the weight of the steel he ordered, but he did not consult them. He failed not only to avail himself of means of information that were accessible, but to exercise his own judgment matured by long experience. The approximate weight of the steel was a simple problem for him, and in buying he had no right to rely upon the representation of the selling agent. There was no relation of trust and confidence between the parties which required of Dreyfus the observance of especial good faith, and no such character, condition, or location of the subject-matter of the contract as entitled one party to rely upon the word of the other. In *Slaughter v. Gerson*, 13 Wall. 379, 383, 20 L. ed. 627, 628, it was said: "Where the means of knowledge are

at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another."

The judgment is affirmed.

KENTUCKY COURT OF APPEALS.

MARY E. CARRITHERS et al., Appts.,
v.

CITY OF SHELBYVILLE.

(— Ky. —, 104 S. W. 744.)

Municipal corporation — annexation of territory — consent.

1. No constitutional right of a holder of property within a particular territory is infringed by its annexation to a municipality without first consulting him, even though the annexation is made to depend upon the consent of a selected class to which he does not belong.

Same — property of woman.

2. A statute permitting the annexation of property belonging to women, to municipalities, without giving them an opportunity to make defense to the proceedings, does not deprive them of the equal protection of the laws.

(October 23, 1907.)

Case Note. — Discrimination between residents or property owners in territory annexed, as to right to defend against annexation of territory to municipality.

While it is now well settled that the annexation of territory to a municipality is not a taking of property, and does not deprive one of his property in a constitutional sense, annexation statutes not infrequently make the right to annexation conditional upon the consent of a certain proportion of persons who may be affected by the annexation, or, as in *CARRITHERS v. SHELBYVILLE*, extend to such persons a right to defend against the proceedings.

But one other case, however, has been found where the validity of such provisions has been attacked upon the ground that they denied the equal protection of the laws. That is the case of *Taggart v. Claypool*, 145 Ind. 590, 32 L.R.A. 586, 44 N. E. 18, holding that a provision in an annexation stat-

A PPEAL by complainants from a judgment of the Circuit Court for Shelby County in defendant's favor in a suit to enjoin the annexation of territory to a municipality. Affirmed.

The facts are stated in the opinion.

Messrs. J. C. Beckham & Son, for appellants:

These appellants, being persons within the meaning of the 14th Amendment, are, by the statute and its attempted enforcement by the ordinance, denied the equal protection of the laws.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385; Boyd v. Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 609.

Mr. P. J. Beard for appellee.

O'Rear, Ch. J., delivered the opinion of the court:

The city of Shelbyville, one of the old cities of this state, is a city of the fourth class, thrifty and growing. It proposed, by proceedings conforming to § 3483, Ky. Stat. 1903, to enlarge its territory by including within the corporate limits of the city a certain boundary which embraces real property owned by appellants and others; some of the latter being voters. This suit was filed in the circuit court to enjoin the city from proceeding in the matter upon the ground that the statute violates § 1 of the 14th Amendment to the Constitution of the United States, and is therefore void. The appellants are all women. They, with certain corporations who joined as plaintiffs in the suit in the lower court, own unimproved lands within the territory proposed to be annexed to the city, and which was not with-

in any city or town when the proceedings were begun. The complaint is that to take the lands of appellants into the city will add a burden of municipal taxation without benefit; and that, as the statute regulating the procedure for adding to the boundaries of a city discriminates against women and all other persons affected who are not voters, they are not afforded equal protection of the laws, inasmuch as the statute provides that voters only may make defense to the proceedings, if there are voters in the territory to be affected. A demurrer to the petition was sustained, and the plaintiffs' prayer for relief was denied by the circuit court.

For the more convenient study of the subject, the existing statute, which is the authority for the city's procedure and the subject of appellants' complaint, is set forth at length as follows: "The boundaries of cities of the fourth class shall, until changed as herein provided, remain as now established by law. Whenever it shall be deemed desirable to annex any territory to a city in this class, or to reduce the boundaries thereof, the same may be done in the following manner: The board of council of such city shall, by ordinance, accurately define the boundary of the territory proposed to be annexed or stricken off. Such ordinance shall be published for not less than three weeks in a newspaper published in such city or county; if there be no newspaper published in the city or county, the ordinance shall be advertised by handbills, to be posted for at least fifteen days at four or more public places in the city, and at the same number of the most public places within the territory proposed to be annexed or stricken off. Within thirty days after the adoption, publication, and advertisement of such ordinance, a petition shall be filed in the circuit court of the county within which said city may be situated, in the name and on behalf of the city, setting forth the passage,

ute granting the right of appeal to "resident freeholders" only (that is, freeholders resident in the territory proposed to be annexed), to the exclusion of owners of property within the territory who were not resident therein, was not in conflict either with the provision of the state Constitution, declaring that the assembly shall not grant to any citizens or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens, or with the 14th Amendment of the Federal Constitution, declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws.

It may be noted in this connection that the court, in *State ex rel. Hammond v. Dimond*, 44 Neb. 154, 62 N. W. 498, denied the right of a nonresident owner of property

within the territory affected to avail himself of a certain statute for disconnecting territory from a city or village by petition, upon the ground that, by its terms, the statute was available only to legal voters of the territory sought to be detached, without suggesting any question as to the validity of the statute; and the same court, in *Osmond v. Smathers*, 62 Neb. 509, 87 N. W. 310, again without questioning the validity of the statute, denied the right of a resident property owner within such territory, who was not a legal voter, to avail himself of such statute.

The general question as to the power of the legislature to annex territory to municipalities is treated in a subject note to *State v. Cincinnati*, 27 L.R.A. 737.

publication, and advertisement of such ordinance, the object and purposes thereof, together with an accurate description by metes and bounds of the territory proposed to be annexed to, or stricken from, the city, and praying for a judgment of the court to annex said territory to, or strike same from, the city, as the object may be. The said petition shall be filed not less than twenty days before the first day of the next succeeding term of the circuit court in that county. Notice of the filing of the same shall be given in the same manner as provided herein for notice of the passage of said ordinance. If no defense be made at the first term of the court after the filing of said petition and notice of same as herein provided, and the court shall make no order for granting further time for making defense, the court shall render a judgment annexing or striking off the proposed territory as the objects of the proceedings may be. But at the first term of the circuit court, or within the time fixed by the court by its order, any one or more of the resident voters of the territory proposed to be annexed or stricken off may file a defense in said proceedings setting forth the reasons why such territory, or any part thereof, should not be annexed to the city, or why the limits of the city should not be reduced. The case shall be tried by the court without the intervention of a jury. If the court, upon hearing, be satisfied that less than a majority of the resident voters of the territory sought to be annexed or stricken off have remonstrated against the proposed extension or reduction, and that the proposed extension or reduction of the limits of the city, as the case may be, will be for the interest of the city, and will cause no material injury to the owners of real estate in the limits of the proposed extension or reduction, it shall so find, and the proposed extension or reduction shall be decreed or adjudged. But, if the court shall find that a majority or more of the resident voters in the territory to be affected, or the owner or owners of said property, if there be no resident voters, remonstrated against such change, and that said change will cause material injury to the owners of real estate in the limits of the proposed extension or reduction, it shall so find, and said extension or reduction shall be denied. If the judgment of the court is adverse to the proposed change, no further effort to annex or strike off the territory so proposed shall be made within two years after the entering of the judgment. Costs shall follow the judgment, and no appeal shall lie from the judgment of the circuit court. If the judgment in such proceedings be in favor of the city, it shall be certified by the clerk of the court

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to the board of council, and entered on the records of the board, and the board shall thereupon, by ordinance, annex to, or strike from, the city the territory described in the judgment: Provided, the circuit court shall not have jurisdiction of such proceedings, unless the required publication or advertisement of the ordinance proposing the extension or reduction of the limits of the city contains notice of the proposed proceedings in such court, proof of which publication or advertisement may be made by affidavit filed in the proceedings: Provided, however, that the provisions of this act shall not be construed as interfering with the rights of any litigant in, or growing out of, any action now pending in any court of this commonwealth under the act to which this is an amendment." This section is the statute amended as of March 22, 1902. Before that amendment other features existed which have been eliminated. The precise question here presented has not heretofore come before this court, nor, so far as we have been able to find, before any other court, for decision. Certain features of the question have been passed upon by this and other supreme courts, which will be noticed in the course of the opinion.

Of course, a woman is a person, and so is a corporation (*Santa Clara County v. Southern P. R. Co.* (C. C.) 9 Sawy. 165, 18 Fed. 385), within the contemplation of the 14th Amendment to the Federal Constitution. If either is denied the equal protection of the law by following the statutory proceeding for annexing territory to a city, then the statute must be declared invalid. A very brief study of the nature of our municipal corporations will materially aid in the determination of the question presented. Our system of city government is adopted from the English, which was probably fashioned upon the Teutonic town. In both the former the will and welfare of the landowner were consulted. Indeed, the Teuton ceorl and the English burgher were deemed the sole beneficiaries of the municipal privileges. *Green's Short Hist. Eng. People*, § 1, p. 3. After the Conquest, King and the nobility overbore the simple freedom of the towns, and sold it back to the inhabitants in consideration of revenues paid into the royal treasury. The liberties or privileges so ceded to the body of the burghers were evidenced by a grant in the nature of a charter, whence was derived the corporate charter of the grantee, the collective citizens as a town. The original idea seems to have been just the reverse of that obtaining at this day. Then the town was supposed to be conducted for the personal benefit of its citizens only, while now it is an arm of the state government, governing in its

name, and by its authority solely, for the benefit of the state. Naturally enough, no town was then set up as a corporation involuntarily, or save by the request of the inhabitants concerned. Acceptance was therefore essential to make operative a charter granted by the King. 1 Kyd, Corp. 61. He had no power to impose political obligations on any person or community, except in the form of conditions, nor to compel the acceptance of any charter. *Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. 385. When Parliament became supreme, and usurped in a sense the prerogatives of the Crown in the creation of municipal corporations, it, in legislating for the public, granted charters to towns and cities at its pleasure. No assent of the inhabitants was necessary in that case; for the charter of a corporation created by Parliament was an act of Parliament, and no assent is requisite to make an act of Parliament operative. But even Parliament has been generally considerate of the will of the inhabitants upon whom the charters were to operate, and a provision was nearly always made for their assent in some form or other. The recent English statutes providing general laws for local government of towns and cities so require. 1 Dill. Mun. Corp. § 34; Municipal Corporation Act of 1882. As this country was settled by Englishmen, who brought over the customs and laws of the mother country, it was to be expected that substantially the same system of town government was instituted over here. After the Revolution, the sovereignty of the King and Parliament was lodged in the state. Thereafter it granted charters to the towns, not as privileges conferred by favor or for price, but as a part of a system conserving the principles of liberty as found in self-government. What was said by Mr. Justice Brown in *People ex rel. Wood v. Draper*, 15 N. Y. 532, can as well be applied to the conditions in Kentucky: "When the present instrument was formed, the entire territory of the state was separated and appropriated by its civil divisions, its counties, cities, and towns. . . . These civil divisions are coeval with the government. The state has never existed a moment without them. All our thoughts and notions of civil government are inseparably associated with counties, cities, and towns. They are permanent elements in the frame of government. . . . They are to be regarded as institutions of the state, durable and indestructible by any power less than that which gave being to the organic law. They are [however] subject to control and regulation by the legislature. It may enlarge or circumscribe their territorial limits, increase or diminish their numbers, separate 17 L.R.A. (N.S.)

them into parts, and annex some of the parts to parts of others; but they must still assume the form and be known and governed only as counties, cities, or towns. . . . The state at large is and ever has been an aggregate of these local bodies." Thus we see that the creation of a municipal corporation is always and essentially a political act. Whether it will be done or not depends solely on the judgment and will of the political department of the government, the legislature. And no legislative act, unless the Constitution so requires, is dependent for its validity upon the assent of the people whom it affects.

The first three Constitutions of this state made no reference to the incorporation of towns and cities. That was done by the legislature as an incident of the powers of the sovereign state lodged in its political department. Charters were then granted to cities and towns by special act of the legislature, as anciently was done by special act of Parliament. The legislature judged of the necessity and propriety of the act. It considered each separate case on its merits, and gave to the municipality such territory and such form of government as was deemed proper, and changed each at will. The Convention of 1891, which framed the present Constitution, determined to have an end to all special legislation. Its evils, not necessary to recount here, had provoked the people. Special legislation was inexorably prohibited respecting all subjects where a general law could apply, and particularly as to the creation of cities and towns and their government. Const. §§ 59-159. The legislature was required to classify all the towns and cities of the commonwealth, and to enact general laws for their government. The legislature did so classify the cities and towns, and has provided for their government by general laws. The section of the statute under consideration is part of the general laws for the government of cities of the fourth class. It could never have been contemplated that the cities and towns were to forever remain in size territorially as the Constitution found and left them. That they would grow in time, and would necessarily require new territory to accommodate their expansion, was known. In the enactment of the general laws, this feature of the situation must of necessity have been presented to the minds of the legislature. Inasmuch as no two cities or towns, much less all of a class, would probably grow at the same rate, or require even equal territory at the same time, and as special acts could not be now passed to meet the exigency of each case as it arose, some plan open to all, and flexible enough to accommodate the particular needs of each

town and city, must be provided by general law. It would scarcely be safe to leave the matter to the sole discretion of the municipal legislative boards (as is done in certain class cities in Missouri, it seems). So, after fixing the general conditions upon which the legislature was willing to grant an extension of the corporate boundary (or to restrict it, as the case might be), some tribunal must be selected or created to whom should be confided the responsibility of determining for the legislature whether the general conditions it had imposed had been complied with. Kentucky is not the pioneer in either its plan of generalizing the incorporation of municipalities or of regulating some essential fact in the process of incorporation to some tribunal other than the legislature, for ascertainment. Nearly all the states now prohibit special legislation, and require the incorporation of municipalities to be by general laws. In some of the states the question of annexation is left to a vote of the territory to be affected, as, for example, in Illinois (*North Springfield v. Springfield*, 140 Ill. 165, 29 N. E. 849), in Texas (*Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742; *State v. Waxahachie*, 81 Tex. 626, 17 S. W. 348), and in Arkansas (*Vogel v. Little Rock*, 55 Ark. 609, 19 S. W. 13). Still others leave the ascertainment of certain facts to the courts of general original jurisdiction in the county wherein the town is situated. It is so in Nebraska (*Gottschalk v. Becher*, 32 Neb. 653, 49 N. W. 715), and in Pennsylvania (*Brinton's Appeal*, 142 Pa. 511, 21 Atl. 978), and in Iowa (*Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031), and in Kansas (*Hurla v. Kansas City*, 46 Kan. 738, 27 Pac. 143). In some of these cases the question was raised that it was incompetent for the legislature to so delegate its powers; but the courts held, though not with entire unanimity, that it was not a delegation of the powers. In this state that question was presented in *Clarke v. Rogers*, 81 Ky. 43. The legislature had enacted a new charter for Flemingsburg, but provided that it should become effective only upon its acceptance by a majority of the legal voters of the town. In the suit involving the constitutionality of the provision, the court observed that, while the legislature had the right to substitute the new charter for the old without consulting the popular will on the subject, yet it could legally submit the charter to the people directly concerned. It was said: "The legislature cannot delegate its power to make laws, but, when enacted, whether or not the law shall become operative may be made to depend on the popular will,"—citing *Cooley*, Const. Lim. pp. 143-230. Why may it not be made to depend as well upon any other

fact? And why may it not delegate to some ministerial or judicial officer the duty of ascertaining the existence of the requisite fact? In the existing statute it is to be observed that the popular will is to be consulted, and to be given weight, as well as the fact whether the benefits and burdens equitably justify the proposed extension or restriction. No other tribunal is so well equipped to develop the facts, and to ascertain the conditions named by the legislature as those upon which its grant shall take effect, as are the courts. The questions are quasi judicial, but are not matters that ever were litigable in any court as a matter of right. In truth, the court in the particular proceeding is not in any sense dealing with the legal rights of persons who live or own property in the affected territory; for, as was held by this court in *Cheaney v. Hooser*, 9 B. Mon. 330, the creation of, or annexation of, new territory to a town, is a matter within the sole discretion of the legislature, and does not in any manner depend upon the will of a majority or any of the inhabitants living within the territory. If the legislature does consult their wishes, as it well may, it acts for its own advice and guidance, and not in deference to any legal right of the citizen.

The question of benefits and burdens in the proposed annexation cannot be said to involve a justiciable right of the individual taxpayer. But it is unquestionably a proper subject of consideration in determining whether the municipal territory be extended or reduced. It is impossible now for the legislature to pass upon each proposed annexation or diminution of territory. Either a hard and fast rule, certain to bear onerously in many instances, must be adopted by general law, or by general law the ascertainment of the fact whether the benefits and burdens are counterpoised must be found to exist by some other tribunal. We are unable to perceive a distinction between the ascertainment of that fact by the court and the ascertainment of the majority of the voters' wills by a ministerial officer appointed to hold an election, as *Cooley* says may be done. *Cooley*, Const. Lim. pp. 143-230. The legislature is prohibited from granting incorporating charters of any kind by special laws. All incorporations in this state, private as well as municipal, are now required to be by general laws. Yet private corporations are granted charters by specially selected tribunals upon the ascertainment by them of certain requisite facts. No one supposes now that that is a delegation of legislative authority. Nor does it confer legislative power upon the courts. Many acts of government are so complex as to partake of some or all the features of the

three,—legislative, executive, and judicial. Yet there are certain controlling marks by which each act is relegated to its own department. It is not infrequent that an act of the legislature is not effective until and unless some other department set it in operation upon its ascertainment of a precedent condition submitted to it by the legislature. But the finding of the fact is not legislative. Nor is it necessarily judicial, although it may be such as not to fall entirely without the legitimate domain of a judicial forum. A certain test of the act required of the circuit court under the statute in hand is: Could it have been done by any other department of government, without invading the prerogative of the judiciary? Undoubtedly it is such an act as the legislature has always exercised jurisdiction over. We have seen it is such, also, as may be settled by a vote taken under executive supervision, if the legislature so provide. From whatever point it is viewed, the subject returns to this: The act of incorporating towns, and enlarging or restricting their boundaries, is legislative and political. In its exercise of discretion in such matters the legislature has plenary power. It is no infringement of any constitutional right of any person that he is not first consulted before the power is exercised, or if it is allowed to be exercised upon the petition or with the consent of a selected class, as, for example, voters or property holders. One illustration, of everyday occurrence, is selected. Street improvements are deemed legislative matters in the first instance; yet the executive performs them in part, and the courts in part,—the latter, in correcting errors of the council or of the executive department, after the work has been done and accepted, although such errors pertain solely to matters of legislation or executive act. Finally, the imposition of taxes for municipal purposes, as well as the annexation of territory to the town, is a political matter. Frequently the legislature submits such matters to the voters. If it does, a majority fastens the tax upon all, the unwilling as well as those who had no voice in the election, such as women, infants, and corporations, and those not voting. In no event is it a taking of private property for public use, as that term is used in the Constitution. *Cheaney v. Hooser*, supra. As the legislature might have had the condition upon which the additional territory was to be incorporated into the city to be ascertained without the right of anybody to be heard in court, or even by a vote of qualified male voters, appellants are not denied the equal protection of the laws 17 L.R.A. (N.S.)

because they were not admitted to defend the proceeding in the court.

The judgment of the Circuit Court is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MANDELL BROTHERS

v.

IDA M. FOGG.

(182 Mass. 582, 66 N. E. 198.)

Foreign statute — enforcement.

A court of one state will not enforce a statute of another state making a wife liable jointly with her husband for family expenses, in case of purchases made by a citizen of the former state while he and his wife were temporarily in the latter.

(February 25, 1903.)

Case Note. — Enforcement of wife's liability under statute of another state for a debt contracted by her husband.

The decision in the FOGG CASE, refusing to entertain an action to enforce the liability of the wife under the Illinois statute, even assuming that the statute was intended to apply to citizens of another state temporarily in Illinois, is directly opposed by a decision of the appellate term of the New York supreme court in *Matthews v. Dickinson*, 36 Misc. 187, 73 N. Y. Supp. 190, holding that an action would lie in New York to enforce the liability of the wife under the same Illinois statute, notwithstanding the contention that such statute was hostile to the settled policy and law of New York. It appeared in this case that all the parties were residents of Illinois and that the contract in question was made and performed there, so that there was no doubt that the Illinois statute applied so far as the substantive rights of the parties were concerned. This circumstance might perhaps have distinguished the case from *MANDELL Bros. v. Fogg*, had not the decision in the latter case been rendered upon the express assumption, for the purposes of the point, that the Illinois statute was intended to apply to such a state of facts as was presented in that case. The New York court cites in support of its holding the decision in *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180, that it is not contrary to the policy of New Jersey to enforce the liability of a wife as surety for her husband under a contract made in another state, by the law of which such a contract was valid and binding upon her, though by the law of New Jersey she could not have thus bound herself. It will be observed that in the latter case the liability of the wife according to the *lex loci contractus* resulted from her own act and contract, whereas, in the *Matthews Case* and in *MANDELL Bros. v. Fogg*, the liability was wholly the creature

REPORT by the Superior Court for Suffolk County after verdict for defendant for the opinion of the Supreme Judicial Court of an action brought to hold a married woman liable for goods purchased by her husband. Judgment on the verdict.

The facts are stated in the opinion.

Messrs. Joseph W. Spaulding and Robert W. Hunter, for plaintiff:

If suit had been brought against the defendant before she left Illinois, in that state, by these plaintiffs, on the account sued, the action would have been sustained.

Ill. Rev. Stat. chap. 68, § 15; Hyman v. Harding, 162 Ill. 357, 44 N. E. 754; Hudson v. King Bros. 23 Ill. App. 118; Houck v. Smith, 46 Ill. App. 64.

The Illinois law in its application to this particular case cannot be said to be "contrary to our public policy or to abstract justice or pure morals, or calculated to injure the state or its citizens."

Higgins v. Central N. E. & W. R. Co. 155 Mass. 180, 31 Am. St. Rep. 544, 29 N. E. 534.

The facts of this case appeal to the good conscience of the law, and it is upon that principle the cases which have sustained the right of action upon a foreign law rest.

Walsh v. New York & N. E. R. Co. 160 Mass. 571, 39 Am. St. Rep. 514, 36 N. E. 584; Hancock Nat. Bank v. Ellis, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349.

Messrs. John Oscar Teele and Arthur P. Teele, for defendant:

When recovery is sought under the Illinois statute, for family expenses, it cannot

be had on any other ground, and a declaration must be based on the statute, and everything must be alleged and proved to bring the case within the statute.

Schlesinger v. Keifer, 30 Ill. App. 253; New Bedford v. Hingham, 117 Mass. 445.

Entries on the creditor's books to the husband are not sufficient alone to support recovery against the wife, although the goods are of the general character of family expenses.

Neasham v. McNair, 103 Iowa, 605, 38 L.R.A. 847, 64 Am. St. Rep. 202, 72 N. W. 773.

Liability under the Illinois statute cannot be enforced here, even upon a declaration based upon it and supported by evidence sufficient to maintain the action in the courts of that state; for it is plainly and directly opposed to the policy of our laws, statute and common, and injurious to our citizens.

Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888.

The construction put upon such statutes by the highest courts of the foreign state should be followed.

Hancock Nat. Bank v. Ellis, 172 Mass. 39, 42 L.R.A. 396, 70 Am. St. Rep. 232, 51 N. E. 207; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Howarth v. Lombard, supra; Hackett v. Potter, 135 Mass. 349.

Loring, J., delivered the opinion of the court:

This is an action brought in Massachu-

of statute without the intervention of any voluntary agreement on the part of the wife.

In this connection attention may be called to the case of Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736, where the court held that the wife of one executing a note governed by the law of Montana was a proper defendant in an action thereon, for the purpose of determining whether the judgment could be executed as one for a community debt; the court, in the absence of any proof as to the law of Montana, indulging the presumption that it was the same as the community law of Washington, according to which the debt sued upon was a community debt, a judgment obtained thereon being enforceable against the community property of the husband and wife in Washington. Upon a subsequent appeal (34 Wash. 323, 75 Pac. 866) the wife put in proof a statute of Montana providing that the separate property of the wife shall be exempt from all debts and liabilities of the husband unless for necessary articles procured for the use and benefit of herself and children. The supreme court held, however, that the trial court erred in directing a verdict in favor of the wife in the absence of proof of the necessary conditions which under that statute would entitle her property to exemption from the debts of the husband. Upon a still later 17 L.R.A. (N.S.)

appeal (38 Wash. 376, 107 Am. St. Rep. 858, 80 Pac. 556) the court again reversed a judgment in favor of the wife upon the ground that improper evidence was admitted as to the construction and effect of the Montana statute. In all these appeals the court seems to have assumed without questioning the point, that there was no obstacle to the enforcement in Washington of the liability of the wife or of her property created by the laws of Montana. It will be observed, however, that there was no fundamental repugnancy between the law of Montana and the law of Washington, and this fact is perhaps sufficient to distinguish the case from MANDELL BROS. v. FOGG. It is to be further noted, however, that there was no such distinction between the latter case and the case of Matthews v. Dickinson, supra.

Upon the somewhat analogous question as to the right to enforce a stockholder's liability outside of the state of incorporation, see note to Cushing v. Perot, 34 L.R.A. 737; and upon the question whether an action will lie in one state upon a cause of action for death created by the statute of another, see note to Boston & M. R. Co. v. Hurd, 56 L.R.A. 193. The general subject of the conflict of laws in relation to matrimonial property is covered by a note in Rush v. Landers, 57 L.R.A. 353.

setta by an Illinois corporation to recover from a wife the price of goods sold to her husband. The husband was a citizen of Massachusetts, and both the husband and the wife were temporarily in Chicago when the husband bought the goods of the plaintiff. At the trial "the plaintiff conceded that there was no evidence of a contract liability on the part of the defendant, . . . but . . . claimed the right to recover in this suit by virtue of" the following statute of Illinois, which was put in evidence: "The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." Ill. Rev. Stat. 1892, chap. 68, p. 793, § 15. The presiding judge ruled "that no recovery could be had under that statute, either on these pleadings or otherwise, on the evidence," and thereupon ordered a verdict for the defendant, and reported the case to this court.

We are of opinion that this ruling was right. The Illinois statute imposes upon the wife a liability for purchases made by her husband without her knowledge, on proof that they constituted a part of "the expenses of the family." Such a statute is founded on the power of a state to regulate the duty of supporting the families of its citizens. For that reason it may be doubted whether it was intended to apply to citizens of other states "temporarily" within that state. If it was intended to apply to such citizens, it is not a liability which will be enforced by the courts of other states. The only reason urged by the plaintiff for its contention that it will be so enforced is that the defendant is presumed to have known the law when the goods were purchased, and, the contract being made under the law, the law became a part of it, and *Howarth v. Lombard*, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888, applies. Without going further, the fact that she did not make the purchase is enough to dispose of that argument.

The entry must be: Judgment on the verdict.

CALIFORNIA SUPREME COURT.

J. HERZOG et al., Appts.,

v.

ATCHISON, TOPEKA, & SANTA FE
RAILROAD COMPANY, Respt.

(—Cal. —, 95 Pac. 898.)

Specific performance — contract to establish station.

1. A contract by a railroad company, in consideration of a grant of a right of way, 17 L.R.A. (N.S.)

to establish a station and stop trains at a certain place without depriving it of the power of complying with its duty to the public in that respect, is not unlawful, and will be enforced if its enforcement will not be detrimental to the interests of the public, or impose a great burden without corresponding benefit.

Pleading — specific performance — necessary allegations.

2. A bill for specific performance of a contract to establish a railway station and stop trains at a certain place must allege that performance will not be detrimental to the interests of the public, or impose great burdens with no corresponding advantage.

Same — allegation of ownership.

3. The presumption of continuance of facts once shown to exist does not apply to an allegation in a bill of ownership of land at a certain place at a time twenty years before the bill was filed, so as to render the allegation a sufficient statement of present ownership.

Parties — specific performance — interest.

4. One having no longer an interest in the performance of a contract by a railroad company to establish a station and stop trains at a certain place cannot maintain a bill to compel it to do so.

Specific performance — remedy at law.

5. To entitle one to specific performance of a contract, he must show that a recovery of damages for its breach will not be an adequate remedy.

(April 30, 1908.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Alameda County in favor of defendant in an action brought to compel specific performance of a contract to establish a station and stop trains at a certain place. Affirmed.

The facts are stated in the opinion.

Messrs. J. J. Scrivner and Alfred H. Cohen for appellants.

Messrs. T. J. Norton, H. D. Pillsbury, and E. E. Millikin, for respondent:

Every application for specific relief is addressed to the discretion of the court, and such relief is never a matter of absolute right; and courts, in granting or denying such applications, are largely controlled by a consideration of what action will best protect the public interests wherever they are involved.

Marsh v. Fairbury, P. & N. W. R. Co. 64 Ill. 414, 16 Am. Rep. 564; *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Beasley v. Texas & P. R. Co.* 191 U. S. 492, 48 L. ed. 274, 24

Note. — As to validity of contract of railroad company to establish and maintain station, see case note to *Atlanta & W. P. R. Co. v. Camp*, 15 L.R.A. (N.S.) 594.

Sup. Ct. Rep. 164; *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Florida C. & P. R. Co. v. State*, 31 Fla. 482, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103; *Mobile & O. R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556, 24 N. E. 643; *Holladay v. Patterson*, 5 Or. 177; *Texas & P. R. Co. v. Scott*, 37 L.R.A. 94, 23 C. C. A. 424, 41 U. S. App. 624, 77 Fed. 726.

Specific performance cannot be decreed because the contract requires the performance of a continuous duty for all time, and because of vagueness and uncertainty in the description of the object of the contract.

Blanchard v. Detroit, L. & L. M. R. Co. 31 Mich. 43, 18 Am. Rep. 142; *Cooper v. Pena*, 21 Cal. 404; *Lattin v. Hazard*, 91 Cal. 87, 27 Pac. 515; *Stanton v. Singleton*, 126 Cal. 657, 47 L.R.A. 334, 59 Pac. 146; *Los Angeles & B. Oil & Development Co. v. Occidental Oil Co.* 144 Cal. 528, 78 Pac. 25.

Sloss, J., delivered the opinion of the court:

To plaintiffs' complaint the defendant interposed a demurrer for want of facts constituting a cause of action. The demurrer was sustained without leave to amend, and plaintiffs appeal from the ensuing judgment in favor of defendant.

The complaint states these facts: On September 20, 1881, and long prior thereto, the plaintiffs were the owners and in possession of a tract of land in Alameda county containing some 65 acres. On September, 30, 1881, the California & Nevada Railroad Company executed and delivered to plaintiffs a writing, whereby, in consideration of plaintiffs "signing for" a right of way for said railroad over their land, the railroad company agreed to "establish and maintain a permanent station to deliver and take passengers and freight at each passing train, said station to be situated at the north side of said Alcatraz avenue and on the west side of Lowell street, and to receive and discharge passengers from all but express trains upon proper signal." At the same time, and in consideration of the execution and delivery of this instrument, the plaintiffs signed and delivered to the railroad company the right of way over their lands referred to in the instrument. Subsequently, the California & Nevada Railroad Company laid down railroad tracks over such right of way, and operated passenger and freight trains thereon. In 1893, the defendant, Atchison, Topeka, & Santa Fe Railroad Company, purchased of the California & Nevada Railroad Company the right of way granted by plaintiffs, and has

ever since been in possession of the same, and has been operating passenger and freight trains thereon. At the time of its purchase, the defendant had notice of its predecessor's agreement with plaintiff, and assumed the obligation to perform the same. Neither the defendant, nor its predecessor in interest, has ever established or maintained a permanent or any station at the place, or for the purposes, specified in the agreement, nor has either of them stopped any train at such place. On June 2, 1904, plaintiffs requested the defendant to comply with the terms and conditions of said agreement, but the defendant has failed and refused to perform any of such terms and conditions. Plaintiffs have, upon their part, performed all the terms and conditions required of them to be performed. On account of the failure and refusal of the defendant to so comply, plaintiffs "have suffered great and irreparable damage, and, if said terms and conditions, as aforesaid, are not carried out and performed by defendant, these plaintiffs will continue to suffer great and irreparable damage." The complaint concludes with a prayer for a decree compelling the defendant to establish a station as agreed, to deliver, receive, and discharge passengers thereat, and to stop all trains except express trains, at such station for these purposes.

The action is clearly one for specific performance of a contract, not to recover damages for its breach (*Pittsburgh Coal Min. Co. v. Greenwood*, 39 Cal. 71; *Bohall v. Diller*, 41 Cal. 532; *Prince v. Lamb*, 128 Cal. 130, 60 Pac. 689), and the sole question is whether the complaint alleges facts entitling the plaintiff to the equitable relief sought. It is argued by the respondent that it is the duty of railroad corporations, which are performing functions partaking of a public character, to locate their stations at places where they will best serve the public needs and convenience, and that, accordingly, a court of equity will not, in order to subserve mere private interests, compel the location of stations for the stopping of trains in such manner as to hamper the company in the performance of its duties to the public. The rule thus invoked has been applied to cases more or less similar to the present one. *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Beasley v. Texas & P. R. Co.* 191 U. S. 492, 48 L. ed. 274, 24 Sup. Ct. Rep. 164; *Marsh v. Fairbury*, P. & N. W. R. Co. 64 Ill. 414, 16 Am. Rep. 564; *Mobile & O. R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556, 24 N. E. 643; *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369;

Holladay v. Patterson, 5 Or. 177; Texas & P. R. Co. v. Scott, 37 L.R.A. 94, 23 C. C. A. 424, 41 U. S. App. 624, 77 Fed. 726. Nearly all of these cases, however, involved contracts which undertook to bind the railroad company, not merely to locate a station at a particular place, but to establish no other station within a given distance of such places. In such cases, it was the exclusive character of the accommodation contracted for that was thought by the courts to involve an attempt to interfere with the companies in the performance of their duty to the public; in other words, the common carrier could not be permitted to bind itself not to furnish accommodations wherever they might be needed. This consideration does not apply to the case of a contract which merely binds the company affirmatively to furnish certain accommodations to the plaintiff, without in any way debarring it from fully complying with all its duties to others entitled to its service. The contract here alleged did not bind the company to limit in any degree the facilities to be furnished to the public. It required the establishment and maintenance of a station at a place named, but left the company free to establish additional stations as they might be needed, without limitation of number or location. Contracts similar to the one here in question have been specifically enforced. Hood v. Northeastern R. Co. L. R. 8 Eq. 666; Lawrence v. Saratoga Lake R. Co. 36 Hun, 468, cited with approval in Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co. 144 N. Y. 153, 26 L.R.A. 610, 39 N. E. 17; Murray v. Northwestern R. Co. 64 S. C. 520, 42 S. E. 617. Where such contracts are limited to the creation of a right to a certain station or train service at given points, without in any way making the right exclusive or infringing upon the company's obligation to furnish proper service at any other place where it may be needed we are not prepared to hold that their enforcement would necessarily be violative of public policy. Texas & St. L. R. Co. v. Robards, 80 Tex. 545, 48 Am. Rep. 268; International & G. N. R. Co. v. Dawson, 62 Tex. 260; Greene v. West Cheshire R. Co. L. R. 13 Eq. 44. A different question is presented where, upon the trial, or from the allegations of the bill, it appears that the enforcement of the contract would impose a great burden upon the defendant, with a slight or no corresponding benefit to the plaintiff, or that such enforcement would be detrimental to the interests of the public. Such circumstances, showing that the performance sought would be oppressive or inequitable, will warrant the denial of specific relief. 6 Pom. Eq. Jur. § 796; Conger v. New York, W. S. & B. R. Co. 120 N. Y. 29, 17 L.R.A. (N.S.)

23 N. E. 983; Murdfeldt v. New York. W. S. & B. R. Co. 102 N. Y. 703, 7 N. E. 404; Clarke v. Rochester, L. & N. F. R. Co. 18 Barb. 350.

The consideration last suggested points directly to a fatal objection to the complaint under discussion. It is thoroughly settled in this state that a complaint for specific performance must, in order to make out a case good as against general demurrer, state facts from which the court may determine that the consideration is adequate, and that the contract is, as to the defendant, just and reasonable. Civil Code, § 3391. In Agard v. Valencia, 39 Cal. 302, the court says: "Another well-established rule in courts of equity is that, in a suit for a specific performance, it must be affirmatively shown that the contract is fair and just, and that it would not be inequitable to enforce it. The court will not lend its aid to enforce a contract which is in any respect unfair, or savors of oppression, but, in such cases, will leave the party to his remedy at law. It is incumbent on the plaintiff, therefore, to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it." This court has frequently restated its adherence to this rule. Bruck v. Tucker, 42 Cal. 352; Nicholson v. Tarpey, 70 Cal. 608, 12 Pac. 778; Morrill v. Everson, 77 Cal. 114, 19 Pac. 190; Windsor v. Miner, 124 Cal. 492, 57 Pac. 386; Prince v. Lamb, 128 Cal. 120, 60 Pac. 689; Stiles v. Cain, 134 Cal. 170, 66 Pac. 231; Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; White v. Sage, 149 Cal. 613, 87 Pac. 193.

The complaint in this case is entirely devoid of any showing of this character. The value of the right of way conveyed is not stated, nor is there any allegation of the cost to the defendant of compliance with its contract. No attempt is made to state any facts indicating the adequacy of the consideration or the fairness of the contract. There is not even an allegation in general terms of the conclusion that the contract is just and fair as between the parties. As bearing upon the question whether the granting of the relief sought would be equitable, it is to be observed that the complaint does not aver that the plaintiffs, at any time since 1881, have been the owners of any land in the neighborhood of the proposed station, or that they live near it. The allegation that they owned land adjoining the right of way in 1881 is not an allegation that they owned it at any later date. The presumption of the continuance of facts once shown to exist (Code Civ. Proc. § 1963, subd. 32) declares merely a rule of evidence and has no application to

the statement of facts in a pleading (*Fredricks v. Tracy*, 98 Cal. 658, 33 Pac. 750). So far as appears from their complaint, the plaintiffs are endeavoring to enforce a bare legal right to have the defendant comply with the contract of its predecessor, without showing that such compliance would in any way add to their convenience, or to the value of any property owned by them. The complaint therefore fails to show that the contract as originally made was fair and just as between the parties, or that it would be equitable to enforce it. Furthermore, it fails to show that the recovery of damages for a breach of the contract would not be an adequate remedy, a condition which is as essential to the obtaining of specific performance as of other forms of equitable relief for the infringement of legal rights. *Senter v. Davis* 38 Cal. 450; *Flood v. Templeton*, supra.

Respondent urges some additional points in support of the rulings sustaining the demurrer, but these need not be discussed in view of the conclusions above expressed.

The judgment is affirmed.

We concur: Shaw, J.; Angellotti, J.

MISSOURI SUPREME COURT.
(Division No. 1.)

ALLEN HOLMES, Resp't.,

v.

OWEN MURRAY, Appt.

(207 Mo. 413, 105 S. W. 1085.)

Dogs — sheep killing — penalty.

1. A statute permitting the owner of sheep killed by dogs to recover their value from the owner of the dogs, and requiring the dogs to be killed, does not deprive the owner of the dogs of his property without due process of law.

Case Note. — Who is the keeper or harbinger of a dog?

This note is confined to the question of who is the harbinger or keeper of a dog, and excludes the general question of liability for injuries inflicted by dogs.

The following persons have been held to be harborers or keepers of dogs:

One who permits a dog owned by his minor child, to be kept and maintained about his premises. *Cummings v. Riley*, 52 N. H. 368; *Plummer v. Ricker*, 71 Vt. 114, 76 Am. St. Rep. 757, 41 Atl. 1045.

One who, for three years, kept and fed a dog belonging to his daughter, and used it as a watch dog. *Duval v. Barnaby*, 75 App. Div. 154, 77 N. Y. Supp. 337.

One who permits his son of mature years to keep a dog, although the property 17 L.R.A. (N.S.)

Same — keeper.

2. Under a statute making the owner or keeper of a dog liable for the value of sheep killed by it, one is liable for sheep killed by a dog owned by his daughter, where she lives with and keeps house for him, and keeps the dog with his knowledge and consent.

Evidence — acts of stranger.

3. In a suit to hold one liable for the value of sheep killed by a dog owned by his daughter who lives with him, in which he denies that the dog did the killing, evidence is not admissible that, without his knowledge, his daughter killed the dog soon after the transaction upon which the suit is based,—especially where it appears that she did so because she thought there was danger of trouble between her father and plaintiff.

(November 27, 1907.)

APPEAL by defendant from a judgment of the Circuit Court for Barry County in plaintiff's favor in an action brought to recover the value of sheep killed by dogs of which defendant was alleged to be keeper. Reversed.

Statement by Woodson, J.:

The plaintiff instituted this suit against the defendant before a justice of the peace in Barry county for the recovery of \$42 damages sustained by him in consequence of the killing of eight of his sheep, alleged to have been done by defendant's dogs. The suit is based upon § 6975, Rev. Stat. 1899 [Anno. Stat. 1906, p. 3402]. There was a trial before the justice, which resulted in a judgment for the plaintiff, from which the defendant appealed to the circuit court of that county. Upon a trial *de novo* in the circuit court, the jury found for the plaintiff and assessed his damages at the sum of \$36, and judgment was rendered accordingly; and in due time and in proper manner

of another, about his premises. *Wood v. Vaughan*, 28 N. B. 472, Affirmed in 18 Can. S. C. 703.

One who kept a dog about his premises off and on for three or four years, feeding it and permitting it to follow him about. *Schaller v. Connors*, 57 Wis. 321, 15 N. W. 389.

One who enticed a dog away from its owner, and kept it against the latter's will. *Burnham v. Strother*, 66 Mich. 519, 33 N. W. 410.

One who retained possession of a dog he had given another, but which had not yet been removed from the former's premises. *Marsel v. Bowman*, 62 Iowa, 57, 17 N. W. 176.

One who, without the consent of a person to whom he has given a dog, permits it to

defendant appealed the cause to this court. The plaintiff introduced evidence tending to prove that he was the owner of the sheep, and that they were worth \$42, and that they were killed by three dogs, and that the dogs which did the killing belonged to the defendant. Over the objections and exceptions of defendant, the court permitted the introduction of evidence tending to show that defendant's daughter, without his knowledge, had two of the dogs killed some time after the sheep were killed. Whereupon defendant asked a demurrer to the evidence, which was, by the court, overruled, and he duly excepted. The evidence for defendant tended to prove that he was a widower, with no family except his daughter, who lived with and kept house for him,

for which he paid her wages. Some of the evidence tended to show the daughter owned two of the dogs, while other portions of it tended to show all of them belonged to him. His entire evidence tended to prove that neither his nor his daughter's dogs killed the sheep. At the request of the plaintiff, the court gave two instructions in his behalf, to the giving of one of which the defendant duly excepted and saved his exceptions, and which is as follows: No. 2: "The court instructs the jury that, even though you may believe from the evidence that the dogs in question were owned by the daughter of defendant, and that she lived with and made her home with her father, the defendant, and that such dogs were knowingly permitted to be kept on the place and premises of

remain on his premises. *Mitchell v. Chase*, 87 Me. 172, 32 Atl. 867.

One who permits a dog to frequent his premises, although owned by one who occupied rooms thereon. *Hahn v. Kordula*, 5 Kan. App. 142, 38 Pac. 896.

One who permits a dog to be kept for two years upon his premises, although owned by his housekeeper's minor son, who resided thereon. *Snyder v. Patterson*, 161 Pa. 98, 28 Atl. 1006.

One permits his servant to keep a dog upon his premises. *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560.

One who, for the convenience of a former servant, kept the latter's dog on his premises. *McKone v. Wood*, 5 Car. & P. 1.

A railway company which, with the knowledge or implied consent of its officers, permits a servant's dog to be kept upon its premises. *Chicago & A. R. Co. v. Kuckkuck*, 197 Ill. 308, 64 N. E. 358, Affirming 98 Ill. App. 252; *Barrett v. Malden & M. R. Co.* 3 Allen, 101.

A corporation which permits a dog with a litter of pups to remain upon its premises, which were fed by one of its servants. *Keenan v. Gutta Percha & Rubber Mfg. Co.* 46 Hun, 544, Affirmed in 120 N. Y. 627, 24 N. E. 1096.

As a matter of law, a woman is the keeper of a dog which is kept upon her farm, although owned by her son, who resides with her and works the farm. *Jenkinson v. Coggins*, 123 Mich. 7, 81 N. W. 974.

One member of a partnership is the keeper of a dog, although the property of another partner, where it is kept about a hotel conducted by the partnership. *Grant v. Ricker*, 74 Me. 487.

A married woman is the harbinger of her husband's dog when, with her consent, it is kept upon her premises. *Quilty v. Battie*, 135 N. Y. 201, 17 L.R.A. 521, 32 N. E. 47; *Valentine v. Cole*, 1 N. Y. S. R. 719; *Hugron v. Statton*, Rap. Jud. Quebec, 18 C. S. 200. Contra, *Bundschuh v. Mayer*, 81 Hun, 111, 30 N. Y. Supp. 622; *Burch v. Lowary*, 131 Iowa, 719, 117 Am. St. Rep. 443, 109 N. W. 282.

But it was held in *McLaughlin v. Kemp*, 17 L.R.A. (N.S.)

152 Mass. 7, 25 N. E. 18, that a married woman is not, as a matter of law, necessarily the keeper of her husband's dog because it is kept upon premises owned by her and occupied by both, although she carries on a separate business thereon.

Executors, who are also the sole devisees of a decedent's property, are the harborers of a dog belonging to the decedent's estate, where it is kept by them upon decedent's property, which is under their control. *Hayes v. Smith*, 15 Ohio C. C. 300, Reversed on other grounds in 62 Ohio St. 161, 56 N. E. 879.

A new trial was refused the defendant, who was charged with being the owner or keeper of a dog, where it appeared that the plaintiff was bitten by a dog kept on the premises which the defendant occupied during the summer months, and the latter did not himself testify upon the trial, but made a vigorous defense upon the merits. *McCormack v. Martin*, 71 Conn. 748, 43 Atl. 194 (no opinion).

It has been said that, in order to charge one as the harbinger of a dog which he did not own, it must appear that he harbored and treated it in the same manner as owners usually treat their own dogs. *Trumble v. Happy*, 114 Iowa, 624, 87 N. W. 678.

It is for a jury to determine whether a parent is the keeper of a dog, although the property of his infant child, where the former left it upon the infant's farm, which the parent controlled, in charge of his tenant. *Clark v. Disbrow*, 77 App. Div. 647, 79 N. Y. Supp. 126.

In *O'Donnell v. Pollock*, 170 Mass. 441, 49 N. E. 745, in affirming a judgment against one alleged to be the keeper of a dog which had been given to his daughter, and which was kept and cared for on his premises, the court said that one who suffers a dog to remain temporarily on his premises is not, as a matter of law, its keeper; and that it would have been error to have permitted or instructed the jury to find unqualifiedly that one who harbors a dog would be liable as its keeper, as the question as to who kept the dog was one of fact for the jury.

But one living with his mother, upon her

defendant, then in such case the defendant is, within the meaning of the statutes, the keeper of such dogs, and is responsible for any damage they may do." The court then gave certain instructions for defendant, and refused No. 2 asked by him, which is as follows: "The court instructs the jury that, if they believe from the evidence that it was the dogs belonging to and owned by Miss Mary Murray, or any other person than the defendant, that killed plaintiff's sheep, then your verdict must be for the defendant." The appellant makes the following assignments of error: "(1) The court erred in overruling the demurrer to plaintiff's testimony. (2) The court erred in refusing instruction No. 2, asked by the defendant. (3) The court erred in admitting testimony

showing that Miss Murray, after the sheep are alleged to have been killed, caused her dogs to be killed."

Messrs. T. D. Steele and W. Cloud for appellant.

Messrs. French & Mayhew for respondent.

Woodson, J., delivered the opinion of the court:

1. The defendant's demurrer to the evidence presents two legal propositions for determination: First, that there was not sufficient evidence introduced to make out a prima facie case for plaintiff; and, second, that § 6975, Rev. Stat. 1899 [Anno. Stat. 1906, p. 3402], is unconstitutional and void.

premises, is not the keeper of a dog owned by his mother's coachman. *Lynt v. Moore*, 5 App. Div. 487, 38 N. Y. Supp. 1095.

So, a toll-bridge owner is not the harbinger or keeper of his bridge tender's dog which is kept, without the former's knowledge and consent, in the tollgate house. *Baker v. Kinsey*, 38 Cal. 631, 99 Am. Dec. 438.

A parent was not the keeper of his adult son's dog where he had forbidden and prevented its presence in his house, and it was kept and cared for by the son in the parent's stable. *McCosker v. Weatherbee*, 100 Me. 25, 59 Atl. 1019.

An instruction was approved which stated that one would not be the keeper of a dog belonging to his adult son, although the defendant permitted the dog to be kept about his premises, where the dog inflicted an injury while off the defendant's premises and some distance therefrom. *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226.

Nor is one the keeper of a stray dog which he permits to take up its abode beneath a building in his coal yard. *Fitzgerald v. Brophy*, 1 Pa. Co. Ct. 142.

A master is not the keeper of his servant's dog, which the latter, for his own convenience, brings upon the master's premises, and keeps there during working hours. *Whallen v. Wetzell*, 6 Ky. L. Rep. 50.

An employer was not the harbinger of a dog owned by a farm hand, who occupied a separate dwelling on the farm, notwithstanding the dog was occasionally used in the employer's business in churning butter. *Simpson v. Griggs*, 58 Hun, 393, 12 N. Y. Supp. 162.

It cannot be said, as a matter of law, that the owner of a farm is the keeper of a dog by reason of the fact that it is brought and kept thereon by a servant, the owner of the farm simply acquiescing in the keeping of the dog thereon. *Whittemore v. Thomas*, 153 Mass. 347, 26 N. E. 875.

A kennel club is not the keeper of a dog exhibited by its owner at a bench show held by the club. *Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599.

One is not, as a matter of law, the keeper of a dog because it is kept upon his premises. 17 L.R.A. (N.S.)

ises by a boarder, although the former occasionally feeds and pets it, and exercises "some control" over it. *Boylan v. Everett*, 172 Mass. 453, 52 N. E. 541.

A city was not, as a matter of law, made the keeper of a dog by reason of the fact that the superintendent of its poor farm, with the knowledge of one of the overseers of the poor, kept thereon a dog which was allowed the run of the farm, and was fed with food furnished by the city. *Collingill v. Haverhill*, 128 Mass. 218.

The parents of a child who was bitten by defendant's dog while it was in the custody of the latter's servants, who were making a call at the parent's home, cannot be held to have been the keeper thereof, so as to relieve the owner from liability. *Fye v. Chapin*, 121 Mich. 675, 80 N. W. 797.

While the following cases are not strictly within the scope of this note, yet in principle they are closely related to it. Thus, it has been held that one is within statutes treating one who keeps or harbors a dog as the owner thereof, under the following circumstances:

One who, with knowledge of the vicious character of his agent's dog, permits it to remain upon his premises. *Harris v. Fisher*, 115 N. C. 318, 44 Am. St. Rep. 452, 20 S. E. 461; *Barklow v. Avery*, 40 Tex. Civ. App. 355, 89 S. W. 417.

One is liable for injuries inflicted by a dog kept by him upon his premises for five months, although owned by another person, who had left it with the defendant for the reason that it had bitten a person. *Gladstone v. Brinkhurst*, 70 N. J. L. 130, 56 Atl. 142.

An innkeeper is the "owner" of a dog, within a statute providing that the occupier of any house or premises where a dog is kept, or permitted to live or remain, shall be deemed the owner thereof, although such dog was owned by a guest; and it was away from the premises, in the charge of another guest, when it inflicted injury. *Gardner v. Hart*, 44 Week. Rep. 527.

An instruction to the jury was approved in *Shultz v. Griffith*, 103 Iowa, 150, 40 L.R.A. 117, 72 N. W. 445, which stated that one

As to the first proposition, we desire to state that, after a careful reading of the entire evidence in the case, we are unable to concur in the views of the learned counsel regarding the sufficiency of the evidence to make out a case for the jury. It tended to show that the defendant was the owner of dogs which killed the sheep, and that the plaintiff was the owner of the sheep, and that they were worth \$42. This made out a *prima facie* case under the statute referred to, and it was, therefore, the duty of the court to submit the issues to the jury. *Barth v. Kansas City Elev. R. Co.* 142 Mo. 548, 549, 44 S. W. 778.

The second proposition commanding consideration is that § 6975, Rev. Stat. 1899 [Anno. Stat. 1906, p. 3402], is unconstitutional, in that it violates § 30 of article 2 of the Constitution of 1875 [Anno. Stat. 1906, p. 166], which provides: "No person shall be deprived of life, liberty, or property without due process of law." Section 6975 reads as follows: "In every case where sheep or other domestic animals are killed or maimed by dogs, the owner of such animals may recover against the owner or keeper of such dog or dogs the full amount of damages, and the owner shall forthwith kill such dog or dogs," etc. The contention of defendant is that this section undertakes to hold him liable for the vicious habits and traits of his dogs or those harbored by him, regardless of his knowledge of their vicious characters, and that the enforcement of this statute would deprive him of his property without due process of law. This is a misconception of the meaning of the constitutional provision referred to. This court, in the discussion of that section of the Constitution, said, in the case of *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. loc. cit. 322, 25 L.R.A. 161, 24 S. W. 598: "We accept Mr. Webster's definition of the law of the land: 'By law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.'" There is nothing in the statute which denies the defendant any of those rights; but, upon the other hand, the defendant was duly summoned to appear and defend the suit, he was

given a full and careful hearing, and, after a complete inquiry as to both the law and the facts of the case, he was adjudged to pay the damage. That is all the letter or the spirit of the Constitution guaranteed unto him. The legislature in no manner attempted to deprive defendant of his property without due process of law, but simply changed the common-law rule of his liability so as to impose a stricter liability.

The St. Louis court of appeals said, in discussing this statute, that "at common law a person could not be made liable for injuries inflicted by vicious dogs belonging to him or under his control, unless the complaint averred and it was established on the trial that such owner or keeper was advised of the mischievous traits of his dogs. The statute merely dispenses with all proof of *scienter*, and did not undertake to create a new or independent cause of action. It merely changed the common-law rule, so as to impose a stricter liability." 2 *Shearm. & Redf. Neg.* 4th ed. § 628." *Jacobsmeier v. Poggemoeller*, 47 Mo. App. loc. cit. 562, 563. The same enunciation of the law under similar statutes has been made in the following cases: *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Ballou v. Humphrey*, 8 Kan. 220; *Trompen v. Verhage*, 54 Mich. 304, 20 N. W. 53; *East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; *Fish v. Skut*, 21 Barb. 333; *Job v. Harlan*, 13 Ohio St. 485; *Kerr v. O'Connor*, 63 Pa. 341; *Slinger v. Henneman*, 38 Wis. 504; *Reg. v. Perrin*, 16 Ont. Rep. 446; 2 *Cyc. Law & Proc.* p. 370. This is the same conclusion reached by this court in the *Mathews-Railway Case*, *supra*. It was there held that, prior to the enactment of § 2615, Rev. Stat. 1889, a railroad company was not liable for damage done to property by fire escaping from its engines, without the owner of the property should allege and prove that the company allowed the first to escape through the negligence and carelessness of its agents and servants in charge of its engines; and that, after the passage of that statute, it was neither necessary to allege nor prove the negligence in order to justify a recovery thereunder. Under the doctrine thus announced, before the plaintiff would be permitted to recover damages for injury done to his sheep by vicious dogs, he would be required to prove to the satisfaction of the jury, in a court duly organized and con-

who has possession of a dog, and harbors him on his premises as owners usually do, will be deemed to be the owner of the dog, within a statute making the owners of dogs liable for injuries inflicted by them.

But one is not liable, under such a statute, where his farm servant's dog habitually follows the latter from his home, and remains 17 L.R.A. (N.S.)

with him, during the day, upon the former's premises. *Auchmuty v. Ham*, 1 Denio, 495.

As to liability for injuries by dogs known to be dangerous, in the absence of negligence in not restraining the same, see case note to *Harris v. Carstens Packing Co.* 6 L.R.A. (N.S.) 1164.

stituted to hear and determine such matters, that he was the owner of the sheep and that the defendant's dogs injured or killed them; and from the evidence the jury would have to determine the amount of the damages. This is in no sense the taking of property without due process of law, and we must therefore decide this question against the defendant.

2. The defendant contends that the action of the trial court in refusing to give instruction No. 2 asked by him was reversible error. In effect, it declared the law to be that, if the jury believed from the evidence that the dogs belonged to the daughter, and that they killed plaintiff's sheep, then they would find for the defendant. We are unable to lend our assent to that declaration of the law. Even admitting the dogs belonged to the daughter, yet the uncontradicted evidence on both sides disclosed the fact that the daughter lived with and kept house for the defendant, and that he paid her wages for her services, and that, with his knowledge and consent, they were kept at his house. The law is well settled that, if a person harbors a dog, or permits his servant to keep such an animal on his premises, that will constitute such person a keeper of the animal within the meaning of the statute. *Jacobsmeier v. Poggemoeller*, 47 Mo. App. loc. cit. 503; *Barrett v. Malden & M. R. Co.* 3 Allen, 101; *Shearm. & Redf. Neg.* 4th ed. § 635. Plaintiff's second instruction given is the counterpart of the one refused for defendant and just considered. The reasons given by us for sustaining the action of the court in refusing defendant's said instruction sustain the action of the trial court in giving plaintiff's second instruction; and for that reason it will not be necessary to further notice it.

3. It is finally insisted by defendant that the court erred in admitting evidence which showed that the daughter had the dogs killed, without first requiring plaintiff to show that she did so with defendant's knowledge and consent. This is a more serious proposition than either of the other two before considered. The issue was sharp and well-defined. The plaintiff's evidence tended to show that the dogs which killed the sheep belonged to the defendant, or were harbored by him, while the defendant's evidence was equally direct and positive that neither his dogs, nor those of his daughter, did the killing. It was contended before the court, and argued to the jury, that the fact the dogs were killed shortly after the sheep were killed was in the nature of an admission on the part of defendant that his dogs killed the sheep, or that he had knowledge of the fact that they did kill them. In discussing this question in the case of *Peeler* 17 L.R.A. (N.S.)

v. McMillan, 91 Mo. App. loc. cit. 316, the Kansas City court of appeals used this language: "The defendant also complains because the court refused to instruct the jury to the effect that, because he killed his dog, it was no evidence that it maimed plaintiff's sheep. In view of the fact that the statute imposes a fine of \$1 upon owners for each dog, after notice that their dogs killed sheep, we are of the opinion that the evidence that the defendant killed his dog shortly after the plaintiff's sheep were killed is somewhat persuasive of the belief upon his part of the sheep-killing tendency of his said dog, and that he must have had some knowledge that prompted him in doing so. We think the court was justified in refusing to give the instruction." Conceding the ruling of the Kansas City court of appeals in that case to be correct, yet the rule there announced falls far short in its application to the facts in the case at bar. While there is one loose and disconnected expression of one of defendant's witnesses, which, if taken alone, would tend to prove defendant concurred in having the dogs killed, yet, when the entire evidence is taken and construed together, it is perfectly clear the daughter had the dogs killed upon her own responsibility, for the reason that she thought there was great danger of serious trouble between her father and the plaintiff, and, in order to prevent that, she, without his knowledge or consent, had the dogs killed. Under this state of facts, it cannot be logically contended that, because she had them killed, the jury would be warranted in taking that fact into consideration in determining the liability of the defendant.

We are therefore clearly of the opinion that the action of the court in the admission of that evidence, in the absence of evidence tending to show he had knowledge of and consented to the killing, was prejudicial error; and, for that reason, the judgment is reversed, and the cause remanded for a new trial.

All concur.

NEBRASKA SUPREME COURT.

JAMES W. JOHNSTON

v.

NEW OMAHA THOMSON-HOUSTON
ELECTRIC LIGHT COMPANY, Appt.

(— Neb. —, 113 N. W. 526.)

Negligence — injury to infant — basis of recovery.

1. In an action for damages for personal injuries to an infant, alleged to have been

Headnotes by AMES, C.

caused by the negligence of another, the foundation for recovery, if there is any, is not the tender years of the child, but the culpable negligence of the defendant.

Same — proximate causé.

2. In an action for damages for personal injuries alleged to have been inflicted by the negligence of another, a recovery can be had for such consequences only, of the act complained of, as ought reasonably and probably to have been anticipated to flow therefrom.

On Rehearing.

Electricity — shock — contributory negligence.

3. An ordinarily bright and intelligent boy, twelve years old, living in a city in which electric light and power wires are in constant use on nearly all of the principal streets and highways, who, having knowledge of the danger, but not of its extent, purposely takes hold of such a wire in order to obtain a shock, and is injured thereby, is, as a matter of law, guilty of contributory negligence.

Negligence — inviting injury — unexpected result.

4. One who is negligent in a situation of danger, the existence and nature of which he knows, is not entitled to recover damages for an injury which his negligent conduct invites, because such injury is greater than he anticipated.

(January 5, 1907.)

APPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Greene, Breckenridge, & Kinsler for appellant.

Messrs. T. W. Blackburn and R. S. Horton for appellee.

Ames, C., filed the following opinion:

This is an appeal from a judgment for damages for a personal injury to a son of the plaintiff, a lad twelve years of age.

There is a foot passageway or sidewalk along the side of a viaduct in the city of Omaha. On the outside of this walk, and along the edge of the viaduct, is an iron railing or fence 44 to 46 inches in height, and constructed of three horizontal rails, connected with crosspieces or lattice work. On the outside of this fence and fastened thereto, and to the substructure of the via-

Note. — Duty in stringing electric wires to guard against danger to children, see case note to *Temple v. McComb City Electric Light & P. Co.* 11 L.R.A. (N.S.) 449. 17 L.R.A. (N.S.)

duct, a street railway company has erected and maintains trolley poles. From the outside of these poles, brackets or arms are extended, and upon insulators at the ends of the arms, wires are suspended for the carrying of currents of the defendant, which is an electric light company. The apparatus of the defendant was erected in compliance with regulations of the city authorities with reference to the subject, and under the supervision of the city electrician. The distance of the wires from the top rail of the fence is not less than 18 and is perhaps 30 inches; much the greater weight of the testimony favoring the latter. On the occasion of the happening of the injury, the plaintiff's son and four other boys of about the same age approached the viaduct on foot for the purpose of crossing it, when one of them remarked that another boy, not then present, had received a shock some days before from a wire on one of the poles, which was designated. When the party had arrived at this place, one of the boys climbed on the second or middle rail of the fence and proposed to grasp the wire, but was dissuaded from so doing by his companions. After that the plaintiff's son proposed that he would climb on the fence "and see if he could get a shock." All the other lads warned him against so doing, but he persisted, telling them to stand at one side, so that if, when he should touch the wire, he should fall, he would not hurt them, and, after making a second attempt, did succeed in touching the wire, from which he received the injury complained of. There is no evidence with respect to the insulation of the wire, except what may be inferred from the circumstances just narrated, and none that the defendant, its agents or servants, had any knowledge or notice of the previous occurrence mentioned by the boys, or that their apparatus was out of repair, if it was so. At the close of the trial the defendant asked a peremptory instruction in its behalf, which the court refused, and submitted the case to the jury, who returned a verdict for the plaintiff, from a judgment on which this appeal is prosecuted.

We think the instruction ought to have been given. It does not appear that the defendant's structure was unskillfully or negligently made, or that it differed in any respect from such as are required by the regulations and authorities of the city and are in general use for like purposes elsewhere. If the wire lacked insulation, it is not shown that that fact was known to the defendant or its employees, or had existed for so long a time that knowledge thereof by it or them may be presumed, or that want of knowledge was due to negligence. The wire was not within the public highway,

or so near thereto that travelers thereon were likely to come in contact with it; nor does it appear that any such persons had ever done so. The structure is not of such a character as to be obviously attractive to children or likely to be used by them as a plaything, nor does it appear that it ever was so used except on the occasion under inquiry. The hearsay testimony about another boy having received a shock at another time is, of course, not evidence; and the event, if it happened, is not shown, even by hearsay, to have come to the notice of the defendant. Even if the wire was negligently allowed to remain insufficiently insulated, of which we think there is not sufficient evidence, the injury complained of is not such a one as could reasonably and naturally have been anticipated would result therefrom; and it is only for the natural and probable consequences of negligence that a person accused of it is responsible. *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, and authorities cited; *Stark v. Muskegon Traction & Lighting Co.* 141 Mich. 575, 1 L.R.A. (N.S.) 822, 104 N. W. 1100; *Powell v. New Omaha Thomson-Houston Electric Light Co.* 74 Neb. 280, 104 N. W. 162; *Crete v. Childs*, 11 Neb. 252, 9 N. W. 55. This rule is too well settled to require further citation of authority in its support; and we do not understand that it is at all interfered with or affected by the fact that a person who may accidentally suffer an injury is a child of tender years.

We have not seen occasion for discussing the character and intelligence of the plaintiff's son, which, if there was evidence of negligence by the defendant, would ordinarily be a question for the jury. He showed a somewhat remarkable persistence in the pursuit of a known danger, and seems to have fully and accurately anticipated and appreciated the injuries likely to be, and which were, consequent upon it, namely, a burning of his hand and a considerable shock to his nervous system. It appears to us at least doubtful if a person thus competent to judge of his own conduct, in connection with known circumstances, can be excused from the charge of contributory negligence because of his youth. But in all such cases the foundation of a right of recovery, if there is any, is not the tender years of the plaintiff, but the culpable negligence of the defendant, which latter is in this case wholly unproved.

For the reasons given, we recommend that the judgment of the district court be reversed and the cause remanded.

Epperson and Oldham, CC., concur.
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Per Curiam:

For the reasons stated in the foregoing opinion, it is ordered that the judgment of the District Court be reversed and the cause remanded.

A rehearing having been granted, Ames, C., filed the following additional opinion on October 16, 1907:

A reargument has been heard in this case, because a motion for a rehearing complained of certain misstatements of fact in the former opinion. 110 N. W. 711. The opinion says that at the time of the happening of the injury in suit the defendant was not aware that its wire was without insulation at the point of contact therewith by the plaintiff's son, and was at that time without knowledge of a previous injury therefrom to another boy. Both these statements are erroneous, but to what extent either is material may be a subject of debate. The second of them is better described as inaccurate rather than erroneous. It is not shown what was the age of the boy formerly hurt, or how or in what circumstances the mishap took place, or that it was such a one as would reasonably have been anticipated to recur. It was these matters upon which the mind of the writer of the opinion dwelt and to which he intended to give expression. There is, in our view, nothing in the nature of an electric-light wire, placed 18 or more inches outside a public way and defended by a substantial fence 4 feet high, which would lead a person to suppose that it is attractive to children of tender years as a plaything, and there is no evidence that the defendant knew or apprehended the wire in question to be so. Decided cases involving the right of children of tender years, or their parents or guardians, to recover for the consequences of negligent injuries, fall into several classes. One of them is of those instances where the child is employed, or is rightfully present, in a place of danger, and does or omits an act or acts which, in a person of mature years and ordinary experience and intelligence, would be admittedly negligent, but for which conduct the child, on account of his supposed lack of these qualities, is either absolutely excused, as a matter of law, or the degree of his incapacity or lack of discretion, and consequent irresponsibility, is left to the jury as a question of fact. The line of discrimination between these two subdivisions, in one of which the injury is disposed of as a matter of law and in the other of which it is treated as a question of fact, is extremely obscure and uncertain, if there can be said to be any such distinct line, and its discovery in every instance is largely dependent upon the peculiar circumstances of the par-

ticular case, and perhaps upon the unconscious bias and preconception of the court who decides it. But with neither of these subclasses, or with their definition, have we anything now to do. Another class of cases is composed of instances in which the party by or on behalf of whom the complaint is made was not an employee or rightfully present, and was one toward whom the person owning the instrument inflicting the injury owed no duty except to abstain from malicious or wanton misconduct. Ordinarily, in such cases, if the person injured is an adult, the question of negligence, or of contributory negligence, properly speaking, does not arise; the trespasser assumes the risk of his own conduct, and no liability exists. But, if the person injured is of immature years, several questions arise, all of which, to justify a recovery, must be answered in the affirmative: First, is the machine or appliance of such a character as to be generally known, or was it, or should it have been, known to the proprietor, to be likely to inflict the same or similar injury if unguardedly dealt with? Second, was it of such a character that a reasonably prudent man would have known, or did the proprietor in fact know, that it was of such a character as to attract or induce young and indiscreet persons to employ it as a plaything, in mental obliviousness, or nearly so, to their peril in so doing, or at least of the nature or degree of such peril? And, third, was the party injured of the description last given? Obviously the last question may be solved in one of two ways. Either discretion or indiscretion may be conclusively presumed, as a matter of law, from the age and experience of the child, or the age may be regarded as raising a presumption susceptible of rebuttal by evidence. And here, too, the authorities speak with no certain or unequivocal voice. We think it would render this opinion uselessly prolix to make an attempt, necessarily fragmentary and imperfect, to cite and criticize the hundreds of reported decisions treating of this and allied questions. A comprehensive and masterly collection and review of them may be found in §§ 306 to 349, both inclusive, of the first volume of Thompson's Commentaries on the Law of Negligence. It seems sufficient to refer to that work and to state our own conclusions as to the principles deducible therefrom and as to their application to the pending case.

One inference from these decisions seems to be quite clear, and that is that the rules of law and practice relative to the weight, sufficiency, and conclusiveness of evidence with respect to any of the foregoing questions, in cases in which they are to be decided upon evidence, are not different from 17 L.R.A. (N.S.)

such as are applicable to the trial of other issues. Now, we are far from assuming, in the absence of proof, that an electric-light wire situated as was the wire of the defendant is an object of such a nature, or is so generally known to be such that the defendant must be presumed to have known it so to be, as to attract and induce children of tender years, or boys of ten or twelve years of age, to make use of it as a plaything. Neither do we think the evidence sufficient to prove that the defendant had such knowledge, or that the wire was in fact of such a nature. So far as our own observation goes, or legal literature discloses, the casualty complained of was singular and peculiar. The circumstances of the former mishap are unknown, and it is a matter merely and wholly of conjecture whether it occurred in circumstances like those in the pending case or otherwise. And one swallow does not make a summer. Even if the circumstances had been shown to be similar, the defendant might have been excused from apprehending, because of its knowledge of one such happening, that so singular and improbable an event would be repeated, and have been permitted to rest securely upon its knowledge that its wire, though the insulation was slightly impaired, was so guarded as to insure the safety of the traveling public and of all others who had a right or could be expected to meddle with it. But the circumstances of the accident themselves are such that all these questions may be resolved in favor of the plaintiff and still there can be no recovery. There were five boys in the party. One of them climbed upon the fence as if to touch the wire, but his companions "scared him down." Then the plaintiff's son climbed partly up the fence apparently with like intent, and his companions "scared him down." Then he told them to go on to one side so as to be out of the way if he happened to fall, and then he climbed up again and touched the wire, and received the shock and consequent injury of which complaint is made. The evidence establishes several things without contradiction and conclusively. Electricity is a mysterious power, but in many of its common manifestations is not, and has not been for many years, an unknown force. It is a matter of common knowledge that electric light and power wires carry powerful and death-dealing currents, and that they are the frequent cause of severe and fatal accidents, and that ordinary prudence requires all persons to avoid contact with them, especially if they are imperfectly or defectively insulated. The evidence establishes conclusively that the plaintiff's son

was an ordinarily bright and intelligent lad, twelve years of age, who lived in the city and knew that the wire carried a current sufficiently powerful to light the circuit of which it was a part, and knew that, because of defective insulation or other defect at the place in question, such current was capable of being diverted into the body of any person coming in contact with it, and knew that, shortly before that time, it had been so diverted, and had thereby caused a shock or injury more or less serious to the person of another boy. That he anticipated an injury of some degree to himself is undeniable, because what he deliberately sought was a "shock," which is nothing less than an injury. Whether he also anticipated its extent or degree is not known, but that he supposed that it would be of considerable severity is shown by his caution to the other boys to stand out of danger in case of his fall.

We know of no rule of law to the effect that, when one is negligent in a situation of danger the existence and nature of which he knows, he may nevertheless recover damages because the resulting injury is greater than he anticipated. We think the case fails precisely within the rule which governed the decision of *Frauenthal v. Laclede Gaslight Co.* 67 Mo. App. 1, in which the plaintiff's son, a boy seventeen years old, purposely took hold of the end of a broken electric-light wire, knowing the danger of so doing, but not its extent, and was killed. A recovery was denied, and the deceased was held to have been guilty of contributory negligence as a matter of law. Irrespective, therefore, of the question of negligence of the defendant company, we are of opinion that the former judgment of this court should be adhered to, because the negligence of the plaintiff's son was a contributory, if not the sole, cause of the injury complained of. The case appears to us to be quite unlike the turntable cases and others of like kind, where children are injured by machinery and appliances attractive as playthings and left unguarded in such situations as to invite them to gratify their impulses without knowledge or apprehension of danger; and it is only in accordance with the principle of those cases that the plaintiff seeks to recover.

We therefore recommend that the former decision of this court be adhered to.

Jackson, C., concurs.

Per Curiam:

For the reasons stated in the foregoing opinion, the former decision of this court is adhered to.

17 L.R.A. (N.S.)

NEBRASKA SUPREME COURT.

ERICK MUNK, Appt.,

v.

J. E. FRINK.

(— Neb. —, 116 N. W. 525.)

Pleading — sufficiency — revocation of physician's license.

1. A complaint filed before the state board of health for the purpose of procuring an order revoking the license of a physician is sufficient if it informs the accused not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration.

Trial — board-of-health hearing — procedure.

2. And in a trial under such a complaint it is not necessary that the proceedings should be conducted with that degree of exactness which is required upon a trial for a criminal offense in an ordinary tribunal of justice.

Same — jury.

3. Proceedings by the state board of health to revoke a physician's license for cause are summary in their nature, and are triable before the board without the intervention of a jury.

Same — revocation of physician's license — previous conviction.

4. A trial and conviction in a court of competent jurisdiction is not a condition precedent to a proceeding by the state board

Headnotes by FAWCETT, C.

Note. — In *Walker v. McMahan* (Neb.) 116 N. W. 528, it appeared that the defendant acted as assistant to the defendant in the above-reported case; and it was held that the same legal propositions were applicable.

In *Gulley v. Territory* (Okla.) 91 Pac. 1037, it appeared that the diploma which accompanied the application for a license had been issued by a pretended medical college which afterwards was declared by the supreme court of the state where it was located to be a mere diploma mill, designed wholly for issuing diplomas to any person who was willing to pay the price, without attendance and without regard to qualification; that the applicant knew these facts, and, for the purpose of deceiving, presented the fraudulent diploma and made affidavit that he had attended the regular sessions of the college. It was held, upon these facts, that the license was properly canceled by the district court, upon which, by statute, had been conferred power to cancel medical licenses fraudulently obtained, and that the licensee was not entitled to a jury trial since the action was an equitable proceeding.

Prior reported cases showing the various grounds for revoking a physician's license may be found in the case note to *Macomber v. State Bd. of Health*, 8 L.R.A. (N.S.) 585.

of health against a physician to revoke his license for any of the causes provided by statute.

Same — procuring abortion — proof of quickening.

5. In a hearing by the state board of health of charges against a physician for procuring, or aiding or abetting in procuring, a criminal abortion, it is not necessary to either allege or prove that the woman had become quick. It is not the murder of a living child which constitutes the offense, but the destruction of gestation, where such destruction is not necessary in order to preserve the life of the woman. The moment the womb is instinct with embryo life and gestation has begun the crime may be perpetrated.

Board of health — revocation of license — administrative function.

6. The power conferred upon the state board of health to revoke a physician's license for cause is an administrative, and not a judicial, function; and the limit of judicial interference in such cases is to protect the accused in his right to a hearing upon specific charges after reasonable notice of the time and place of hearing has been given, and a full opportunity afforded him to present his defense to such charges and against a conviction, unless upon competent evidence.

Appeal — findings of board of health.

7. And, in such a case, when the state board of health has so proceeded and taken testimony, and has given the respondent full opportunity to appear in person or by counsel to cross-examine the witnesses against him, and to introduce testimony in his own behalf, and has passed upon the sufficiency of the evidence so taken, the findings of the board as to the sufficiency of the evidence to sustain the charges will be upheld, unless it appears that there is no evidence to sustain such findings.

Same — evidence to support findings — sufficiency.

8. Evidence examined, and held that the state board of health proceeded in the present case fairly and openly, and within the powers granted to it by the legislature; that appellant was given proper and sufficient notice of the hearing, and full opportunity, upon such hearing, to vindicate himself from the charges preferred against him; and that the findings and judgment of the board are in all respects regular and in accordance with the statute under which it acted.

(May 7, 1908.)

A PPEAL by defendant from an order of the District Court for Lancaster County dismissing his petition for a writ of error to the state board of health to review an order revoking his license to practise medicine. Affirmed.

On the 27th day of May, 1904, a proceeding was begun by the state board of health 17 L.R.A. (N.S.)

to revoke a license of the appellant, Erick Munk, to practise medicine, on the ground of procuring a criminal abortion. After a full hearing, the defendant was found guilty of the charge, and his license was revoked. The district court dismissed the petition for a writ of error, on the ground that it had no jurisdiction to review the proceedings. On appeal to the supreme court, department No. 1, the judgment of the district court was reversed on the ground that the district court was vested with full jurisdiction to review the order of the said board of health, and the case was remanded for further proceedings. The complaint against the defendant charged the procurement of an abortion in the following language: "Dr. Erick C. Munk, on the 11th day of February, 1904, in the county of Boone, wilfully, unlawfully, and maliciously did use a certain instrument the name of which is to affiant unknown, by thrusting and inserting said instrument into the womb of one Laura Orender, then and there being a pregnant woman, with the intent then and there and thereby to procure the miscarriage of the said Laura Orender, the same not being necessary to preserve the life of the said Laura Orender, not being advised by two physicians to be necessary for that purpose other than Dr. D. G. Walker, who assisted in producing said miscarriage, and was a coconspirator in said crime."

Mr. H. Halderson for appellant.

Messrs. W. T. Thompson, Attorney General, Halleck F. Rose, and H. C. Vail, for appellee:

The complaint is sufficient in form and substance to authorize the board to act.

Wilson v. State, 2 Ohio St. 319; Mills v. Com. 13 Pa. 663; State ex rel. Hart v. Duluth, 53 Minn. 244, 39 Am. St. Rep. 595, 55 N. W. 118; People ex rel. Keech v. Thompson, 94 N. Y. 461; Re Smith, 10 Wend. 458; Traer v. State Bd. of Medical Examiners, 106 Iowa, 562, 76 N. W. 833; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 715, 1 L.R.A. (N.S.) 811, 72 Pac. 247; School Dist. No. 23 v. McCoy, 30 Kan. 268, 46 Am. Rep. 92, 1 Pac. 97.

Fawcett, C., filed the following opinion:

This case is before us for the second time. The opinion on the first hearing, in 75 Neb. 172, 106 N. W. 425, gives a full and accurate statement of the nature of the case. When the case was remanded to the district court, that court considered it upon its merits, and affirmed the findings of the state board of health revoking appellant's license to practise medicine, surgery, and obstetrics in this state; and to review such judgment this appeal is prosecuted.

The former opinion in this case and our

opinion in *State v. Walker*, 75 Neb. 177, 106 N. W. 427, have settled adversely to appellant his contention that the complaint under which the state board of health proceeded is insufficient. It is argued that our holding on the former hearing that the complaint was sufficient is not the law of the case, for the reason that the reference to that question in the former opinion is mere *dictum*. In this contention we are unable to concur. Even if we were to hold that the discussion of the proposition by Ames, commissioner, in that case is *dictum*, we would adopt his reasoning now in holding that the complaint is sufficient, and would support such holding by the authorities cited by Judge Ames. While it is true some courts have held that in a case of this kind the offense must be alleged with the same certainty, and the evidence must be of the same degree, as would be necessary in a criminal prosecution, the overwhelming weight of authority is against that idea. One of the strongest cases relied upon by appellant in support of that contention is *Skeen v. Craig*, 31 Utah, 20, 86 Pac. 487; but an examination of that case will show that the only reason the court so held was because § 4575 of the act (Utah Rev. Stat. 1898) under which that case was being prosecuted provides that "the trial . . . shall be conducted . . . in the same manner as the trial of an indictment or information for a felony." It will be seen, therefore, that that case could not be considered as an authority in this. Our holding in the former opinion that "a complaint filed before the state board of health for the purpose of procuring an order revoking the license of a physician is sufficient if it informs the accused not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration," is well sustained; and the contention of appellee that proceedings before the board for revocation of a physician's certificate are not to be conducted and carried on in conformity to the technical rules of procedure obtaining in courts of justice is fully supported by the following authorities: *Meffert v. State Bd. of Medical Registration* (*Meffert v. Packer*) 66 Kan. 710, 1 L.R.A. (N.S.) 811, 72 Pac. 247; *State ex rel. Hart v. Duluth*, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; *Traer v. State Bd. of Medical Examiners*, 106 Iowa, 559, 562, 76 N. W. 833; *People ex rel. Keech v. Thompson*, 94 N. Y. 451, 461; 1 Dill. Mun. Corp. § 255. In *Traer v. State Bd. of Medical Examiners*, supra, it is said: "The statute does not prescribe the practice to be followed in cases instituted for the revocation of certificates; and, although it may, when practicable, follow somewhat the methods of the courts, yet, from the nature 17 L.R.A. (N.S.)

of the board and the character of the duties it is required to perform, a more flexible practice than that allowable in the courts must, of necessity, be followed in many cases." In *State ex rel. Hart v. Duluth*, supra, the court says: "We also recognize the fact that while in the exercise of this power their proceedings are quasi judicial, and hence reviewable by the courts, yet they are not courts, but essentially legislative and administrative bodies; and that their action should be considered in view of their nature and the purposes for which they were organized, and not tested by the strict legal rules which prevail in trials in courts of law. Hence, if such a body has kept within its jurisdiction, and the evidence furnished any legal and substantial basis for their action, it ought not to be disturbed for any mere informalities or irregularities which might have amounted to reversible error in the proceedings of a court. To apply any other rule to the proceedings of such bodies would be impracticable, and disastrous in the extreme to public interests." In *People ex rel. Keech v. Thompson*, supra, it is said: "The charges as made were sufficient to answer the purpose intended, and were within the requirements of the statute under which the proceeding was had. It was not necessary that the proceedings should be conducted with that degree of exactness which is required upon a trial for a criminal offense in an ordinary tribunal of justice; and it cannot be said that the charges made were insufficient." In *Meffert v. State Bd. of Medical Registration*, supra, it is said: "The provisions of the act creating the board plainly indicate that such investigation was not intended to be carried on in observance of the technical rules adopted by courts of law. The act provides that the board shall be composed of seven physicians. These men are not learned in the science of law; and to require of a board thus composed that its investigations be conducted in conformity to the technical rules of a common-law court would at once disqualify it from making any investigation. It is subversive of the morals of the people and degrading to the medical profession for the state to clothe a grossly immoral man with authority to enter the homes of her citizens in the capacity of a physician. It was the intention of the legislature to adopt a summary proceeding by which the morals of the people and the dignity of the profession might be protected against such a possibility without being embarrassed by the technical rules of proceedings at law."

The contention of appellee that the act in question was a proper exercise by the legislature of its police powers is assailed by

counsel for appellant as inapplicable and unsound, "because there is no necessity for the exercise of the power in that form;" but the contention of counsel for appellee is fully sustained in *Meffert v. State Bd. of Medical Registration*, supra. The section of the statute under which these proceedings were had defined "unprofessional and dishonorable conduct," and includes "the procuring, or aiding or abetting in procuring, a criminal abortion" in that definition. Counsel for appellant assails this definition as "a profound legal *bizarrierie*," and says that the author of that definition "should be immortalized as an apostle of the incongruous." We are unable to concur in this severe criticism of the author of the section of the statute under consideration, or of the definition referred to. If "the procuring, or aiding or abetting in procuring, a criminal abortion," is not "unprofessional or dishonorable conduct" in one holding a certificate entitling him to practise medicine, then we are unable to conceive of any conduct of which such persons might be guilty which could be called unprofessional or dishonorable. As stated by the supreme court of Pennsylvania in *Mills v. Com.* 13 Pa. 632: "It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman, because it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountain of life, and therefore it is punished."

Counsel for appellant contends that "it follows that a sufficient complaint of unprofessional or dishonorable conduct within the meaning of § 14, supra (Comp. Stat. 1907, § 4327), must, in apt terms, charge the criminal destruction by the accused, either as principal or accessory, of a vitalized human fetus;" that "there is here no charge, even by implication, of the destruction of a vitalized fetus, which is the very essence of the crime of abortion." Authorities are not wanting to sustain this contention by counsel; but we fully concur in the following holding of the supreme court of Pennsylvania in *Mills v. Com.* supra: "The next error assigned is that it ought to have been charged in the count that the woman had become quick. But, although it has been so held in Massachusetts and some other states, it is not, I apprehend, the law in Pennsylvania, and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life and gestation has begun the crime may be per-

petrated." If the theory contended for by counsel for appellant should be sustained, it would be practically impossible to convict an abortionist for any abortion, or attempted abortion, during the first five months of pregnancy; for, if gestation had not proceeded to the period of quickening, there would be no way of disputing the testimony of the abortionist that what he removed from the woman was in fact a dead fetus. Even the woman herself could not dispute this testimony prior to pulsation following the quickening period. It would be giving unlimited license to the abortionist to ply his nefarious calling, provided he confined his criminal operations to the early months of gestation. We prefer to be in line with the supreme court of Pennsylvania, and say, although it has been so held in Massachusetts and some other states, it is not the law "in Nebraska," and never ought to have been the law anywhere.

It is also contended by counsel that by this proceeding they have been deprived of the right of a trial by jury. This contention was considered in *Re Smith*, 10 Wend. 449, where it is said: "It is contended . . . that it conflicts with those provisions of the Constitution of the United States and of this state which secure to the citizens the right of trial by jury, and prohibit the establishment of any new court, except such as shall proceed according to the course of the common law. . . . The power conferred by this statute is similar in its character and consequences to that which is possessed by the courts of record of this state over counselors, solicitors, and attorneys. They may, by statute (1 Rev. Stat. 1st ed. pt. 1, chap. 5, title 4, p. 108, §§ 23, 24), be removed or suspended by the several courts to which they belong. The 24th section prescribes the mode of proceeding in such cases. They are strictly summary. A copy of the charges is to be delivered to the party, and he is to have an opportunity of being heard. But there is no grand jury to indict, or petit jury to try, nor any of the usual concomitants of a trial by jury; and yet I believe no constitutional objections were ever raised to this jurisdiction." Continuing, the court says: "The practice of physic and surgery in this state was regulated by law as early as 1760 (2 Rev. Laws, p. 219, note), and such regulations have been altered and extended from time to time down to the passing of the act in question. Under the law as it previously existed, the county medical society were authorized to make such by-laws and regulations relative to the admission and expulsion of members as they thought fit and proper, not inconsistent with the Constitution and laws of the state." So, also, § 5 of the act in ques-

tion (Comp. Stat. 1907, § 4319) provides that our state board of health "may make and adopt all necessary rules, regulations, and by-laws, not inconsistent with the Constitution and laws of this state or of the United States, to enable it to perform its duties and transact its business under the provisions of this act."

The further contention is made by counsel that proceedings against appellant should have been preceded by a conviction in a court of competent jurisdiction. This contention is decided adversely to them in *Re Smith*, supra. The court says: "The trial and acquittal of the defendant upon the indictment for producing the abortion was no bar to this proceeding. They are entirely distinct and independent proceedings, having different objects and results in view; the one having regard to the general welfare and criminal justice of the state; the other simply and exclusively to the respectability and character of the medical profession and the consequences connected with or necessarily flowing from it. It is immaterial, therefore, in my judgment, whether the offense mentioned in the charge was indictable or not, and whether the indictment was disposed of upon its merits, or upon some matter of form." If, as stated by the New York court, a trial and acquittal of the defendant upon his indictment for producing an abortion would not be a bar to the proceeding, it follows as a matter of course that a trial and conviction for producing an abortion is not a condition precedent to proceedings to revoke a license. It is contended that no right of review of the evidence exists. A careful consideration of the question satisfies us that, where the officer can only be removed, or the licensee have his license revoked, for cause, first found and ascertained by the board or tribunal provided for that purpose, the right of review should be preserved. This was so held in the former opinion in this case. 75 Neb. 172, 106 N. W. 425. In such a case the findings of the board should be upheld, unless it clearly appears that there is no evidence to uphold them. We have carefully read the entire record, and, if it were now before us as a bill of exceptions in an ordinary court trial, with a verdict of the jury against appellant, we would be compelled to hold that the evidence sustains the verdict.

A consideration of the whole case has convinced us that the state board of health proceeded in the present case fairly and openly and within the powers granted to it by the legislature; that appellant was given proper and sufficient notice of the hearing, and every opportunity upon the hearing to vindicate himself from the charges preferred against him; that the findings and judg-

ment of the board were in accord with the law and fully sustained by the evidence; and that the district court did not err in affirming its proceedings.

We therefore recommend that the judgment of the district court be affirmed.

Calkins and Root, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Reese, J., did not sit.

OHIO SUPREME COURT.

JACOB A. DAVY et al., Pliffs. in Err.,

FIDELITY & CASUALTY INSURANCE COMPANY.

(78 Ohio St. 256, 85 N. E. 504.)

Demurrer — contingent attorney's fee — compromise.

1. While a contract for an attorney's fee contingent upon the amount to be recovered by judgment or settlement is ordinarily valid, yet, when such contract contains a stipulation that the client shall not compromise or settle his claim without the consent of the attorney, it is champertous and voidable at the option of the client, and its illegality will avail as a defense in any action against a third party which is based on the contract.

Same — divisibility of contract.

2. In such case the illegal stipulation cannot be ignored and the other provisions of the contract enforced.

(June 9, 1908.)

ERROR to the Circuit Court for Miami County to review a judgment affirming a judgment of the Court of Common Pleas in defendant's favor in an action brought to recover a sum alleged to be due by virtue of a settlement by defendant of a cause of action against it in disregard of plaintiffs' lien for attorney's services therein. Affirmed.

Statement by Davis, J.:

The plaintiffs in error were plaintiffs below, and, on the 22d day of October, 1904,

Headnotes by the COURT.

Note. — As to validity of provision in contract for contingent fee forbidding client to settle claim without attorney's consent, see case note to *Re Snyder*, 14 L.R.A. (N.S.) 1101.

filed their petition setting forth that they are partners engaged in the general practice of the law in Miami county, Ohio; that the defendant is a corporation engaged in the accident and life insurance business; that, on and after the 14th day of December, 1903, one Margaret R. Slagle had a cause of action against the defendant growing out of a policy issued to her husband, Jacob Slagle, insuring him against disability or death resulting from accident, and, while said policy was in force, her said husband was injured in a railroad accident, from which injury he died; that the plaintiffs, at the request of said Margaret R. Slagle, prepared proofs of the said death, loss, and claim, and examined into the facts incident to the injury and death of her said husband, advised her as to her rights, and, on the 23d day of July, 1904, entered into a contract in writing with her whereby she employed the plaintiffs as her attorneys to prosecute suit against the defendant to recover for the said death loss under the said policy, and, in consideration of the services which the plaintiffs had already performed for her concerning the said death loss, and the further agreement on the part of the plaintiffs to bring suit against the defendant for said Margaret R. Slagle to recover from the defendant the said death loss of \$10,000, or so much thereof as should be found due her by the verdict of a jury or decision of the court, and further agreement to prosecute the case through all the courts to which it might be carried, said Margaret R. Slagle agreed that 40 per cent of the amount realized from the defendant in said case, either by judgment or settlement, should be paid to the plaintiffs for their services, and the said Margaret R. Slagle thereby made an equitable assignment to the plaintiffs of an undivided two-fifths interest in said cause of action and of the proceeds to be realized therefrom either by settlement or judgment; that the plaintiffs began such an action against the defendant, and that, on or about the 16th day of August, 1904, they entered a notice on the appearance docket in said cause and likewise gave a notice in writing to the defendant of their agreement with the plaintiff and of the terms thereof; that, on the 14th day of October, 1904, the said Margaret R. Slagle, without the knowledge and consent of the plaintiffs, made a settlement of said cause of action with the defendant, and presented to the clerk of the court an entry setting forth that said cause had been settled and dismissed, and caused said entry to be approved by the court and said cause thereby dismissed; that no part of plaintiffs' compensation for said services has been paid, and that said Margaret R. Slagle is insolvent, and that, by reason of the prem-

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ises, the defendant is indebted to the plaintiffs for the amount of the compensation due them under their contract with the said Margaret R. Slagle. The plaintiffs further set forth as a second cause of action, after adopting all of the allegations and statements of fact contained in the first cause of action, that in the written notice given by the plaintiffs to the defendant of their said contract with Margaret R. Slagle the plaintiffs also made a demand that the defendant retain from any settlement it might make with Margaret R. Slagle of said cause of action the said 40 per cent due the plaintiffs under their contract, and that the same should be paid directly to the plaintiffs; that the defendant, on or about the 14th day of October, 1904, paid to the said Margaret R. Slagle a large sum of money to settle said cause of action and dismiss said cause, the exact amount being unknown to the plaintiffs, but said defendant failed and neglected to account for and pay to plaintiffs the share due to them under their contract with Margaret R. Slagle, or any part of it; wherefore plaintiffs pray the court to decree said settlement, as to the plaintiffs, to be collusive, fraudulent, and void, and that a discovery be had of the amount paid by the defendant to said Margaret R. Slagle under said collusive settlement, either directly or indirectly, for the alleged settlement and dismissal of said case, and that the court decree the defendant a trustee for said two fifths of said cause of action or the proceeds thereof, and that an accounting be had and the court ascertain the amount due to the plaintiffs from the defendant and render a judgment in plaintiffs' favor and against the defendant for the amount so found due; and, further, that the court grant to the plaintiffs all other and further relief to which they may be entitled under the premises.

The defendant answered, and, after sundry denials of allegations of the petition, admits that said Margaret R. Slagle and the plaintiffs entered into a written contract employing the plaintiffs to prosecute the said claim under said policy against this defendant in consideration of 40 per cent of the amount recovered against this defendant, but the defendant avers that the said contract was contrary to public policy, illegal, and void, and sets out a copy of said contract which is as follows:

Troy, Ohio, July 23, 1904.

This memoranda made this 23d day of July, 1904, by and between Margaret R. Slagle, of the first part, and J. A. Davy and L. E. St. John, of the firm of Davy & St. John, of the second part. witnesseth, that the said Margaret R. Slagle does hereby-

retain and employ said Davy & St. John as her attorneys to prosecute her two certain and separate actions for money due her, on contract, one against the Aetna Life Insurance Company, of Hartford, Connecticut, for \$10,000, and one against the Fidelity & Casualty Company of New York, for \$10,000, for the loss of life of Dr. Jacob Slagle by reason of accident or caused by accident occurring to him on December 14, 1903, said companies having insured the said Dr. Jacob Slagle against loss of limb or life. Said attorneys are to prosecute and agree to prosecute the said separate causes of action through all the courts beginning with the court of common pleas of Miami county, Ohio, on behalf of the said Margaret R. Slagle, and do and perform for her and on her behalf all that is necessary to be done in prosecution of said actions against said companies. Said attorneys are to employ such other and additional help and counsel as to them seems necessary. Said attorneys receipt to the said Margaret R. Slagle for \$100 retainer fee received herein; and it is agreed by the parties hereto that the compensation of said counsel and attorneys shall be contingent upon their success in the prosecution of said causes of action against said companies or compromise of the said claim against the said companies. It is agreed by the parties hereto that, for the services already rendered and to be rendered on behalf of the said attorneys in prosecution of said causes of action against said companies through all the courts as above specified, that said attorneys shall receive for their compensation 40 per cent of any and all sums recovered against said companies by the said Margaret R. Slagle either at the end of a judgment and execution, or at the end of a more voluntary payment, or, if said causes of action shall be compromised and settled; that said Margaret R. Slagle shall receive 60 per cent of the amount so recovered and the said attorneys for their compensation shall receive 40 per cent of the same. This forty per cent to include the compensation of any and all counsel employed by Davy & St. John to assist them.

It is agreed by the parties that, in the taking of depositions, or in attending court at Columbus, Ohio, or in performing other labor or services in said cause, said attorneys shall pay their own personal expenses as a part of their duty in this matter. But the payment of a notary and witness fees and for printing of records and briefs, such expense shall be paid by the said Margaret R. Slagle.

Said attorneys further hereby agree to furnish the said Margaret R. Slagle any and all information at all times in reference to the said cause of action that she or her

agents may call or ask for, and to give their very best service and attention and legal ability in the prosecution of said cause, and that all of the parties hereto hereby agree that all propositions of settlement or compromise shall be first submitted by one to the other before any action or agreement shall be taken thereto. And that it is understood that said counsel and said Margaret R. Slagle shall not compromise or settle the cases without the approval and consent of the others. Witness our hands.

[Signed]

Margaret R. Slagle.

Davy & St. John.

J. A. Davy.

Troy, Ohio, July 23, 1904.

This contract was not denied in the reply, but therein the plaintiffs admit that said contract contained a provision that all propositions of settlement or compromise received by either party to said contract should be submitted to the other party to said contract before any action is taken or agreement made, and no compromise to be made without the approval and consent of the parties; that said provisions are separable and the provision in relation to settlement was a mere incident to the main provisions of said contract relating to plaintiffs' employment and their compensation; and that neither the defendant, nor said Margaret R. Slagle, acted under said provisions relating to settlement, but, on the contrary, settled said litigation as though no such provision was in said contract. Thereupon, on the 29th day of June, 1905, the defendant moved the court for judgment in its favor upon the facts appearing upon the face of the pleadings, and the cause coming on for hearing upon said motion, and the court, being fully advised in the premises and having heard argument by counsel, rendered judgment in favor of the defendant and against the plaintiffs. Said judgment was afterwards affirmed by the circuit court.

Messrs. William H. Gilbert and Leonard H. Shipman, for plaintiffs in error:

A collusive and fraudulent settlement made for the purpose of taking advantage of an attorney is reprehensible, and, when made, the attorney may recover of the defendant.

4 Cyc. Law & Proc. pp. 1019, 1020; Randall v. Van Wagenen, 115 N. Y. 527, 12 Am. St. Rep. 828, 22 N. E. 361; Aspinwall v. Sabin, 22 Neb. 73, 3 Am. St. Rep. 258, 34 N. W. 72; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Talcott v. Bronson, 4 Paige, 501; Pickard v. Yencer, 21 Hun, 403; Wilbur v. Baker, 24 Hun, 24; Coleman v. Ryan, 58 Ga. 132;

Jones v. Morgan, 30 Ga. 310, 99 Am. Dec. 458; Carpenter v. Myers, 90 Mich. 209, 51 N. W. 206; 4 Cyc. Law & Proc. p. 1022; Lamont v. Washington & G. R. Co. 2 Mackey, 502, 47 Am. Rep. 268.

The owner could assign and create equitable interests in the cause of action to her attorneys; and the interest must be respected by those having notice.

Coughlin v. New York C. & H. R. R. Co. and Carpenter v. Myers, *supra*; Reece v. Kyle, 49 Ohio St. 484, 16 L.R.A. 723, 31 N. E. 747.

The assignment of the future interests creates an equity by way of the contract merely, to take effect and to attach to the thing assigned when it comes into *esse*.

4 Cyc. Law & Proc. p. 12; Pittsburg, C. C. & St. L. R. Co. v. Volkert, 58 Ohio St. 371, 50 N. E. 924; Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736; Connell v. Brumback, 18 Ohio C. C. 502.

A lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration.

Morris v. Way, 16 Ohio, 469; Widoe v. Webb, 20 Ohio St. 435, 5 Am. Rep. 664; State ex rel. Laskey v. Board of Education, 35 Ohio St. 519; State ex rel. Riley v. Blain, 36 Ohio St. 429; King v. King, 63 Ohio St. 363, 52 L.R.A. 157, 81 Am. St. Rep. 635, 59 N. E. 111.

The contract was not against public policy.

Lipscomb v. Adams, 193 Mo. 530, 112 Am. St. Rep. 500, 91 S. W. 1046.

Mr. A. F. Broomhall, for defendant in error:

An attorney can acquire no interest in a cause of action before judgment, which will prevent the parties from settling the case without indemnifying the attorney.

Key v. Vattier, 1 Ohio, 132; Weakly v. Hall, 13 Ohio, 167, 42 Am. Dec. 194; Stewart v. Welch, 41 Ohio St. 483.

The court has never failed, where the contract prevents the case from being settled without the attorney's consent, to declare the contract void.

Key v. Vattier and Weakly v. Hall, *supra*; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 14 L.R.A. 785, 29 N. E. 573; Brown v. Ginn, 66 Ohio St. 316, 64 N. E. 123; Emslie v. Ford Plate Glass Co. 1 Ohio C. C. N. S. 603.

Davis, J., delivered the opinion of the court:

The theory upon which this action is based is that an attorney may not only contract with his client for a contingent fee, but that he may at the same time and upon the same consideration acquire such an interest in his client's cause of action before judgment as to prevent the latter from settling his case without consent of the attorney. If this theory is sound the motion for judgment on the pleadings should have been overruled; otherwise it was properly sustained.

It is, beyond question, the law in this state that attorney and client may lawfully agree upon compensation to the attorney contingent upon the amount to be recovered, either by settlement or by judgment; and it is also settled that such contract may be of valid consideration for an assignment of an interest in a judgment already obtained, such as might be enforced in equity (Pittsburg, C. C. & St. L. R. Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924); but, as we remarked recently (Pennsylvania Co. v. Thatcher, 78 Ohio St. 175, 85 N. E. 55), an attorney's lien before judgment has not been heretofore distinctly recognized in this state, and it has hitherto remained an open question, and one of much doubt, whether an attorney may, before judgment, acquire such an interest in the subject-matter of his client's claim or cause of action as that the defendant to such claim or cause of action is bound to take notice of it. The questionable character of such a proposition arises from two considerations: First, an interest in a cause of action would seem to imply the right to be consulted in negotiations for settlement and the right to prevent a settlement which might be acceptable to the client. Second, an interest in the proceeds of a settlement is an interest in a fund which has no existence until the settlement is agreed upon and the money paid over, and therefore the attorney's interest is in the fund in the hands of the client. In the case in hand, although the plaintiffs aver in their petition that their client "thereby"—that is, by the contract in writing—"made an equitable assignment to the plaintiffs of an undivided two-fifths interest in said cause of action and of the proceeds to be realized therefrom, either by settlement or judgment," yet it appears from the contract itself, which is set out in full in the defendant's answer, that there was no express assignment of an interest in the cause of action or of the proceeds to be realized therefrom, but that there was an express agreement that the client should not compromise or settle the cases without the approval and consent of the others.

It appears, therefore, that whatever may be the form of the contract, whether it contains an express assignment of an interest in the subject-matter of the client's claim, or an implied assignment thereof, or no assignment at all, the really vital question in all of these cases is this: Does the contract contain an express or implied limitation upon

on the right of the client to compromise and settle his claim with his adversary without the consent of anybody else? When such a limitation appears in the contract, the contract is voidable at the option of the client, and its illegality may be pleaded as a defense in any action founded on the contract; and the defendant to the suit concerning which the contract was made may, with or without notice of the contract, compromise with the plaintiff without the knowledge or consent of the plaintiff's attorney, and will not be liable to the attorney for his part. *North Chicago Street R. Co. v. Ackley*, 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222, reversing the judgment of the appellate court in the same case, 58 Ill. App. 572; *Boardman v. Thompson*, 25 Iowa, 487.

This court has spoken on this subject so frequently and definitely that there ought to have been no misunderstanding of its position. *Key v. Vattier*, 1 Ohio, 132, resulted in a judgment for the defendant upon a demurrer to the declaration. The plaintiff declared upon a contract in which the plaintiff agreed to prosecute suits for the recovery of property, to pay the costs and be compensated by a part of the property to be recovered; and it was further stipulated between the parties that, "if any compromise should be effected, the same should be the joint act and consultation of the parties to said indenture." At the conclusion of the opinion is the following clear and unmistakable statement: "The stipulation in the contract, on which the opinion and judgment of the court are chiefly predicated, and to which they have directed it to be confined, is that which prevents Vattier from compromising and settling the matters in controversy, without the concurrence and consent of the other contracting parties. This point being considered sufficient, the court forbears to give an opinion on any other. As the provision on the subject of cost is not set out in the declaration, and the defendant has demurred without oyer, that feature in the contract has not been considered." So that *Key v. Vattier* is a decision upon the precise question now under review. The court was equally explicit in *Weakly v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194, when it said: "It is unnecessary, perhaps, to say anything in reference to the lien which is set up in the replication, and which, it is insisted, could not be discharged by the release of *Weakly* to *Hall*. But we take occasion to say that the law of Ohio will tolerate no lien in or out of the profession, as a general rule, which will prevent litigants from compromising, or settling their controversies, or which, in its tendencies, encourages, promotes, or extends 17 L.R.A. (N.S.)

litigation. We think the replication is bad, and the demurrer is sustained. Judgment for defendant." The question was again before this court in *Lewis v. Lewis*, 15 Ohio, 715, and it was again said that "a contract with an attorney to prosecute a suit containing a stipulation that the party should not have privilege to settle or discontinue it without the assent of the attorney would be so much against good policy that the court would not enforce it. Much less will a court raise an implied contract in order to encourage and foster litigation." In *Brown v. Ginn*, 66 Ohio St. 316, 64 N. E. 123, the court, *Spear, J.*, delivering the opinion, said: "Again, if this paper effected the object, and was a real transfer of these accounts to the attorney, the several parties of the second part thus parted with all right to control the litigation or to compromise it without the consent of the attorney; and this inability was made doubly so by the fact that no one of the second parties had any sort of interest in the portion of the demand which rested upon the services of any other. Upon all the authorities, such an arrangement is champertous, and will not be maintained by the courts. . . . So that, if the agreement vested in the attorney the legal title to the accounts so as to constitute him the real party in interest, and thus enable him to bring an action in his own name, such action cannot be maintained because against public policy, while, if he is not, within the meaning of § 4993, the real party in interest, the case would fail for that reason."

We have brought together these quotations from former decisions in order to present a conspectus, which demonstrates that this court has always maintained a consistent and unambiguous attitude in regard to contracts of the kind which we have in this case. Some further instructive illustration may be found in *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 14 L.R.A. 785, 29 N. E. 573, opinion by *Minshall, J.*, 5, 6; *Stewart v. Welch*, 41 Ohio St. 483; and remarks of *Okey, Ch. J.*, in *Diehl v. Friester*, 37 Ohio St. 477.

These cases also show that the illegal stipulation renders the whole contract illegal and indivisible; and that, whenever the illegal stipulation was inserted, it so far tainted the whole contract that no relief whatever was granted upon the contract. It could not well be otherwise. If the plaintiffs may waive the cause as to consent, ratify the compromise made by the client, and recover from the defendant, when both parties to the compromise have acted on the theory that the contract is illegal and voidable, then the doctrine of the cases which we have cited means nothing in prac-

tice; for it may be evaded in every case. If, notwithstanding the illegal restriction upon the right to compromise, an attorney may nevertheless acquire such an interest in his client's cause of action that the defendant thereto is answerable over to him after a compromise effected with the client, the real party in interest, then the doctrine of the cases is a mere figment, and may as well be ignored; for the attorney will thereby have gained as much as if the veto on his client's right to compromise had been sustained. It does not seem to us that the contention of the plaintiffs is supported by law or considerations of justice. 15 Am. & Eng. Enc. Law, 2d ed. p. 988, and note 4. Affirmed.

Price, Ch. J., and Shauck, Crew, Summers, and Spear, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

BENDER et al., Appts.,

v.

ENTERPRISE MANUFACTURING COMPANY.

(84 C. C. A. 353, 156 Fed. 641.)

Patent — expiration — marking articles.

One other than the original patentee manufacturing repair parts for a machine the patent on which has expired need not place thereon anything to indicate their origin, where there is no attempt to palm them off as made by the patentee.

(November 8, 1907.)

A PPEAL by defendants from a decree of the Circuit Court of the United States for the Northern District of Ohio enjoining them from making repair parts for a ma-

chine without marking them with the name of the manufacturer. Reversed.

The facts are stated in the opinion.

Argued before Lurton, Severens, and Richards, Circuit Judges.

Mr. E. L. Thurston for appellants.

Mr. Charles Howson for appellee.

Richards, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree enjoining the defendant from making and selling repair parts for the Enterprise meat chopper, without marking on each the name of the maker. The case was heard on an agreed statement of facts. It appears that the complainant below, the Enterprise Manufacturing Company, had been making and selling meat choppers for many years. It and its predecessor used as a trademark for its choppers, and other like hardware, the word "Enterprise." The meat choppers it makes at present have been manufactured since 1883. Since 1891, it has been making what is called the "Enterprise Tin Meat Choppers," and since 1892 that name has been registered as a trademark. The original Enterprise Meat Chopper was patented in 1883 and 1886. The patents have long since run out. Since 1887 and 1888, many of the repair parts of the Enterprise chopper have been marked as made by that company. It appears that for many years there has been a large independent trade in the repair parts of meat choppers, and that the defendant below has made and sold many thousand sets of such repair parts. These sets are packed in boxes which are labeled: "Repair parts for the Enterprise Meat Chopper, manufactured by the Giant Lock Company, Cleveland, Ohio."

The court below held in its decree that, as matter of fact, the complainant had for many years used the name "Enterprise" as a trademark to distinguish its meat chop-

Case Note. — Unfair competition in sale or manufacture of article, not protected by patent, identical with that originated by competitor.

This subject raises a question somewhat similar to that raised in the note to *George G. Fox Co. v. Glynn*, 9 L.R.A. (N.S.) 1096. The subject there under consideration, however, was the right so to simulate the dress or package of similar goods of another as to enable them to be palmed off on the public as the goods of the other. There the intent to secure advantage from simulating the goods of another appeared from the very act itself. The question here under consideration is different in that the right to manufacture the article in the form and structure as originally manufactured is undoubted. No right exists in the original

manufacturer whose patent in a manufactured article has expired, or which was never protected by a patent, to prevent others from making articles of like form and structure. The enjoyment of this right by others is not accompanied by any duty so to exercise it as not to injure or destroy the business built up by the original manufacturer, and also in such a manner as not to deceive the public. The good will established by the original manufacturer may not, however, be destroyed by unnecessary simulation by others, or by failing to adopt precautions to protect the good will of the original manufacturer, and also to prevent the deception of the public as to the manufacture, if the exercise of such precaution imposes no substantial restriction upon the right to manufacture the article.

On this subject, the court, in *Singer Mfg.*

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TENNESSEE SUPREME COURT.

SOL COHN, Appt.,

v.

STATE OF TENNESSEE.

CHARLES PERKINS et al., Appts.,

v.

SAME.

LEM HORTON, Appt.,

v.

SAME.

(— Tenn. —, 109 S. W. 1149.)

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Testimony of persons who make a peep-hole into a saloon, as to what they observed inside, and that they took some articles from the room and brought them to court, is not inadmissible in a prosecution for illegal liquor selling as being an unreasonable search or seizure, or as compel-

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Upon the question of the constitutional protection against being forced to furnish evidence to be used against one's self in a civil case, see note to *Levy v. Superior Court*, 29 L.R.A. 811.

There appears to be no other case in which an objection was made to the competency of evidence upon the ground that it was obtained by spying while acting in an unlawful way. Testimony as to conversations overheard while eavesdropping, however, has been held admissible in some cases.

Thus, in *People v. Cotta*, 49 Cal. 166, the court said: "The defendant has no cause of complaint either because, if an eavesdropper, the witness may possibly not have heard all that was said in the conversation to which he testified, or on the ground that eavesdropping is disreputable in itself, or was an offense at common law."

So, in *State v. Allen*, 37 La. Ann. 685, it was held that an objection to evidence of a conversation overheard by the witness while eavesdropping, upon the ground that the accused did not know that the witness was listening, and therefore his statements were not voluntary, was manifestly frivolous; that, while the fact that the conversation was overheard by eavesdropping might affect the weight of the evidence, it could in no wise affect its admissibility.

out marking it as his own manufacture; *Deering Harvester Co. v. Whitman & B. Mfg. Co.* 33 C. C. A. 558, 62 U. S. App. 689, 91 Fed. 376, in which it appears that the parts of which complainant sought to enjoin the making and sale were plainly advertised by catalogue and labeled as the complainant's manufacture; and *Neostyle Mfg. Co. v. Ellam's Duplicator Co.* 21 R. P. C. 185, in which the court suggested it was the duty of the defendant to mark an ink sold for use in a duplicating machine as its own product, so as to distinguish it from that made by the manufacturers of the machine. The cases referred to by the court are, for the purposes he uses them, in line with the case of *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002, in which it was held that, while anyone, after the expiration of

the Singer patents, was free to make and sell the Singer sewing machine under that name, it must mark the machine with the name of the maker, so that the public might not be misled into thinking it was the product of the original patentees. The decision below apparently extends the doctrine of this case so as to require not merely the machine, when made by others than the original patentees, but the repair parts of the machine, to be marked with the name of the maker. We think this is going too far, and that the resulting limitation upon the rights of the public is unjustified and therefore unreasonable. The cases themselves may be distinguished. In *Flagg Mfg. Co. v. Holway*, supra, the either was of a unique shape. The defendant purposely and wrongfully imitated its shape. The court held he had not the right to do this "to steal the

to deceive subsequent purchasers from his vendees as to the origin of the goods. As to the use of the names and letters by the defendant, the court said that they were equally apt, whether he intended to deceive as to the origin of the goods sold by him, or merely to indicate the well-known classes of stoves which his grates, beds, and other parts would fit; but, as he carefully stated in his catalogue that he was a manufacturer, the fair conclusion was that he had no purpose to mislead.

This case was cited and followed as authority in *Dover Stamping Co. v. Fellows*, 163 Mass. 191, 28 L.R.A. 450, 47 Am. St. Rep. 448, 40 N. E. 105, wherein the right to manufacture egg beaters of the style, shape, size, and structure similar to one as to which the patent had expired was sustained. Like *Singer Mfg. Co. v. June Mfg. Co.* however, the principal question considered in this case was the right to use the same name as that which had been applied to the egg beater when protected by a patent.

In sustaining the right to manufacture sewing machines of a similar character, shape, form, and structure as one formerly protected by a patent which had then expired, the court, in *Brill v. Singer Mfg. Co.* 41 Ohio St. 127, 52 Am. Rep. 74, said: "Where machines, during the time they are protected by a patent, become known and identified in the trade by their shape, external appearance, or ornamentation, the patentee, after the expiration of the patent, cannot prevent others from using the same modes of identification in machines of the same kind manufactured and sold by them."

As already stated, however, the right to simulate the size, shape, form, and structure of an article no longer protected by a patent, in the manufacture of a similar article, cannot be extended to the extent of enabling the sale of such goods as the goods of the original manufacturer, where the particular danger of such deception may be 17 L.R.A. (N.S.)

obviated without imposing any substantial restriction on the right to manufacture goods of the same form, structure, etc. As said by the court in *Singer Mfg. Co. v. June Mfg. Co.* supra: "But it does not follow, as a consequence of a dedication, that the general power, vested in the public, to make the machine and use the name imports that there is no duty imposed on the one using it, to adopt such precautions as will protect the property of others, and prevent injury to the public interest, if by doing so no substantial restriction is imposed on the right of freedom of use. This principle is elementary, and applies to every form of right, and is generally expressed by the aphorism, *Sic utere tuo ut alienum non ladas*. This qualification results from the same principle upon which the dedication rests,—that is, a regard for the interest of the public and the rights of individuals."

Applying this principle, the court, *Yale & T. Mfg. Co. v. Adler*, 83 C. C. A. 149, 154 Fed. 37, held it to be unfair competition for one to manufacture locks of a size, shape, and color so similar to those of another manufacturer as to mislead the public and enable his goods to be palmed off on the public as the goods of the other, although the right to manufacture the several parts was recognized.

In *Enterprise Mfg. Co. v. Landers*, 124 Fed. 923, affirmed in 65 C. C. A. 587, 131 Fed. 240, while the right of others to manufacture coffee mills of similar structure as those manufactured by the complainant, which were not protected by patent, was recognized, the court, however, denied the right so to construct the mill as to produce a coffee mill which would be liable to be mistaken for the mills for which, by long and persistent effort, the plaintiff had obtained a distinctive reputation.

To the same effect, also, as to the manufacture of atomizers not protected by patent, is *Dunlap v. Willbrandt Surgical Mfg. Co.* 80 C. C. A. 575, 151 Fed. 223.

good will attaching to the plaintiff's personality," and, to prevent it, required the defendant's zithers to be clearly marked so as to indicate they were the defendant's, and not the plaintiff's, goods. But in the present case no such attempt was shown. There was no effort to palm off the repair parts of the defendant below as those of the complainant. In the case of Deering Harvester Co. v. Whitman & B. Mfg. Co. supra, it does not appear that the repair parts were marked as made by the defendant. They are advertised by catalogue and labeled as of their manufacture, but that was just what was done in the present case. In the Deering Harvester Case the parts themselves were marked by certain letters showing where each belonged in the machine. This was quite a different thing, and unnecessary in the present case. In the English Case, Neostyle Mfg. Co. v. Ellam's Duplicator Co. supra, there was an attempt to restrain the defendant from selling ink or paper for use on the Neostyle machine. This was defeated; the judgment being for the defendant. Having thus decided the case, the court suggested that they put their names on future tins of ink, and this was accepted.

There was no actual deception charged in this case, nor any attempt at proof of any made. The only unfair trade was inferential or constructive. The present case goes on the assumption that unmarked repair parts are to be taken as made by the makers of the machine, the original patentees, and this although the makers marked their repair parts. We think a safer assumption would be, in view of the established trade in repair parts, that unmarked repair parts are to be taken as not made by the makers of the machine or original patentees, but by others. It is not to be inferred that they are made by the makers of the machine, unless so marked. The mere making and sale of repair parts for a well-known machine by other than the makers would therefore not be regarded as an act of unfair trade, unless they were put out as the goods of the original patentee. The patents having long since expired, the manufacture of meat choppers and all their parts is now open to all. To require every repair part, however small, to be branded with the name of the maker, would tend, it seems to us, to stifle competition in the manufacture and sale of repair parts, and put an unnecessary burden upon a large and important branch of trade.

The decree of the lower court is reversed. 17 L.R.A. (N.S.)

TENNESSEE SUPREME COURT.

SOL COHN, Appt.,

v.

STATE OF TENNESSEE.

CHARLES PERKINS et al., Appts.,

v.

SAME.

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(— Tenn. —, 109 S. W. 1149.)

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ling one to become a witness against himself.

(March 14, 1908.)

A PPEALS by defendants from judgments of the Criminal Court for Davidson County convicting them of violating the Sunday law and the statute prohibiting the sale of cigarette papers. Affirmed.

The facts are stated in the opinion.

Mr. W. C. Cherry for appellants.

Mr. Walter W. Faw, for the State:

The method by which the testimony was obtained did not violate the rights of the defendants, guaranteed to them by the Constitutions of the state of Tennessee and the United States.

2 Am. & Eng. Enc. Law, 2d ed. p. 48; Com. v. Dana, 2 Met. 329; 1 Greenl. Ev. § 254a; 4 Wigmore, Ev. § 2183; State v. Atkinson, 40 S. C. 363, 42 Am. St. Rep. 885, 18 S. E. 1021; State v. Royce, 38 Wash. 111, 80 Pac. 268; State v. Edwards, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429; Williams v. State, 100 Ga. 511, 39 L.R.A. 269, 28 S. E. 624; Gindrat v. People, 138 Ill. 103, 27 N. E. 1085; Siebert v. People, 143 Ill. 571, 32 N. E. 431; State v. Pomeroy, 130 Mo. 489, 32 S. W. 1002; Shields v. State, 104 Ala. 35, 53 Am. St. Rep. 17, 16 So. 85.

Nell, J., delivered the opinion of the court:

In the first case against Sol Cohn, he was held under presentment, in the criminal court of Davidson county, for selling liquors on Sunday, and, in the second case, for selling cigarette papers, contrary to the statute applicable to such case. In each of the three cases against Charles Perkins and Lem Horton, they were likewise held for selling intoxicating liquors on Sunday. In the case brought against Lem Horton alone, he was held under presentment containing several counts; one for keeping cigarette papers in stock, another for selling cigarette papers, and another for giving away cigarette papers.

In all of the foregoing cases the plaintiffs in error were convicted on trial before the court, without the intervention of a jury, and appropriate punishment assessed against them. Thereupon they severally appealed to this court, and have here assigned errors.

The cases turn upon a single question, and therefore they were all heard together in this court.

The question arises on the admission of alleged illegal testimony in the court below. John Yeaman, a deputy sheriff of Davidson county, testified that, accompanied by his brother, Owen Yeaman, and Mr. Adkin, both being regular deputy sheriffs, he went to

Cohn's place about 6 o'clock on Sunday morning, the 13th day of January, 1907, and mounted a stairway leading up by the side of the saloon, and, after they had reached a point about halfway up the stairway, they stopped and removed some bricks from the wall, and the mortar along with them, being careful to draw the bricks and the mortar out upon the stairway so as to give no indication, in the saloon, of what they were doing on the stairway; that the hole thus made was smaller on the inside of the saloon than on the outside; that, having made this peephole, they sat and watched occurrences in the saloon; that they saw Lem Horton and Charles Perkins enter the barroom by a rear door, and they were soon followed by a crowd; that witness and those who were with him watched the persons inside for an hour; that Lem Horton and Charles Perkins sold, and received money for, a great many drinks of whisky and beer, certainly more than three; that they saw Lem Horton reach under the bar and take out a large box of cigarette papers and sell a book of them to a customer, one Henry Ewing; that he rang up this sale of the cigarette papers just as he did the drinks, in the cash register; that the witness and the others with him got the cigarette papers and the sale book and brought them to court. It was further testified that Horton and Perkins worked for Cohn.

The other witnesses present gave substantially the same testimony as that given by John Yeaman. At the close of the testimony of each witness, the plaintiffs in error, by their counsel, moved the court to strike out the entire testimony of each witness "because the same was inadmissible, and incompetent, because obtained illegally and contrary to the laws of the state, and the state and Federal Constitutions." This motion was overruled in the court below, and this action of the court is made the basis of the error assigned here.

It is insisted that the evidence thus obtained was in violation of the constitutional provision against unreasonable searches and seizures, and also violative of the constitutional inhibition against compelling a party, in a criminal case, to give testimony against himself.

We think the evidence was competent. The unreasonable search and seizure against which the constitutional provision was designed to operate was that made through governmental agency, and has no bearing upon the unauthorized acts of private persons, or of petty officers of the law. Nor has the inhibition against compelling a person charged with crime to incriminate himself any more bearing upon the present controversy, since the plaintiffs in error were not

required to testify. Nor was any presumption indulged or permitted against them because of their silence. Nor were the plaintiffs in error required to produce any private papers that would so speak as to incriminate them. It is true that the act of Yeaman and his companions in making a hole in the wall and spying upon the inmates of the building was an unlawful one, for which they were subject to punishment. Still, although the evidence was thus procured, it would not be rejected by the court as irrelevant to the issue. 4 Wigmore, Ev. §§ 2183, 2264; 1 Greenl. Ev. § 254a; 2 Elliott, Ev. § 1013.

Some illustrations from the cases will show the scope of the rule.

In the case of *State v. Edwards*, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429, it appeared that the prisoner was arrested for larceny, in obtaining money through a trick. When arrested, along with certain good money found upon his person, there was found a supply of worthless bank notes. The latter were offered as evidence on the trial, as a part of the testimony showing the trick that had been practised upon the prosecutor. This was objected to on the ground that these papers were taken from the person of the prisoner illegally by the officer who arrested him. Speaking to this point, the court said: "One complete answer to this is that, if it was an illegal seizure, that is no objection to the use of the papers as evidence, they being proper evidence in the case in other respects; for the court can take no notice how they were obtained, whether lawfully or unlawfully, nor would it form a collateral issue to determine that question."

In *Williams v. State*, 100 Ga. 511, 39 L.R.A. 269, 28 S. E. 624, it appeared that a police officer devised the following plan to discover whether Sarah Williams was selling whisky in violation of law. He gave to one Mose Lucas a silver quarter marked with a cross, and an empty half-pint whisky flask with a file on the neck, and to one Jeff Bunkley a silver 10-cent piece, marked with a cross on the head of the female figure on the coin. Both went in the direction of the house of Sarah Williams, the accused. In a few minutes thereafter these two men came out of the back yard, and Mose Lucas handed the officer the same bottle that had been given to him, and in the same condition, except that it was full of whisky. The police officer then called another officer, and the two entered the house of Sarah Williams, and the officer put his hand in her apron pocket, took out her purse, and found in it the two pieces of marked money above referred to. He testified that the two pieces were the same that he had marked and given to Lucas and Bunkley. He then searched

her house and found a gallon jug of black-berry wine and three bottles, two of them quart bottles and one of them a half-gallon bottle. One of the bottles was nearly full of whisky, and another had only the bottom covered with whisky, and a third, the half-gallon bottle, was full of something that looked like whisky. The officer had no search warrant to search either the defendant or the house. The jug of wine, the half-gallon bottle of whisky, the quart bottle of whisky, partly used, and the other bottle of whisky which contained a little bit in the bottom of it, together with a tin funnel, and the 25-cent and the 10-cent piece of silver money, were tendered in evidence and permitted, over the objection of the accused. The objection was overruled, the court saying: "Irrespective of the many respectable authorities above referred to, and speaking for ourselves, we are satisfied that the contention of the accused that her constitutional rights were infringed by the ruling of the trial judge admitting the evidence complained of ought not to be sustained. As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures, was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the Constitution of the United States, and of this and other states, merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify, or declare lawful any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful, upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual responsibility and of their own volition, surely none of the three divisions of government is responsible. If an official, or a mere petty agent of the state, exceeds or abuses the authority with which he is clothed, he is to be deemed as acting, not for the state, but for himself only; and therefore he alone, and not the state, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a mere individual, the most that any branch of government can do is to afford the citizen such redress as is possible, and

bring the wrongdoer to account for his unlawful conduct."

In *Chastang v. State*, 83 Ala. 29, 3 So. 304, a pistol found on searching a person was held admissible as evidence, regardless of the illegality of the search. To the same effect is *Shields v. State*, 104 Ala. 35, 53 Am. St. Rep. 17, 16 So. 85. In that case it was held that however unfair or illegal may be the method by which the evidence was obtained, yet it may be received, if the accused was not compelled to do any act to incriminate himself. In that case it appeared that the prisoner was on trial for carrying concealed weapons, and it was permitted to be shown that a pistol was found concealed on the defendant's person, as the result of a forcible search by an officer. The evidence was permitted to be received, although the search was unauthorized and unlawful.

In *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002, it was held that it was not a violation of the constitutional provision, that no one shall be compelled to testify against himself in a criminal case, to introduce in evidence, in a prosecution for establishing a lottery, tickets, papers, etc., taken from the person and premises of the accused, even though they were obtained without authority of law.

In *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085, it was held that the fact that evidences of the commissions of a crime were found by a mere private detective, on an unauthorized search of a party's rooms, would not itself render the evidence incompetent against the party in whose possession the articles were found, if such evidence was otherwise competent. In that case it appeared that a party was under indictment for larceny of a diamond ring by substituting an imitation diamond in its place. The search above referred to by the private detective resulted in discovering cheap, imitation diamonds in the possession of the accused. It was held that the admission of these objects in evidence was not a violation of any constitutional right.

In *State v. Atkinson*, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021, it was held that papers illegally obtained by searching the rooms of the accused during his absence were competent evidence against him on a trial for murder.

In *State v. Griswold*, 67 Conn. 290, 33 L.R.A. 227, 34 Atl. 1046, it appeared that a certain package was obtained by searching the prisoner's office during his absence; the search not being made under any warrant, but by consent of one Butler, the servant of the accused. This evidence was objected to on the ground that it was illegally obtained, because the servant had no right to

consent to a search of the office. The court held that, even if the property had been taken from the possession of defendant by trespass, that would be no valid objection to its admissibility.

In *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382, it was held that papers and things taken from the accused at the jail, on the usual search being made, might be admitted in evidence against him without any violation of the constitutional provisions against unreasonable search and seizures, or the provision against compulsory self-incrimination.

In *Trask v. People*, 151 Ill. 523, 38 N. E. 248, it was held that papers found in a room occupied by a person under indictment for larceny, while out on bail, which the officer took from the room in his absence, were admissible in evidence, even though thus unlawfully obtained.

In *Siebert v. People*, 143 Ill. 571, 32 N. E. 431, it appeared that a Pinkerton detective found certain letters in the rooms of the accused, which he obtained from the person in charge of them by representing that he was her friend. It was held that these letters were admissible in evidence, notwithstanding the manner in which they had been obtained.

In *Com. v. Welsh*, 110 Mass. 359, it was held that, although an officer had been guilty of misconduct in his mode of serving a warrant, in breaking open a safe, on the refusal of the defendant to give up the key, and although he might be criminally liable for his act, yet this did not render the fact that intoxicating liquors were found in the safe incompetent evidence in a prosecution for the selling of intoxicating liquors.

The foregoing are sufficient illustrations of the rule. The cases are very numerous, and could be cited in great numbers. We do not suppose any question would have been made but for the case of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, referred to and quoted from extensively in the brief of counsel for plaintiffs in error. That case, however, is distinguished in the later case of *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372. In that case the court, after quoting with approval from the leading case of *Com. v. Dana*, 2 Met. 329, and *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910, and citing most of the cases we have referred to, and approving the doctrine therein declared, held that the case of *Boyd v. United States* was not an authority to the contrary. In that case the following, from *Com. v. Dana*, supra, was quoted with approval: "Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search war-

rant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt v. Tolvervey*, 14 East, 392, and *Jordan v. Lewis*, 14 East, 300, note, and we are entirely satisfied that the principle on which these cases were decided is sound and well established."

The following is also quoted with approval from *Com. v. Tibbetts*, supra: "But two points have been argued. The first is that the criminatory articles and letters found by the officer in the defendant's possession were not admissible in evidence because the officer had no warrant to search for them, and his only authority was under a warrant to search her husband's premises for intoxicating liquors. The defendant contends that, under such circumstances, the finding of criminatory articles or papers can only be proved when, by express provision of statute, the possession of them is itself made criminal. This ground of distinction is untenable. Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular, or even an illegal, manner. A trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly, and perhaps criminally, but his testimony is not thereby rendered incompetent."

The following is also quoted with approval from *State v. Flynn*, 36 N. H. 64: The "evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued."

Distinguishing the case of *Boyd v. United States*, supra, the court said: "In that case a section of the customs and revenue laws of the United States authorized the court in revenue cases, on motion of the government's attorney, to require the production by the defendant of certain books, records, and papers in court; otherwise the allegation of the government's attorney as 17 L.R.A. (N.S.)

to their contents to be taken as true. It was held that the act was unconstitutional and void as applied to a suit for a penalty or a forfeiture of the party's goods. The case has been frequently cited by this court, and we have no wish to detract from its authority. That case presents the question whether one can be compelled to produce his books and papers in a suit which seeks the forfeiture of his estate on pain of having the statements of government's counsel as to the contents thereof taken as true and used as testimony for the government."

In *Adams v. New York*, supra, it appeared that, while the officers were making a legal search, for the purpose of finding gambling paraphernalia, they took other papers which were found useful in identifying the writing upon certain gambling papers. The question was whether these other papers could be used as evidence. The court said: "We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his own behalf, as was his privilege under the laws of the state of New York. He was not compelled to testify concerning the papers, or make any admission about them."

We need not pursue the subject further. The overwhelming weight of authority, both state and national, is in favor of the competency of the evidence offered in the present case, and we think there was no error in the judgment of the court below in the several cases mentioned, and all the judgments must be affirmed.

Appeal dismissed by Supreme Court of United States June 1, 1908, 210 U. S. 437, 52 L. ed. 1137, 28 Sup. Ct. Rep. 763.

CALIFORNIA SUPREME COURT.

J. T. WALKER, Resp't.,

v.

JOSEPH CHANSLOR et al., Appts.

(— Cal. —, 94 Pac. 606.)

Evidence — assault — defense.

1. Upon the question of exemplary damages for assault in attempting to force an occupant off from land, evidence is admissible that defendant had title to the

Case Note. — Civil liability for assault committed in regaining possession of land, by one entitled to possession.

This note is confined to cases where the person entitled to possession attempted

property, took advice of counsel, and as to his intention in entering upon the land.

Assault — expelling trespasser.

2. The owner of land who is entitled to immediate possession of it is not liable for assault upon a trespasser thereon because of the use by him of no more force than is necessary to expel the trespasser when he attempts to exercise his right of entry.

Remedy — statutory — exclusiveness.

3. The remedy afforded by statute to one forcibly expelled by the owner from the wrongful possession of land is exclusive.

Evidence — assault — ownership.

4. Evidence of ownership of the property is admissible in defense of an action for assault upon one in wrongful possession, made during an attempt to effect an entry thereon.

to regain the same forcibly, and does not include cases where the one entitled to possession had regained the same peaceably, and later committed an assault in defense of it. Some conflict exists among the cases.

The cases next cited adhere to the doctrine that, whatever may be the criminal liability, there is no civil liability for assault committed under such circumstances, if no more force was used than was reasonably necessary for the purpose of regaining possession.

Thus, in *Souter v. Codman*, 14 R. I. 119, it was held that an owner of land could justify an assault and battery committed in expelling a wrongful occupant, using no more force than was necessary. The court, in referring to the argument that the allowing of such a right would endanger the public peace, said: "The answer to the argument is that for criminal offenses the criminal law affords the proper remedy, and that the unlawful occupant ought not to be permitted to treat the rightful owner, who simply asserts and maintains his right, as a trespasser, out of regard for the public peace."

So, in *Low v. Elwell*, 121 Mass. 310, 23 Am. Rep. 272, in a case of assault and battery brought by a tenant at sufferance against the landlord, the court said: "A tenant holding over after the expiration of his tenancy is a mere tenant at sufferance, having no right of possession against his landlord. If the landlord forcibly enters and expels him, the landlord may be indicted for the forcible entry. But he is not liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary."

To the same effect is *Winter v. Stevens*, 9 Allen, 526.

And in *Stone v. Lahey*, 133 Mass. 426, where plaintiff's brother had rented premises of defendant and surrendered them by agreement, and the plaintiff remained in possession with his consent after he vacated, it was held that, when she had been informed that the one under whom she claimed had surrendered the premises, 17 L.R.A. (N.S.)

Assault — servant — liability.

5. That one injured by a property owner attempting to effect an entry on the property was merely an employee of one in wrongful possession thereof does not render such owner liable for the injury if he used no more force than was necessary to effect the entry.

Appeal — affirmation — erroneous theory of case.

6. The supreme court will not affirm a judgment for actual damages only, in an action for assault by one seeking to enter upon his own property which is in possession of a wrongdoer, on the theory that excessive force was employed, where the trial court refused to permit the fact of ownership to be considered as justifying the use of force, and thereby tried the case upon an erroneous theory.

upon her refusal to vacate the defendant was justified in ejecting her, using no more force than was necessary.

And in *Mugford v. Richardson*, 6 Allen, 76, 83 Am. Dec. 617, the owner was held not liable for an assault committed upon one whose right to possession had terminated, where he had peaceably gained possession to a portion of the premises, and used no more force than was necessary.

The case of *Sampson v. Henry*, 11 Pick. 379, which is referred to by some courts as supporting the contrary doctrine, was decided upon the pleadings, and that case and *Sampson v. Henry*, 13 Pick. 36, which favored the contrary doctrine were, as stated in *Low v. Elwell*, in effect overruled by *Curtis v. Galvin*, 1 Allen, 215, and *Eames v. Prentice*, 8 Cush. 337, cases for breaking and entering and carrying away goods.

In the following cases, however, it was held that an owner, or one entitled to possession, is liable for an assault committed while attempting to regain the same:

In *Parsons v. Brown*, 15 Barb. 590, an action for assault and battery where the right to possession was in dispute the court said: "It is supposed he [the judge] erred in instructing the jury that it was not material which party had the right to the possession of the shingle mill. In this I do not perceive any error. Admitting the defendant had such right, it most clearly would not justify him in committing an assault and battery upon the plaintiff for the purpose of reducing his right to actual possession."

And in *Bristol v. Burr*, 120 N. Y. 427, 8 L.R.A. 710, 24 N. E. 937, where the defendant, a minister, had been furnished with a house as a residence, the court said: "He lawfully went into occupancy of the parsonage. If that occupancy was the actual possession of it by him at the time of his eviction, the defendants were chargeable with liability for assaulting and forcibly expelling him from the house. And this was so irrespective of the mere right to the possession, as in that case there was no justification for the application of such force to eject the plaintiff, although the defendants,

Evidence — good faith — forcible entry on property.

7. Upon the question of good faith and use of excessive force by a property owner who, in attempting to enter upon the property when it was in the wrongful possession of a trespasser, used firearms and shot an employee of the trespasser, for which he is being sued for damages, evidence is admissible that the trespasser gained possession of the property by the use of firearms, and had remained armed up to the time of attempted entry.

(February 27, 1908.)

PETITION for rehearing after affirmance by the District Court of Appeal, Second District, of a judgment of the Superior Court for Kern County in plaintiff's favor

as trustees, may have had the right to reduce the premises to possession by means of legal process and proceedings. . . . It is, however, contended on the part of the defendants that the plaintiff was a mere servant of the church, and that in that relation only he resided in the house. If that were so, and if the trustees, as lessees of the insurance company, had the control of the house, the plaintiff had no possession of it, and the trustees had the right to remove him from it, and, on his refusal to go, to use all force essential to do so. In such case the possession would be theirs, and not his."

So, in *Hyatt v. Wood*, 3 Johns. 239, an instruction to the effect that the right of possession was sufficient to justify a person in entering and using such force as was necessary to expel another who was in possession, was held incorrect.

And in *O'Donnell v. McIntyre*, 118 N. Y. 156, 23 N. E. 455, where one claiming under a tax title committed an assault upon one who had a tenant in possession of the property, the court said that, if the defendant did not have the actual possession of the premises, he was not justified in the use of force to remove the plaintiff from the house.

In *McMillan v. Cronin*, 75 N. Y. 474, it was held that the removal of gates by one having an easement did not work such an immediate forfeiture as to authorize the use of force to the extent of an assault and battery to prevent the further use of the way; and it was said that the right to possession will not justify the use of force to take possession.

In *Davis v. Whitridge*, 2 Strobb. L. 232, where one overseer forcibly took possession of premises against another, it was said that the owner might take possession if he could do so without tumult or breach of the peace; but that, if this could not be done, he must resort to the law, since any other doctrine would convert every dispute into a question of power. In this case, however, possession was construed as being in the master, and the overseers were considered merely as his servants.

In *Lobdell v. Keene*, 85 Minn. 90, 88 N. 17 L.R.A. (N.S.)

in an action brought to recover damages for assault. Reversed.

The facts are stated in the opinion.

Mr. Byron Waters for appellants.

Messrs. A. D. Warner, Thomas Carroll, John Leo, and W. W. Kaye for respondent.

Lorigan, J., delivered the opinion of the court:

This action was brought to recover damages for an assault and battery alleged to have been committed by defendants upon plaintiff. The evidence discloses that the assault and consequent injuries to plaintiff occurred in a contest between two oil companies for the possession of a quarter section of land. Trial was had before the court without a jury, and, from the findings of

W. 426, the court was of the opinion that one in whose favor a judgment was rendered in proceedings for forcible entry and unlawful detainer was not entitled to the possession of the premises pending an appeal with supersedeas by the other party; but said that, even if he were entitled to possession, he had no right, after making a forcible and violent entry, to defend the possession thus acquired by an assault upon the other party to the proceedings, who was attempting to enter the property.

The leading English case upon the question is *Newton v. Harland*, 1 Scott, N. R. 474. There an action was brought to recover for an assault and battery upon the plaintiff's wife, alleged to have been committed by defendant while forcibly entering apartments which had been occupied by plaintiff as a tenant of defendant. It appeared that the plaintiff remained in the apartments after the expiration of his term; and it was held that the defense that the act was done in defense of his possession, or while attempting to regain the same, failed, as his entry was unlawful.

To the same effect is *Hillary v. Gay*, 6 Car. & P. 284.

In *Beddall v. Maitland*, L. R. 17 Ch. Div. 174, the action was for damages to plaintiff's goods, but the court, affirming *Newton v. Harland*, laid down the proposition that, for an independent wrong (as assault and battery) committed in the course of a forcible entry, a recovery could be had where the statute made possession obtained by force unlawful, although the party seeking to recover held possession wrongfully against the one having the lawful right to possession.

In *Roberts v. Tayler*, 1 C. B. 117, the case was decided upon the pleadings; but it was intimated that an assault could not be justified by an attempt forcibly to regain possession of the realty. Barons Parke and Alderson, who sat in *Newton v. Harland*, favored the rule laid down in *WALKER v. CHANSLOR* notwithstanding the decision of the majority of the court of common pleas; and in *Harvey v. Brydges*, 14 Mees. & W. 437, although not necessary to the decision

the court, it appears that, on April 14, 1901, an oil corporation known as the "Superior Sunset Oil Company" went into the possession of said quarter section,—the northwest quarter of section 26, township 32 south, range 23 east M. D. M., in Kern county,—and was in occupation thereof on April 20, 1901, and continued to occupy it until some time thereafter; that, on the 19th day of April, 1901, plaintiff went into the service of said corporation, and, at the time the injuries complained of by him were sustained, was upon said premises, together with certain officers and other employees of said corporation; that, about the hour of 12:30 A. M. of April 20, 1901, these defendants (appellants herein), who were either officers, directors, or stockholders of another oil company known as the "Mt. Diablo Mining & Development Company," together with the employees of said company, all armed with rifles, guns, and pistols, went upon said land with the intention of driving all persons connected with the Superior Sunset Oil Company therefrom; that, upon the entry of defendants and such employees upon the said land, an employee of the Superior Sunset Oil Company—Cornell—went out to meet them in order to ascertain their reason for coming on the land; that, when he came up to them defendants commanded him to throw up his hands, and, upon his refusal to do so, began shooting at him; that, when the shooting commenced, plaintiff and others connected with the Superior Sunset Oil Company ran out to where the defendants were, to ascertain what was going on; that these defendants and those with them immediately began shooting at plaintiff and those who accompanied him, firing some 75 or 100 shots; that plaintiff was shot through the body and received several other gunshot wounds at the hands of defendants and those with them, resulting in great suffering to plaintiff, and in his permanent disfigurement and injury, to such an extent as to incapacitate him from doing any physical work.

The court further found that, at the time of the shooting, the Superior Sunset Oil Company was in possession and occupation

of said quarter section, claiming it as its own, as lands chiefly valuable for petroleum oils, under oil-mining locations thereof, and that, when defendants entered thereon, they had no right or business on said land, and were there in violation of law; that the shooting of plaintiff by said defendants was wilful and deliberate, the result of an unlawful conspiracy by defendants to violently and by force of arms drive the officers and employees of the Superior Sunset Oil Company and plaintiff off said lands, and that such shooting by defendants was wanton and done with malice and deliberate intent to harm the plaintiff and the other parties who were with plaintiff on the land. The court rendered judgment in favor of plaintiff against nine of the defendants for the sum of \$8,500, \$5,000 thereof being for actual damages and \$3,500 for exemplary damages. These nine defendants appeal from the judgment, and from the order of the court denying their motion for a new trial.

Before proceeding to consider the merits of these appeals, it is proper, as bearing on the points presented here for consideration, to say that there was testimony in the case, introduced on behalf of defendants, that, when the officers and employees of the Superior Sunset Oil Company were about to enter and take possession of said quarter section on April 14, 1901, they were met by the superintendent of the Mt. Diablo Oil Company (of which the defendants were officers, directors, and stockholders), who was then upon the section, and who told them that the land belonged to the Mt. Diablo Mining & Development Company, that the company had an oil derrick on it, that he was superintendent, managing the property for it, and were forbidden to enter, but they nevertheless did so. There was evidence also offered by defendants that, after they had entered on the property on the night of the shooting, their spokesman stated to the person representing the Superior Sunset Oil Company, who came to meet them, that they (defendants) were representatives of the Mt. Diablo company, and were there to notify the Superior Sunset Oil people to get off the land,—that the

of that case, Baron Parke said: "Where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in 17 L.R.A. (N.S.)

so doing, a breach of the peace was committed." And the opinion of these judges was approved in *Blades v. Higgs*, 10 C. B. N. S. 713, which was a case of an assault committed in regaining possession of chattels, and which, therefore, is not directly in point with the cases of this note.

As to the right of one who was in peaceable possession to maintain forcible entry and detainer against another entitled to possession, who dispossessed him, see case note to *Wilson v. Campbell*, 8 L.R.A. (N.S.) 426.

land belonged to the Mt. Diablo Company; that the Superior Sunset Oil Company not only refused to vacate, but notified defendants to immediately withdraw or take the consequences; that this declaration and notice was immediately followed by shots being fired at defendants by persons representing and in the employ of the Superior Sunset Oil people, who were in the background; that the defendants returned the fire, and the shooting then became general on both sides, resulting in the wounding of plaintiff and other employees of the Superior Sunset Oil Company; that thereupon the firing ceased, and the defendants withdrew from the premises.

The principal points urged on the appeal for a reversal are as to the rejection of evidence by the trial court, offered by the defendants under their amended answer. In that answer defendants set up that the Mt. Diablo Mining and Development Company was the owner of the lands in question, and, on the 14th day of April, 1901, was in the possession thereof, and that defendants were employees, officers, and directors of that corporation; that, on the 14th day of April, 1901, the Superior Sunset company forcibly dispossessed said Mt. Diablo company, and thereafter maintained possession of said lands; that, on April 19, 1901, defendants, at the instance of the Mt. Diablo company, and on its behalf, went on the said lands to protect the interest of said corporation, and while thereon were shot at by plaintiff and the other employees of the Superior Sunset Oil Company without cause or provocation, and only returned the fire of said parties in defense of their lives; and that any gunshot wounds received by plaintiff were by reason of said unlawful attack of the Superior company's employees upon the defendants.

While many exceptions were reserved to the rulings of the court in the admission and rejection of testimony, the points relied on on this appeal relate only to the rejection by the court of evidence tendered by the defendants to show the title of the Mt. Diablo Oil company to the quarter section in question and the refusal of the court to allow the witnesses of defendants to testify as to their intentions in going upon said land, and to the taking of the advice of counsel relative to their contemplated action in doing so; also, as to the refusal of the court to permit defendants to show that the officers and employees of the Superior Sunset Oil Company were armed with deadly weapons when, on April 14, 1901, they came upon the quarter section where plaintiff was subsequently injured, and that they were armed from that time up to the occurrence out of which plaintiff's injuries were sustained.

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Upon the trial of the cause, the plaintiff was permitted to show that the quarter section in question was, on April 19, 1901, unoccupied public land, and that the Superior Sunset Oil Company on that day took possession of and occupied it; that it built a bunk house and cook house on the land for its officers and employees, and had been, up to the time of the entry by defendants, engaged in constructing a derrick and placing the necessary machinery for oil-drilling purposes, and the court, as we have heretofore stated, found that said Superior Sunset Oil Company was, at the time of the injury of plaintiff, in the possession and occupancy of said land, claiming it as its own.

When the defendants tendered their evidence to show title in the Mt. Diablo Mining & Development Company to the land, as set up in their amended answer, an objection interposed by counsel for plaintiff that "any question of title is irrelevant and immaterial for any purposes of the case" was sustained, the court stating: "I don't think if they had a United States patent they would have any right to go there and force parties who were there wrongfully off the premises. I am not going to try any question of title." Subsequently, the whole deraignment of title of the Mt. Diablo Mining & Development Company to this quarter section was deemed offered by defendants, objected to, and the objection sustained. Under exceptions taken by defendants to both these rulings, the question as to the correctness of such rulings is presented for review.

This appeal was originally heard by the district court of appeal for the second appellate district, and, in deciding it, it was held by that court that the ruling of the trial court, rejecting the offer of proof of title, as far as it was interposed as a defense against the claim of plaintiff for actual damages, was correct; that the matter of title of the Mt. Diablo company was not a material issue in the case. The appellate court, however, held that, while evidence relative to the title of the Mt. Diablo company was inadmissible to prove title, as a defense to the claim for actual damages, it was admissible as bearing upon the claim of plaintiff for exemplary damages; that for this latter purpose it was admissible, and was one link in defendants' chain of defense, namely, that the Mt. Diablo company had rights in the land, which defendants, as officers and stockholders of that company, were endeavoring to protect; that the other links in this chain of defense were to be found in the other evidence sought to be introduced relative to the taking by defendants of the advice of counsel and their intentions in entering upon the land where

the shooting took place. In harmony with these views, the appellate court held that it was error to exclude the evidence tendered on all these matters,—the title of the Mt. Diablo company, the taking of advice of counsel, and the intentions of defendants,—solely, however, because they were admissible as bearing on the question of exemplary damages; and directed that the judgment and order appealed from should be reversed for this error, unless the plaintiff would, within a given time, elect to accept the judgment for actual damages alone, and release that portion of the judgment awarding him exemplary damages. A petition of appellants that the cause be heard and determined by this court, having been granted, the matter is now before us for disposition.

There can be no question but that the district court of appeal was right in holding that the evidence offered by the defendants of title in the Mt. Diablo company to this land, the taking of advice of counsel by defendants as to their contemplated action with reference to entering upon the property in question, and their intentions in doing so, were admissible on the question of exemplary damages. Damages of an exemplary character could only be assessed against the defendants upon a showing of malice in fact as distinguished from malice in law. Under the claim made by plaintiff for exemplary or punitive damages, the good faith and motives of the defendants were directly in issue. And, as bearing on that issue, any facts which tended to show their motive and intent in entering upon the premises in question were admissible. As was properly said by the district court of appeal on that subject: "In some forms of action certain facts being shown, a cause of action for actual damages is conclusively established. Even in such cases the evidence so held to be conclusive as to actual damages is at most *prima facie* evidence only of the right to exemplary damages. *Childers v. San Jose Mercury Printing & Pub. Co.* 105 Cal. 289, 45 Am. St. Rep. 40, 38 Pac. 903; *Taylor v. Hearst*, 107 Cal. 289, 40 Pac. 392. Malice in fact is defined in the former case to be a 'spiteful or rancorous disposition which causes an act to be done for mischief.' Malice in fact is always a question for the jury. *Badostain v. Grazide*, 115 Cal. 429, 47 Pac. 118. Under our system, where all persons may testify, a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action. Even in a criminal case a defendant may testify as to the intent with which he entered a building or killed a human being, although, of

course, a jury is not bound to believe the witness either in a criminal or civil action. But such testimony is competent and relevant, and not immaterial. *Barnhart v. Fulkerth*, 93 Cal. 497, 29 Pac. 50; *People v. Morton*, 72 Cal. 62, 13 Pac. 150; *Kyle v. Craig*, 125 Cal. 114, 57 Pac. 791." Upon this point, it is unnecessary to engage in any further discussion because the claim of appellants that this testimony offered by them was admissible upon the question of exemplary damages is not contested by respondent in his original brief. The claim of error in this respect is not there discussed by counsel for respondent, or authority advanced by him in support of the ruling of the trial court in his briefs. Nor, in the supplemental brief of respondent filed on rehearing here, is it undertaken to defend the rulings in this regard. All that is insisted on here is that some evidence offered as to the good motives and intentions of the defendants in making entry on the land did not sustain them. But this is beside the point urged here. The question is not what was the effect of the evidence on these points which was admitted, but whether it was error to reject other and additional evidence offered on this subject; and we make no question but that it was. But, while we agree with the district court of appeal in its views as to the admissibility of all this evidence offered, as far as it went, we are of the opinion that that court took too restricted and constrained a view as to the extent to which proof of title in the Mt. Diablo company, offered by appellants, was available to them, when it held that such evidence was admissible upon the question of exemplary damages alone.

The amended answer set up that the Mt. Diablo Mining & Development Company was the owner of the land in question on April 14, 1901, and had been forcibly dispossessed therefrom by the Superior Sunset company on that day; that the defendants, as officers, directors, and employees of the Mt. Diablo company, at its instance and on its behalf, went on said premises on the 19th of that month to protect the interests of the latter company; that, while there, they were attacked by the employees of the Superior Sunset company, and defended themselves against said attack, and that any injuries sustained by plaintiff were received while defendants were repelling such attack in self-defense. In other words, that the Mt. Diablo company, at all such dates, as owner of the land, was entitled to the possession of it; that the defendants, as officers thereof, entered only in the exercise of the right of entry possessed by said company as owner of the property, and only used such force against those wrongfully in

possession as was necessary to protect them in the exercise and assertion of such right. The view of the district court of appeal was that this defense could not be asserted against a claim for actual damages; that, although one was the owner and entitled to the immediate possession of property, yet, if he attempted to obtain possession of his property by force, and, in doing so, injury was sustained by a trespasser thereon, proof of such right of entry which the owner attempted to exercise, employing no more force than was necessary to expel the trespasser, would be available to him in defense of a claim for exemplary damages only; that the existence of such right, and its exercise, without unnecessary force, would be no defense against a claim of the trespasser for actual damages sustained by him while the owner was asserting his right of entry.

This view, however, is incorrect. The rule obtaining in this state is subject to no such limitation. It is broader and is the rule of the common law. At common law the owner of real estate had the right to enter upon his property to expel by force an intruder, and in doing so was entitled to use all the force necessary to secure possession. Having the right of entry, and exercising it, he would not be subject to an action for tort for damages resulting either from his entry or from any assault upon or physical injury sustained by one in wrongful possession, provided he used no more force than was necessary to dispossess him. The trespasser could only maintain an action for damages against the owner, provided an excessive use of force was employed in making the entry or dispossessing him, and then only for that excess. The rule of the common law is the rule which obtains in this state, except in so far as it has been changed by the provisions of the Code relative to the summary remedy provided therein for a forcible entry made upon real property. Under these provisions, a right of action is given to one wrongfully in actual possession of property where a forcible entry is made, even by the owner, in which action damages occasioned through the forcible entry may be recovered, and judgment for the restitution of the property had. But the Code prescribes a method of procedure and the extent of the remedy for such forcible entry, and that remedy is exclusive. A person wrongfully in possession, dispossessed by the owner of the property having a right of entry, and no excessive force being used in asserting it, is not entitled to maintain any other action than is afforded for a forcible entry under the Code. He was not entitled to maintain, under such circumstances, any action whatever under the common law, and 17 L.R.A. (N.S.)

the common-law rule has only been changed in this state to the extent, and no further, that the Code affords him a remedy under its provisions referred to, which he otherwise would not have.

Having these principles in mind, it will be observed that this action is not brought under the provisions of the Code relative to forcible entry. It is an action brought purely for assault and battery, and is subject to the common-law rule as to such actions, which is that it is a complete defense to their maintenance, either for exemplary or actual damages, if it be shown that the injuries claimed to have been sustained by one wrongfully in possession were sustained while the owner of the property was exercising a right to the possession of his land, although using force to obtain such possession, if no more force was employed than was necessary to accomplish it.

We have said that this rule of the common law applies in this state to actions of this character, and we proceed now to refer to the authorities so declaring. This entire matter—the rule of the common law and the extent to which it has been changed by the summary proceeding for forcible entry under the Code—is so thoroughly considered in the cases to be referred to as to make some quotations from them suffice for any further discussion of the subject.

Referring first to the case of *Canavan v. Gray*, 64 Cal. 5, 27 Pac. 788, the facts there presented this situation: The defendant Gray, who was the owner of a certain house in which plaintiff was wrongfully in the possession of certain rooms, caused the house to be unroofed, and, in so doing, damaged the personal property of the plaintiff, who brought an action for the injury and obtained a verdict in her favor. The motion of the defendant for a new trial upon the ground of insufficiency of the evidence to sustain the verdict being denied, he appealed. In disposing of the appeal, this court said: "The vital question is, Can the plaintiff, upon these facts, maintain an action of trespass against the defendant? . . . All agree that at common law the plaintiff could not, upon the facts disclosed by this record, maintain any action whatever against the defendants. It is also conceded that the only change which has been made in the law relating to this subject is that made by the statute which, in this state, as in many others, provides a summary remedy for forcible entry upon or into any real property. It is only as to the extent of the change wrought by this statute that there is any difference of opinion. . . . The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the

to determine whether unnecessary force was used by defendants, and that became a vital question, assuming that the writ did not cover the premises upon which the entry was made by them."

It is clear from these authorities that one who is in possession of real property without right cannot maintain an action of trespass on his person—assault and battery—against the owner of the property, having a right to its possession, or against those, acting at his instance or in his behalf, who make a forcible entry thereon to dispossess him, where no more force than is necessary is used to make the entry effective.

The defense interposed by the defendants here was that the Mt. Diablo company had a right of entry upon the property in question as the owner thereof, and that they entered upon it on behalf of such owner in the exercise of such right. In support of the existence of this alleged right of entry and as a basis for its exercise, they were entitled to prove ownership of the property in the Mt. Diablo company if they could do so, and the trial court, in refusing to permit them to do it, prevented them from making a defense which they had pleaded, and which, if proven as pleaded, would have been a valid defense to the recovery of any damages by the plaintiff, either exemplary or actual.

It is claimed by the respondent that the principle of law declared by the authorities to apply to actions for assault and battery for injuries growing out of the exercise of the right of entry by the owner of land to dispossess those who are trespassers upon it, applies only between conflicting claimants to land; that the rule can have no application in a case where a mere employee (such as it is claimed respondent was) who had no interest in a contest between the rival claimants to the possession of land, and is simply on the premises by virtue of his employment, is injured by the owner in exercising the right of entry against his trespassing employer. We perceive no force in this contention. If the Mt. Diablo company had the right of entry on the lands in question, the defendants, acting for it, in the exercise of that right, were entitled to dispossess all persons who were on the premises, whether officers or employees of the Superior Sunset company, and to exercise all necessary force to do so. They owed no different duty to the employees of the Superior Sunset company who were upon the premises than they did to the officers of the company who were there. Their sole duty as to all occupants was to use no more force than was necessary to effectuate their removal and obtain full possession, and their responsibility to any of them injured thereby was

only for any excessive use of force employed in doing so.

It is further insisted on behalf of respondent, as we understand his brief on rehearing, that the judgment should not be disturbed, as far as it awarded actual damages, for any error in the admission of evidence of ownership of the land by the Mt. Diablo company, because it clearly appears from the evidence that the force and violence used by defendants in making the entry upon the premises, and as a result of which plaintiff was injured, was so excessive, unnecessary, and unreasonable that the judgment would have had to be the same whether evidence of ownership had been admitted or not. This proposition is doubtless made upon the theory that this court might make the same alternative order on this appeal as did the district court of appeal. Undoubtedly this court could do so if a proper case was presented for such action. But, as was said in *Burnham v. Stone* (as to a similar suggestion that the judgment there should be affirmed notwithstanding the error committed by the trial court), when the effect of the action of the trial court is to cut off a substantial defense upon the merits, the rule invoked has no application. The case at bar was tried on an erroneous theory which, as in the *Burnham Case*, would not justify this court in looking into the evidence to determine whether unnecessary force was used by defendants. Whether unnecessary force was used was a vital question under the pleadings in the case, and its solution depended largely on whether the Mt. Diablo company had a right of entry upon the premises or not. The defendants, acting for it, could only employ force to eject those in possession of it if it had. The court not only refused to permit defendants to show that the Mt. Diablo company was the owner of the property with a right of entry thereon, but, while refusing to permit the proof, actually made a finding against defendants on these matters. The court further found that the defendants were trespassers *ab initio* on the property on the night of the conflict; that the "said defendants had no right or business on said lands, and were there in violation of law." Of course, under such a view, the trial court must necessarily have concluded that the use of any force employed by the defendants was entirely unwarranted and illegal; that the question as to the degree of force used by the defendants was a false quantity in the case, as the defendants had no right to be upon the land at all, or employ any force whatever against those in possession. It is apparent that, under these circumstances, the case was tried upon an entirely erroneous theory under which the defendants

were precluded from making a defense where-by it could be properly determined by the court whether the force employed by them was necessary only, or excessive.

As to the last point made by appellants relative to the exclusion by the court of evidence that the Superior Sunset people were armed with deadly weapons when they came upon the property in question, and were so armed while in possession and up to the night of the entry by defendants: We think such evidence should have been admitted in connection with all the other circumstances attending the dispute over the possession of the property. Under the authorities cited, even if the Mt. Diablo company had a right of entry to dispossess the Sunset people as trespassers, still the defendants, acting in its behalf, would be justified in using only necessary force for that purpose, and liable for any damages the result of the use of excessive force. If the officers and the employees of the Superior Sunset company entered into possession of the property armed, and remained armed, this fact would be proper to be taken into consideration in determining whether the defendants acted reasonably and in good faith and without malice in making their entry upon the premises also armed, and as bearing upon the question whether they were using only reasonable force in doing so. This disposes of the only points on the appeal made before the district court of appeal, or on rehearing here.

As the trial court erred in rejecting the evidence offered by the defendants on the matters we have discussed, the judgment and order appealed from are reversed, and a new trial ordered.

We concur: Sloss, J.; Shaw, J.; Angellotti, J.; McFarland, J.; Henshaw, J.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ARTHUR M. EPPSTEIN, Trustee of Colorado Carlsbad Water Company,

v.

HARPER M. ORAHOOD.

(84 C. C. A. 208, 156 Fed. 42.)

Jurisdiction — bankruptcy — summary process.

1. A court of bankruptcy may, by summary process, require those who assert title to, or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court, and, the

notice being reasonable, may proceed to adjudicate the merits of such claims.

Bankruptcy — property in custodia legis — tax deed.

2. While property in the course of administration under the bankruptcy act is not exempted from taxation, or freed from tax liens or claims theretofore fastened upon it, it is nevertheless *in custodia legis*; and a pre-existing tax lien or claim cannot be converted into a full title by the procurement of a tax deed without the court's sanction.

(September 2, 1907.)

Case Note. — Effect of property being in custodia legis on right to enforce payment of delinquent taxes.

This note presupposes that the taxes sought to be collected were regularly assessed, and that all antecedent steps were in strict conformity to law, and presents simply the question whether the payment of such taxes, if delinquent, can be enforced against property, either by sale or otherwise, when at the time of such sale or enforcement such property is in the custody of the law.

While no court would go so far as to hold that property *in custodia legis* is exempt from taxation or freed from any tax liens, some of them, where property was in their custody, do seem to have been exceedingly jealous of their power over its control or disposal, and, accordingly, have held that such property cannot be levied upon and sold, without their consent, by an officer of the state in satisfaction of unpaid taxes; these courts evidently holding that claims for taxes must be proved like all other claims, and will then be allowed and paid as a preferential claim.

Thus, in *Prince George's County v. Clarke*, 36 Md. 206, it was held that, after a decree has been passed by a court of equity for the sale of real estate, and trustees have been appointed to make the sale, the property being therefore under the control and jurisdiction of the court, a tax collector has no power to seize and sell such property, or any part thereof, for taxes due; the court saying that the duty of the tax collector is to apply to the court for the payment of taxes due.

So, in *Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653, it was held that personal property in the hands of a receiver, being in the custody of the law, is not subject to seizure and sale for the collection of taxes thereon.

In *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785, where the state officers levied, for the satisfaction of taxes, upon several cars of a railroad then in actual use for conducting the business of the receiver in charge, the court, in holding them guilty of contempt, said: "The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis* and that unauthorized interference with such possession is punishable as a con-

Headnotes by VAN DEVANTER, Circuit Judge.

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PETITION for revision of an order of the District Court of the United States for the District of Colorado, in bankruptcy, refusing to consider the right of the trustee to set aside a tax deed of the bankrupt's real estate. Petition granted.

The facts are stated in the opinion.

Argued before Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge.

Messrs. Ernest Morris, Alfred Muller, and Mr. Summerfield, for petitioner:

When a court of equity has possession of property, all proceedings, whether for the collection of assets, or for the defense of property rights, are ancillary to the main suit, and are cognizable in the court.

Re Tyler, 149 U. S. 104, 37 L. ed. 689, 13 Sup. Ct. Rep. 785.

The court may proceed by summary process.

Re Rochford, 59 C. C. A. 388, 124 Fed. 182; White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778, 14 Am. Bankr. Rep. 51; Virginia, T. & C. Steel & I. Co. v. Bristol Land Co. 88 Fed. 134.

That the property in controversy is real estate, instead of personalty, can make no difference.

Virginia, T. & C. Steel & I. Co. v. Bristol Land Co. supra; Re Whitener, 44 C. C. A. 434, 105 Fed. 180; Re Baughman, 138 Fed.

tempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law; but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether Federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle. The levy of a tax warrant, like the levy of an ordinary fieri facias, sequesters the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and, while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the

742, 15 Am. Bankr. Rep. 23; Prince George's County v. Clarke, 36 Md. 206.

Messrs. Simon Wolf and Myer Cohen, for respondent:

A court of bankruptcy in custody of property has power, by summary proceeding, to compel persons who assert title to, or an interest in, such property, to present their claims for determination, and to adjudicate the merits thereof.

Hitz v. Jenks, 185 U. S. 155, 46 L. ed. 851, 22 Sup. Ct. Rep. 598; Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 209, 7 Am. Bankr. Rep. 224; Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557, 5 Am. Bankr. Rep. 623; White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007, 4 Am. Bankr. Rep. 178; Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778, 14 Am. Bankr. Rep. 45; Re Rodgers, 60 C. C. A. 567, 125 Fed. 169, 11 Am. Bankr. Rep. 79; Re Antigo Screen Door Co. 59 C. C. A. 248, 123 Fed. 249, 10 Am. Bankr. Rep. 359; Re Leeds Woolen Mills, 129 Fed. 922, 12 Am. Bankr. Rep. 136; Re Kellogg, 57 C. C. A. 547, 121 Fed. 333, 10 Am. Bankr. Rep. 7; Re Rochford, 59 C. C. A. 388, 124 Fed. 182, 10 Am. Bankr. Rep. 608; Re McMahon, 77 C. C. A. 668, 147 Fed. 684, 17 Am. Bankr. Rep. 530.

The title to property in the actual pos-

court will fail in the discharge of its duty,—an assumption carrying a contempt upon its face."

Other cases holding or recognizing that a tax collector has no right to levy upon and sell property for delinquent taxes when such property is in the hands of a receiver, without first applying to the court for permission to sue such receiver, are King v. Wooten, 4 C. C. A. 519, 2 U. S. App. 651, 54 Fed. 612; Virginia, T. & C. Steel & I. Co. v. Bristol Land Co. 88 Fed. 134; McRae v. Bowers Dredging Co. 90 Fed. 360; Yuba County v. Adams, 7 Cal. 35.

It was held in Woodward v. Ellsworth, 4 Colo. 580, that, whatever might be the rights of a tax collector if a lien had attached to specific property of a national bank by virtue of a tax levied thereon prior to the bank's insolvency, he cannot enforce payment by seizing personalty in the receiver's hands.

However, in Central Trust Co. v. Wabash, St. L. & P. R. Co. 26 Fed. 11, it was held that the fact that property of a corporation is in the hands of a receiver did not exempt it from seizure and sale by the collector of taxes.

So, in Flower v. Beasley, 52 La. Ann. 2054, 28 So. 322, it was held that it is the duty of the tax collectors to proceed to the enforcement of delinquent taxes by sale of the real estate affected by the same when the time fixed by law for doing so is reached; and the fact that it may be at that time

session of a court of bankruptcy cannot be taken from the court by means of the machinery employed by the state to enforce the collection of taxes, without permission first having been obtained.

Mueller v. Nugent, *supra*; *Yates v. Hurd*, 8 Colo. 343, 8 Pac. 575; *Henderson v. Wanamaker*, 25 C. C. A. 181, 49 U. S. App. 174, 79 Fed. 730; *New Jersey v. Anderson*, 203 U. S. 483, 51 L. ed. 284, 27 Sup. Ct. Rep. 137, 17 Am. Bankr. Rep. 63; *Re Tyler*, 149 U. S. 182, 37 L. ed. 695, 13 Sup. Ct. Rep. 785; *Hitz v. Jenks*, *supra*; *Virginia, T. & C. Steel & I. Co. v. Bristol Land Co.* 88 Fed. 134; *McRae v. Bowers Dredging Co.* 90 Fed. 360; *Ledoux v. Le Bee*, 83 Fed. 761; *Clark v. McGhee*, 31 C. C. A. 321, 59 U. S. App. 69, 87 Fed. 789; *Johnson v. Southern Bldg. & L. Asso.* 132 Fed. 540; *Wiswall v. Sampson*, 14 How. 65, 14 L. ed. 328; *Barton v. Barbour*, 104 U. S. 128, 26 L. ed. 674; *Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653; *Adams v. Hassell*, 6 Cal. 113, 65 Am. Dec. 491; *Yuba County v. Adams*, 7 Cal. 35.

Mr. E. W. Hurlbut also for respondent.

Van Devanter, Circuit Judge, delivered the opinion of the court:

The Colorado Carlsbad Water Company, a corporation existing under the laws of Colorado, was adjudged a bankrupt upon the petition of creditors. Before the peti-

tion was filed, certain real property of the bankrupt had been sold for taxes, but the title, the right of possession, and the actual possession remained with the bankrupt, and these passed to the trustee upon his qualification. After the lapse of the three years designated in the redemption statute, and while the property was yet in the custody and control of the court of bankruptcy as part of the bankrupt's estate, the holder of the tax-sale certificate, without the leave of that court, applied to the county treasurer and obtained a tax deed purporting to invest him with all the right, title, and interest of the bankrupt as the former owner. Thereafter the trustee, learning of the sale and deed, tendered to the claimant thereunder the amount for which the property had been sold, with statutory interest, penalties, and costs, and demanded a surrender of the tax title. The tender and request were refused, and, upon the trustee's petition, the claimant was ordered to show cause why the deed should not be set aside. He appeared and objected that his right could not be adjudicated in a summary proceeding, whereupon the objection was sustained and the petition dismissed. A petition for revision brings the matter here.

The question of jurisdiction is not free from doubt, but we are of opinion that the result of the cases is that a court of bankruptcy may, by summary process, require

in the possession of the sheriff under a seizure is no obstacle to this being done.

In *Metcalf v. Commonwealth Land & Lumber Co.* 113 Ky. 751, 68 S. W. 1100, it was evidently recognized that the fact that a receiver has been appointed to take possession of property does not prevent its sale for taxes due the state; and it was held, further, that, if the receiver, although appointed, was not in possession, a purchaser under a tax sale might take possession without leave of the court, and without being guilty of contempt therefor.

It was held in *Soniat v. Donovan*, 118 La. 847, 43 So. 462, that the fact that, at the time of a tax sale, the property sought to be sold was under administration, did not prevent the tax collector from proceeding with the sale; the court saying, however, that, although the property was under administration, it could scarcely be said that it was in the custody of the court in the sense that legal sale of the same could not be made otherwise than through the regular machinery of the courts, as in matters of probate sale.

In *Whitehead v. Farmers' Loan & T. Co.* 39 C. C. A. 34, 98 Fed. 10, it was held that the fact that real property, sold by a county for delinquent taxes, afterwards came into the possession of a receiver as a part of the assets of an insolvent railroad company, does not afford any ground for enjoining the issuance to the purchaser of a tax deed therefor. The court, after distinguishing *Re* 17 L.R.A. (N.S.)

Tyler, *supra*, said: "Here there was no seizure of any property, and no interference, or threatened interference, with the receiver's possession or custody. but only an attempt to perfect an incipient title by taking the required statutory steps to that end. If a deed should be executed by the treasurer to Whitehead, and he should attempt to take possession of the property conveyed to him, the court in charge of the receiver will undoubtedly be able to protect his possession, when disturbed, or threatened to be disturbed, with due consideration to the rights of all parties interested in the same. In this way the court can assert its lawful right to exclusive custody and control, and the state will not be embarrassed by any unwarranted interference with its own process for collecting its revenue." This case was followed and approved in *Rice v. Jerome*, 38 C. C. A. 388, 97 Fed. 719; and it will be noticed that the above two cases were cited in *EPPSTEIN v. ORAHOOD*, and an attempt there made to distinguish them.

In *Bristol v. Murff*, 49 La. Ann. 359, 21 So. 519, it was held, in an action to annul a tax sale, that, when property is constructively seized by a tax collector when it is under seizure by attachment in the Federal court, and the attachment is dissolved, the tax collector's seizure will hold good.

Right to sell property while in custody of law, see subject note to *Fulghum v. J. P. Williams Co.* 1 L.R.A. (N.S.) 1055.

oath is improper; and such statements are not admissible against him if he is subsequently tried for the offense involved.

In *Cicero v. State*, 54 Ga. 156, it was said: "A magistrate has no right to examine a defendant for the purpose of obtaining from him contradictory statements." Before a confession is admissible in evidence, it must appear *prima facie* that it was freely and voluntarily made. If the contrary appears, it is inadmissible. If the evidence for the state makes out a *prima facie* case for the admission of such a confession, the court is not bound, before admitting it, to hear evidence on behalf of the accused, tending to show coercion or improper inducement in its procurement. If the evidence for the state shows the confession to be admissible, it will be admitted. If the defendant desires to introduce evidence to show that there was improper inducement which caused the confession to be made, he can do so, and it will then be for the jury to determine, under all the evidence, whether or not the confession was free and voluntary. *Irby v. State*, 95 Ga. 467, 20 S. E. 218; *Dawson v. State*, 59 Ga. 333; *Smith v. State*, 88 Ga. 627, 15 S. E. 676. As to inculpatory statements, or even statements seeking to place the crime upon another, see *Fuller v. State*, 109 Ga. 809, 35 S. E. 298. In *Inman v. State*, 72 Ga. 269, no question was raised as to the admissibility of evidence, but exception was taken to the charge of the court as to the credit to be given to sworn statements of a person as a witness before a coroner's jury, when subsequently introduced in evidence (apparently without objection) on his trial for murder. Counsel for the state in the present case relied on the case of *Woolfolk v. State*, 81 Ga. 551 (6), 562, 8 S. E. 724. It will be observed that there the court dealt with two matters together: First, that testimony was allowed in relation to the coroner's requirement the defendant, during the progress of the inquest, to remove his clothing, whereby certain blood stains were disclosed on his person; and, second, certain statements of the defendant which were made during the investigation. The first point was the one principally considered. In regard to the second point, it was stated, in the opinion (page 562 of 81 Ga.) that, "so far as this record discloses, the statements made by the defendant were perfectly voluntary, and not under oath." This distinguishes the *Woolfolk* Case from that now under consideration. In *Green v. State*, 124 Ga. 344, 52 S. E. 431, it was held that the objection to showing the statement which the defendant had made at the coroner's inquest was without merit, where the record did not disclose any evidence of compulsion, or that

the statement proved by such testimony was not freely and voluntarily made. In the opinion (page 346 of 124 Ga.) it was stated that "there was no error in admitting the testimony complained of in the first ground of the amendment to the motion for new trial; it not appearing from the record that the accused was under oath when she made her statement during the coroner's inquest." A sentence in the opinion should, perhaps, be mentioned, lest it might be subject to be misunderstood hereafter. It was said that, "as it does not appear from the record in the case at bar that the incriminating statement of the accused was not voluntarily made, and the burden being upon her to show such fact, if it was a fact (*Eberhart v. State*, 47 Ga. 599), her failure so to do renders her objection to the testimony without merit." It was not intended by this to conflict with the rulings in *Irby v. State* and *Dawson v. State*, supra. In the *Eberhart* Case, one ground of the motion for a new trial was because the court erred in allowing the confessions of the defendant and of one Spann to go to the jury without a preliminary examination, and without proof that they were freely and voluntarily made. In a note to this ground, the court stated that, during the examination of the same witness on the trial of Spann, on the preceding day, in regard to the same confessions, he had thoroughly examined the witnesses as to the character of such confessions, and had fully satisfied himself that they were freely and voluntarily made, without the slightest hope of benefit or the remotest fear of injury; that, during the trial of the prisoner, no objection was made by counsel on this ground, and the attention of the court was not called to the fact. In the opinion the failure to object was emphasized. It was said: "We incline to think that, if objected to, it would have been the duty of the state to show the circumstances under which they were made, that the court might see if they were voluntary. . . . If they are given in and not objected to, it is too late after verdict to say that there was not a sufficient inquiry into the circumstances." The language of the seventh headnote is too broad, standing alone. It must be construed in the light of the question before the court.

In many cases it has been held, where a person, under arrest accused of a crime connected with the death of the person on whose body the inquest is held, is called as a witness before the jury, not of his own motion or volition, that sworn confessions so obtained are not considered voluntary, and cannot be used against the witness in a subsequent prosecution of him. Different courts have assigned different reasons for

this exclusion, and have advanced different theories on the subject. Some have based it upon the letter or spirit of statutes. Others, without regard to statutes, have declared that confessions so obtained are not voluntary. In Wharton's *Crim. Ev.* 9th ed. § 664, after stating that a confession, though made under oath, if not procured or induced by compulsion or undue influence, is admissible, it is added: "And, as we will presently see, when the defendant is in custody under charge of crime, and is then sworn and questioned by the examining magistrate, his answers thus compelled cannot afterwards be put in evidence against him." In § 668, it is said: "But the testimony of an accused party, taken as such, is not admissible, when such accused party is put on his oath and sworn, and examined, not on his own motion, but on the motion of the prosecution. This rule is founded upon the unreliable as well as the inquisitorial character of such statements; and therefore, where a man, having been arrested by a constable, without a warrant, upon suspicion of having committed murder, was compelled to answer under oath as a witness at the coroner's inquest, it was held that the statements thus made by him were not admissible against him on his trial for the murder. The same rule obtains where the defendant is compelled to answer under oath questions by the committing magistrate." See also 1 Greenl. *Ev.* § 225. An elaborate discussion of the subject and of leading cases on both sides will be found in 1 Wigmore, *Ev.* §§ 842-852, and note to § 852. See also 1 Bishop, *Crim. Proc.* 4th ed. §§ 1255, 1256. In *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721, it was held that, on a trial for murder, statements made by a person as a witness at a coroner's inquest upon the body of the deceased, before the witness had been charged with the murder, and before it was ascertained that a murder had been committed, were admissible in evidence against him. Selden and Allen, JJ., dissented. In the opinion numerous opinions were discussed. In *People v. McMahon*, 16 N. Y. 384, the prisoner had been arrested by a constable, without a warrant, on suspicion of being the murderer of his wife. The constable took him before the coroner, who was holding an inquest on the body of the murdered woman. The coroner swore him and examined him as a witness. It was held that his evidence thus given before the coroner was not admissible on the prisoner's trial for the murder. The opinion was prepared by Selden, J., who had formerly filed a dissenting opinion in the *Hendrickson Case*. It was learned and interesting, but much that was said extended beyond the ruling actually made, and it has given rise to no little discussion since. In *Teachout v. 17 L.R.A. (N.S.)*

People, 41 N. Y. 7, the two preceding cases were considered, and it was held that "statements made by the prisoner, under oath, at a coroner's inquest upon the body, are admissible against him upon his trial for the murder, although he knew, at the time he was sworn, that it was suspected the deceased was poisoned, and that he himself would probably be arrested for the crime, and was informed by the coroner that rumors implicated him, that he had a right to refuse to testify." A distinction was made between one who was merely suspected of the crime, and one who had been arrested and stood before the coroner's jury as substantially a party charged with the crime, and who was subjected to examination on oath. In *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496, this distinction was again recognized. In *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469, the person who had been arrested, charged with the crime of murder, desired to go before the coroner's jury and make a statement, and, after being duly informed that his depositions might be used against him, elected to be sworn, and asked to be allowed to testify. It was held that, under the then existing statute, his statement was admissible in evidence against him on a subsequent trial for murder. In that case the preceding rulings were treated as harmonious, which has called forth from Professor Wigmore a somewhat satirical comment. 1 Wigmore, *Ev.* § 852, note 1, *supra*. See also *Wilson v. State*, 110 Ala. 1, 55 Am. St. Rep. 17, 20 So. 415; *State v. Clifford*, 41 Am. St. Rep. 518, and note (86 Iowa, 550, 53 N. W. 299); *Farkas v. State*, 60 Miss. 847; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *State v. Broughton*, 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507.

The case of *Davis v. State*, 122 Ga. 564, 50 S. E. 376, is readily distinguishable from the one at bar. There, on an investigation before a grand jury, founded on an indictment against certain parties, another person was examined as a witness. Apparently there was some suspicion of his being connected with the crime, but in the report it does not appear that he was under arrest. He was warned of his privilege not to testify to anything tending to criminate him. He nevertheless voluntarily answered a question. It was held admissible, when he was afterwards indicted and tried, to prove what he said and his manner while testifying.

If there were any irregularities in regard to one of the jurors, or in regard to certain expressions in the charge, as claimed, they will probably not occur again.

Judgment reversed.

All the Justices concur.

IDAHO SUPREME COURT.

JENNIE E. WEST, Exrx., etc., of I. D.
West, Deceased, Appt.,
v.

CHARLES THEIS, Respnt.

(— Idaho, —, 96 Pac. 932.)

Statute of limitations — interpretation
— “return to the state.”

1. The words “return to the state,” used in § 4069, Rev. Stat. 1887, providing that “if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state,” apply to a nonresident debtor who enters into a contract in a foreign state, and thereafter comes into this state, as well as to a citizen who enters into a contract within this state, and thereafter departs from the state.

Same — when action arises — foreign state.

2. The phrase “has arisen in another state,” used in § 4079, Rev. Stat. 1887, providing that, “when a cause of action has arisen in another state or territory, or in a foreign country, and, by the laws thereof, an action cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state,” refers to and means the state in which the foreign contract is to be paid or discharged, and has no application to an intermediate state, or foreign country, through which the debtor may subsequently travel, or in which he may reside for a sufficient length of time to constitute the bar of the statute of limitations of such state prior to coming to this state, where an action is eventually commenced.

Same — place of performance.

3. Under the provisions of § 4079, Rev. Stat. 1887, “a cause of action arises” at the time and the place, in the state or foreign country, when and where the debt is to be paid or the contract performed; and the cause of action thus arising continues and follows the debtor until such time as it is either barred by the statute of limitations of the state wherein it arose, or until the debtor has lived within this state a sufficient length of time to bar it by the statute of limitations of this state.

Same — debtor's residence in third state.

4. Where T. executed promissory notes in the state of Kansas, and agreed to pay at a definite time and place within that

state, and thereafter left the state, and went to the state of Washington, and there resided a sufficient length of time to bar the right of action under the statutes of the state of Washington, and thereafter came to Idaho, where he was sued upon the cause of action; and it appears that the statute of limitations of the state of Kansas has not yet run against the obligation, and that the debtor has not been in this state a sufficient length of time to bar the action here, he will not be permitted to plead the bar of the statute of limitations of the state of Washington. In such case the only inquiry is as to the statute of limitations of the state in which the debt was contracted and agreed to be paid, and of this state wherein the action is being prosecuted.

(June 24, 1908.)

APPPEAL by plaintiff from a judgment of the District Court for Ada County in defendant's favor in an action on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Johnson & Johnson, for appellant:

Sections 4069 and 4079 have reference only to the statute of limitations of the place where the contract was made and to be performed.

Chevrier v. Robert, 6 Mont. 319, 12 Pac. 702; Doughty v. Funk, 15 Okla. 643, 4 L.R.A. (N.S.) 1029, 84 Pac. 484; McKee v. Dodd, 152 Cal. 637, 14 L.R.A. (N.S.) 780, 93 Pac. 854; John Shillito Co. v. Richardson, 102 Ky. 51, 42 S. W. 847; Hiller v. Burlington & M. River R. Co. 70 N. Y. 223; Omaha Nat. Bank v. Lindsay, 41 Wash. 531, 84 Pac. 11; Story v. Thompson, 36 Ill. App. 370; McCann v. Randall, 147 Mass. 81, 9 Am. St. Rep. 606, 17 N. E. 75; Drake v. Found Treasure Min. Co. 53 Fed. 474.

Messrs. Cavanah & Blake and W. E. Borah, for respondent:

When a party has resided in another state a sufficient length of time to bar the action in said state, suit cannot be maintained upon said cause of action in this state.

Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162; Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N. W. 1056; Lewis v. Hyams, 26 Nev. 68, 99 Am. St. Rep. 677, 63 Pac. 126, 64 Pac. 817; McCormick v. Blanchard, 7 Or. 232; Osgood v. Artt, 11 Biss. 160, 10 Fed. 305; Freundt v. Hahn, 24 Wash. 8, 85 Am. St. Rep. 939, 63 Pac. 1107; Wooley v. Yarnell, 142 Ill. 442, 32 N. E. 891; Strong v. Lewis, 204 Ill. 35, 68 N. E. 556.

Section 4069 applies only where a party within the state departs therefrom and the cause of action arises during his departure, or where, after the cause of action has arisen, he departs and returns. This sec-

Headnotes by AILSHIE, Ch. J.

Note. — As to construction and effect of statute of forum admitting bar of statute of limitations of state or country in which the cause of action arises or accrues, see case notes to Doughty v. Funk, 4 L.R.A. (N.S.) 1029, and Bruner v. Martin, 14 L.R.A. (N.S.) 775.
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tion must be construed in connection with § 4079.

Powers Mercantile Co. v. Blethen, supra; *Snoddy v. Cage*, 5 Tex. 106; *McCormick v. Blanchard*, supra; *Hyman v. Bayne*, 83 Ill. 256; *Wilson v. Daggett*, 88 Tex. 375, 53 Am. St. Rep. 766, 31 S. W. 618.

Allshie, Ch. J., delivered the opinion of the court:

The question to be determined in this case is: Where a debtor executed a promissory note in the state of Kansas, and agreed to pay the same at a specified time and place within that state, and who thereafter removed to the state of Washington, and resided there until the bar of the statute of limitations of that state had run against the right of action on the contract, and the debtor thereafter came into the state of Idaho, and was sued upon the obligation, can he here plead the bar of the statute of limitations of the state of Washington? The trial court held that the plea of the statute of limitations of the state of Washington was good, and entered judgment in favor of the defendant. This appeal is from the judgment so made and entered.

The transaction out of which this action arose and the circumstances involving the statute of limitations are briefly as follows: On April 2, 1888, the defendant, Charles Theis, at Richfield, Kansas, executed and delivered to I. D. West his four promissory notes for the sum of \$2,000 each, and therein promised and agreed to pay the same at the office of Ritter & Doubleday in the city of Columbus, state of Kansas. The plaintiff here is the widow of I. D. West, and executrix of his estate. The defendant, Theis, left Kansas after the maturity of two of these notes, and before the maturity of the other two, and before the statute of limitations had run as against any of these obligations. He thereafter located in the state of Washington, where he resided continuously for a period of more than six years, which period is prescribed, by the statutes of that state, as the limit within which actions of this character must be commenced. He thereafter came into the state of Idaho, and this action was brought against him on May 10, 1906. The defendant answered, admitting the execution of the notes, as alleged in the complaint, and pleaded the statute of limitations of the state of Washington as a bar to the action in this state, under § 4079 of the Revised Statutes of 1887 of Idaho.

The proper solution of this question must necessarily depend upon the construction to be placed on §§ 4069 and 4079 of the Revised Statutes of 1887 of this state. Those sections are as follows:

"Sec. 4069. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

"Sec. 4079. When a cause of action has arisen in another state or territory, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

Statutes similar to the foregoing have been considered and construed by the courts of last resort of a number of the states, and different conclusions have been reached by the different courts. We shall not undertake to review or analyze the decisions to any great extent, but shall rather consider the reasons suggested by some of them, in so far as they may throw light on the statutes under consideration. In the first place, it must be conceded that the decisions from Minnesota, Illinois, and Nevada sustain the contention made by the respondent in this case. *Luce v. Clarke*, 49 Minn. 356, 51 N. W. 1162; *Powers Mercantile Co. v. Blethen*, 91 Minn. 339, 97 N. W. 1056; *Osgood v. Artt* (I. C. C.) 11 Biss. 160, 10 Fed. 365; *Wooley v. Yarnell*, 142 Ill. 449, 32 N. E. 891; *Strong v. Lewis*, 204 Ill. 35, 68 N. E. 556; *Lewis v. Hyams*, 26 Nev. 68, 99 Am. St. Rep. 677, 63 Pac. 126, 64 Pac. 817.

There is also some support to be found for respondent's contention, in *McCormick v. Blanchard*, 7 Or. 232; *Freundt v. Hahn*, 24 Wash. 8, 85 Am. St. Rep. 939, 63 Pac. 1107; *Snoddy v. Cage*, 5 Tex. 106; *Wilson v. Daggett*, 88 Tex. 375, 53 Am. St. Rep. 766, 31 S. W. 618. On the other hand, appellant is supported in her contention by the decisions of *Chevrier v. Robert*, 6 Mont. 319, 12 Pac. 702; *Doughty v. Funk*, 15 Okla. 643, 4 L.R.A. (N.S.) 1029, 84 Pac. 484; *McKee v. Dodd*, 152 Cal. 637, 14 L.R.A. (N.S.) 780, 93 Pac. 854; *Lawson v. Tripp* (Utah) 95 Pac. 520; *John Shillito Co. v. Richardson*, 102 Ky. 51, 42 S. W. 847, and *McCann v. Randall*, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75. There are also cases from other states that, although not directly in point, tend to support the latter contention.

In *Chevrier v. Robert*, supra, the supreme court of Montana had under consideration the identical question presented in this case, and, in considering their statute, §§ 50 and 55 of the Revised Statutes of 1879 of

Montana territory, which correspond to §§ 4069 and 4079, supra, of our Revised Statutes of 1887, in course of the opinion, the court said: "When an action is brought in the courts of this territory, on a cause of action arising beyond its limits, and the statutes of limitation are invoked, it is only necessary to inquire what are the statutes of Montana, and, under § 55 of the Code of Civil Procedure, to inquire, further, what are the statutes of the state or country where the cause of action arose or originated, or, it may be expressed, when the demand was created, and first became enforceable. Any other interpretation of the law would compel the creditor to trail the debtor from one country to another, and ascertain how long he resided in any particular jurisdiction, and to search the statute books of every foreign country through which he may have passed, and where-in he may have tarried for business or pleasure, to see if, in some one or other of them, his debt had not been barred. This could not have been the intention of the legislature. *Olcott v. Tioga R. Co.* 20 N. Y. 226, 75 Am. Dec. 393. We believe the legislature intended that the creditor should have the option to say when he would enforce his demand, and that the only statutes he need to regard are those of the forum, where he brings his suit, and of the place where the debt was contracted." The court concluded its consideration of that case by holding that, under the statute, the court could not consider the defendant's residence, or the statute of limitations of any state or foreign country in which the defendant had resided, except that of the state or country in which the contract was entered into, and of the jurisdiction in which the action was brought.

In *Doughty v. Funk*, supra, the supreme court of Oklahoma had under consideration a contract entered into in the state of Kansas, on which suit was brought in the territory of Oklahoma. The defendant pleaded that the action had been barred by the statutes of the state of Nebraska, where he had lived for a period exceeding that constituting a bar to the action. The court cited and considered the provisions of the statutes of Oklahoma, corresponding, in substance, to §§ 4069 and 4079 of our statute, and held that the defendant could not be heard to plead the bar of the statute of Nebraska, and that the only statutes to be considered in determining whether the cause of action was barred were the statutes of Kansas and of Oklahoma. In discussing the meaning and intent of the phrase "when a cause of action has arisen" (§ 4079), the court said: "We cannot therefore, in determining the meaning of the phrase under consideration, 17 L.R.A. (N.S.)

hold that a cause of action has arisen only when the remedy and the right occur at the same time. But we do hold that a cause of action arises, when the obligation was created which gave rise to a right of action, as soon as such right accrued thereon. Following this definition of the word 'arisen,' or the words 'has arisen,' as the same are used in the limitation statute of this territory under consideration, and as the same affects the cause of action involved in this case, we must hold that such cause of action arose in the state of Kansas, and is not barred in this territory until the same has become barred in the state of Kansas, or until he resides in Oklahoma a sufficient length of time for the territorial statute to run against that cause of action."

Section 4069 of our statute corresponds to § 351 of the Code of Civil Procedure of California, while our § 4079 corresponds with § 361 of the California Code; and they were both evidently copied from the California statute. As late as January of this present year, in *McKee v. Dodd*, supra, the supreme court of California was called upon to construe these sections, and determine as to whether a defendant could plead the bar of the statute of a foreign territory, in which he had resided a sufficient length of time to constitute a bar, within that jurisdiction. In that case the note had been executed, and was payable, in the state of New York, where both parties resided at the time of its execution. After the maturity of the obligation the defendant went to Europe, and finally located in Hawaii, where he resided for a sufficient length of time for the bar of the statute of limitations of the territory of Hawaii to run against the right of action. He died in Hawaii, leaving an estate in California. Action was thereafter commenced in California against the administrator of his estate, who pleaded the bar of the statute of limitations of the territory of Hawaii. In passing on the matter, and considering the provisions of the statute, the court said: "It is at once apparent, then, that the crux of this matter is to be found in the true interpretation to be given to the phrase 'when a cause of action has arisen.' Appellant contends that the cause of action 'arose' simultaneously in New York state at the time the promissory notes became due and payable, and also in Europe, where at that moment deceased chanced to be; that subsequently the cause of action arose successively in every country through which he passed, and arose finally in Hawaii upon his arrival there. . . . A cause of action, as Professor Pomeroy points out with his usual lucidity (Remedies and Remedial Rights, §§ 452 et seq.), arises out of an antecedent primary right and corresponding

duty, and the delict or breach of such primary right and duty by the person on whom the duty rests. 'Of these elements, the primary right and duty, and the delict or wrong combined, constitute the cause of action in the legal sense of the term, and as it is used in the Codes of the several states.' It was the right of plaintiff to look for payment of his debt at the time it became due, and at the place of payment,—New York state. It was the duty of the deceased to pay the debt, not only when it became due, but at the place of payment,—New York state. His failure in this regard gave rise to the cause of action, and, clearly, therefore, that cause of action arose in the state of New York. In a legal sense the cause of action cannot have two places of origin. It can arise in but one place, and that, in such a case as this, is where the note is payable and the payee resides." The court concludes its consideration of that case by holding that the defendant could not successfully plead the bar of the statute of the territory of Hawaii. See also *Hiller v. Burlington & M. River R. Co.* 70 N. Y. 223; *Omaha Nat. Bank v. Lindsay*, 41 Wash. 531, 84 Pac. 11; *Drake v. Found Treasure Min. Co.* (C. C.) 53 Fed. 474.

The latest judicial expression on this subject, to which our attention has been called, is that found in *Lawson v. Tripp*, supra, decided by the supreme court of Utah, March 28th of this year. The court there was considering the provisions of §§ 2888 and 2889 of the Revised Statutes of 1898 of Utah, which correspond to our §§ 4069 and 4079. Paragraphs 1 and 5 of the syllabus to that case state very clearly the holding of the court as to the meaning of these two sections when considered together, and are as follows:

"(1) The word 'return,' in Rev. Stat. 1898, § 2888, providing that 'if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state,' as applied to absent debtors, includes nonresidents, as well as citizens of the state who have gone abroad and returned to the state, the words 'return to the state' being equivalent to 'come into the state. [In support of this holding, see authorities cited in the opinion.]"

"(5) A cause of action consists in, first, the primary right and the facts from which it flows, and, second, the breach of that right and facts constituting such breach, which elements, taken together, create a remedial right."

We find, therefore, from an examination of the foregoing decisions of courts of last resort, in considering and passing upon the meaning and intent of these statutes, that 17 L.R.A. (N.S.)

they hold: First, that § 4069 has reference to the time when a right of action arises, or the right to commence an action has arrived, and that the period excluded from the computation of time applies both to residents and nonresidents of the state, and that the words "after his return to the state" refer as well to one who comes into the state, who has never before been in the state, as to one who has departed from the state, and returns to its jurisdiction; second, that § 4079, in referring to "a cause of action that has arisen in another state," has reference to the state or jurisdiction in which the contract or obligation was to be performed or discharged, and has no reference whatever to any intermediate state or jurisdiction through which the defendant may travel, or in which he may reside, between the time of executing the contract and the commencement of the action thereon.

We shall not attempt to review the authorities supporting the respondent's contention more than to say that the reasoning employed therein does not appeal to us as sound or logical, nor do they seem to us to portray or set forth the true meaning or intent of these statutory provisions. For example, in *Luce v. Clarke* the court holds, in substance, that, where a debt is made payable according to the terms of the contract in one state, and when it becomes due the debtor resides in another state, the "cause of action" cannot be said to have arisen in the state where the debt is payable, for the reason that the debtor is not personally within its jurisdiction. This is substantially the same position taken in *Osgood v. Artt.* To our minds there is a patent fallacy in this contention. Whenever a debt becomes due, and is not paid in accordance with the terms of the contract, a cause of action thereupon arises. This exists as an absolute and unqualified right, independent of where the debtor may be. His absence from the state in no way affects the right of the creditor to commence his action. His absence from the jurisdiction simply affects the service of process, and avoids the possibility of the creditor securing a personal service on the defendant, and a personal judgment against him; but it in no way affects a judgment *in rem* against any property he may have within the jurisdiction, nor does it affect the right to commence the action. Indeed, the action must be commenced before process can issue. Rev. Stat. 1887, §§ 4138 and 4139. It seems to us a strange and novel doctrine to hold that a debtor may, by his own acts, without the knowledge or consent of his creditor, create for himself a defense that can defeat the creditor's right of recovery. When the debtor enters into a contract, within a jurisdic-

tion, to pay a certain sum of money within that jurisdiction, a duty and obligation at once arises, requiring him to discharge the act at the time and place contracted, and the creditor has a right to assume that he will be there, at the time and place when and where the obligation matures, ready to discharge it. The debtor, in the face of his contract, should not be allowed to select the jurisdiction in which he will establish his residence, and thereby set the statute of limitations of a foreign jurisdiction to running against his creditor, without the latter's consent; nor should the creditor be required to keep a detective force in order to keep track of his whereabouts, and the various jurisdictions in which he locates, and a law firm to keep him posted as to the statutes of limitations of those several jurisdictions. If the debtor fails to discharge his obligation in accordance with his contract, and to keep faith with his creditor, he ought not to be heard to plead, as a bar in one jurisdiction, that he had previously acquired the defense of the statute of limitations by residing in another state for the period establishing the bar. It should be remembered that the statute of limitations is not a defense to the action, but is rather a plea to the remedy. *Chemung Min. Co. v. Hanley*, 9 Idaho, 794, 77 Pac. 226. The fact that a man pleads the statute of limitations does not pay his debt. He still owes it just the same, but it deprives the creditor of his remedy, on the theory that he has been guilty of laches and unreasonable delay in not prosecuting his claim within the period prescribed by the statute. If, however, the debtor should not plead this statute, a valid judgment might be obtained against him, even half a century after the execution of the contract.

Another thing that is of vital importance, in this and similar cases, is that, under the law of the state where the contract was made, it is still enforceable. As in this case, under the statute of Kansas, the bar of the statute of limitations ceased to run when Theis removed from the jurisdiction, and at the time this action was commenced it could have been maintained under the laws of that state, and a judgment *in rem* could have been entered against any property he might have had in that state, or, indeed, a personal judgment might have been recovered against him had he been within the jurisdiction. Now, we do not think it was the purpose or intention of § 4079 of our statute to relieve a man from his liability, on an obligation incurred in a foreign state, by reason of the plea of the statute of limitations of another state, or of any country, 17 L.R.A. (N.S.)

except that particular state in which the contract was executed, and the state in which it is sued upon. The state to which that section refers is evidently the state in which the contract was to be performed. That is clearly the state referred to by the expression "has arisen in another state." In our opinion it is the intention of our statute to avail a debtor, who has entered into a contract to be performed in a foreign state, of two, and only two, pleas of the bar of the statute of limitations: First, he may show that he has resided in this state for a period exceeding that of the bar of the statute of limitations of this state; second, he may show that the cause of action is barred by the statute of limitations of the state in which it was to be performed. Beyond this he may not go.

Counsel for respondent urge that this court approved *Luce v. Clarke*, 49 Minn. 356, 51 N. W. 1162, in *Alspaugh v. Reid*, 6 Idaho, 223, 55 Pac. 300, and that, on the authority of the latter case, and its approval of the Minnesota decision, the trial court sustained defendant's plea in this case, and accordingly followed the line of authorities cited by respondent. It is true that this court, in the *Alspaugh-Reid Case*, cited and approved *Luce v. Clarke*; but anything like a close examination of that case discloses the fact that the court did not have the question here involved before it, nor was the inquiry presented as to when and where a cause of action arises within the meaning of our statute of limitations. It is also worthy of note that the quotation from *Luce v. Clarke*, contained in the original opinion, is not entirely in harmony with the comment of the court in denying the petition for rehearing. There it is said that "a cause of action would arise if payment was not made as stipulated." It will also be observed that the opinion in that case, denying the petition for rehearing, confuses the cause of action, or right of action, with the power to serve process or acquire personal jurisdiction, and thereupon concludes that a creditor might have a cause of action, and yet not be able to "bring his suit because of the absence of the defendant." This expression is entirely misleading, and contrary to sound reasoning and legal principles. It only serves, however, to illustrate the unwisdom and danger of a court discussing and passing upon questions that are not involved in the case.

The trial court erred in allowing the plea of the statute of limitations of the state of Washington, and, for that reason, the judgment must be reversed, and it is so ordered, and a new trial is granted, and the cause is

hereby remanded. Costs awarded in favor of appellant.

Stewart, J., concurs.

Sullivan, J., did not sit at the hearing, and took no part in the decision.

MARYLAND COURT OF APPEALS.

SARAH SAXTON, Appt.,

v.

SOPHIE KRUMM.

(— Md. —, 68 Atl. 1056.)

Will — undue influence — presumption.

Undue influence in the making of a will cannot be inferred from the mere fact that it was in favor of one with whom testator had maintained illicit relations, and was contrary to his expressed intention of leaving his property to a dependent sister, who had cared for him in his youth.

(February 26, 1908.)

Case Note. — *Effect of meretricious relations between testator and beneficiary on validity of devise or bequest.*

As to the character of presumption of undue influence as to a gift to mistress, see note to *Platt v. Elias*, 11 L.R.A. (N.S.) 554.

Effect of meretricious relations upon the validity of gifts between the parties thereto is not considered in this note. The cases are limited to the validity of devises or legacies.

At the threshold of the question here under consideration, it is well to remember that undue influence is the exercise of sufficient force, coercion, or overpersuasion to destroy the free agency and will power of the testator, and so to dominate his mind as to constrain him to do what he would not have done if such influence had not been exercised. To hold that the mere existence of meretricious relations between a testator and a legatee or devisee will raise a presumption of undue influence would, therefore, require the inference from such a relation, not only that the devisee or legatee had an influence over the testator, but that this influence was so exercised as to destroy the liberty and free agency of the testator, and to substitute for his will the will of the devisee or legatee in question. The bare statement of the proposition shows the fallacy of such a doctrine. It is hardly necessary to say that no court sustains it, although the language used in a few cases in considering the existence of such a relation as an element to be considered with other facts in determining as a fact whether or not influence existed and was unduly exercised, has been tortiously construed to sustain it. The existence of such a relation is an element entitled to more or less weight 17 L.R.A. (N.S.)

A PPEAL by caveator from a judgment of the Circuit Court for Alleghany County sustaining the will of Christian F. Young, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. A. C. Strite and C. D. Wagaman for appellant.

Mr. Alexander Armstrong for appellee.

Burke, J., delivered the opinion of the court:

A paper writing, dated the 14th day of January, 1899, purporting to be the last will and testament of Christian F. Young, was offered for probate in the orphans' court of Washington county. By this paper the testator gave and bequeathed to Mrs. Lewis Krumm his house and lot situated in Watsontown, Pennsylvania, and all his money in banks, and all notes and bonds, and all valuables in his name and in his possession, if she survived him. On the petition and caveat of the appellant, who is a sister of the testator, three issues were sent to the circuit court for Washington county

in determining whether the will under consideration was the free and voluntary product of the testator's own mind, or whether it was induced by the influence of another, so exercised as to overcome the free agency of the testator. When an influence is so exercised,—no matter in what manner obtained, whether through meretricious relations, or in some lawful manner, as through the relation of husband and wife, or parent and child,—it will invalidate the will. It does not follow, however, that, in determining the existence and exercise of undue influence, no distinction is recognized between the exercise of such influence as arises from a lawful relation and a meretricious and unlawful one. In the latter case, however, the mere relation itself raises no presumption of undue influence, and in and of itself is not proof of undue influence sufficient to invalidate a will.

As was said by the court in *Wingrove v. Wingrove*, L. R. 11 Prob. Div. 81: "A young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favor, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet, the law does not attempt to guard against those contingencies. . . . To be undue influence in the eye of the law there must be—to sum it up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you, to come to a conclusion that he or she will make a will in a particular person's favor, because, if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to

for trial. The first issue related to the execution and attestation of the will; and the second and third issues related to fraud and undue influence exercised and practised upon the testator in the making of the will. The case was removed to the circuit court for Alleghany county. The trial in that court resulted in a verdict for the defendant upon each of the issues. This record brings up for review certain rulings of the lower court made during the trial. There are three exceptions in the record. Two relate to rulings upon questions of evidence and one to the action of the court upon the prayers. At the close of the plaintiff's case the court granted three prayers by which the jury were instructed to find their verdict for the defendant upon each issue.

The main and practically the only question in the case arises under the second prayer granted by the court. By this instruction the jury were told that the plaintiff had offered no legally sufficient evidence to show that the will in question was procured by undue influence. The testator undoubtedly had the right to dispose of his property in any manner he deemed proper, consistent with the policy of the law, and it is no valid objection to the will that he gave his property to a stranger in blood, provided he was mentally competent to execute a valid deed or contract, and was free from undue influence at the time. There is not the slightest evidence that Christian F. Young was not fully competent to make the will in question. The issues of fraud

another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence. . . . If, therefore, the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about,—for we are not dealing with a case of fraud,—though you may condemn the testator for having such a wish, though you may condemn any person who has endeavored to persuade, and has succeeded in persuading, the testator to adopt that view, still it is not undue influence."

The same line of thought was expressed in *Re Hamilton*, 29 Misc. 724, 62 N. Y. Supp. 820, wherein, after commenting on the fact that the right of a person during life to do as he will with his own property, so long as there is no actual violation of the civil or criminal law, was universally recognized, the court continued: "Strangely, however, there seems to be a widespread impression that a different state of affairs exists after a person is dead, and that in such case this court, or some other court, has power to come in and interfere . . . in his testamentary disposition of his property. This is not the fact. A person who could not be interfered with by anyone in his lifetime as to the disposition of his property can, if mentally competent and free from undue influence, insure by his will virtually the same absolute immunity of that property from outside interference after his death. Probate of a will cannot be refused merely because the court considers that the will is absurd, unjust, unnatural, cruel, immoral, or improper, and that the testator was wicked or unjust."

This doctrine, although not always based on this line of reasoning, is well settled. It was applied or recognized in the following cases as to devises or bequests by a man to a woman with whom he was having either illicit or adulterous relations: *Dunlap v. Robinson*, 28 Ala. 100 (bequest in favor of mistress and children as result of

illicit cohabitation); *Pool v. Pool*, 35 Ala. 12 (bequest in favor of mistress and children who were slaves); *Stant v. American Security & T. Co.* 23 App. D. C. 25; *Waters v. Reed*, 129 Mich. 131, 88 N. W. 394 (such relation is a circumstance entitled to be considered by the jury); *Weston v. Hanson* (Mo.) 111 S. W. 44; *Sunderland v. Hood*, 84 Mo. 293; *Westbrook v. Wilson*, 135 N. C. 400, 47 S. E. 467; *Howell v. Troutman*, 53 N. C. (8 Jones, L.) 304 (bequest to illegitimate child); *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11 (bequest to natural children at instance of mistress, to exclusion of wife and lawful children); *Re Middleton*, 68 N. J. Eq. 584, 59 Atl. 454, Affirmed in 68 N. J. Eq. 798, 64 Atl. 1134 (mistress chief beneficiary); *Schuchhardt v. Schuchhardt*, 62 N. J. Eq. 710, 49 Atl. 485 (bequest to illegitimate child); *Re Rand*, 28 Misc. 465, 59 N. Y. Supp. 1082 (mere meretricious relation not sufficient to prove undue influence); *Re Hamilton*, supra; *Re Jones*, 85 N. Y. Supp. 294 (third person beneficiary); *Re Mondorf*, 110 N. Y. 450, 18 N. E. 256 (right of competent testator to make any disposition of his property which pleases him will not be curtailed on moral grounds); *Rudy v. Ulrich*, 69 Pa. 177, 8 Am. Rep. 238 (illegitimate child beneficiary); *Main v. Ryder*, 84 Pa. 217 (wife and child excluded in favor of mistress and her children, with whom testator had resided many years); *Wainwright's Appeal*, 89 Pa. 220 (adulterous relation not sufficient evidence of undue influence); *Johnson's Appeal*, 159 Pa. 630, 28 Atl. 448; *Lewis's Estate*, 210 Pa. 599, 60 Atl. 280; *Allshouse v. Kelly*, 219 Pa. 652, 69 Atl. 88 (wife and children excluded); *Houser v. Lightner*, 42 Phila. Leg. Int. 289 (adulterous relation not sufficient to establish allegation of undue influence); *Re Gordon*, 28 Pittsb. L. J. N. S. 78 (illicit relation will not raise presumption of undue influence); *Heilbrun's Estate*, 9 Pa. Co. Ct. 350 (such relation is not proof of undue influence and does not give rise to presumption); *Mullen v. McKeon*, 25 R. I. 305, 55 Atl. 747 (fact of illicit relations, together with other facts, held to show undue influence); *O'Neill v.*

and undue influence assume his testamentary capacity. It is not pretended, nor is there a particle of evidence in the record to show, that the will was procured by fraud; but it was earnestly contended that the record contains sufficient evidence to have justified the jury in finding that the will was procured by undue influence. Upon this issue, the burden was upon the plaintiff, and she was obliged to offer evidence tending to show that the will was the product of an influence exerted upon the testator to such a degree as to amount to force, or coercion, or by importunities which he could not resist, so that the motive was tantamount to force or fear. This is the established law in this state, and has been applied in numerous adjudged cases in this

court. *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282; *Higgins v. Carlton*, 28 Md. 125, 92 Am. Dec. 666; *Layman v. Conrey*, 60 Md. 286; *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; *Zimmerman v. Bitner*, 79 Md. 128, 28 Atl. 820. In *Somers v. McCready*, 96 Md. 439, 53 Atl. 1117, where the question now before us was under consideration, the court, speaking through the late Judge Jones, said: "From what thus appears to be the rule of law by which we are to be guided in the inquiry as to the sufficiency of evidence to support a charge of undue influence in the procuring of a will, it is not sufficient to condemn and avoid the will to find that there was influence which affected the testator's disposition of his property; but it must be, to vitiate his act, such influ-

Farr, 1 Rich. L. 83; *Farr v. Thompson*, Cheves. L. 37 (bequest to offspring of cohabitation with slaves); *Bryant v. Pierce*, 95 Wis. 331, 70 N. W. 297 (verdict of jury invalidating will for undue influence sustained).

The same result was reached as to a devise or bequest by a testatrix in favor of a man with whom she had unlawfully cohabited. In *Re Willford* (N. J.) 51 Atl. 501, wherein such a bequest was said to raise no presumption against its validity, and was only a circumstance calling for a careful scrutiny.

In considering the validity of a bequest by a woman to a man with whom she had unlawfully cohabited, the court, in *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620, said: It is the policy of the law to secure to everyone the right to dispose of his property according to his individual will, and the only illegal influence is that which places the freedom of a testator's will under some kind of restraint; and therefore it matters not what may be the origin or character of any influence operating upon a testator, if it does not place him under any restraint. "It would seem to follow, also, that it would be equally immaterial how an individual may have acquired an influence over a testator, unless such influence is exerted in a manner that tends to restrain the free exercise of his will in the disposition of his property."

This doctrine was also recognized as to devises or bequests by a woman to a man with whom she had unlawfully cohabited, in the following cases: *Re Westernman*, 29 Misc. 409, 61 N. Y. Supp. 1065; *Re Evans*, 81 App. Div. 636, 81 N. Y. Supp. 1125; *Dickie v. Carter*, 42 Ill. 376 (improper relation insufficient; must be proof of exercise of improper influence); *Stewart v. Lyons*, 54 W. Va. 665, 47 S. E. 442.

This doctrine has also been applied as to devises or bequests where the reputed relation between the parties is lawful, although, as matter of fact, it is unlawful. *Moore v. Heineke*, 119 Ala. 627, 24 So. 374; *Re Ruffino*, 116 Cal. 304; 48 Pac. 127; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600; 17 L.R.A. (N.S.)

Porschett v. Porschett, 82 Ky. 93, 56 Am. Rep. 880.

Of course, if the devisee or legatee induced the testator or testatrix to believe the relation was lawful, and the devise or bequest was made because of this belief, it might be void on the ground of fraud. That question, however, is not here under consideration. See *Moore v. Heineke*, supra. Nor is a subsequent marriage between parties theretofore living in meretricious relations with each other, even though made for the purpose of thereby influencing the testator, sufficient to invalidate a will. *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413. The effect of undue influence, however, cannot be overcome by such marriage. *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432.

As stated in general, the courts recognize a distinction between influence exerted by or through a lawful relation, and that exerted through a meretricious relation. Coercion will be inferred from much less evidence under the latter status than under the former. Thus, in *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227, considering this subject, the court said: "The existence of an illicit relation between a deceased testator and his mistress will not give rise to a presumption of undue influence as a matter of law; but undue influence is more readily inferred in case of a will made in favor of a mistress than in the case of a will in favor of a wife. The existence of the relation is a circumstance to be considered by the jury along with other facts in the case. 'The influence of a lawful relation may result in testamentary dispositions which ought not to be set aside, when, if they resulted from the influence of an unlawful and immoral relation, they would produce deep suspicion,' the question to be determined being whether the influence exerted was undue or not. The jury have a right to consider the fact of the unlawful relationship, where there is proof, as there is in the case at bar, tending to show constraint and interference, impaired mental capacity, a loss of will power and sickness or disease, at the time of the making of the will."

ence as, at the time he was making such disposition, dominated his will, took away his free agency, and prevented the exercise of judgment and choice by him. There may have been advice, suggestion, or importunity going to affect his purpose and his act in the disposition he chooses to make, yet, if he had testamentary capacity and was free and unconstrained in his volition at the time of making his will, the influence that may have inspired it or any of its provisions will not be that influence which the law denounces as undue. The inquiry to be made in any given case goes to the effect of the influence in bringing about the testamentary act, and how the effect was produced, and includes, first, the existence of the influence; second, the opportunity for it to be exerted; and, third, its actual exer-

cise or operation to the extent and in such a way as to make the act in question the product of the influence uncontrolled by and irrespective of any volition on the part of the testator." When the evidence contained in this record is tested by this well-established rule, is it legally sufficient to support the issue of undue influence?

The testator died at Hagerstown, Maryland, in December, 1904. His wife had died in 1897. His only heirs at law were two sisters, one of whom is the appellant, and some nephews and nieces, children of two deceased sisters. Mrs. Saxton, the appellee, is a widowed sister of the testator, and was about sixty-three years of age at the time of his death, and is dependent upon others for her support. When the testator was a boy, she had taken care of him. Shortly

And in *Porschett v. Porschett*, supra, the court said: "A distinction may, and doubtless would, exist between the ordinary influence of a lawful relation and that of an unlawful relation. The exercise of an influence that must naturally exist by reason of the lawful relation would not be improper, while the exercise of a like influence by a stranger, or one occupying an unlawful relation, would be sufficient to destroy the will. This undue influence, however, must be exercised to render the will invalid, and, where there is no constraint operating on the mind of the testator at the time of the testamentary act, and he disposes of his property in accordance with a former purpose of his own, the devise will be upheld. . . . If the offspring of a sound and disposing mind and memory, the mere fact that the testator has given his estate by the will to one with whom he has lived for years as his wife, in preference to his brothers and sisters, will not authorize the court to say to the jury that the law presumes the existence of undue influence, and, in the absence of any proof to the contrary, they must find against the will."

On the same subject, in *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44, the court said: "Clearly, it is an important fact for the consideration of the jury as to what was the standpoint from which it is alleged the undue influence was exercised. The just and honorable influence of the pure and lawful relation of a wife cannot be put upon the same plane as the influence of a mistress. The influence of the virtues and affections of a wife may powerfully operate to move the mind of her husband to a testamentary disposition very favorable to her; and such influences are to be distinguished from the charms and meretricious arts of a lewd woman. . . . It cannot be said, however, that any presumption of undue influence, as matter of law, would arise from the mere fact that the will was favorable to one occupying an illegal relation to the testator; but the fact should be submitted to the jury as a circumstance to be considered by them 17 L.R.A. (N.S.)

along with the other facts of the case, and as shedding light upon the other evidence."

Pursuing the same line of reasoning, it was said in *Monroe v. Barclay*, supra: "It may, however, be admitted that the influences growing out of an unlawful marital relation do not stand, and should not be permitted to stand, upon an equal footing with those coming from the lawful relation, but the question recurs, whether the difference is in matter of law or of fact. If it be the former, then every will induced by an unlawful relation is void, though the testator might not have been 'under any restraint;' but this, it has been shown, is contrary to the general policy of the law. If it be the latter, then the proof of the unlawful relation should go with the other evidence to the jury to enable them to determine the question of undue influence."

On the other hand, the existence of a meretricious relation between parties may be considered, under certain conditions, as showing a moral obligation upon the part of a testator to rebut evidence of undue influence. Thus, in *Schuchhardt v. Schuchhardt*, 62 N. J. Eq. 710, 49 Atl. 485, it was said: "Testator owed a moral duty at least to make such provision; and arguments, and even persuasions, to do that duty, would not be undue, unless they appear to have produced a disposition of his property which he would not otherwise have made. . . . If the character of a testator and the circumstances existing at the execution of the will naturally and reasonably explain its provisions so that it may be fairly inferred that it was such a will as he would have made, the inference that it was the product of influence will not be justified."

On the same subject, it was said in *Re Ruffino*, supra: "I do not see how a will can be said to be unnatural which is in favor of a person for whom a sane testator entertained a strong affection. That a will is what would be called undutiful is only material when the circumstances are such as to show that the testator, if unin-

after the death of his wife in 1897 he made a will by which, after giving some small legacies to a number of his relatives, he devised and bequeathed one third of the remainder of his estate to the appellee, stating at the time that she had taken him into her home when he was a boy and had been a mother to him. He had contributed small sums of money to her for her support, always spoke kindly of her, and appeared to be attached to her, and this apparently affectionate relation continued down to the time of his death. There is evidence in the record to the effect that at Christmas, 1899, the testator told the appellee that she would have his property in case he died before her. The will in controversy was written by the testator in Hagerstown, and was attested by two reputable and credible witnesses, both

of whom were dead at the time of the trial, but whose signatures were proved. The caveatee, Mrs. Krumm, was not in Maryland when the will was made, and there is no evidence whatever in the record of any acts of undue influence exerted over him at that time, or at any other time. There is no evidence of suggestion, advice, or importunity on her part as to the disposition of his property. It is not shown that she ever discussed that matter with him, and there is nothing whatever to show the circumstances under which the will was made. The testator had known Mrs. Krumm in Watson-town before he moved to Maryland, and, prior to the death of his wife, had been on friendly terms with her. There is evidence tending to show that, after Mrs. Young's death, the testator had committed acts of

fluenced, would most likely have made what is called a dutiful will."

And in *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620, it was said: "It would be easy to suppose cases where considerations of moral obligation as well as that of public duty would require a man to make suitable provision for a woman with whom he had sustained this relation. In such cases it would do no violence to the morality of the law to sustain such provision, though it be made by will, and induced solely by influences springing from the unlawful cohabitation."

A few cases have been cited as opposed to the general doctrine enunciated in the foregoing cases, that the mere existence of meretricious relations is not sufficient to invalidate a devise or bequest. One of the leading cases cited as enunciating a contrary doctrine is *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620, wherein the court, in holding that all the facts and circumstances in that case, together with the fact that the will in question was in favor of an adulterous consort, to the exclusion of an only child, was sufficient evidence of undue influence, used language tending to show an intention to enunciate the doctrine that such a relation would raise a presumption of undue influence. That the court did not so intend the language used, however, is clearly apparent from the language of Chief Justice Lowrie, who, in speaking 'or the court in referring to the fact of such a relation, said: "I have, myself, thought that it raised a presumption of law of undue influence; but we do not so decide, but leave it as a question of fact merely."

In commenting on this case, however, the court, in *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432, said that it was there held that the mere fact of the unlawful relation of mistress to a testator was enough to justify an inference of undue influence, and that, together with the fact of the devise to her children, would be enough to justify a verdict against the validity of the will. This is not, however, the doctrine

of the Pennsylvania courts, and *Dean v. Negley* is not so construed by the courts of that state, as will appear from the Pennsylvania cases heretofore cited.

In *Leighton v. Orr*, 44 Iowa, 679, in considering the validity of a will, and also of conveyances of real estate, by a man to his mistress, the court said: "Whatever influence Mrs. Orr had over Wolcott, or however intimate and confidential their relations were, she obtained such influence by unlawful means, by ministering to his passions, by adulterous intercourse; their mode and relations in life were disgraceful. Influence obtained by the use of lawful means by a wife or child is eminently right and proper, if exercised with proper and honest motives. But the influence obtained by the use of unlawful means, immoral and indecent conduct, is undue influence, and no one should be permitted to derive benefit or advantage therefrom. . . . The unlawful relations existing between these parties; the influence the defendant must have obtained; the confidential relations that must have existed between them; the confidence necessarily reposed,—may be well likened to that existing between friend and adviser, physician and patient, or many other relations in life that beget confidence. It matters not what the relation is, if confidence is reposed and influence obtained. Transactions based thereon or obtained thereby will be jealously watched and guarded by courts of equity, and set aside unless the beneficiary shows the bona fides of such transaction." Although the validity of a will was involved in this case, as well as certain deeds, the court, in considering the matter, treated the question as the same. It will be noted that the question of gifts is not included in this note. The court, in passing on the question, however, treated the principles involved as the same, and applied the doctrine that is applied to gifts *inter vivos* between persons occupying toward each other confidential relations.

adultery with the appellee in Watsonstown, Pennsylvania, in 1897, and in Hagerstown in 1901. They corresponded frequently, and some of the letters of the appellee contained allusions of an impure and vulgar nature. But no reference is found in any of them to his business affairs.

The position of the appellant is that it was competent for the jury, as matter of law, to infer the will was procured by undue influence from the testator's illicit relation with the legatee, and from the unnatural disposition of the property, which disposition is contrary to his previously expressed purpose. To this proposition, which was earnestly pressed upon us by the very able arguments of the appellant's counsel, we cannot assent. There appears to be a general concurrence in the authorities that neither an illicit relation, nor an unjust and unnatural disposition of the property, is sufficient *per se* to warrant a conclusion of undue influence. They are circumstances properly to be considered by the jury in connection with evidence of undue influence, but they are not in themselves evidence either of fraud or undue influence. Where there is evidence of external acts of fraud, or undue influence, and especially where there is evidence that the capacity of the testator was impaired, the circumstances here relied on would be of great weight, as is evidenced from the cases of *Grove v. Spiker*, 72 Md. 300, 20 Atl. 144, and *Hiss v. Weik*, 78 Md. 439, 28 Atl. 400. In *Layman v. Conrey*, supra, and in *Dalrymple v. Gamble*, 68 Md. 523, 13 Atl. 156, the principle here stated is fully recognized and applied. In the latter case the court said: "A good deal was said in argument as to the relations which existed between the testator and this legatee, but, assuming them to have been as reprehensible and immoral as they have been pictured, still such immoral conduct, of which they were both equally guilty, did not deprive him of the power of making a will in her favor, nor her of the right to receive whatever property that will gave her." It would be a great inconsistency and absurdity to accord to a testator the power to dispose of his estate in any way he may think proper, consistent with the settled principles of the law, and at the same time say that his will may be annulled if it appears that its disposition is unjust, inequitable, or unaccountable. The effect of such a principle would be the practical denial of the free right of testamentary power in a very large class of cases.

The appellant places her main reliance upon the cases of *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620, and *Reichenbach v. Rudach*, 127 Pa. 593, 18 Atl. 432. It is to be 17 L.R.A. (N.S.)

noted that these cases are not in harmony with the general current of authority upon the question we are considering. In 29 Am. & Eng. Enc. Law, 2d ed. p. 131, the rule as to the weight to be given to the fact of illicit relation shown to have existed between the testator and the legatee is thus stated: "While undue influence is more readily imputed where the beneficiary under a will is the mistress of the testator, than where she is his wife, and while such illegitimate relation is a circumstance which is proper for the jury to consider, particularly where there is evidence that the testator's capacity was impaired,—still there is generally held to be no presumption of undue influence arising from such relation merely, though there is authority that the mere existence of the unlawful relation justifies a verdict against the validity of the will." The author states that this is the prevailing rule in at least eleven states of the Union. The exception to the general rule is to be found in the two Pennsylvania cases cited by the appellant. It is true that in *Dean v. Negley*, supra, where it was shown that the testator was living in open adultery with a woman to whose children he devised the bulk of his estate, and where it was shown that the testator was suffering from a cancerous disease and an impaired mind, and where numerous acts of undue influence were shown to have been exercised upon him by the woman with whom he was living as his mistress, the court held that the facts of the adulterous relation, taken in connection with the devise to the daughters of the adulteress, was "evidence of an undue influence exerted by her over the testator and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will." But in *Wainwright's Appeal*, 89 Pa. 220, the court declined to follow this broad rule. In *Wainwright's Case* the court, speaking through Chief Justice Sharswood, said: "In an issue of *devise-vel non* on the allegation of undue influence by the mother of an illegitimate child, the legatee in the will, the unlawful cohabitation of the mother with the testator is not of itself sufficient evidence from which a jury could infer undue influence. *Rudy v. Ulrich*, 59 Pa. 177, 8 Am. Rep. 238. It is true that, if there are other facts, unlawful cohabitation may be a circumstance of weight." In *Johnson's Appeal*, 159 Pa. 630, 28 Atl. 448, the evidence tended to show the testator devised nearly one half of his estate to a woman with whom he had unlawful relations at the time he executed the will. The court said: "The contention of the appellants necessarily rests upon the proposition that the existence of an unlawful relation between the testator and Mrs. Russel

is sufficient alone to raise a question of undue influence, and to carry the question to a jury. That such is not the law was expressly decided by this court in *Rudy v. Ulrich*, 69 Pa. 177, 8 Am. Rep. 238, *Main v. Ryder*, 84 Pa. 217, and *Wainwright's Appeal*, supra. In the former of these cases, *Dean v. Negley*, supra, was distinguished as resting upon the peculiarity of its own facts." In *Smith v. Henline*, 174 Ill. 196, 51 N. E. 227, it is said: "The existence of an illicit relation between a deceased testator and his mistress will not give rise to a presumption of undue influence as a matter of law; but undue influence is more readily inferred in case of a will made in favor of a mistress than in the case of a will in favor of a wife. The existence of the relation is a circumstance to be considered by the jury along with other facts in the case. . . . The jury have a right to consider the fact of the unlawful relationship where there is proof, as there is in the case at bar, tending to show constraint and interference, impaired mental capacity, loss of will power, and sickness or disease, at the time of the making of the will."

The jury could not have lawfully concluded that the will was procured by undue influence from the mere fact that he gave all his property to the appellee, with whom the evidence shows he had been guilty of adultery. He had a legal right to give her his property. He had full capacity to make a will. He was many miles distant from the appellee when he made it. It was made more than five years before his death, and he made no change in it, although he had ample opportunity to do so, and the fact he did not change it is evidence that he was satisfied with its provisions. The disposition of his property is unnatural, and it is much to be regretted that no provision was made for this aged and dependent sister; but the court cannot aid her without unsettling the fixed principles of law. The testator undoubtedly had an unlawful attachment to this appellee, and resorted to deceit and duplicity to obtain the possession of the will which he had made in 1897 in order that he might destroy it. We have examined the record carefully, and the most we are able to say is that the will is the product of the improper affection entertained by the testator for Mrs. Krumm. But this is not undue influence sufficient to avoid the will, as that term is understood in the law. The language of the court in *Sunderland v. Hood*, 84 Mo. 297, may well be applied to this case: "Many wills are made which ought not to have been made. Testators are always under some improper influence when the proper objects of their bounty are in no way provided for in their wills. A father

who disinherits a worthy and needy son or daughter has the right, but must be prompted by some improper influence, to do so. He may have formed an attachment for strangers stronger than that for his children, which should not exist; but the law does not prevent him from gratifying his whims or caprice in the testamentary disposition of his property."

2. There are two exceptions to testimony taken by the appellant. These exceptions are not referred to in the brief of the appellant's counsel, and were practically abandoned in this court. The testimony of Edward E. Hutzell was properly stricken out, as it had not the remotest bearings upon the issues. The witnesses to the will being dead, and the appellee having complied with the requirements of § 346, art. 93, Code Pub. Gen. Laws, there was no error in the ruling on the first exception, and the evidence objected to was properly admitted.

Finding no error in any of the rulings, they will be affirmed.

Rulings affirmed, and cause remanded.

SOUTH CAROLINA SUPREME COURT.

STATE OF SOUTH CAROLINA
v.

OSCAR BROOKS, Appt.

(79 S. C. 144, 60 S. E. 518.)

Homicide — animus — evidence.

1. To show the animus probably existing between a murderer and his victim, evidence is admissible of quarrels months before the homicide.

Same — self-defense.

2. One assaulted by a trespasser with a deadly weapon when within a few feet of his doorstep is not bound to retreat, but may meet force with force, even though the result is the death of his adversary.

(February 21, 1908.)

APPEAL by defendant from a judgment of the General Sessions Circuit Court for Marlboro County convicting him of murder. Reversed.

The facts are stated in the opinion.

Messrs. Townsend & Hamer for appellant.

Mr. J. Monroe Spears for the State.

Jones, J., delivered the opinion of the court:

The defendant, Oscar Brooks, charged

Note. — "Retreat to the wall" in homicide, see subject note to *State v. Gardner*, 2 L.R.A. (N.S.) 49.

with the murder of Harrison Alford, in Marlboro county, March 4, 1906, was found guilty with recommendation to mercy, and received sentence of life imprisonment.

The difficulty had its origin in a controversy as to the custody of Etta Brooks. This girl, who was about nine years old, was the daughter of the defendant by his first wife, Molly Alford. Defendant moved to Georgia and his wife died there. About two years later, when Etta was about three years old, she was taken charge of by Helen Alford, her grandmother, and reared as one of her family. The deceased was a son of Helen Alford, and lived with her. In January, 1904, defendant returned to Marlboro county, and later married a daughter of Helen Alford, a half sister of his first wife, and for some time lived in her home. While living at this place defendant expressed an intention to take Etta with him when he moved, and testimony was admitted, over objection by defendant's counsel, to show that there was an altercation between defendant and Helen Alford about it, during which defendant struck Helen Alford, and that, some days later, the subject came up again, and defendant cursed the oldest daughter of Helen Alford, whereupon the deceased, who was present, jerked defendant down and got on top of him, and was pulled off by some member of the family. The defendant then threatened to kill Harrison. Exception 8 assigns error in the admission of this testimony as to difficulties occurring eight months before the homicide, and in thus impeaching the character of defendant by showing specific acts of violence when his character was not put in issue. The evidence was properly admitted under the well-settled rule admitting evidence of previous quarrels, ill feeling or hostile acts between the parties to show the animus probably existing between them at the time of the homicide. *State v. Adams*, 68 S. C. 425, 47 S. E. 676; *State v. Emerson*, 78 S. C. 90, 58 S. E. 974.

On Sunday evening, March 4, 1906, Etta was accompanying the defendant to his home, at the command of defendant according to Etta's statement, but at her own request according to defendant's version, and they stopped at the home of Willie Johnson, about 200 yards from the house of defendant, to which he had moved after leaving Helen Alford's. The deceased and two others, after calling at the house of defendant and not finding him there, went to Johnson's house. Harrison, standing with knife in hand, addressed defendant, who was sitting down, asking why he had brought Etta off up there, to which defendant replied that he had not done so. The deceased declared that he had done so, and that he

would carry Etta back home that night. The defendant, fearing trouble and as pretext for getting away, asked for a drink of water, and stepped out of the door and ran to his home, leaving his wife and Etta at Johnson's. The defendant was soon heard to call for his wife and Etta to come home, and was heard cutting wood. Johnson testified that deceased declared: "I came after Etta. . . . I am going to carry her home to-night, or Oscar Brooks will kill me or I will kill him." Defendant declared to Evander McClellan and Henry Sports before deceased (who was approaching) arrived: "I want you to bear witness that, if Harrison Alford comes in my yard to-night, there will be bloodshed, for I am going to forbid him coming in." When they reached the entrance to the yard of defendant's dwelling, defendant ordered deceased and his two companions, Coot Turner and Henry McDowell, not to enter. Defendant was then standing at his wood pile near his dwelling, with axe in hand, with which he had been cutting wood. Deceased's two companions stopped, and advised him not to enter, but deceased went on in, declaring that he would go where he "dammed pleased," further saying, "I will go in you yet, old man." The deceased went around by the pump, and, after pumping once or twice, he continued around towards the doorsteps, near which defendant was then standing. State witness Evander McDowell testified: "Harrison continued on around, and got something near the doorstep and Mr. Brooks. . . . Harrison was venturing on towards Mr. Brooks, and Mr. Brooks said 'Stand off. If you do not, I will hurt you.'" That the parties cursed each other, and about that time Brooks struck Alford with the axe. Defendant testified that he was going towards his door, intending to get in the house first, that deceased came on him, cutting at him with a knife when he struck with the axe to save his own life. No other witness testified to seeing any knife in deceased's hand at the time of the fatal blow. There was testimony that deceased put his knife in his pocket before entering the yard, and that his knife was found closed in his pocket after his death, about two days later. There was also testimony that Evander McDowell and Henry Sports, state witnesses who testified that they saw no knife in deceased's hands, declared before the trial that deceased was cutting at defendant with a knife when defendant struck him with the axe. All the witnesses agree that the fatal blow was struck within the yard of defendant's dwelling, and within a few feet of his doorsteps, at night, after warning not to enter the yard, and not to come on defendant. The

deceased was younger, heavier, and stouter than defendant. The defendant sought to excuse the homicide on the ground of self-defense and defense of his dwelling.

Judge Gage charged all the requests presented by defendant's counsel on the law of self-defense, except the following request, the refusal of which is the ground of appellant's main contention: "(3) When a trespasser enters upon the premises or land of a party, it is his duty to gently lay his hands upon him and bid him leave, and, if he refuses, he is justified in using sufficient force to expel him. But the dwelling house of a man, where he lives, is his home, or castle, and he may repel force by force in the defense of his person, habitation, or property against one who manifestly intends and endeavors by violence to commit a felony on either; and in such case he is not bound to retreat, but may pursue his adversary until he has secured himself from all danger, and, if he kills his adversary, it is excusable homicide." In response to this request, the court said: "Now, you have heard, in the argument of counsel and in the requests to charge, another defense, called the 'defense of the castle.' That law is this: It is a law which requires a man to defend his own home, or, more accurately, his own dwelling house. If a man is in his dwelling house, and another man offers to break into it by force, the man in the house has the right to keep him out, even to the extent of killing him. But that belongs to the man's dwelling house. It does not belong to his yard; and, under the testimony of the case here, that doctrine has no application. And even in a man's house, if a person enters, if he enters without violence, and is in, it was decided one hundred years ago in this state that the occupant of the house could use only such force as was necessary to put him out; and his unlawful presence without violence would not justify an occupant of the house in killing him to get him out. He can kill him to keep him from coming in there. If he is in peaceably, he can use only such force as is necessary to put him out. As I have told you, the doctrine of the castle has no application in this case, because it is not claimed that the killing was done in the dwelling house." We think it was harmful error to refuse the instruction. The court, neither in response to this request, nor in any other portion of his charge, instructed the jury as to the right of defendant to defend himself, without retreating, against a violent assault of a trespasser within his dwelling-house yard, but, on the contrary, the case was submitted to the jury under the rules ordinarily governing the law of self-defense, including the duty of defendant to retreat if there be

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a probable means of escape. For the purposes of this question only, we must assume as a possible theory of the case that the deceased was struck while assaulting defendant with a knife, for such was the testimony of defendant.

In the case of *Beard v. United States*, 158 U. S. 550, 39 L. ed. 1086, 15 Sup. Ct. Rep. 962, after review of numerous authorities, the court held that a person on his premises outside his home, in his orchard lot 50 or 60 yards from his dwelling, if assaulted by another with a deadly weapon, is not bound to retreat, but may stand his ground and meet such attack, even to the killing of his assailant, if in other respects he brings himself within the ordinary rules of self-defense. The court quotes, among other authorities, from 1 East, P. C. 271, Fost. C. C. 273, 2 Wharton, Crim. Law, ¶ 1019, language substantially the same as the second sentence of the request which was refused. In *State v. Bodie*, 33 S. C. 124, 11 S. E. 624, the court recognized as correct instructions to the jury substantially in accordance with appellant's request in this case. The case of *State v. Rochester*, 72 S. C. 199, 51 S. E. 685, holds that one on his land adjoining a public road, if assaulted by another who is on such road, is bound to retreat before taking the life of his adversary if there is probability of his being able to escape without losing his life or suffering grievous bodily harm. The court declared the reason of this distinction to be that, under the circumstances, he would not have had the right to eject his adversary from the place where he had a right to be. In the case at bar the deceased was a trespasser, and the defendant had the right to eject him. If one on his own premises not a part of his habitation precincts is not bound to retreat before the violent assault of a trespasser, for a greater reason one within the curtilage of his home is not bound to retreat. There is much reason and authority for holding that one within the curtilage of his dwelling is in fact and law within his dwelling. *Lee v. State*, 92 Ala. 15, 25 Am. St. Rep. 19, 9 So. 407; *State v. Bartmess*, 33 Or. 110, 54 Pac. 167; note to *State v. Sumner*, 74 Am. St. Rep. 739; 25 Am. & Eng. Enc. Law, p. 278.

We do not regard it important to consider at length any of the remaining exceptions to the charge as to self-defense and manslaughter. Considering the charge as a whole, the law declared as to manslaughter and as to self-defense, except in the particular above discussed, was free from error.

For the error indicated, the judgment of the Circuit Court is reversed, and the case remanded for a new trial.

WISCONSIN SUPREME COURT.

JOHN BONNETT, Resp.,

v.

JOSEPH E. VALLIER, as Factory Inspector, et al., Appts.

(— Wis. —, 116 N. W. 885.)

Statute — constitutionality — who may challenge.

1. A person specially injuriously affected by enforcement of an unconstitutional law may, in judicial proceedings, challenge the validity thereof.

Same — enforcement — action to enjoin.

2. An action against state officials to enjoin them from enforcing an unconstitutional legislative enactment is not an action against the state. In such circumstances the law, so-called, affords such state officers no protection. They are judicially regarded as acting in their personal capacities only.

Same — unconstitutional act — effect.

3. An unconstitutional legislative enactment

Headnotes by MARSHALL, J.

Case Note. — Constitutionality of statutory regulations as to safety and sanitary conditions of tenement, lodging, and boarding houses.

This note does not include cases where the provision was a general one, applying alike to all buildings. Neither does it include those cases passing upon the necessity of a license to carry on lodging and boarding houses. The cases seem to be agreed that provisions looking to the protection of health and safety concerning such places are a valid exercise of the police power, provided, always, that they are reasonable.

So, in *Tenement House Department v. Moesch*, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, affirming 90 App. Div. 603, 85 N. Y. Supp. 1148, and 89 App. Div. 526, 85 N. Y. Supp. 704, and affirmed in 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781, it was held that a provision referring to tenement houses, requiring that all school sinks, privy vaults, or other similar receptacles, be removed and replaced by individual water-closets, of which there should be provided one for every two families, was held constitutional as a proper exercise of the police power. This act was designed for New York city, and the court's observation that it might not be adapted to smaller cities was quoted in *BONNETT v. VALLIER*.

In *Signell v. Wallace*, 35 Misc. 656, 72 N. Y. Supp. 348, the court, while conceding that the requirement of a statute passed April 25, 1901, that the excavation for a tenement house must be commenced in good faith on or before the 1st day of June, 1901, after approval of plans therefor by the department of buildings, as a condition that it be subject only to the provisions of the statute affecting existing tenement houses, was reasonable and a valid exercise of the police power,—held that the further condition that the first tier of beams must be set on or before the 1st day of August, 1901, was invalid, as it was unreasonable and had no direct tendency toward the accomplishment of the main purpose of the legislation.

ment, though law in form, is in fact not law at all. "It confers no rights; it imposes no duties; it affords no protection; . . . it is in legal contemplation as inoperative as though it had never been passed."

Constitution — duty to uphold.

4. A court, upon its jurisdiction being properly invoked for the purpose, is in duty bound to test a legislative enactment by all constitutional limitations bearing thereon and condemn it if it be found illegitimate, and thus uphold the Constitution as superior to legislative will.

Statute — constitutionality — doubt.

5. In testing a legislative enactment as regards its constitutionality, all reasonable doubts must be resolved in favor of legislative power.

Police power — limitations.

6. Legislative authority in the field of police power, the same as in any other, is fenced about on all sides by constitutional limitations. It cannot properly extend beyond such reasonable interferences as tend to preserve and promote the enjoyment, generally, of those "unalienable rights" with which all men are endowed, and to secure which "governments are instituted among

sions of the statute affecting existing tenement houses, was reasonable and a valid exercise of the police power,—held that the further condition that the first tier of beams must be set on or before the 1st day of August, 1901, was invalid, as it was unreasonable and had no direct tendency toward the accomplishment of the main purpose of the legislation.

And in *Com. v. Roberts*, 155 Mass. 281, 16 L.R.A. 400, 29 N. E. 522, in a case involving a dwelling, the provision that "every such building [including tenements] situated on a public or private street, court, or passageway in which there is a public sewer, and every building connected with any sewer, shall have sufficient water-closets connected with the sewer, and shall not have a cesspool or privy, except where, in the opinion of the board of health, it can be allowed to remain temporarily, and then only as said board shall approve," was held constitutional as a valid exercise of the police power.

So, in *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833, a provision referring to tenement houses, and providing, in substance, that every such house should have Croton or other water furnished in sufficient quantity at one or more places on each floor, occupied, or intended to be occupied, by one or more families, was held valid as a proper and reasonable exercise of the police power in the aid of health and fire protection.

In *Adams v. Cumberland Inn Co.* 117 Tenn. 470, 101 S. W. 428, a provision requiring the owners of lodging houses, etc., to place fire escapes upon them was held to be a reasonable and valid police regulation.

men." When it goes beyond that, it enters the field of the destructive, and so offends against some constitutional limitation.

Same — legislative and judicial questions.

7. What constitutes a proper subject for regulation under the police power is a judicial question. Matters of mere expediency in respect thereto are wholly for legislative cognizance. What is reasonable is primarily for legislative judgment, but in the ultimate it is a judicial question. There must be reasonable ground, having regard for the public welfare, for the interference, and the means adopted to accomplish the purpose in view must be reasonably necessary.

Same — reasonable exercise.

8. What is reasonable in any given case being a matter resting in human judgment and difficult of ascertainment, in all doubtful cases judicial authority must defer to legislative wisdom; but, where the interference is plainly excessive, the duty of the court to repel the encroachment is absolute.

Same — measure of reasonableness.

9. What is reasonable is not necessarily

what is best, but what is fairly appropriate to the purpose, under all the circumstances. The scope of the term "reasonable," as regards any situation, must be measured having regard to the fundamental principles of human liberty as understood at the time of the formation of the Constitution, adapting the same to modern conditions.

Same — language of statute — facts.

10. In determining what is reasonable, the court must look to the language of the statute and the facts which appear because of judicial knowledge thereof or otherwise.

Tenements — regulation.

11. The regulation and maintenance of tenement, lodging, and boarding houses is a proper subject for legislative regulation; but the degree of regulation permissible varies greatly according to circumstances.

Same — general application of regulations.

12. A police regulation in the field mentioned in the last foregoing paragraph, which is not excessive as to a large city, might be held unreasonable if applied to the state at large.

Same — impracticability of regulations.

13. Limitations in the field suggested im-

And in *People ex rel. Kemp v. D'Oench*, 111 N. Y. 359, 18 N. E. 862, the court said that it had no doubt of the competency of the legislature, in the exercise of the police power, to pass an act construed as having been passed to regulate tenement and apartment houses, which provided the height to which such houses might be built.

In *New York v. Herdje*, 68 App. Div. 370, 74 N. Y. Supp. 104, an act regulating the erection of tenement houses, the exact provisions of which do not appear, was held valid as an exercise of the police power.

In *People ex rel. Cornman v. Butler*, 120 App. Div. 590, 105 N. Y. Supp. 117, a provision of the tenement-house laws as to the arrangement of windows in alcoves was construed and given effect.

In *State v. Hyman*, 98 Md. 596, 64 L.R.A. 637, 57 Atl. 6, provisions which, in substance, enacted that no person except those living in any tenement should use it for the manufacture of clothing; that no room in any tenement should be so used until a permit is obtained; that no person, firm, or corporation should work, or hire or employ any person to work, on such clothing in a room or apartment in the rear of a tenement without obtaining a written permit, — were held constitutional as being within the police power for protecting the public health.

But in *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, a provision that "the manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor, in any tenement house, is hereby prohibited, if such floor, or any part of such floor, is, by any person, occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any house-

hold work therein," was held unconstitutional. The court said: "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void."

In *Bailey v. People*, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98, a provision prohibiting more than six persons sleeping in the same room of a lodging house at the same time was held unconstitutional as a discrimination in favor of hotels, inns, and boarding houses against lodging houses. The court said: "The principle which may be deduced from the declarations of this court on the subject is, that an act which arbitrarily discriminates against one class in the transaction of a business of a lawful occupation, and leaves unaffected by such discriminatory enactment other persons or classes of persons engaged in acquiring property in a manner not distinguishable in character from that in which the class discriminated against is employed, is in contravention of the constitutional guaranties under consideration."

In *Re Paul*, 94 N. Y. 497, a section of a statute regulating the manufacture of cigars in tenement houses was held unconstitutional because the title was not broad enough. The validity of the act as an exercise of the police power was held not necessary to be considered.

possible or impracticable to comply with, either because of absence of facilities necessary therefor, or expense so great as to render the regulation prohibitive in many situations, are unreasonable.

Same — minuteness of regulations.

14. A general police regulation down to minute particulars, of the construction and maintenance of tenement houses, rendering it impracticable to safely comply therewith in the absence of any official approval of plans and specifications in advance and containing no provision for such approval, is unreasonable.

Constitutional law — building regulation — equal protection.

15. Where the penal feature of a police regulation is so severe, having regard to the nature of the regulation, as to efficiently intimidate property owners from using their property at all for tenements or lodging-house purposes, and from resorting to the courts for redress or defense as to their honestly supposed rights, it is highly unreasonable. It is a defiance of the equal protection of the laws, rendering the act void irrespective of whether its provisions would otherwise be valid.

Same — resistance.

16. To penalize good-faith resistance to the enforcement of a law by judicial interference is unreasonable and indefensible from any point of view. It denies the equal protection of the laws; it violates the constitutional guaranty to every person of a certain remedy in the law for all injuries to persons and property, and violates every principle of civil liberty.

Tenement — street courts — width.

17. A law regarding the construction of tenement houses requiring street courts to be 6 feet in width between the lot line and the opposite wall of the building under all conditions, and in all localities to be at least 6 feet wide, is an unreasonable interference.

Health — boarding-house regulation — reasonableness.

18. A police regulation making every habitation, regardless of locality, a boarding or lodging house in case the proprietor allows a person not a member of his family to have a sleeping room in the house, and regulates the maintenance of the house as regards light, location of beds, equipment with water-closets, etc., is an unreasonable interference.

Same — practical regulations.

19. There is a wide interval between the ideal and the practical; the latter standard should prevail as to legislative regulations as to the construction and maintenance of tenement, lodging, and boarding houses. Common sense as to what is reasonable in such matters should prevail, not the extreme views of well-meaning persons, as to what is for the best.

Statute — unconstitutional features.

20. Where parts of a law, viewed by themselves, are unconstitutional, and other 17 L.R.A. (N.S.)

parts, so viewed, are not, the former may be condemned and the latter upheld, if the two are separable; otherwise not. In case the act as a whole has one or more features pervading the entire act, it must be regarded as an entirety, and all be condemned as unconstitutional.

(June 5, 1908.)

APPEAL by defendants from an Order of the Circuit Court for Milwaukee County overruling a demurrer to plaintiff's complaint in an action brought to restrain the defendants from interfering with the construction of a building. Affirmed.

Statement by Marshall, J.:

Action by a property owner specially affected by chapter 269, p. 910, Laws 1907, against public officers required by the terms of such chapter to enforce its provisions, to restrain them from doing so by interfering with the plaintiff in the construction of a building upon a lot owned by him in the city of Milwaukee.

The complaint sets forth facts sufficient to entitle plaintiff to the relief prayed for if the law referred to is unconstitutional. Among others, these things are substantially stated: Plaintiff entered into a contract in writing with a construction company for the building of a four-story flat building upon a lot owned by him in the city of Milwaukee, Wisconsin, having a frontage of 50 feet on one of the streets of said city and a depth of 150 feet; the plans for the building were duly approved by the building inspector of said city before the contract was let, and that they complied in all respects with chapter 269, p. 910, Laws 1907, except as to street courts. The plans call for a building 44 feet wide, except the rear portion for a length of 22½ feet, which is 50 feet wide. For a distance of 72 feet from the street on each side of the building there is to be an open space known as a street court 3 feet wide, open from the ground to the sky, whilst the law aforesaid required said courts to be 6 feet wide. The courts as planned satisfy all reasonable necessities. To require them to be 6 feet wide would be unreasonable, would render his plans for the building useless, his lot unsuitable for such a building, and irreparably damage him. Defendants, unless enjoined by the court, in case the construction company proceeds with the building as planned, will cause plaintiff or his agents, or the officers, agents, and employees of the company, to be arrested, his permit to construct the building will be revoked, and he will be prevented from going on with the work as planned. Said law is so unreasonable as to be unconstitutional and void. It applies to

all towns, cities, and villages of the state, whereas it is impracticable to comply with it in the absence of a sewer system and system of water supply. There are many such cities, villages, and towns where it would be impossible to equip a building as required by the law. Plaintiff and all those who may act in his behalf in the construction of a building upon his lot as planned are menaced with arrest and prosecution under said law for each and every day they persist in the work. Plaintiff has no adequate remedy at law for the injuries to him threatened as aforesaid.

An interim injunction was granted restraining defendants from doing the things pending the action which the same was instituted to permanently restrain, a bond for \$250 being given..

The defendants demurred to the complaint for insufficiency and the demurrer was overruled. Defendants appealed from the order generally. It covered the ruling as to the demurrer and the one regarding the temporary injunction.

The defendants entered a motion in this court to dismiss the action upon the ground of its being an action against the state, and to dissolve the temporary injunction, and for a temporary injunction restraining the plaintiff and all persons acting for him from proceeding with the construction of the building mentioned in the complaint pending the action.

Messrs. F. L. Gilbert, Attorney General, and A. C. Titus, for appellants:

It is a general rule that a court of equity will not lend its aid to prevent an illegal act nor to enjoin the enforcement of criminal laws.

High. Inj. 4th ed. ¶¶ 20, 68; Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 479; Holdersstaffe v. Saunders, 6 Mod. 16; Tiede v. Schmeidt, 99 Wis. 201, 74 N. W. 798; Hemaley v. Myers, 45 Fed. 283; Gault v. Wallis, 53 Ga. 675; Yates v. Batavia, 79 Ill. 500; Crighton v. Dahmer, 70 Miss. 602, 21 L.R.A. 84, 35 Am. St. Rep. 666, 13 So. 237; Davis v. Society for Prevention of Cruelty, 16 Abb. Pr. N. S. 73; Kramer v. Board of Police, 21 Jones & S. 492; Balogh v. Lyman, 6 App. Div. 271, 39 N. Y. Supp. 780; Kenny v. Martin, 11 Misc. 651, 32 N. Y. Supp. 1087; Golden v. Guthrie, 3 Okla. 128, 41 Pac. 350; Burnett v. Craig, 30 Ala. 135, 68 Am. Dec. 115; Poyer v. Des Plaines, 123 Ill. 111, 5 Am. St. Rep. 819, 13 N. E. 819; Skakel v. Roche, 27 Ill. App. 423.

The exceptions are where property rights are being destroyed or threatened, or where the plaintiff is being subjected to repeated or unreasonable prosecutions.

Joseph Schlitz Brewing Co. v. Superior, 17 L.R.A. (N.S.)

117 Wis. 297, 93 N. W. 1120; Wallack v. Society for the Reformation, 67 N. Y. 23; Shinkle v. Covington, 83 Ky. 420; Milwaukee Electric R. & Light Co. v. Bradley, 108 Wis. 467, 84 N. W. 870.

The action is, in fact, against the state, which cannot be sued except as the legislature shall provide by law therefor.

Chicago, M. & St. P. R. Co. v. State, 53 Wis. 509, 10 N. W. 560; Houston v. State, 98 Wis. 481, 42 L.R.A. 39, 74 N. W. 111; State ex rel. New Richmond v. Davidson, 114 Wis. 563, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1067; Taylor v. Hall, 71 Tex. 206, 9 S. W. 141; 26 Am. & Eng. Enc. Law, 2d ed. p. 488.

A suit to restrain the attorney general of the state from enforcing a penal statute is a suit against the state.

Union Trust Co. v. Stearns, 119 Fed. 790; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Rhodes & J. Mfg. Co. v. New Hampshire, 70 Fed. 721; Western U. Teleg. Co. v. Myatt, 98 Fed. 335.

The court will give further inquiry to the subject than to ascertain merely the names of the parties to the record in order to determine whether or not the state is an actual party to the controversy.

United States v. Beebe, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; Re Ayers, 123 U. S. 492, 31 L. ed. 225, 8 Sup. Ct. Rep. 164; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 202, 609; Pennoyer v. McConaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; McWhorter v. Pensacola & A. R. Co. 24 Fla. 417, 2 L.R.A. 504, 12 Am. St. Rep. 220, 5 So. 129; Mills Pub. Co. v. Larrabee, 78 Iowa, 97, 42 N. W. 593; Tate v. Salmon, 79 Ky. 540; State ex rel. Hart v. Burke, 33 La. Ann. 498; State ex rel. McNery v. Lanier, 47 La. Ann. 110, 16 So. 647; Michigan State Bank v. Hastings, Walk. Ch. (Mich.) 9; McElroy v. Swart, 57 Mich. 500, 24 N. W. 766; Ottawa County v. Auditor General, 69 Mich. 1, 36 N. W. 702; Lodor v. Baker, 39 N. J. L. 49; Lowry v. Thompson, 25 S. C. 416, 1 S. E. 141; Hosner v. De Young, 1 Tex. 764; League v. De Young, 2 Tex. 497; State v. Wygall, 46 Tex. 447; Milwaukee Electric R.

& Light Co. v. Bradley; Joseph Schlitz Brewing Co. v. Superior; and Chicago, M. & St. P. R. Co. v. State,—*supra*.

The act in question is constitutional.

State v. Heinemann, 80 Wis. 253, 27 Am. St. Rep. 34, 49 N. W. 818; State ex rel. Larkin v. Ryan, 70 Wis. 676, 36 N. W. 823; State ex rel. Baltzell v. Stewart, 74 Wis. 620, 6 L.R.A. 394, 43 N. W. 947; Fire Department v. Helfenstein, 16 Wis. 136; Carter v. Dow, 16 Wis. 298; State ex rel. Henshall v. Ludington, 33 Wis. 107; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425; Re Langley, 37 Wis. 377; Hinckley v. Chicago, M. & St. P. R. Co. 38 Wis. 194; Taylor v. State, 35 Wis. 298; State v. Wisconsin C. R. Co. 128 Wis. 79, 107 N. W. 295; Baker v. State, 54 Wis. 368, 12 N. W. 12; State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; State v. Redmon (Wis.) 14 L.R.A. (N.S.) 229, 114 N. W. 137; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Com. v. Strauss, 191 Mass. 545, 11 L.R.A. (N.S.) 968, 78 N. E. 136; Welch v. Swasey, 193 Mass. 364, 118 Am. St. Rep. 523, 79 N. E. 745; Health Department v. Trinity Church, 145 N. Y. 49, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Heister v. Metropolitan Bd. of Health, 37 N. Y. 661; People ex rel. Outwater v. Green, 56 N. Y. 466; Health Department v. Knoll, 70 N. Y. 630; Polinsky v. People, 73 N. Y. 65; Health Department v. Purdon, 99 N. Y. 237, 52 Am. Rep. 22, 1 N. E. 687; Re Paul, 94 N. Y. 497; People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; Lawton v. Steele, 119 N. Y. 233, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; Health Department v. Lalor, 38 Hun, 542; Health Department v. O'Reilly, 17 Jones & S. 524; People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 18 N. E. 862; New York v. Herdje, 68 App. Div. 370, 74 N. Y. Supp. 104; Tenement House Department v. Moesch, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231; Tenement House Department v. Newland Realty & Constr. Co. 56 Misc. 635, 107 N. Y. Supp. 723; Freund, Pol. Power, § 123; State v. Robb, 100 Me. 180, 60 Atl. 874.

It is not necessary that statutes passed in the exercise of police power should apply equally and uniformly to all citizens of the commonwealth in order to be constitutional.

Com. v. Danziger, 176 Mass. 290, 57 N. E. 461; Com. v. Roberts, 155 Mass. 281, 16 L.R.A. 400, 29 N. E. 522; American Print Works v. Lawrence, 23 N. J. L. 9, 17 L.R.A. (N.S.)

Mr. Edward W. Frost, also for appellants:

The court will not interfere unless the law questioned is, beyond a fair doubt, unreasonable and unduly oppressive upon individuals, and the judgment of the legislature is to be taken as correct unless it appears to be wrong beyond reasonable controversy.

Re Wilshire, 103 Fed. 620; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; State v. Redmon (Wis.) 14 L.R.A. (N.S.) 229, 114 N. W. 137.

Messrs. Rose, Witte, & Rose for respondent.

Marshall, J., delivered the opinion of the court:

The complaint shows that respondent would be specially injuriously affected by enforcement of chapter 269, p. 910, Laws 1907. Therefore we will regard as the sole matter submitted for consideration that of whether such law is unconstitutional.

That it is competent, under the police power, by legislative enactments, to regulate the construction and maintenance of tenement and lodging houses to some extent, and that legislative activity in that field within all proper limits is commendable, are not open to serious controversy. In some situations such regulations are imperative in the interest of public safety and public health. The court approaches the consideration of the law in question fully appreciating, it is thought, the worthy motives of those within and those without the legislature to whose efforts the legislation is attributable. Good intentions in the passage of a law, or a praiseworthy end sought to be attained thereby, cannot save the enactment if it transcends, in the judgment of the court, the limitations which the Constitution has placed upon legislative power. In such cases the law, so-called, is not a law at all. As has been aptly said: "It confers no rights; it imposes no duties; it affords no protection; . . . it is, in legal contemplation, as inoperative as though it had never been passed." Norton v. Shelby County, 118 U. S. 442, 30 L. ed. 186, 6 Sup. Ct. Rep. 1125.

The appeal is often made to courts directly or indirectly to look favorably upon a law because of the worthy purpose in the minds of the promoters in securing its place upon the statute books. That cannot go to the extent of causing hesitancy or failure to condemn a legislative act which clearly exceeds the lawmaking power. Courts have their duty to perform in a case like this, and, however unpleasant it may be, they cannot turn aside on any account whatever,

even in the face of manifestly the very best of intentions upon the part of the law-makers and promoters. The greatest constitutional lawyer of our country during its early history aptly said: "Good intentions will always be pleaded for every assumption of power, but they cannot justify it. The Constitution was made to guard the people against the dangers of good intentions. When bad intentions are boldly avowed the people will promptly take care of themselves. They will always be asked why they should resist or question the exercise of power which is so fair in its object, so plausible and patriotic in appearance, and which has the public good alone confessedly in view. Human beings, we may be assured, will generally exercise power when they get it, and they will exercise it most undoubtedly under a popular government under the pretense of public safety or high public interest. . . . They think there need be little restraint upon themselves."

Again, they sometimes, it seems, lose sight of the fact that there are such restraints, and so it becomes necessary for the courts, in the performance of their constitutional duty, to call that to mind. The fathers foresaw that in writing into the Constitution those significant words: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Const. art. 1, § 22.

The general principles by which the constitutionality of such a law as the one in question must be determined have been so often, so recently, and so fully discussed here that it is useless to go over the ground again at this time. It is sufficient to refer to the following: State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; State ex rel. Jones v. Froehlich, 115 Wis. 32, 58 L.R.A. 757, 95 Am. St. Rep. 894, 91 N. W. 115; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; State v. Redmon (Wis.) 14 L.R.A. (N.S.) 220, 114 N. W. 137.

The general effects of the authorities are these: An act of the legislature is to be sustained unless it violates some constitutional limitation beyond reasonable question. Such limitations exist by implication as well as by express prohibition. A police regulation must not extend beyond that reasonable interference which tends to preserve and promote enjoyment, generally, of those "inalienable rights" with which "all men are endowed" and to secure which "governments are instituted among men," and must not violate any express prohibition or requirement of the state or national Constitution.

When it goes beyond the scope indicated, and enters into the dominion of the destructive, it is illegitimate, and offends against some constitutional restraint, express or implied, and though law in form, it is, as before said, not law at all; and that whether an act purporting to be within the field of police power is reasonable or not, in the ultimate, is a judicial question. There must be reasonable ground for the police interference, and also the means adopted must be reasonably necessary for the accomplishment of the purpose in view. So, in all cases where the interference affects property and goes beyond what is reasonable by way of interfering with private rights, it offends against the general equality clause of the Constitution; it offends against the spirit of the whole instrument; it offends against the prohibitions against taking property without due process of law, and against taking private property for public use without first rendering just compensation therefor.

We pass over, as already indicated, as not open to fair controversy, the question of whether the subject dealt with by the law before us is one proper for legislative interference under the police power, so we come at once to the secondary question of judicial cognizance of whether the manner of interference is reasonable.

"Small limitations," it is said, "of previously existing rights incident to property, may be imposed for the sake of preventing a manifest evil," while "larger ones could not be, except by the exercise of the right of eminent domain." *Rideout v. Knox*, 143 Mass. 368-372, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390, 392; *Sawyer v. Davis*, 136 Mass. 239-242, 49 Am. Rep. 27. Note the significant words "small limitations." What constitutes such limitations must necessarily be determined with reference to the exigencies of the particular situation. So actual destruction of private property under the police power in some cases is proper, while very little interference in others might be held improper. *State v. Redmon*, *supra*. There is no certain test by which what is reasonable in any given case can be definitely measured. It is a matter resting in human judgment. So, the line between what is reasonable and what is not, marking the boundary of constitutional authority of the legislature, is one often difficult of ascertainment, rendering it very necessary, in all doubtful cases, for the judiciary to defer to the wisdom of the legislature. But, when the boundary has been plainly passed, the duty of the court to repel the encroachment and so uphold the Constitution is absolute. It has no

discretion in the matter. *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

It is said "that an attempt to give a specific meaning to the word 'reasonable' is 'trying to count what is not number, and measure what is not space.'" *Altschuler v. Coburn*, 38 Neb. 881-890, 57 N. W. 830, 838. It is not synonymous with "expediency." Matters of that sort are wholly for legislative cognizance. As applied to means to a legitimate end, it suggests not necessarily the best or the only method, but one fairly appropriate, at least under all the circumstances. In the ultimate, the scope of the term as regards any situation must be measured having regard to the fundamental principles of human liberty, as they were understood at the time of the formation of the Constitution and were intended to be impregnably entrenched thereby, adapting the same, of course, to our modern conditions. Those principles have not changed in the years that have elapsed since the Constitution was formed. They are unchangeable, and are of no less, but rather of greater, importance than they were when the framers of the Constitution attempted so carefully to guard them.

Reasonable as applied to a law is manifestly not what extremists upon the one side or the other would deem, in the light of the principles referred to and the situation to be dealt with, fit or fair. It is what, "from the calm sea level," so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. In determining that, the court must look to the language of the statute and to all the facts bearing on the situation of which it may properly be said to judicially know because of their common nature or otherwise. *People ex rel. Kemmler v. Durston*, 119 N. Y. 569, 7 L.R.A. 715, 16 Am. St. Rep. 859, 24 N. E. 6; *Schollenberger v. Pennsylvania*, 171 U. S. 1-8, 43 L. ed. 40-52, 18 Sup. Ct. Rep. 757.

It must be conceded that the degree of regulation of the construction, maintenance, and manner of occupancy of tenement houses and lodging houses which is reasonable must vary greatly according to density of population and other circumstances. What would be reasonable in a very large city might be highly unreasonable in the country, or in the small cities and villages of the state. Requirements as to large structures to be occupied by many persons might be very unreasonable as to the smaller class of the same general class of structures to be occupied by very few persons. Again, requirements as to water service and fire hazard, not difficult to comply with by moderate expense in cities where there is a water and sewer system which are essential

to the equipment of buildings in those respects, might be plainly reasonable, while such requirements in country districts and the smaller cities and villages, where there are no such facilities, might be just as plainly absurd. The character of the structure and its equipment, as regards the expense required to comply with the law in a large city, where the added cost is warranted, not only by the degree of danger to be guarded against, but by the returns a proprietor could reasonably expect to derive from his investment, might be within the boundaries of reason, while the same requirement as to the sparsely settled districts and in small cities and villages, where the conditions as to such dangers and the expense that could prudently be incurred in erecting the structure are entirely different, might be plainly outside the boundaries of reason. In *Tenement House Department v. Moesch*, 179 N. Y. 325-335, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, the court observed that an act of the nature of the one under consideration "necessary for the city of New York, might not have the slightest application to Albany or Buffalo;" and, in *Health Department v. Trinity Church*, 145 N. Y. 32-41, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833, 836, that "no one would contend that the amount of the expenditure which an act of this kind may cause, . . . is within the absolute discretion of the legislature. It cannot be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of property and for the purpose of carrying out some provision of law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made, the act would without doubt violate the constitutional rights of the individual. The exaction must not alone be reasonable when compared with the amount of the work or the character of the improvement demanded. The improvement or work must in itself be reasonable, proper, and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public. Of this the courts must, within proper limits, be the judges."

Turning to the law in question, in the light of the foregoing, the most striking general feature which challenges our atten-

tion is that it applies to every part of the state, country districts, small cities and villages.—every portion is subject to the same degree of regulation as the city of Milwaukee, notwithstanding the obvious fact, as suggested in effect in the New York case above cited, that the conditions calling for such interference are so widely different that it would seem need for classification would have occurred to the legislative mind at once, in dealing with the matter, especially in view of the requirements which are entirely unsuitable to locations where water and sewer systems do not exist, and the calls for an expensive grade of buildings common to large cities, but which no prudent man would seriously think of erecting in some situations unless he could afford and designed to devote his means to charitable uses.

We find the law framed after the manner of the one in New York specially designed for the great city of New York and said by the New York court, as indicated, that it might be entirely unsuitable for even such cities as Albany and Buffalo, with many new features added to the model and many of those presented in such model much more severe, and then the whole applied to every part of the state.

To illustrate what has been said, we will refer to a few of the most prominent features of the law.

Section 1636-1602, subd. 2, Stat. 1898, as enacted by Laws 1907, chap. 269, p. 395, containing the requirement specially complained of, calls for lot-line courts reaching from the street, when permissible at all, to be at least 6 feet wide for all buildings four stories or less in height. So even for a small two-story structure to be occupied by two families, anywhere in the state, it must not be so placed that in case of a street court the width will not be less than 6 feet. No such severe provision is found in any law of the kind anywhere else, even in the case where it is restrained in its effect to the largest city in the United States. We have no hesitancy in saying that the interference as to this matter, considering its general nature, is unreasonable. Whether it would in all respects bear the constitutional test, even as to large cities, as regards small two-story structures to be occupied by two families only, and a large class of houses that fall under the designation of lodging or boarding houses, especially in the outskirts of such cities, is not entirely free from doubt. We might well add, it is clearly on the border line, if not across it, of what is reasonable. We do not need to go further at this point and will not do so, but leave the matter for legislative consideration in the future with 17 L.R.A. (N.S.)

such caution as what has been said may afford.

Section 1636-169, requires every tenement house down to the most insignificant of such structures anywhere in the state to be equipped with substantially all the ordinary modern conveniences as to water supply common to cities where there is a public sewer system and public water system. That it seems no one taking a common-sense view of the matter can considerably claim is reasonable. It is impracticable in the extreme, impossible would probably not be too strong a term to use, to comply with such requirements in many, even most, portions of the state. The result is that, except within a very limited area, the construction and enjoyment of even the most insignificant kind of tenement houses is, in effect, prohibited by the law. It is not likely that the promoters of the legislation, or the legislature, deliberately intended any such result. Presumably their minds were so engrossed with the importance of such regulations as to large cities, and possibly only to the largest city of this state, that the effect of the law upon the rest of the state was overlooked. Manifestly, the provision is highly unreasonable in the general sense, and whether in some of the particulars it does not go too far even for special localities is not entirely free from doubt.

The law contains specific requirements, down to the minutest details, as to the construction of stair halls and their accessories and fire escapes, and, not content with the result of following such minute specifications, the legislature added a requirement that the stairs must have at least a carrying capacity of safety of four, of 75 pounds per square foot when loaded over the entire area. Section 1636-153. That is to say, by the terms of the law, though a person constructs his stairs in all respects according to the precise specifications thereof, regardless of the size of the building or its location, if they do not possess the required carrying capacity, he and all concerned with him are subject to be treated as criminals, and to suffer the severe penalties prescribed.

There are particular requirements as to the method of construction to be followed too numerous to mention: in the whole, such as to enhance the probable expense of building a tenement house to such an extent as to practically prohibit the construction of any outside cities of the first or second importance. It is to be noted that in the New York model, which was apparently the guide and which applies, as indicated, only to the city of New York, a special exception from many provisions of the law was made for wooden tenement houses, not exceeding two stories in height, to be occupied by not

more than four families and erected outside of prescribed fire limits. The act in question contains no saving clause at all for the protection of parties desiring to erect modest two-story tenement houses anywhere in the state. In that respect the act must be regarded, as to some situations at least, as practically taking property without due process of law and taking it for public use without rendering just compensation therefor, in violation of the constitutional provisions on those subjects, and violative of other constitutional restraints not necessary to mention. Whether these regulations are not, in many features, too severe even for the larger cities, may well be the subject for study in case of a further effort to legislate in respect to the matter.

A further general feature of the law which arrests our attention is this: It is so particular and technical in its requirements that an ordinary person would not be reasonably safe in entering upon the work of constructing such a building as it deals with without the assistance of an expert architect to make the plans and specifications and even details, expert mechanics to execute the scheme, with the architect to supervise such execution, and, perhaps, a competent adviser as to the legal aspects of the matter; and, even then, the builder and all concerned with him in the matter, however innocent, so far as bad intent is concerned, they might be, would be in considerable danger of many criminal prosecutions for as many separate violations of law, and being penalized in large sums of money and cast into and confined in jail besides; and yet, there is no provision in the act to enable the builder, before entering upon the work, to obtain a certificate of sufficiency of his plans from some official source, which will protect him in case of a good-faith execution of the scheme. It is a very serious question as to whether that does not render the law unreasonable in the whole, especially since it reaches every part of the state preventing anyone from enjoying the ordinary privilege, as heretofore, of building a simple, inconsequential two-story house for two families, which is commonly erected by the proprietor himself, or by the use of ordinary mechanics and without the use of a skilled, or perhaps any, architect. Absence of such a provision from the act is peculiar to the one in question. There is much reason to suppose it was omitted by oversight. We cannot think it was omitted by design. The New York model covers the subject in a most particular way. Sections 121 and 122 of the tenement house act; 3 Birdseye Rev. Stat. Codes & Gen. Laws of New York, p. 3638. The same is true of the New Jersey law (Laws 1904, chap. 61, 17 L.R.A. (N.S.)

§ 182), and likewise of the law of Connecticut (Laws 1905, chap. 178, § 25, p. 376).

There is another general feature of the act which arrests our attention, and that is the penal clause, particularly in view of the recent decision of the Federal Supreme Court, that, where a police regulation is sought to be made effective by danger of such punishment for violations thereof and such burdens upon unsuccessful effort even to test its validity as to intimidate parties affected thereby from resorting to the courts in the matter, as to practically prohibit them from seeking any judicial remedy for supposed wrongs inflicted upon them, it denies to them equal protection of the laws, and renders the whole act void irrespective of whether its provisions would otherwise be valid.

We must view the penal provision in the light of the situation before adverted to. That the act is replete with requirements down to minor details and of a technical character in some respects, relative to buildings of the character dealt with, regardless of locality and in many respects regardless of the character of the structure other than the characteristics of two stories and designed occupancy, or occupancy by two or more families, in the whole, as before indicated, not practicable for one to follow without expert advice in preparation and execution, and not practicable to follow safely in all respects under those circumstances; and yet there is no provision for official approval of plans and specifications in advance of execution, so the builder and all concerned with him must proceed, if at all, wholly at their peril of having many violations of as many requirements discovered to have occurred, without any bad intent, and after it is too late to remedy the difficulty without serious and perhaps ruinous loss and too late to avoid in any way the severe punishments prescribed.

The penal clause is as follows:

"Sec. 1636-176. Every person who shall violate, or assist in violating, or who shall fail to comply with, any of the provisions of this act, or who shall resist the enforcement of any provision of this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than \$10 nor more than \$200, or by imprisonment in the county jail not less than fifteen days, nor more than sixty days, or by both such fine and imprisonment, in the discretion of the court; and for each and every day after the first that such violation shall continue such person shall be subject to a fine of \$10, in the discretion of the court, in addition to that hereinbefore provided."

It will be noted that a person may unin-

tentionally violate some one or any number of provisions, and, upon demand being made upon him by the authority charged with the duty of enforcing the law, however much he may think he is not at fault as to any particular matter, he is made guilty of a second offense if he fails to comply, and in case of a prosecution being commenced against him as to any such violation,—and, we repeat, there may be many, and there be an entire absence of any bad intent,—he will become guilty of a third offense, if he resists prosecution by standing trial; and the situation as to him will apply to all concerned with him, regardless of any intent to disobey the law or to unreasonably resist its enforcement. Further, upon its being determined judicially that any violation has occurred,—and we again repeat there might be many, and without bad intent,—no time is given to remedy the departure from the law; every day of the continuance will be counted and penalty upon penalty may be imposed till the violation shall be effaced regardless of the diligence of the guilty person to remedy the wrong, and even regardless, as to many persons that might be guilty, of the possibility of their being competent to remedy the wrong at all. It is thus not difficult to see how, under the law, a person of moderate means, though acting in the best of good faith and with diligence, might, in the construction of a single building of moderate dimensions, have penalties accumulated against him to an enormous amount, and be so menaced by the fact that every failure to comply with the law would add to the load, and every instance of an application to the courts by way of attack or defense, regardless of good faith in the matter, would further add thereto, so that no one but a man of courage would take the chances of building a structure affected by the act, especially in portions of the state where expert assistance in the matter is either not obtainable at all, or obtainable without such expense as to render the act prohibitory.

Except as to the element making mere resistance to the enforcement of the act a separate offense, the penal provision would look somewhat different if a way was provided for official approval of plans and specifications at the outset, affording a reasonable basis for holding the builder guilty at least of negligence, constructive or actual, in case of his failing in execution, though even with the exception and the additional provision the penal feature would not be entirely free from difficulty. As it stands the feature penalizing mere resistance to the law is clearly unreasonable and indefensible from any point of view. The effect of it would be to take property without due pro-

cess of law, to violate § 9, art. 1, of the state Constitution guaranteeing to every person a certain remedy in the law for all injuries or wrongs which he may receive in his person, property, or character, and violates every principle of civil liberty entrenched in the Constitution.

We have read and reread the act without success, to see if the particular matter under consideration can be reasonably seen to refer to resistance to its enforcement in any other sense than defending against a prosecution commenced under it. If this were the only difficulty with the penal clause, it might be condemned without affecting the rest; but, taking the clause as a whole, in view of the general character of the act, combined with the significant absence of any facility for a prospective builder to reasonably protect himself by obtaining, in advance of commencing his work, an official approval of his plans, it seems that the dangers are so many and so great that an ordinary person would be quite liable to be intimidated into surrendering his right to use his real estate for tenement-house or lodging-house purposes rather than take the chances, or, if he did not make such surrender and proceeded to enjoy such right as circumspectly as practicable, be intimidated into submitting to the demands of those charged with the enforcement of the law, and to prosecutions under it, regardless of whether he thought himself innocent or not. This feature of the act pervades and condemns the whole under the doctrine of *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441.

There are other features of the law which arrest our attention, but whether they are excessive interferences or not need not necessarily be decided, though we feel warranted in saying that, if it were required to pass upon them, the questions involved would be extremely difficult to solve in favor of the act. We will refer to a few of such features. There is a provision preventing the owner of a lot from using his building more than 80 per cent of the area of any other lot to use over 65 per cent; a provision prohibiting transoms or movable sash, and requiring in nonfireproof buildings in the stair halls fireproof self-closing doors and fixed iron sash filled with wire glass; a provision requiring, in the absence of a special permit to the contrary, all rooms to be whitewashed at least twice every year in particularly specified months; a provision prohibiting a person from permitting another not a member of his family to have the use of a room in his house for sleeping purposes without such house being classed as a lodging house, and subjected to numer-

ous and somewhat petty requirements as to such places, including the keeping of "a proper light" burning in the common hallway near the stairs upon the first and second floors from sunset to sunrise every night throughout the year and upon all other floors until ten o'clock in the evening unless officially otherwise directed. The extreme nature of that interference can only be appreciated by keeping in mind that it applies to every portion of the state and to every habitation where the proprietor allows even one person, not a member of his family, to have a sleeping apartment therein. Further, in this connection, it should be noted that every lodging house is required to have at least one water-closet. That, of course, means a water-closet such as is commonly constructed in dwelling houses in localities where there are water and sewer facilities rendering it practicable. So, a person in any part of the state is prohibited from allowing another, not a member of his family, to have a sleeping apartment in his house unless the habitation is equipped with a water-closet. Further, there is an arbitrary requirement for rooms generally to be at least 9 feet high in the clear. That to apply, of course, to lodging houses as well as tenement houses, and the unusual height of rooms, as will be seen, is not to be restricted to the extent of the ordinary finish in such unpretentious buildings as are commonly constructed in the country and small communities. We note, in this connection, that the law the act was modeled after does not contain such severe provisions. The further provision should not be overlooked (§ 1636-173), prescribing particularly how beds shall be located in a bedroom, and requiring, generally, under all conditions, a person having a tenement or lodging house to consult and conform to such a petty requirement as that in case of his allowing two beds in a room they shall be so located as to have at least 2 feet on each side, and receive direct light from windows unobstructed, such requirement to extend in any case where a person allows another not a member of his family to have a sleeping apartment in his house. How anyone could expect that such a petty interference with individual rights could be squared with common sense in the light of a rational idea of the principles of civil liberty is not perceived. What good reason is there in classing every habitation regardless of character or locality, if at all, as a lodging or boarding house, and to minutely, if at all, regulate its use, merely because of the proprietor or lessee permitting a person not a member of his family to have a sleeping apartment therein? We cannot imagine any.

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There are other provisions that might be referred to which are worthy of some attention, especially in view of the general character of the act. Sufficient, however, has been said to indicate that it cannot stand, and that in case of a further effort to legislate in the same field, the particular features condemned should be avoided and others should be studied with care; appreciating that lawmaking power is quite closely fenced about by wise limitations, and must proceed, in the field of police regulation, reasonably at every step. Common sense as to reasonable requirements and reasonable means of securing such requirements should prevail, not the extreme views of well-meaning persons as to what is for the best. Idealists will often find efforts to force their standards of living upon people generally by legislation barred by constitutional limitations. An eminent author aptly said: "There is a wide interval between the ideal and the practical." If what is here said were not so, individual rights as to persons and property would be only such as sovereign power, acting through the legislature, might see fit to recognize, the inalienable rights commonly supposed to be sacred and inviolable would be changed into mere uncertain privileges, and regulation, so called, might easily become destructive of that which we have been wont to believe was essential to life, liberty, and the pursuit of happiness. It must be appreciated that "small limitations" as to the enjoyment of property, having regard to the nature of the case, measure the scope of police interference. Beyond that lies the broad field where the individual is sovereign so that it cannot be entered at all for private purposes, and, as said in *Rideout v. Knox*, 148 Mass. 368-372, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390, 392, not for public purposes except by the power of eminent domain.

We may well point the last foregoing by quoting from *Ex parte Jentsch*, 112 Cal. 468-472, 32 L.R.A. 664, 44 Pac. 803, 804, this language: "The spirit of a system such as ours is, therefore, at total variance with that which, more or less veiled, still shows in the paternalism of other nations. . . . We give to the individual the utmost possible amount of personal liberty, and, with that guaranteed him, he is treated as a person of responsible judgment, not as a child in his nonage, and is left free to work out his destiny. . . . So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the Republic. For the difficulty which is experienced in defining its just limits and bounds, affords a temptation to the legisla-

ture to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant." It is sought to uphold the law because "it is a police regulation." It is argued that "the people have passed the law; let not the courts interfere with it. If the people are dissatisfied they may amend or repeal it."

We were favored with a similar argument in this case, but such arguments, of course, are of no avail.

In closing we should say we have examined with care all authorities and laws of a somewhat similar character to the one under consideration, cited to our attention, and extended our researches much further. It does not seem necessary to refer to such laws and authorities in detail. We have found nothing elsewhere out of harmony with the principles laid down in this opinion, and, if it were otherwise, it would not necessarily change the situation. No law similar to the one here, in many of the features, has been passed upon in the whole by any court, as regards its constitutionality. Particular features as to particular situations have been upheld in accord with principles here recognized, though expressions are found in some legal opinions not really necessary to the decisions reached rather more extreme than could meet with our unqualified approval.

From what has been said the rule as to preserving parts of a law and condemning other parts where the latter are unconstitutional and are separable from the former does not apply to this case. There are several invalid features of the act, each of which pervades the whole, and, therefore, lamentable though it is that a manifestly laudable legislative purpose to promote the public welfare should wholly fail, all portions of the act must be regarded as an entirety, and share a common fate of being condemned as unconstitutional.

What has been said renders it unnecessary to discuss the motion made on behalf of appellants to dissolve the injunction granted by the circuit court and for an injunction and for a dismissal of the appeal. The act the appellants, representing the state, were enjoined temporarily, and sought to be enjoined permanently, from enforcing, being unconstitutional, the action must be regarded as against them in their individual capacities, and not against the state. *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441. The motion, therefore, in all respects must fail for that reason and others indicated in the opinion.

The motion above referred to is in all respects denied with \$10 costs. The order overruling the demurrer to the complaint and 17 L.R.A. (N.S.)

restraining the defendants pending the action is in all respects affirmed.

IDAHO SUPREME COURT.

VILLAGE OF SANDPOINT, Appt.,

v.

• WILLIAM DOYLE, Resp't.

(14 Idaho, 749, 95 Pac. 945.)

Bridge — highway.

1. Under § 850 of the Revised Statutes of 1887 of this state, a bridge is a "highway," and subject to the laws applicable to "highways."

Highway — abutting owner — peculiar rights.

2. Every property owner having a lot abutting on a street or highway has a special and peculiar right in that particular street or highway not common to other citizens; and such right is a property right appurtenant to his lot, and furnishes and affords him the means of getting to and from his property, and thereby enjoying the common right of all the streets and highways in common with the community in general.

Same — deprivation of access.

3. The owner of a lot abutting on a street or highway has the right of ingress and egress, and, for the protection of such right, has his cause of action; and for a municipality to prohibit and forbid him exercising his right to go to and from his property over and by way of such street, and to employ the means necessary to reach the street, would be to take his property without due process of law.

Municipal corporation — bridge — abutting owner — access.

4. A municipality has a right to establish its grades, and to fill in or bridge or plank its street and right of way, so as to raise the surface to such grade; but by doing so it cannot preclude the abutting property owner from employing and using such reasonable means, or making such reasonable improvements, as may be necessary to enable him to go from his property to the street, and exercise and enjoy the right of ingress and egress.

Same — private platform — connection with bridge.

5. Where a municipality constructs a bridge 450 feet long across a small stream 25 feet wide, and the adjacent ravine or depression in the natural surface of the ground, and such bridge is a height of 20 feet from the ground at the place where it

Headnotes by AILSHIE, Ch. J.

Note. — No additional case has been disclosed passing upon the right of an abutting owner to adjust his property to a change of condition in the highway.

passes an abutting property owner's lot,—Held, that it is without the power and authority to unqualifiedly prohibit and deny the property owner the right to erect a platform on his own lot to such height as to enable him to go from his building to the bridge, and to connect such platform with the bridge by proper and substantial railings, and, by such means and in such manner, exercise the right of ingress and egress.

(Sullivan, J., dissents.)

(May 9, 1908.)

APPEAL by plaintiff from a judgment of the District Court for Bonner County in defendant's favor in an action brought to enjoin defendant from the commission of certain acts alleged to constitute a nuisance. Affirmed.

The facts are stated in the opinion.

Messrs. John A. Steinlein and Charles L. Heitman, for appellant:

Use of the highways, or the dedication of their use, or any portion thereof, for private uses, cannot be granted by the town or its authorities.

State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Davis v. New York, 14 N. Y. 524, 67 Am. Dec. 186; Topeka v. Hempstead, 58 Kan. 328, 49 Pac. 87; Mischke v. Seattle, 26 Wash. 616, 67 Pac. 357.

The use of a street, highway, or bridge within the corporate limits of the municipality by an individual, simply for his own convenience and accommodation, unaccompanied by public uses, is unauthorized, and essentially a nuisance.

Mischke v. Seattle, *supra*; Wendell v. Troy, 39 Barb. 329.

There is no such thing as a rightful private permanent use of public highways.

State v. Berdetta, *supra*; 1 Addison, Torts, 328, § 313; Rev. Stat. § 850.

The public are entitled to the entire width of the street, including the bridge, and any addition to the bridge that may become necessary by reason of increased traffic.

1 Addison, Torts, 328, § 313; 2 Dill. Mun. Corp. 4th ed. §§ 659, 660, 1032.

Mr. W. C. Jones for respondent.

Allshle, Ch. J., delivered the opinion of the court:

This action was originally commenced in 1903 by the village of Sandpoint against the defendant Doyle, charging him with constructing a building for the purpose of running and conducting a saloon business, and in cutting the rails of a certain bridge across Sand creek and connecting his building therewith. The plaintiff charged defendant with certain acts committed and 17 L.R.A. (N.S.)

others threatened, which would amount to a nuisance, and asked that he be restrained and enjoined from the further commission of such acts. A demurrer was sustained to the complaint, and an appeal was taken to this court, and the judgment of the lower court was reversed. Sandpoint v. Doyle, 11 Idaho, 642, 4 L.R.A. (N.S.) 810, 83 Pac. 598. The cause was remanded, with direction to the lower court to overrule the demurrer, and take such further proceedings as might be consistent with the views expressed in the opinion. The cause was tried in the district court, and findings of fact and conclusions of law and judgment were made and entered in favor of the village and against the defendant, restraining and enjoining the defendant as prayed for in the complaint. The defendant prepared and served his statement and bill of exceptions, and had the same settled, and thereupon moved for a new trial, and his motion was granted, and a new trial was ordered. The case thereafter came on for a new trial, and, upon stipulation of the attorneys for the respective parties, the case was submitted to the trial judge upon the evidence that had been taken on the previous trial, and no witnesses testified upon the latter trial. The case was submitted, and taken under advisement by the court, and thereafter findings of fact and conclusions of law were made and filed, and judgment was rendered and entered in favor of the defendant and against the plaintiff, and this appeal is from the judgment.

It is necessary to observe here that the first trial took place before Honorable R. T. Morgan, who was then presiding judge of the first judicial district, and a new trial was granted by him. Before the case came on for a new trial, Honorable W. W. Woods succeeded to the office of judge of the first judicial district, and accordingly tried the case on retrial. Judge Woods, therefore, did not see the witnesses or hear them testify, and the entire case was made, so far as he was concerned, upon a paper record. Under such circumstances, this court must examine the evidence, and weigh the same in all respects as if the case had never been tried before, and will consider the evidence the same as if the case were being originally heard in this court. Roby v. Roby, 10 Idaho, 139, 77 Pac. 213; Morrow v. Matthew, 10 Idaho, 433, 70 Pac. 196; Stoneburner v. Stoneburner, 11 Idaho, 607, 83 Pac. 938; Van Camp v. Emery, 13 Idaho, 202, 89 Pac. 752. It appears from the evidence that the bridge in question is about 16 feet wide or 14½ in the clear, and that it crosses what is known as "Sand creek," and that the street at each end of the

bridge is 50 feet in width, and the street over which the bridge is erected is the street connecting Railroad street with First street in the village of Sandpoint. This bridge is 450 feet long, and varies from a height of 27 feet at the deepest place in the canyon or stream down to a point at each side of the canyon at which the bridge meets the ground. It is a wooden bridge, with posts and hand rails on each side to protect pedestrians, vehicles, and animals from running or falling off the bridge. The stream is only about 25 feet wide, and at low water is only about 6 inches deep, but when the high waters come the stream is sometimes as much as 300 feet wide and 15 feet deep at the center of the stream. The defendant Doyle owns a lot, situated within the depression or canyon, between the main channel of the stream and the end of the bridge. The water seldom overflows his lot. The easement or right of way for a street in front of Doyle's lot appears to be 50 feet in width, but, when defendant constructed its bridge, it built the bridge on the side of the street next to Doyle's lot, and immediately along and contiguous to the front of the lot, so that no space was left between the side of the bridge and the defendant's lot. This bridge has been constructed for some six or eight years. Doyle commenced the construction of his building, erecting it on substantial posts, well braced, and in doing so it became necessary for him to cut the railing on the side of the bridge next to his property. He constructed his building so as to make the floor on a level with the bridge, setting the building back some 12 feet from the bridge. He constructed a safe and substantial platform in front of his building, between the building and the bridge, and placed posts and rails around it so as to protect persons from falling off. The rails placed around the platform appear to be as substantial and safe in every respect as those placed around the bridge by the village. Doyle appears to have erected this building for the purpose of conducting a saloon, and so declared his intention, and, when he completed the same, opened up in the saloon business. He ran the saloon, however, for only a couple of hours, when he was arrested and fined for violating the village ordinances. It appears that the village trustees had duly and regularly passed and adopted an ordinance prohibiting the sale or giving away of any liquors or intoxicating drinks within 100 feet of this bridge, and it was for violating this ordinance that Doyle was arrested and fined. He appears, however, to have threatened to continue in the saloon business at that place, and to complete, equip, and maintain his building

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for that purpose, which was the cause of this action being instituted against him. After leaving his building idle for considerable time, he later opened up in the dry-goods business, concluding, perhaps, that it would be a more peaceful business and less offensive to the municipal authorities, and perhaps less liable to invite the repeated visits of the police authorities. He continued in the mercantile business to the time of the trial of this case, and made no further attempt to conduct the saloon business, or any other unlawful, prohibited, or illegitimate business therein, so far as the record shows.

It is contended by the municipality that the decision of this court on the previous appeal is the law of the case, and that the judgment rendered and entered by the district court is in conflict therewith. On the previous appeal, this court, speaking through Chief Justice Stockslager, said: "We think the village authorities have the power to permit or reject the application of anyone to construct any kind of a building to connect with this bridge. If it is by them considered dangerous to the traveling public, offensive to any class of people who may have occasion to pass over the bridge, . . . then they may prohibit its construction." Upon a casual reading of this language, it might be taken to indicate the view of the court that the municipality could absolutely prohibit the construction of any kind of a building, whether lawful within itself or not, and whether intended for use in a lawful and legitimate business or otherwise. In order to ascertain, however, the real purpose and intent of the court, it is necessary to ascertain the exact question that was before the court, and that was then being discussed and considered by the court, and out of the consideration of which the use of this language arose. The question there being considered was the right of Doyle to maintain a nuisance on his property adjacent to this bridge, and particularly the power of a court of equity to restrain him from carrying on a business within a district where the same was prohibited and forbidden by a municipal ordinance, and to maintain a nuisance on and adjacent to this bridge. The court held that, notwithstanding the right of the municipality to have Doyle repeatedly arrested for violating the ordinance, it might also invoke the aid of a court of equity to restrain him from maintaining the building and offensive business at the place and in the manner it was maintained, and wherein the offense and violation was being repeatedly committed. The question was not before the court, on that appeal, of the power of the municipal authorities to absolutely

prohibit the construction of any building whatever at that place, or the maintaining and carrying on of any lawful and legitimate business on the property in question. The decision rendered by this court on the former appeal is unquestionably the law of the case upon all matters that were involved in, presented, and passed upon, on that appeal. It determines the right of the municipality to restrain and enjoin the appellant in this case from maintaining a saloon or conducting a saloon business on this property. Beyond that, however, we do not think anything said in that opinion can be treated as the law of the case.

At the trial of this case it appeared that the defendant and respondent had abandoned the saloon business more than three years previous to the trial, and had not been maintaining his place of business for that purpose, and that he had, on the contrary, maintained an orderly and legitimate business, and was at the time of the trial engaged in the mercantile business, using his property for that purpose. It was therefore unnecessary to issue a permanent restraining order against him, enjoining him from carrying on or conducting the saloon business or maintaining a place for that purpose. The only question properly presented on this appeal for our determination is the power and authority of the municipality to absolutely forbid and prohibit the respondent from erecting and maintaining a building on his own lot, and erecting and maintaining the platform in front thereof, so as to connect with the bridge and have access to and egress from his property over and by way of the bridge. In the first place, we must remember that respondent's lot abuts on one of the streets and thoroughfares of the appellant corporation. It must also be borne in mind that the bridge along and over this street is a part of the street; in other words, a bridge is a highway. Rev. Stat. 1887, § 850; Elliott, Roads & Streets, 2d ed. § 27. If the village had not seen fit to construct this bridge across Sand creek, and the ravine and depression through which it flows, but had rather preferred to leave the street as it previously was on the surface of the ground, there could be no question of the right of Doyle to construct his building, under proper regulations, and maintain the same on his lot and fronting on this street, with all the necessary privileges of ingress and egress through and over the street. But the village saw fit to raise the surface of the street, which it might have done by a fill, until it came to the main channel of the stream, or, as it did do, by erecting posts and building a platform or bridge at the grade and level to which it desired to

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raise the surface of the street. Now, the village having seen fit to raise the surface of its easement and right of way for street purposes to an elevation of 20 feet in front of Doyle's property, has he not an equal right to raise his building to the same elevation, so as to preserve his right of ingress and egress? If he can do so, he is clearly within his legal rights. If he cannot, then the village, by raising the grade of its street, through the guise and name of a bridge, may improve Doyle out of his property and all right of use and benefit thereof. This is certainly not justice, and we do not think it is the law. Every citizen has an equal right with every other to travel the streets of this municipality; but, on the contrary, every property owner, having a lot abutting on a street or thoroughfare, has a special and peculiar right in that particular street not common to the other citizens. That right is a property right appurtenant to his lot, and furnishes him the means of getting to and from his property, and thereby enjoying the common right of all the streets with the balance of the citizens of the community. If he cannot get out from his property, and has no means of ingress or egress, then the streets and thoroughfares of the municipality will be of no use to him, and consequently his property will be of but little benefit to him. While the public generally may have no special or particular interest in the right of ingress to any particular lot owner's property, the lot owner has a very material and special interest in having the public reach his property and place of business, and in his right to go and come and carry on business and invite the public to his place of business. It has been held by the courts that to cut off this right of ingress and egress would be to take the lot owner's property without due process of law. *Pennsylvania University v. Lexington*, 3 B. Mon. 25, 38 Am. Dec. 173; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L.R.A. 493, 12 Am. St. Rep. 644, 39 N. W. 629; Elliott, Roads & Streets, 2d ed. § 695.

In considering the general question of the right of ingress and egress, and the property owner's right of action for damages on account of an obstruction thereof, the supreme court of Minnesota, in *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41, 11 N. W. 124, says: "With reference to the other point, it is well settled that the owner of lots abutting on a public street, whether he owns the soil to the center of the street or not, has a special interest in the street, different from that of the general public. It may not be very important

to the general public whether they shall be able to get to the private property of an individual, but it is important to the individual whether he should be able to get to and from his residence or business, and whether the public have the means of getting there for social or business purposes. If there be an obstruction in the street in front of or near his abutting property, so as to prevent access to it, the damage which he sustains is different, not merely in degree, but in kind, from that experienced in common with other citizens, and he may maintain a private action for the special injury to him, notwithstanding there is also a remedy in behalf of the public." Likewise, the supreme court of Kansas, in *Venard v. Cross*, 8 Kan. 255, says: "But the petition goes further, and alleges that this highway is plaintiff's 'only means of ingress and egress' to his land. Obstructing such highway therefore prevents his access to his lands. Here is disclosed a particular injury to plaintiff, one differing not merely in degree, but also in kind, from that suffered by the community in general. It is not that he uses this highway more than others, but that the use is of a particular necessity to him, affording him an outlet to his farm. It is to him a use and a benefit, differing from those enjoyed by the public at large. Obstructing the highway destroys that particular use and benefit. He, therefore, may maintain his individual action." See also *Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville*, 14 Ohio St. 523; *Los-tutter v. Aurora*, 126 Ind. 436, 12 L.R.A. 259, 26 N. E. 184; *Broome v. New York & N. J. Teleph. Co.* 42 N. J. Eq. 141, 7 Atl. 851.

Considerable stress has been laid on the proposition that an abutting property owner has no right to interfere with or cut the rails of a bridge. That is a correct, general principle of law; but it is founded upon the assumption that the municipality, on its part, will not undertake to prevent the property owner's right of ingress and egress, and that it will so construct its bridges and maintain its street grades as to afford the property owner an equal right of erecting or constructing like or similar means on his property in order to enable him to get to and from the streets. If the municipality should build a bridge across another street, then, clearly, there would be no abutting property owner entitled to cut the rails of the bridge or interfere therewith, for the reason that it would be one highway across another, and the public would be entitled to both easements and to maintain and protect the same. This would also be true if the municipality should build a bridge across a navigable stream. Again we would have one highway over and across

another, and the public would be entitled to maintain the easement and right of way and keep the same open and free to traffic. A very different principle of law arises, however, when the city raises its grade, either by fill, a bridge, or in any other manner, through or over a depression in the natural surface of the ground and along adjoining, and abutting properties. In such case, while the municipality may adopt reasonable rules and regulations with reference to the erection and maintenance of buildings and all approaches to the same, and entrance to and over the street, it cannot absolutely prohibit the property owner from using the street and enjoying his right of going and coming to and from his property through and over such street. In order to enjoy that right and privilege, he must be accorded an equal and concurrent right of using such means and methods on his own property as to enable him to get to the street, and connect his property or place of business with the street or highway over which he must necessarily pass. It has been suggested that the bridge in question is not wide enough to accommodate the traveling public and also afford means of ingress and egress to abutting property owners. The question as to the extent of the duty and responsibility of the municipality in that respect does not arise in this case, for the reason that the village here constructed its bridge on the side of its right of way, next to respondent's property, and caused the bridge to adjoin the front of respondent's lot. It therefore cut him off from his previous right of access to the street on its natural surface, and left him without any means of egress and ingress at all, unless he can go over the bridge. Had his lot been on the other side of the street, and, consequently, 34 feet from the bridge, as are the other property owners on the farther side of the street, another and different question would then arise and call for our consideration; but, since it does not arise in this case, we will not consider it.

We have examined all the evidence in this case, and are satisfied that the village is not entitled to an injunction restraining the respondent from maintaining his building and place of business on his lot abutting on this bridge. We are also satisfied that he is entitled to egress and ingress over this bridge.

The judgment of the lower court must therefore be affirmed, and it is so ordered, with costs in favor of respondent.

Stewart, J., concurs.

Sullivan, J., dissenting:

I am unable to concur in the conclusion reached by my associates. While a bridge

is a highway under our law, it seems to me that there is a clear distinction between the rights of landowners abutting on the streets of a town or city, and the rights of landowners abutting on a bridge. Bridges necessarily require different and more careful protection from fire and other elements than the ordinary street, and most of the bridges of the state are only of sufficient width to permit vehicles to pass each other, and I do not think that the owners of property abutting on a bridge have that "special and peculiar right," referred to in the opinion of the majority, to the use of the bridge that abutting property landowners have on the ordinary street or highway. In my view of the matter the abutting landowners to a bridge have the same rights as the public to use such bridge, but they have no right to establish business houses along such bridge, cut the railing thereof, connect their business houses with the bridge, and conduct business therein.

The judgment of the lower court ought to be reversed.

KANSAS SUPREME COURT.

JOHN R. HARMON, Plff. in Err.,
v.
FRED BOWER.

(— Kan. —, 96 Pac. 51.)

Civil rights — suspension — imprisonment.

1. The suspension of the civil rights of a person sentenced to the penitentiary for a term less than life begins at the date of his imprisonment under the sentence.

Headnotes by BENSON, J.

Case Note. — At what time does suspension of civil or political rights of one under sentence commence?

It appears that in the United States a convict under sentence for life (Willingham v. King, 23 Fla. 478, 2 So. 851; Platner v. Sherwood, 6 Johns. Ch. 118; Frazer v. Fulcher, 17 Ohio, 260; Davis v. Laning, 85 Tex. 39, 18 L.R.A. 82, 34 Am. St. Rep. 784, 19 S. W. 846), or for a term less than life (Re Nerac, 35 Cal. 392, 95 Am. Dec. 111; Presbury v. Hull, 34 Mo. 29); or under a death sentence (Cannon v. Windsor, 1 Houst. [Del.] 143; Gray v. Stewart, 70 Kan. 429, 109 Am. St. Rep. 461, 78 Pac. 852; Rankin v. Rankin, 6 T. B. Mon. 531, 17 Am. Dec. 161),—is not civilly dead unless the statute so provides; and no consequences follow the conviction except those declared by statute.

Accordingly, the question indicated by the above title could arise only in those jurisdictions where, by statute, convicts

Same — conveyance before imprisonment.

2. A sentence to the penitentiary for a term of years does not make void a conveyance duly executed by the convict before he is imprisoned under the sentence, and while execution of the judgment of conviction is stayed by proceedings upon appeal to the supreme court.

Deed — delivery — deposit with third person.

3. The manual deposit of a deed with a third party to receive and hold for the grantee, with intent thereby to give it effect as a conveyance and to place it beyond the custody and control of the grantors, with a declared or manifest purpose of making a present transfer of title, is a sufficient delivery.

(May 9, 1908.)

ERROR to the District Court for Cowley County to review a judgment in defendant's favor in an action brought to recover certain land and for rents and profits. Affirmed.

The facts are stated in the opinion.

Messrs. A. M. Jackson, A. L. Noble, and L. C. Brown, for plaintiff in error: Plaintiff's civil rights having been suspended, he was deprived of the power to make contracts.

Sample v. Horner, 61 Kan. 738, 60 Pac. 745; Manley v. Mayer, 68 Kan. 396, 75 Pac. 550; 9 Cyc. Law & Proc. p. 873; Williams v. Shackelford, 97 Mo. 322, 11 S. W. 222; Rice County v. Lawrence, 29 Kan. 158.

So long as a grantor retains any power, control, or disposition over a deed, there can be no delivery.

Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592; Elliott v. Murray, 225 Ill. 107,

are deprived of their civil rights. Again, it is quite clear that the question would not arise, even in such jurisdictions, except where the convict, at some time between the pronouncement of sentence and the actual commencement of his punishment thereunder, had exercised, or attempted to exercise, some civil or political right. The only other case of that kind which has been found is State v. Houston, 103 N. C. 383, 9 S. E. 699, where Smith, Ch. J., in a concurring opinion, held that, under a constitutional provision that "no person who, upon conviction or confession in open court, shall be adjudged guilty of felony, or other crime infamous by the laws of this state, and hereafter committed, shall be deemed an elector," the alleged criminal was not deprived of his personal privilege or right to vote until final judgment against him; and a mere verdict of guilty upon which judgment had been suspended did not disfranchise him.

80 N. E. 77; *Cole v. Cole*, 144 Mich. 676, 108 N. W. 101; *Steffian v. Milmo Nat. Bank*, 69 Tex. 513, 6 S. W. 823; *Davis v. Ellis*, 39 W. Va. 226, 19 S. E. 399; *Oswald v. Caldwell*, 225 Ill. 224, 80 N. E. 131.

The deed in the hands of Gilmer never arose to the dignity of an escrow.

Davis v. Clark, 58 Kan. 105, 48 Pac. 503; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427.

Messrs. C. T. Atkinson, C. R. Pollard, G. H. Buckman, and S. C. Bloss, for defendant in error:

Sentence pronounced by the district court was suspended during the time of the appeal.

Gen. Stat. 1901, §§ 5725, 5776, 5777; *Archie v. State*, 26 Tex. App. 193, 9 S. W. 686; *Re Morse*, 117 Fed. 764; *Gray v. Stewart*, 70 Kan. 429, 109 Am. St. Rep. 461, 78 Pac. 852; *Smith v. Spooner*, 3 Pick. 229; *Jones v. Semple*, 91 Ala. 182, 8 So. 557; *Strong v. Birchard*, 5 Conn. 357; *Sutherland, Stat. Constr.* § 66; 26 Am. & Eng. Enc. Law, 2d ed. p. 661; *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; *Ex parte Jones*, 41 Cal. 209; *Harris v. People*, 138 Ill. 63, 27 N. E. 706; *State ex rel. Johnson v. McClellan*, 87 Tenn. 52, 9 S. W. 233; *Clemons v. State*, 92 Tenn. 282, 21 S. W. 525; *State v. Grottkau*, 73 Wis. 589, 41 N. W. 80, 1063; *Hollon v. Hopkins*, 21 Kan. 638; *Re Nerac*, 35 Cal. 392, 95 Am. Dec. 113; *Ex parte Duckett*, 15 S. C. 210, 40 Am. Rep. 694; *Sartain v. State*, 10 Tex. App. 651, 38 Am. Rep. 649; Kan. Gen. Stat. 1905, § 6188.

There was a valid delivery of the deed.

Shep. Touch, 58, 59; *Devlin, Deeds*, §§ 260, 269; *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445; *Wuester v. Folin*, 60 Kan. 337, 56 Pac. 490; *Brown v. Westerfield*, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439; *Tucker v. Allen*, 16 Kan. 319; *Kittoe v. Willey*, 121 Wis. 548, 99 N. W. 337; *Pentico v. Hays*, 75 Kan. 76, 9 L.R.A. (N.S.) 224, 88 Pac. 738; *Young v. McWilliams*, 75 Kan. 243, 89 Pac. 12; *Kelsa v. Graves*, 64 Kan. 777, 68 Pac. 607; *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 301; *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; *Lippold v. Lippold*, 112 Iowa, 134, 84 Am. St. Rep. 331, 83 N. W. 809; *Gage v. Gage*, 36 Mich. 229; *Bauman v. McManus*, 75 Kan. 106, 10 L.R.A. (N.S.) 1138, 89 Pac. 15; *Thompson v. Calhoun*, 216 Ill. 161, 74 N. E. 775; *Gould v. Day*, 94 U. S. 405, 24 L. ed. 232.

Benson, J., delivered the opinion of the court:

On March 5, 1904, John R. Harmon was the owner of a tract of land in Cowley county, 17 L.R.A. (N.S.)

ty, Kansas, upon which he resided with his wife as a homestead. On the same day he was convicted of a crime in the district court of that county, and, on April 12, 1904, he was sentenced to the penitentiary. He appealed to the supreme court, where the judgment was affirmed December 1, 1904. From the time of his sentence, April 12, 1904, until January 19, 1905, John R. Harmon was at liberty under bond, but, on January 19, 1905, he was taken to the penitentiary, where he remained until January 12, 1906, when he was pardoned and discharged. After his conviction and sentence in the district court, and before he was taken to the penitentiary, Harmon and his wife, Lucinda W. Harmon, made a deed of the homestead to John R. Simpson and Ella Simpson, which was placed in the hands of R. A. Gilmer, to be delivered to Simpson for the benefit of Mrs. Harmon. On March 5, 1905, Fred Bower negotiated with Mrs. Harmon for the purchase of the land, upon which she still resided, and the deed was thereupon executed to him by John R. Simpson and wife. The consideration for this deed was \$500 cash, the payment of taxes, and the release of prior debts of Harmon and wife to Bower, which were liens upon the land. Some time in the summer of 1905 Mrs. Harmon died, leaving in the possession of John R. Simpson \$297, part of the money received by her from Fred Bower, to be delivered to Mr. Harmon when he should be released from the penitentiary, which was done. This action was brought by Harmon against Bower to recover the land and for rents and profits. The judgment was for the defendant, and the plaintiff asks for a reversal.

The plaintiff claims, first, that, on account of his disability as a convict, he was unable to make a legal transfer of his realty during the time that he was under sentence, but at liberty, under bond; second, that the deed which he made to John R. Simpson, and in which his wife joined, had never been legally delivered. Section 2301, Gen. Stat. 1901, reads as follows: "A sentence of confinement and hard labor for a term less than life suspends all civil rights of the person so sentenced during the term thereof. . . ." It is necessary to determine when the term of imprisonment referred to in this statute begins. The defendant having appealed to this court from the judgment of conviction and sentence, and having given bond as provided by law, execution of the judgment was stayed as provided in chapter 389, p. 594, Sess. Laws 1903. Another statute provides for the appointment of a trustee to take charge and manage the estate of a person imprisoned in the penitentiary for a term less than life, but such appointment

cannot be made until satisfactory evidence is given that the convict is actually imprisoned. Gen. Stat. 1901, §§ 5776, 5777. From these provisions it appears that civil rights are not suspended until the convict is imprisoned. If we should hold that civil rights are suspended the moment sentence is pronounced, the defendant's punishment would be increased by taking away his civil rights for an indefinite period in excess of the term of imprisonment, which does not begin until the stay allowed upon appeal has expired and he is imprisoned, or possibly when he is in custody to be conveyed to the penitentiary. "If, after sentence has been pronounced, no appeal is taken, the conviction is complete, and its consequences attach and operate at once; but, if an appeal be prosecuted, the effect of the appeal is to suspend and hold in abeyance the enforcement and legal consequences of the conviction until the judgment of the court of last resort has affirmed the conviction had in the trial court." *Arcia v. State*, 26 Tex. App. 193, 205, 9 S. W. 685, 686. The period of confinement and hard labor referred to in § 2301, above quoted, is the same as the actual imprisonment referred to in §§ 5776 and 5777, and is the period intervening between the date of actual imprisonment under the sentence and the discharge therefrom. *Williams v. Shackelford*, 97 Mo. 322, 11 S. W. 222; *State v. Grottkau*, 73 Wis. 589, 9 Am. St. Rep. 816, 41 N. W. 80, 1063; *Ex parte Jones*, 41 Cal. 209; *Re Morse* (C. C.) 117 Fed. 763.

It is next insisted that the deed to Simpson is void as a conveyance for the reason that it was not delivered. The trial was before the court, and no special findings were made; but the general finding for the defendant determined every material fact in issue necessary to uphold the judgment against Harmon. It appears from the abstract that Harmon and wife, in anticipation of the imprisonment of the husband, desired to make some disposition of the homestead for the benefit of the wife, and accordingly, with the consent of the Simpsons, but without any consideration moving from them, executed and acknowledged the deed to them, and left it with the notary, Mr. Gilmer, for the grantees. Mr. Simpson testified that Harmon told him of his intention to make the deed for the benefit of Mrs. Harmon, and afterwards informed him that he had done so, and requested him to go to Gilmer and get the deed. Mr. Gilmer testified that the deed was so delivered to him, with instructions from Harmon to deliver it to Simpson for the benefit of Mrs. Harmon. Mrs. Harmon, while negotiating for the sale of the property to Bower, sent to Simpson for the deed, but the messenger did not find it there, and, by Simpson's direction, went to Gilmer for

it, and Gilmer, at Simpson's request, and upon the assurance that it would be used for the benefit of Mrs. Harmon, handed it to the messenger, who took it to the real-estate agent who was preparing the deed to be executed by the Simpsons, and it was handed with that deed to Bower, the purchaser of the land. This court has held that "an actual or formal delivery of a deed never was necessary. A deed may be good by constructive delivery as well as by actual delivery. Any words or acts showing an intention on the part of the grantor that the deed shall be considered as completely executed and the title conveyed is sufficient." *Tucker v. Allen*, 16 Kan. 312, 319. The manual deposit of a deed with a third party to receive and hold for the grantee, with intent thereby to give it effect as a conveyance, and to place it beyond the custody and control of the grantors, with a declared or manifest purpose of making a present transfer of title, is a sufficient delivery. *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490; *Kittoe v. Willey*, 121 Wis. 548, 99 N. W. 337; *Brown v. Westerfield*, 47 Neb. 309, 53 Am. St. Rep. 532, 66 N. W. 439; *Devlin, Deeds*, § 269.

It is argued that the deed, while in Gilmer's hands, was subject to the dominion and control of Mrs. Harmon, and therefore subject to recall; but upon this matter there was not only the inference to the contrary that might be drawn by the trial court from the testimony above stated, but there was the additional testimony of Mr. Gilmer that, if Simpson had called for the deed, he would have delivered it to him even without Mrs. Harmon's consent; and when he did give it up, as we have already noted, it was upon Simpson's direction.

The arrangement by which Harmon and wife voluntarily conveyed their homestead to the Simpsons, to be used by the latter for benefit of Mrs. Harmon, appears to have been a beneficent provision for her, in view of the condition of the property and of his pending imprisonment, and it was carried out in good faith by the persons in whom they confided. The plaintiff's wife was thereby supported, wholly or partially, his debts were paid, and the remainder of the consideration left in Mr. Simpson's hands when she died was, according to her request, duly paid over to him. Retaining this material part of the consideration, he invoked the aid of the court in an effort to recover the land for which this consideration had been paid. No sufficient reason, legal or equitable, being shown for undoing this transaction at his instance, the decision was adverse to his claims.

We find no reason to disturb this judgment, and it is affirmed.

LOUISIANA SUPREME COURT.

JOHN F. CHERRY et al.

v.

LOUISIANA & ARKANSAS RAILROAD
COMPANY, Appt.

(121 La. 471, 46 So. 596.)

Railroad — crossing — obstructed view.

1. Where, by leaving cars near or upon a public crossing, a railway company has obstructed the view and created an extra danger to travelers upon the crossing, it is bound, in approaching the crossing, to use extra precautions, as by a less amount of speed, or by increased warnings, or otherwise; and the fact that the crossing is upon

the yard of the railway company makes no difference.

Same — traveler — duty to look and listen.

2. Where the distance across four railroad tracks is only 49 feet, a traveler about to cross the tracks exercises all due legal care and prudence if he stops and looks and listens before venturing upon the first track. He is not required to repeat the precaution with each of the tracks in succession.

Damages — amount — death of two children.

3. The father and mother of two children aged six and ten are allowed \$12,000 damages for the suffering and death of the two children, resulting from the negligence of the defendant company.

Headnotes by PROVOSTY, J.

(April 27, 1908.)

Case Note. — Duty to stop, look, and listen after entering on first track.

No hard and fast rule of law can be laid down as to the duty to stop, look, and listen after entering on the first track; but it is usually held to be a question of fact for the jury whether, under all the circumstances of the particular case, the plaintiff is guilty of contributory negligence in passing across without again stopping to look and listen.

It has been held that the question of contributory negligence for failing to stop, look, and listen after entering on the first track was for the jury, under the following circumstances:

Where plaintiff stopped, looked, and listened before crossing the first track, and, seeing the headlight of an approaching engine on the second track at such distance as to enable him to pass over safely, hurried across and was struck by a train, which he neither heard nor saw in the darkness, which had been switched onto the third track. *Southern P. Co. v. Harada*, 48 C. C. A. 423, 109 Fed. 379.

Where one driving up to a public crossing waited for the passage of a train, and then, being signaled by the flagman to go ahead, started across after looking each way himself for approaching trains, though his view was obstructed to some extent by a wall, and was struck by a train on the second track. *Union P. R. Co. v. Rosewater*, 15 L.R.A.(N.S.) 803, 84 C. C. A. 616, 157 Fed. 168.

Where plaintiff, while driving, approached defendant's crossing, stopped until a freight passed out of the way, and then, not seeing or hearing any other train, started across, although his view of the main track was obstructed by the freight on the siding, and his horse was struck by a train on the main track. *Louisville & N. R. Co. v. Bryant*, 141 Ala. 292, 37 So. 370.

Where plaintiff, when about 90 feet from the track, stopped, looked, and listened, but, seeing no train except a passing freight, started to cross the tracks, but stopped again after crossing the first track, and, 17 L.R.A.(N.S.)

while looking south along the track for approaching trains, was struck by a train from the north, on one of the main tracks. *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37.

Where, before crossing the first track, plaintiff looked both ways, but, seeing no train and no men on top of the freight cars, as an ordinance required when trains were in motion at the crossing, proceeded to walk across, and was struck by a train on another track; although it was admitted that he might have seen the approaching train had he looked just after passing a line of freight cars on the siding. *Jennings v. St. Louis, I. M. & S. R. Co.* 112 Mo. 268, 20 S. W. 490.

Where, the gates being raised, decedent, who was not familiar with the crossing, passed over the first track, his view of the other tracks being obstructed, and was struck and killed by a train on the middle track, though, had he looked just after passing the first track, he could have seen the danger and escaped. *Oldenburg v. New York C. & H. R. R. Co.* 124 N. Y. 414, 26 N. E. 1021.

Where deceased and his wife, upon reaching the crossing, stopped to look and listen, and, seeing no trains, hurried across four tracks, but were run over and killed by defendant's train upon the fifth track, freight cars having obstructed the view in the direction of the approaching train. The court said it could not be declared as a matter of law that one must "stop, look, and listen between the different tracks lying close to each other." *Pennsylvania R. Co. v. Garvey*, 108 Pa. 369.

Where plaintiff and his friend, driving a two-horse wagon, stopped at the crossing, looked, and listened, and, while so waiting, observed a hand car pass, but, upon failing to hear or see the approach of any other trains or other cars from either direction, their view being obstructed by box cars, proceeded to cross, and were struck upon one of the main tracks by a hand car. *Lake Shore & M. S. R. Co. v. Frantz*, 127 Pa. 297, 4 L.R.A. 389, 18 Atl. 22.

In *Owens v. Pennsylvania R. Co.* 41 Fed.

APPEAL by defendant from a judgment of the Judicial District Court for the Parish of Webster in plaintiffs' favor in an action brought to recover damages for the alleged negligent killing of their two children. Judgment reduced, and, as reduced, affirmed.

The facts are stated in the opinion.

Messrs. **Henry Moore and White, Thornton, & Holloman**, for appellant:

Plaintiffs' representative failed to stop, look, and listen at a time and place when the reason upon which the rule is founded could have been made effective.

Snider v. New Orleans & C. R. Co. 48 La. Ann. 1, 18 So. 695; **Mercier v. New Orleans & C. R. Co.** 23 La. Ann. 264; **Mur-**

ray v. Pontchartrain R. Co. 31 La. Ann. 490; **Deikman v. Morgan's L. & T. R. & S. S. Co.** 40 La. Ann. 787, 5 So. 76; **Schlater v. Wilbert**, 41 La. Ann. 406, 6 So. 127; **Brown v. Texas & P. R. Co.** 42 La. Ann. 350, 21 Am. St. Rep. 374, 7 So. 682; **White v. Vicksburg, S. & P. R. Co.** 42 La. Ann. 990, 8 So. 475; **Herlisch v. Louisville, N. O. & T. R. Co.** 44 La. Ann. 280, 10 So. 628; **Blackwell v. St. Louis, I. M. & S. R. Co.** 47 La. Ann. 268, 49 Am. St. Rep. 371, 16 So. 818; **Vincent v. Morgan's L. & T. R. & S. S. Co.** 48 La. Ann. 933, 55 Am. St. Rep. 287, 20 So. 207; **Dieck v. New Orleans City & Lake R. Co.** 51 La. Ann. 262, 25 So. 71; **Ponsano v. St. Charles Street R. Co.** 52 La. Ann. 245, 26 So. 820; **Farrar v.**

187, plaintiff stopped, looked, and listened upon reaching defendant's tracks, but, seeing no train, started across without again looking, and was struck by a train on one of the main tracks. The jury were charged that it was plaintiff's duty to stop, look, and listen along the main track before crossing, unless, as contended by the plaintiff, it was dangerous for himself so to stop between the siding and the main tracks.

In **Killiam v. Chicago, M. & St. P. R. Co.** 86 Mo. App. 473, however, where the plaintiff, while approaching the crossing, looked and listened as he drove along, but, seeing no trains, crossed the first track, where he stopped to look and listen, when an engine started on another track, frightened his horse so that he ran away, the court held that he could not recover, for he was guilty of contributory negligence in driving across the first track before he stopped to look and listen.

In **Spannknebel v. New York C. & H. R. R. Co.** 111 N. Y. Supp. 705, where plaintiff's intestate stopped, looked, and listened some distance from the first track, but, seeing no train, hurried across and was struck on the second track 15 feet away, by a passing train, the court said that it held, as a matter of law, that deceased was guilty of contributory negligence, because she did not stop after passing the first track, where she could have had a more extended view, instead of stopping where she did.

In **Arnold v. Philadelphia & R. R. Co.** 161 Pa. 1, 28 Atl. 941, where plaintiff stopped to look and listen, about 2 feet from the first track, and, seeing or hearing no train, hurried to cross, but was struck by a train passing on the second track, it was held that plaintiff was not guilty of contributory negligence, as a matter of law, in failing to stop on the first track or in the space between the first and second tracks, where she might have seen and avoided the danger.

In **Elston v. Delaware, L. & W. R. Co.** 196 Pa. 595, 46 Atl. 938, where plaintiff, who was driving along the highway crossed by defendant's six tracks, stopped about 24 feet from the crossing, while a train passed on track 5, looked, and listened, but, seeing

no other train in either direction, crossed the tracks, where his horse was struck by a train on track 6, which had approached without giving signals, it was held that the question of plaintiff's contributory negligence in not again stopping after entering on the first track was for the jury; though the court said a different question might have arisen had plaintiff been on foot.

In **Ayers v. Pittsburgh, C. C. & St. L. R. Co.** 201 Pa. 124, 50 Atl. 958, plaintiff, upon reaching the crossing, waited for a freight to pass, looked and listened for approaching trains, but seeing none, though his view was somewhat obstructed, started to cross, being signaled by the flagman to go ahead, and was struck by a train on the second track. The court held that, since plaintiff had stopped, looked, and listened before crossing the first track, he was not guilty of contributory negligence *per se* for failure to do so after he had entered on the track; but, taking into account all the circumstances, it was for the jury to say whether the plaintiff exercised due care.

In **Cohen v. Philadelphia & R. R. Co.** 211 Pa. 227, 60 Atl. 729, plaintiff stopped to look and listen before crossing the defendant's tracks, and later again stopped, but, seeing no danger, proceeded a few steps, and was struck by an engine on one of the main tracks. It was contended that the plaintiff was guilty of contributory negligence because he failed to stop in a space between the first and second tracks where he might have seen the danger; but the court held that, after one has stopped, looked, and listened before crossing the first track, he is not guilty of contributory negligence *per se* for failing to do so after getting on the tracks, but may or may not be, according to the circumstances; and it is for the jury to say whether the plaintiff exercised due care.

But it has been held that one is guilty of contributory negligence, as a matter of law, for failing again to stop, look, and listen after entering on the first track, under the following circumstances:

Where plaintiff stopped to look and listen

New Orleans & C. R. Co. 52 La. Ann. 417, 26 So. 995; Cowden v. Shreveport Belt R. Co. 106 La. 236, 30 So. 747; Kaiser v. New Orleans & C. R. Co. 107 La. 539, 32 So. 75; Schutt v. Shreveport Belt R. Co. 100 La. 500, 33 So. 577; Heebe v. New Orleans & C. R. Light & P. Co. 110 La. 970, 35 So. 251; Riley v. Shreveport Traction Co. 114 La. 137, 38 So. 83; Dewez v. Orleans R. Co. 115 La. 432, 39 So. 433.

The greater the difficulty of seeing and hearing the train as he approaches a crossing, the greater caution the law imposes upon the traveler.

Barnhill v. Texas & P. R. Co. 109 La. 43, 33 So. 63; Hemingway v. New Orleans

City & Lake R. Co. 50 La. Ann. 1087, 23 So. 952; Brown v. Texas & P. R. Co. supra.

No exemplary damages are allowed unless malice is shown.

Black v. Carrollton R. Co. 10 La. Ann. 33, 63 Am. Dec. 586; Jackson v. Schmidt, 14 La. Ann. 818; Rutherford v. Shreveport & H. R. Co. 41 La. Ann. 793, 6 So. 644; McGuire v. Ringrose, 41 La. Ann. 1029, 6 So. 895; McFee v. Vicksburg, S. & P. R. Co. 42 La. Ann. 790, 7 So. 720; Patterson v. New Orleans & C. R. Light & P. Co. 110 La. 797, 34 So. 782.

Punitive damages are not heritable.

Hamilton v. Morgan's L. & T. R. & S. S. Co. 42 La. Ann. 829, 8 So. 586; Kimbell

before starting to walk across the tracks, but his view was obstructed by freight cars so that he walked out within 18 inches of the main track, where he stopped, and, while looking to the north, was struck by the pilot beam of an engine coming down from the south; it appearing that there was a space of about 15 feet before reaching the main track, where the view was unobstructed. Burns v. Louisville & N. R. Co. 136 Ala. 522, 33 So. 891.

Where plaintiff, who was accustomed to crossing the tracks, stopped to look and listen before reaching the crossing, but, the view being obstructed by cars, did not see the approaching train and was struck by it on the main track; there being a space between the siding and main tracks where it would have been safe for him to have stopped, and, had he again stopped to look and listen, he could have avoided the accident. Hinken v. Iowa C. R. Co. 97 Iowa, 603, 66 N. W. 882.

Where plaintiffs were approaching a public crossing with a gentle team, and claimed to have looked and listened at three different places before crossing the tracks, their view being obstructed by freight cars, and their team was struck on one of the main tracks by a passenger train, there being sufficient space after crossing the first track in which their view was unobstructed, and, had they again looked, the accident might have been avoided. Weyl v. Chicago, M. & St. P. R. Co. 40 Minn. 350, 42 N. W. 24.

Where plaintiff approaching the crossing on foot, looked either side, but, seeing or hearing no train, passed over the first track without again looking, and was struck on the second track by a passing train; there being a space just beyond the first track from which he could have seen the train and avoided the accident. Young v. New York, L. E. & W. R. Co. 107 N. Y. 500, 14 N. E. 434.

Where deceased, while riding a bicycle along the highway, looked each way before crossing the first track, but rode on for 40 feet without again looking either side, and was struck by a passing train, on another track, it appearing that deceased could have looked again without danger to him- 17 L.R.A. (N.S.)

self, and have avoided the accident. Coleman v. New York C. & H. R. R. Co. 98 App. Div. 349, 90 N. Y. Supp. 264.

In Fowler v. New York C. & H. R. R. Co. 74 Hun, 141, 26 N. Y. Supp. 218, plaintiff approached the crossing with which he was perfectly familiar, stopped to look and listen a short distance from the track, and then started to walk across, but was struck on the second track by the bumper of the engine. The court affirmed a judgment directed for defendant by the trial court, saying, the burden is on the plaintiff to show that he was free from contributory negligence, and such burden is not sustained where there are four tracks to be crossed, and the evidence merely shows that, "when yet some distance from the first track, he looked both ways."

In Tucker v. New York C. & H. R. R. Co. 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916, plaintiff's intestate, a boy of twelve years, was killed while crossing defendant's tracks, by colliding with a passing engine. There was some evidence that he stopped and looked in the direction from which the locomotive was coming when on the switch, and, in reversing a judgment for plaintiff because of contributory negligence, the court used the following language: Deceased "had still six tracks to cross, and was then 11 feet from the south rail of the first tracks. To look then, and not again, to go on from that point without observing the further precaution of watching for the approach of trains upon tracks almost constantly in use, was not a proper observance of that care which it was his duty to exercise."

In Keppleman v. Philadelphia & R. R. Co. 190 Pa. 333, 42 Atl. 697, plaintiff stopped, looked, and listened before crossing the first track, though his view was somewhat obstructed by freight cars, but, walking on across the tracks without again looking, he was struck by a train on the north track; and a judgment of nonsuit was affirmed because it appeared that the collision might have been avoided had plaintiff stopped to look and listen on the third track.

v. Homer Compress & Mfg. Co. 109 La. Ann. 966, 34 So. 39; Parker v. Crowell & S. Lumber Co. 115 La. Ann. 466, 39 So. 445.

Messrs. Sandlin & Robertson and Stewart & Stewart, for appellees:

It is negligence on the part of the railroad company to obstruct the view so as to prevent travelers from seeing the train at a safe distance, and to prevent the train crew from seeing travelers in ample time to stop the train.

Ortolano v. Morgan's L. & T. R. & S. S. Co. 109 La. 902, 33 So. 914; 8 Am. & Eng. Enc. Law, pp. 391, 392.

When a railroad company has increased the danger at a particular point, it is its duty to use increased precaution at that point.

Eichorn v. New Orleans & C. R. Light & P. Co. 112 La. 237, 104 Am. St. Rep. 437, 36 So. 335; Ortolano v. Morgan's L. & T. R. & S. S. Co. supra; Sundmaker v. Yazoo & M. Valley R. Co. 106 La. 116, 30 So. 285; Lampkin v. McCormick, 105 La. 422, 83 Am. St. Rep. 245, 29 So. 952; Schwartz v. New Orleans & C. R. Co. 110 La. 534, 34 So. 667; 8 Am. & Eng. Enc. Law, pp. 391, 392; Wharton, Neg. 839; 1 Thomp. Neg. 346.

When the railroad crosses a street used by the public, it is the duty of the company to give the public all necessary warning.

Eichorn v. New Orleans & C. R. Light & P. Co. supra; Ortolano v. Morgan's L. & T. R. & S. S. Co. 109 La. 911, 33 So. 914.

Where a railroad crosses a public street, the rights and duties of the railroad and travelers at that point are mutual, and whichever gets there first has the best right to cross, and the other must give way.

Knox v. North Jersey Street R. Co. 70 N. J. L. 347, 57 Atl. 423; Baltimore & O. R. Co. v. Griffith, 159 U. S. 608, 40 L. ed. 277, 16 Sup. Ct. Rep. 105; Texas & P. R. Co. v. Cody, 166 U. S. 614, 41 L. ed. 1135, 17 Sup. Ct. Rep. 703; Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403.

It is not negligence on the part of a pedestrian on the highway to fail to anticipate recklessness or negligence on the part of others, or to presume that he will be exposed to unusual danger.

Schwartz v. New Orleans & C. R. Co. 110 La. 545, 34 So. 667; Stringer v. Frost, 116 Ind. 477, 2 L.R.A. 614, 9 Am. St. Rep. 875, 19 N. E. 331; Kellogg v. Chicago & N. W. R. Co. 26 Wis. 223, 7 Am. Rep. 69; Beach, Contrib. Neg. § 38; Shea v. Reems, 36 La. Ann. 966; O'Connor v. Missouri P. R. Co. 94 Mo. 150, 4 Am. St. Rep. 364, 7 S. W. 106.

A citizen who, on a public highway, approaches a railroad track, and can neither hear nor see any indication of a moving train, is not chargeable with negligence in 17 L.R.A. (N.S.)

assuming that there is none sufficiently near to make the crossing dangerous.

Tabor v. Missouri Valley R. Co. 46 Mo. 353, 2 Am. Rep. 517; Kennayde v. Pacific R. Co. 45 Mo. 255; Correll v. Burlington, C. R. & M. R. Co. 38 Iowa, 120, 18 Am. Rep. 22; Louisville & N. R. Co. v. Com. 13 Bush, 388, 26 Am. Rep. 205.

Damage may be allowed for the mental anguish of the parent on account of the death of the child.

Parker v. Crowell & S. Lumber Co. 115 La. 463, 39 So. 445; Sundmaker v. Yazoo & M. Valley R. Co. 106 La. 111, 30 So. 285; Le Blanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303, 31 So. 766; Graham v. Western U. Teleg. Co. 109 La. 1069, 34 So. 91; Barnes v. Western U. Teleg. Co. 27 Mo. 438, 65 L.R.A. 666, 103 Am. St. Rep. 776, 76 Pac. 931.

Provosty, J., delivered the opinion of the court:

The plaintiffs sue the defendant railway company for the death of their two little boys, one six and the other ten years old, who were killed upon the Cemetery street crossing of the defendant's railway in the town of Minden by being run over by one of the locomotives of the defendant company. Cemetery street is 40 feet wide, and crosses the yard of the defendant company. It runs east and west, and the tracks upon the yard run north and south. There are four of them,—three side tracks and one main track. The two lads, at about 2 o'clock in the day, were going west upon Cemetery street in a one-mule wagon driven by their grandfather, Mr. Johnson. They were seated on the floor of the wagon at the tail end, facing back, with their feet dangling, while their grandfather and his twelve-year old son were seated upon the spring seat in front. As Johnson approached the tracks, there was to his right, or north, and flush with the first track, and 20 feet from the crossing, a large warehouse obstructing his view in that direction; that is to say, in the direction from which the locomotive was coming. At the north end of this warehouse, about 500 feet from the crossing, was a planer mill, making the usual noises of such an establishment. When Johnson reached the first track, he stopped, looked, and listened. As he thus stood, with the head of his mule pointing west and within a few feet of the first track, there were cars obstructing his view on both sides of the crossing. On his right, or north, side there were the following: On the first track, some cars, 30 or 90 feet from the crossing; on the second track, some flat cars loaded with logs, beginning about 20 or 30 feet from the crossing; on the third

track,—that next to the main track,—a long train of cars loaded with logs, beginning some 5 feet upon the crossing and extending a long distance north. The testimony conflicts as to the number of cars on the left of Johnson, or south of the crossing. According to Lee Griffin, whose testimony we have adopted in the matter of the number and location of these cars, there was but one car below the crossing, and it stood 20 or 30 feet or more from the crossing. Not seeing and not hearing anything, and thinking the way safe, Johnson ventured upon the tracks. The distance from the outer rail of the first track to the outer rail of the fourth track was 49 feet. He passed the first, second, and third tracks safely; but on the fourth track, on the other side of the long train of cars which stood upon the third track, a locomotive with tender was coming, and was so close to the crossing, when the mule and wagon appeared from behind the cars that stood on the third track, that a collision was inevitable. The locomotive was backing. Johnson says he did not hear it, and we can well believe the statement, as he would not otherwise have cast under its wheels his own life and the other precious lives in his keeping. His not hearing is accounted for by the fact that the planer mill to his right was making some noise, but more especially by the fact that the track was down grade and smooth, and the locomotive had shut off steam 275 yards back, and was coming almost noiselessly; the only noise being the rumbling of the wheels.

The seriously contested facts in the case are as to the speed of the engine and as to whether the usual signals by bell and whistle were given.

The crew of the locomotive, and one witness who first saw it when within 30 feet of the crossing, say it was going at from 6 to 10 miles an hour; but, if by this is meant that it was not going faster than was usual upon the yard, the testimony stands in opposition to that of a large number of witnesses whose attention was attracted to it. These witnesses lived in the neighborhood of this yard, and were accustomed to the noises and movements upon it, and the speed of this particular engine would not likely have attracted their attention if it had not been unusual; and the effect upon the wagon shows that the blow must have been quick and sharp. Every spoke was broken in the two hind wheels, where the wagon was struck. One witness, of more than twelve years' experience as a locomotive engineer, says that his attention was attracted to the engine by the rapidity of its exhaust; that it shut off steam about 275 yards from the crossing, and that he continued to observe it until it was about 75 yards from the crossing, and it was still going about 25 17 L.R.A. (N.S.)

miles an hour. How far beyond the crossing the locomotive ran after the collision it is impossible to know definitely from the conflicting testimony.

The occupants of the wagon were hurled in the air and forward, how far is variously stated by the witnesses. Johnson was found senseless, but with no serious injury. His son was unhurt. The two other boys fell on the track and were run over. One had a hand and a foot cut off, and the other a leg; and both were otherwise wounded and severely bruised and lacerated. Both died before the next morning.

It is inconceivable that, if the whistle was blown near enough to the crossing to serve for a warning, or if the bell was rung continuously, these signals would not have been heard by Johnson and by so many persons whose attention was attracted to this engine by its unusual speed. The theory that will best reconcile the conflicting testimony on these points is that the whistle was blown too far up the track to serve as a warning, and the bell was begun to be rung too near or too late.

Defendant has an elaborate argument with diagrams to prove that the smokestack of the locomotive protruded $1\frac{1}{2}$ feet above the long train of log piled-up cars on the other side of which the locomotive was coming, and that Johnson could have seen it. But the best proof that Johnson could not see it is that he stopped and looked and did not see it, although he had good eyes and was familiar with the crossing.

Defendant's learned counsel argue that Johnson stopped at the wrong place to look and listen; that he should not have stopped before going upon the first track, but should have waited until he had gone upon tracks 1, 2, and 3. We do not agree with that view. The four tracks were only 49 feet across. Johnson could see and hear just as well where he stopped as nearer to the fourth track, and, had he gone upon the tracks and stopped there, and been injured, defendant would have been the first to construe his act into negligence.

We are satisfied that the true cause of the accident was the negligence of the employers of defendant in charge of the locomotive in not giving the proper warnings by bell and whistle, and in coming upon this crossing, one of the most frequented of the town, at a negligent speed, especially in view of its obstructed condition from the cars standing upon and near it. The engineer frankly admitted on the witness stand that he did not know the cars stood so near the crossing, or, in other words, that the crossing was so obstructed or so dangerous. This engineer, by the way, was a mere fireman, with very little experience in running engines, who had taken charge that very day in the absence

of the regular engineer on leave. The same fireman, acting engineer, was discharged twice for negligence between the date of this accident, May, 1906, and the date of the trial, June, 1907.

By leaving these cars so near the crossing and obstructing the view, defendant increased the danger, and thereby assumed the duty of taking extra precautions for guarding against accidents. *Eichorn v. New Orleans & C. R. Light & P. Co.* 112 La. 237, 104 Am. St. Rep. 437, 36 So. 335.

Defendant not only took no extra precautions, but neglected even the ordinary ones. It ran this locomotive at extra speed and noiselessly on the other side of a train of cars, thereby laying a sort of trap, and gave imperfectly, if at all, even the ordinary signals of bell and whistle.

One who, on a public highway, approaches a railroad track, and can neither hear nor see any indication of a moving train, is not chargeable with negligence in assuming that there is none sufficiently near to make the crossing dangerous. *Tabor v. Missouri Valley R. Co.* 40 Mo. 353, 2 Am. Rep. 517; *Kennayde v. Pacific R. Co.* 45 Mo. 255. See also *Correll v. Burlington, C. R. & M. R. Co.* 38 Iowa, 120, 18 Am. Rep. 22, and *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407; *Louisville & N. R. Co. v. Com.* 13 Bush, 388, 26 Am. Rep. 205.

Plaintiffs claim damages as follows: For the great shock to them, and for their pain, sorrow, anguish, and distress, \$10,000; for deprivation of comfort, society, companionship, and assistance of their boys, who were their only children, \$10,000; for the pain, torture, and anguish suffered by the boys, and which they inherit from them, \$15,000; punitive damages, \$10,000,—total, \$45,000. The jury allowed \$30,000, without specification of what they made the allowance for.

This case is not one for the allowance of punitive damages. *Parker v. Crowell & S. Lumber Co.* 115 La. 466, 39 So. 445. Touching the proper amount of damages to allow in a case of this kind we find no occasion for adding anything to what was said in the case of *Bourg v. Brownell-Drews Lumber Co.* 120 La. 1009, 45 So. 972. In *Buechner v. New Orleans*, 112 La. 599, 66 L.R.A. 334, 104 Am. St. Rep. 455, 36 So. 603, for the death of a child, this court allowed the parents \$6,000. A like amount for each of the children will in this case satisfy the ends of justice.

The judgment appealed from is reduced to \$12,000, and, as thus reduced, is affirmed. Plaintiffs to pay costs of appeal, and defendant those of lower court.

Petition for rehearing denied May 25, 1908.
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MICHIGAN SUPREME COURT.

JENNIE TUCKER, Plff. in Err.,

v.

McKINSTRY BURT.

(152 Mich. 68, 115 N. W. 722.)

Property owner — removal of sick person — liability.

The owner of an apartment building, who insists on his janitor's compelling the removal of his relative who has become ill with an infectious disease while temporarily in the janitor's apartments, is not liable for aggravation of the illness due to the excitement attending the removal, where the patient was not confined to bed, and there is nothing to show that she might not, with comparative safety, have been taken home in a cab or hack, or that he had any knowledge as to her pecuniary ability to secure one, or that he might have inferred that aggravation of the disease would follow the removal.

(March 31, 1908.)

Case Note. — Liability of property owner for compelling removal of sick person.

In *Bradshaw v. Frazier*, 113 Iowa, 579, 55 L.R.A. 258, 86 Am. St. Rep. 394, 85 N. W. 752, it was held that removing a tenant from the leased premises in which he and his family are living, under a judgment of forcible entry and detainer, on a cold day, at a time when his child is visibly broken out with measles, is an abuse of legal process which will render the landlord liable for the death of, or injurious consequences to, the child; and a certificate of a physician, which he has procured, to the effect that a removal will not injure her health, is not a defense, as a matter of law.

In *Preiser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890, it was held that a tenant whose wife is seriously ill at the expiration of the lease is entitled to a reasonable time in which to vacate the premises, without necessary risk to her life; and where the landlord, after being fully informed as to the dangerous nature of his tenant's wife's sickness, commenced tearing down the house, with its accompanying noise, excitement, and dust, which compelled her removal and aggravated her illness, from the effect of which she died shortly after, he is liable for the damages resulting from her death, if it was the natural and necessary consequence of his wrongful act.

In *McLaughry v. Porter*, 86 Hun, 316, 33 N. Y. Supp. 464, the plaintiff, daughter of a mortgagor who was being evicted on a warrant of dispossession after foreclosure of a mortgage, was removed under said writ while sick, and with unnecessary force. The court, though not especially considering the effect of the plaintiff's illness, assumed that a prima facie case of abuse of process was shown, and held that the evidence was suffi-

ERROR to the Circuit Court for Wayne County to review a judgment in defendant's favor in an action brought to recover damages for aggravation of plaintiff's illness because of defendant's alleged wrongful act. Affirmed.

Statement by Grant, Ch. J.:

Defendant was the owner of a six-family apartment building, known as the "Pontiac apartments." It was occupied by six families. The janitor, plaintiff's son-in-law, Mr. Barber, received as compensation for his services \$20 per month and the use of certain rooms in the basement for the use of himself and wife. Plaintiff was a widow, whose youngest son—about twelve years old—lived with her. She was poor and went out to service. She was in the habit of leaving her son during the day with her daughter and her husband, calling for him at night when she returned to her own home, about 12 blocks from the Pontiac apartments. One day during the latter part of April, 1905, the boy was taken ill with inflammatory rheumatism at his sister's home. It was arranged that the boy should remain there, that plaintiff should take care of him at night, and that the daughter and her husband would take care of him during the day. They had but one bedroom which was given up to plaintiff and

her son, while the daughter and her husband slept in a bed upon the floor in the sitting room. One day, but the precise time does not appear, plaintiff was taken ill with erysipelas. It was not regarded by the physician as a very serious case. She remained there until May 15th. Meanwhile plaintiff's physician had told the tenants in the building that the disease was infectious, and warned them to be careful. He testified that one of the tenants called him up, and berated him a little for having her there. On Sunday, the 14th, the defendant, having learned of plaintiff's illness and the infectious character of it, notified the janitor, Mr. Barber, that he must take plaintiff out of the flat. Mr. Barber said he would try and see what he could do about having her removed before Monday afternoon. On the following forenoon defendant called Mr. Barber by telephone, and informed him that he must get plaintiff out by noon, or he would bring an officer and put them all out. Mr. Barber communicated this message to the plaintiff. He told her that she had better stay. He testified: "She (plaintiff) got up on her ear, and said she was going. She got very excited, and said she did not want to cause me any trouble, and she would rather go than cause me trouble." She described the circumstances of her leaving as follows: "On the 15th day of May, 1905, it

was unable to go to the jury to determine whether the landlord had participated with the officers in the removal, and thus made himself liable.

In *McHugh v. Schlosser*, 159 Pa. 480, 23 L.R.A. 574, 39 Am. St. Rep. 699, 28 Atl. 291, it was held that an innkeeper was liable for the death of a person who, while sick, was driven out into the storm without adequate covering, and left for half an hour in a stream of melting ice and snow, where he fell from inability to stand on his feet, if it was reasonable to suppose that death might follow such sudden exposure in his condition.

In *Levy v. Corey*, 1 N. Y. City Ct. Rep. Supp. 57, it was held that, where a guest is taken ill at a hotel, with a contagious disease, the proprietor, after notice, has the right to remove her in a becoming manner to a hospital or other proper place if it can be safely done, or make any reasonable agreement for extra compensation for permitting the guest to remain. The agreement, however, must be voluntarily made, and, if the hotel keeper takes advantage of the misfortune, and, by threats amounting to duress, unlawfully exacts money from the guest or her husband, it may be recovered back.

In *Depue v. Flatau*, 100 Minn. 299, 8 L.R.A. (N.S.) 485, 111 N. W. 1, the plaintiff, a cattle buyer, went to the farm of defendant on a cold winter evening to buy cattle, but, on account of the darkness,

was unable to inspect the cattle until daylight, and asked permission to remain, which was refused. He was invited to supper, however, and bought some furs. He was then taken violently ill and again asked permission to remain, which was refused. He was helped into his cutter, but on his way home again became ill, lost consciousness, and, because of the exposure, suffered impairment of health and other injuries. It was held that, the plaintiff not being a trespasser on the premises of defendant, but there by express invitation, defendant owed him the duty, upon discovering his physical condition, to exercise reasonable care in his own conduct not to expose him to danger by sending him away from his house; and it was for the jury to say whether, considering defendant's means of looking after plaintiff, or of communicating with his friends, he neglected any duty which he owed him.

In *Weymire v. Wolfe*, 52 Iowa, 533, 3 N. W. 541, plaintiff's intestate drank at the saloon of defendant until he was in a state helpless and unconscious intoxication, when he was ejected at a late hour and died from the consequent exposure. It was held that defendant was liable; nor was it a defense that the intoxication was voluntary.

For exhaustive note on care due to sick, infirm, disabled, and otherwise helpless persons, with whom no contract relation is sustained, see *Union P. R. Co. v. Cappier*, 69 L.R.A. 513.

was brought to my knowledge that Mr. Burt desired me to leave and insisted on my leaving. My son-in-law came in and said that Mr. Burt telephoned that I should leave the place, and if I didn't leave in an hour or two hours, if I was not out in that length of time, he would come up and put the whole shooting match out of the house. That frightened me, because I did not want to cause my son-in-law any trouble, and he said, 'Don't be frightened;' and I said, 'I am, because I don't want to cause you trouble.' And he said, 'You are not able to go,' and I said, 'I will go anyway;' and put on my things, and took the street car. My daughter accompanied me. Up to that time I had not left the house during my illness at the Pontiac flats. I had not left the room. I can't tell the time of day. We telephoned for an ambulance, but I could not pay the amount of charges, and I took a street car. I had to walk nearly two blocks. I went down Beaubien, and transferred on a Crows-town, and when I got to Third avenue I walked from the cars." She also testified that she was taken worse immediately thereafter. She left the apartments for her home about 2 o'clock P. M.; her daughter accompanied her. It took about half an hour to get home. She had forgotten the key to her house, and sat upon the stoop while her daughter climbed into a window and opened the door. There was no fire in the house, but the daughter immediately built one. She brought this suit charging that "she, in common with all the inhabitants of this Republic, was entitled to be protected in the enjoyment of her health, her life, and her limbs, her property, and all other rights commonly known as the absolute rights of persons, and, in her then condition, was entitled to be protected against being exposed to the weather, or to such physical or mental effort and fatigue as would have a tendency to bring about a relapse in her condition and an aggravation of her said affliction. And the plaintiff further avers that, by reason of the premises, it became and was the duty of the said defendant to permit her to enjoy her said absolute rights, and to wholly desist and refrain from requiring, ordering, directing, or compelling her to leave her place at said Pontiac flats, and undergoing the fatigue, physical exertion, and mental anxiety incident to leaving her said place at said flat in her then condition, and going to her said home at 853 Third avenue, in said city. And it was the other and further duty of the said defendant to refrain from any and all acts which would have a tendency to and would bring upon the said plaintiff a relapse, and to permit the plaintiff to remain at her room in said flat until restored to such

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health that she could return to her own room without danger of a relapse. Yet the said defendant, not regarding his said duty or duties, or any or either of them, for the sole reason that some of the tenants in said flat thought that plaintiff's affliction was contagious, the said defendant wrongfully, heartlessly, unlawfully, and in utter disregard of the plaintiff's rights and condition of her health, required, ordered, and directed and insisted upon the removal of the said plaintiff from said flats, although it must have been perfectly apparent to anyone that such action would greatly endanger the life and health of the said plaintiff, and the said defendant unlawfully, wrongfully, negligently, and recklessly and heartlessly required and ordered the said James Barber to put the said plaintiff out of said flat, and instructed the said Barber that, unless he did as directed, the said defendant would come there with policemen and officers and remove the said plaintiff from said flat." Plaintiff introduced evidence tending to show that she was worse after leaving the defendant's premises. When the plaintiff rested her case the court directed a verdict for the defendant, on the ground (1) that the defendant had violated no duty which he owed to plaintiff; and (2) that there was no evidence that her physical condition after she left was traceable to the alleged wrongdoing on the part of defendant.

Messrs. Abbott & Abbott and Lehman & Riggs, for plaintiff in error:

It was the duty of the defendant to use due care to avoid injury to the plaintiff, for breach of which he is liable.

Depue v. Flatau, 100 Minn. 299, 8 L.R.A. (N.S.) 485, 111 N. W. 1; Hill v. Kimball, 76 Tex. 210, 7 L.R.A. 618, 13 S. W. 59; Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034; Brownback v. Frailey, 78 Ill. App. 262; Preiser v. Wielandt, 48 App. Div. 569, 62 N. Y. Supp. 890; Barbee v. Reese, 60 Miss. 906; Heaven v. Pender, L. R. 11 Q. B. Div. 509; Cincinnati, N. O. & T. P. R. Co. v. Marra, 119 Ky. 954, 70 L.R.A. 291, 115 Am. St. Rep. 289, 85 S. W. 188; Weymire v. Wolfe, 52 Iowa, 533, 3 N. W. 541; Barrows, Neg. § 304; 2 Thomp. Neg. 1702.

Mr. James H. McDonald and Lloyd L. Axford, for defendant in error:

The rights of the janitor were not those of a tenant.

Jones, Land. & T. § 20; School Dist. No. 11 v. Batsche, 106 Mich. 333, 29 L.R.A. 576, 64 N. W. 196.

Mere threats are not a trespass.

Baldwin, Personal Injury, § 21; Burden v. Lake Shore & M. S. R. Co. 104 Mich. 101, 62 N. W. 173.

Grant, Ch. J., delivered the opinion of the court:

The question here involved is one of legal, not of moral, obligation. The law imposes no duty upon the individual citizen to care for the sick or the unfortunate who are poor. The public in this country assume that obligation, and each citizen has performed all that the law requires of him when he has paid his share of the expense imposed upon him by taxation for that purpose. The Priest and Levite violated no rule of law when they passed by on the other side of the wounded man. The Good Samaritan was not acting in obedience to a legal duty when he took compassion upon him, took care of him, and removed him to the inn. What legal duty, if any, did defendant owe plaintiff? Unless the law imposed the duty upon the defendant to shelter her and her son in his house, it is clear that he cannot be held liable. The janitor, Mr. Barber, was defendant's employee, not his tenant. He possessed none of the rights of a tenant. *School Dist. No. 11 v. Batsche*, 106 Mich. 330, 29 L.R.A. 576, 64 N. W. 196. He had no right to bring into his employer's house to live with him anyone, whether well or ill, without his employer's assent. Defendant had not invited plaintiff to his house, neither had he authorized his employee to do so. The disease was infectious and dangerous to the tenants in the house, especially, perhaps, to one woman, who shortly before had given birth to a child. The doctor had notified the tenants of the danger. Defendant was under no obligation to keep the plaintiff in his house if she could be removed without danger of serious injury. He might lawfully request those who were responsible for her being there to cause her removal. He might not, neither did he, turn her into the street. He first requested his employee to cause her removal. When that employee failed, he insisted and threatened to take prompt legal steps with an officer to accomplish it. She was not confined to her bed. There was testimony to show that defendant knew that plaintiff had a house of her own, but none to show that he knew where it was located. Her physician testified that defendant talked with him two or three times, and that he told him that she would be much better if she was in her own house, but did not think it advisable to move her in her present condition. How long this was before she left is not shown. There is no evidence to show that she might not with comparative safety have been taken to her home in a cab or hack without danger. But, even if there was some danger incident to her going, there was also danger to the other occupants of the house incident upon her remaining, and it was as much the legal duty of the defend-

ant to look out for them as to look out for her. She was able to walk and walked to the street car, made a change from one car to another, and walked two blocks to her own home. It does not appear whether she was able to hire a cab or hack, for which a very inconsiderable sum would have sufficed, or whether defendant had any information or knowledge as to her ability in this regard.

Counsel for plaintiff cite and rely upon *Depue v. Flatau*, 100 Minn. 299, 8 L.R.A. (N.S.) 485, 111 N. W. 1. The facts in that case are in no respect similar to those in this case. In that case the plaintiff was invited into the defendants' house, and while there, he was taken suddenly ill and fell to the floor. He requested permission to remain over night, but defendants refused. The defendants assisted him from their house to the cutter. Plaintiff could not hold the reins to guide his team, and one of the defendants threw the reins over his shoulders, and started the team upon the road. The plaintiff was in the house of the defendants by invitation. He was temporarily their guest. While the court in that case could not find an "all-four" precedent, they based their decision upon "the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself." That decision is founded upon just and sound principles. The defendants in that case violated a legal duty towards their guest, and did an active wrong when they turned him out of their house in a winter night so helpless that he could not guide his horses, and left him to his fate. The record in this case contains nothing to bring it within that. In *Union P. R. Co. v. Cappier*, 66 Kan. 649, 69 L.R.A. 513, 72 Pac. 281, it is said: "With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure." Whatever aggravation of illness was caused in consequence of plaintiff's removal, the physicians agreed that it was due more to excitement than to any other cause. There is no evidence from which the defendant might

have inferred that such a result would follow, or that he had any intimation that the removal would excite the plaintiff, or that the excitement would aggravate her illness.

The defendant was guilty of no legal wrong; and the judgment is affirmed.

MICHIGAN SUPREME COURT.

JUDSON HARMON, Receiver of Pere Marquette Railroad Company, Plff. in Err.,
v.

OLD DETROIT NATIONAL BANK.

(— Mich. —, 116 N. W. 617.)

Check — fictitious payee — justification of payment.

1. A bank cannot justify payment of a check fraudulently drawn in favor of a fictitious payee by the fact that the check

Case Note. — *Who must bear loss when check or bill is issued or indorsed to impostor?*

The decision in the foregoing case may perhaps be reconciled with the cases which throw the loss upon the drawer rather than upon the drawee in case the former is induced to issue a check to an impostor under a mistake as to his identity, by reason of the fact that the record does not show to whom the warrant was paid by the Denver bank. Possibly the fact that the payee was described as a company would itself be ground for a distinction, and yet it is at least questionable whether, if it had appeared that the warrant was paid to the person who received it through the mail, and who assumed to be G. E. Fairbanks, treasurer of the G. E. Fairbanks Coal Company, the case on its facts would not have fallen within the doctrine—which, as shown in a note to Land Title & T. Co. v. Northwestern Nat. Bank, 50 L.R.A. 75, is sustained by the weight of authority—that a drawer of a check who, supposing one to be the person whose name he has falsely assumed, delivers to him a check describing the payee by that name, must, as against the drawee or a bona fide holder, bear the loss where the impostor obtains payment of, or negotiates, the same. As shown in that note most of the cases which sustain the doctrine place it upon the ground that the payment of the check to, or upon the indorsement of, such an impostor, carries out the actual intention of the drawer, even though that intention was superinduced by a fraud. It should be noted in this connection that the statement in the opinion in HARMON v. OLD DETROIT NAT. BANK, that in United States v. National Exch. Bank, 45 Fed. 163, the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check, is based upon a misapprehension of the facts. It appears from 17 L.R.A. (N.S.)

came to it through other banks which had cashed it, since their negligence is imputed to it.

Same — statutory provision.

2. A statute making a check drawn in favor of a fictitious payee payable to bearer does not apply where its execution in that form was secured by fraud.

Same — identification.

3. The duty of the bank to identify the one to whom a check is paid is not changed by the fact that the name of a fictitious payee was fraudulently inserted before it was signed by the drawer.

Same — suspicious circumstance.

4. The bank cashing a check must take proper means to assure itself that it is paid to the proper person,—especially where it is presented far distant from the residence of drawee or payee.

Forgery — fictitious indorsement.

5. The indorsement upon a check of the name of a fictitious person to whom it was,

the report of the case that the person who identified the impostor to the bank, though himself deceived, was the same person who identified him to the postmaster, and so far as appears he had no connection with the postoffice.

The doctrine supported by the cases cited in the earlier note, which throws the loss upon the drawer rather than upon the drawee, is declared and applied by Central Nat. Bank v. National Metropolitan Bank, post, 520. In Meyer v. Indiana Nat. Bank, 27 Ind. App. 354, 61 N. E. 596, also, where one by impersonating another and negotiating a loan under his name procured a check which described the payee by that name, indorsed the same under that name and presented it for payment to the drawee, and, being identified under his own name, also indorsed the latter name, and got the money—it was held that the drawer rather than the drawee must bear the loss. The court said, in support of its decision, that names are used merely as one method of indicating identity of persons; that the person to whom the drawer ordered his funds to be paid was the one to whom they were paid, notwithstanding that the drawer was deceived as to his true name and was mistaken as to the ownership of the property and his character. While it appears in this case that the impostor was identified to the drawee, it will be observed that he was identified under his true name, and not under the name by which the payee was described.

In States v. First Nat. Bank, 17 Pa. Super. Ct. 256, the plaintiff, in pursuance of certain letters purporting to come from his sister, but actually written by her husband, sent through the mail addressed to her a bank draft representing a legacy due her from an estate for which the plaintiff was executor; as a matter of fact the sister was dead, though the plaintiff was not aware of that fact, and the draft was

by fraudulent procurement, made payable, is forgery.

May 26, 1908.)

ERROR to the Circuit Court for Wayne County to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due on a deposit account. Reversed.

Statement by Grant, Ch. J.:

The defendant was one of the general depositaries of the Pere Marquette Railroad Company. The funds on deposit were paid out upon warrants issued by the company. Its method of doing business with the bank will appear from the following statement of facts: In May, 1905, the railroad company was indebted to the Sunday Creek Coal Company in the sum of \$2,097.38. Its purchasing agent prepared a voucher warrant for payment. This document was prepared

on a printed blank. The first page of the document, called the "warrant," constituted the check or warrant of the treasurer of the company on the bank. The warrant as prepared by the purchasing agent reads as follows: "Pere Marquette Railroad Company, Dr., to the Sunday Creek Coal Co. (Pay W. N. Cott, Treas.), Columbus, O. Made 5/31/05, Dept. No. 6706, April. For coal per attached statement, \$2,097.38." Below this were blanks for the signatures of the auditor of disbursements, comptroller, and treasurer, and for the signature of the payee upon presentation at the bank. Above the auditor's signature is the following: "I certify that this warrant is in accordance with an account approved by the proper officer and duly audited." Above the comptroller's signature are the words "approved for payment." Above the treasurer's signature is the following: "Will pay this warrant when properly dated and receipted

received by the husband and indorsed by him in the wife's name and eventually paid by the bank upon which it was drawn and charged to the account of the defendant, the bank from which it was purchased. Subsequently the plaintiff was obliged to pay the amount of the legacy to the children of the deceased sister, and brought an action to hold the bank from which he purchased the draft liable because of its payment upon the forged indorsement of the name of the deceased sister. It was held, upon the authority of *Land Title & T. Co. v. Northwestern Nat. Bank*, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420, that there could be no recovery, and that the loss must fall upon the plaintiff, the purchaser of the draft, upon whom the deception was primarily and successfully practised. The court said that the fact that the fraud was accomplished by correspondence to which the plaintiff gave credence did not remove the case from the application of the principle laid down in *Land Title & T. Co. v. Northwestern Nat. Bank*, supra, and other cases of that kind; remarking that the facts in the case at bar were practically identical with those in *Maloney v. Clark*, 6 Kan. 82, cited in the earlier note.

In *Sherman v. Corn Exch. Bank*, 91 App. Div. 84, 86 N. Y. Supp. 341, the plaintiff in response to a newspaper advertisement announcing the sale of horses called at a livery stable and saw there a person who represented that he was the coachman of the owner of the horses, whom he described as a certain wealthy gentleman connected with a well-known business; the plaintiff delivered to him in payment of the horses a check in which the payee was described by the name of that gentleman; at the time the check was paid by the drawee it bore what purported to be the indorsement of the payee as well as that of a third person. It was found by the referee upon sufficient evidence that the check was given in pay-

ment of horses purchased from a person bearing the same name as the gentleman described, but who was in fact a different individual. The horses having proven unsatisfactory, the question arose whether the drawee bank was entitled to a credit in its account with the drawer for the amount of the check it had paid. The court decided in favor of the bank, saying that the fact that the person to whom the check was made payable was not the person whom the drawer had in mind was of no importance. While the court relied upon the class of cases cited in the earlier note, the case before it differed somewhat from those cases in that the drawer of the check received some consideration for it, and, so far as appears, the person who indorsed the check in the name of the payee was not a party to the fraud, there being simply a mistake of identity with respect to two persons bearing the same name, though that mistake was induced by the misrepresentation of the person with whom the drawer dealt.

The doctrine sustained by the cases cited in the earlier note and the cases above cited in this note is, however, directly opposed by *Tolman v. American Nat. Bank*, 22 R. I. 462, 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480. In that case an impostor impersonating another person negotiated with plaintiff for a loan, received a check in which the payee was described by the name of the person falsely impersonated, indorsed that name on the check, and gave it to a third person who collected it from the bank on which it was drawn. It was held that the loss must fall upon the drawee bank, and not upon the drawer. The court said that the contention of the counsel for the bank that the payment of the check upon the indorsement of the impostor carried out the actual intent of the drawer was based on a manifest fallacy, and added: "Moreover, of what consequence is the intent of the drawer of the check when the di-

if presented within sixty days from date stamped hereon." All the above, except the receipt of the payee, appeared upon a carbon page, called the "voucher." Instead thereof there were blanks in which to show the manner in which the amount paid should be charged upon the books of the railroad company. The purchasing agent and his clerk who prepared the papers signed their names upon the voucher, and then the original warrant and voucher, with a statement of the coal to be paid for and original invoices thereof attached, were sent to the general manager for his approval. The general manager approved the payment by signing the voucher, and forwarded the papers to the president, who also approved the payment by signing the voucher, and then

forwarded the papers to the auditor of disbursements. In the office of the auditor of disbursements the papers passed through the hands of several clerks, each of whom had some particular duty to perform in relation to them in verifying the computations, entering the transaction upon the books of the company, etc. Before the warrant had been signed by the auditor of disbursements Edwin Murdock, one of the clerks in his office, fraudulently took the papers out of the office and sent them to Chicago, where the name and address of the payee named in the voucher was changed from "The Sunday Creek Coal Co., Pay W. N. Cott, Treas., Columbus, O.," to "The G. E. Fairbanks Coal Co., Pay G. E. Fairbanks, Treas., 407 Able Bldg., Cor. 63 St. Stewart

rejection is to pay to the party named? He has the right to assume that the bank will pay to the party as directed. In this case the money was intended for Haskell [the person falsely impersonated] because his was the only name suggested; he had been looked up and found to be responsible. It is a perversion of words to say that it was intended for Potter, simply because he had fraudulently impersonated Haskell and led the plaintiff to believe that he was Haskell. The plaintiff did not intend to let Potter have money; his check showed he was not to have it, because it was made payable to Haskell. When, therefore, Potter fraudulently indorsed Haskell's name on the check, it was a typical case of forgery. It was a false signature, with intent to deceive."

In *Western U. Teleg. Co. v. Bi-Metallic Bank*, 17 Colo. App. 230, 68 Pac. 115, the local agent of a telegraph company, having received instructions from the company to pay a certain amount of money to "W. H. Daily," sent out a notice addressed in that form; in response to which a man presented himself, stating that he was the person to receive the money; the agent not being satisfied with the identification, and for the purpose of having the bank identify the payee, drew a check payable to the order of "W. H. Daily" and delivered it to the claimant, taking a receipt from him which was signed "Wm. H. Daley;" the check was cashed by another bank upon an indorsement in the form "Wm. H. Daley," and eventually paid by the drawee. It was held that, as between the drawer and the drawee, the loss must fall upon the latter. The court said that the variation between the name as written in the body of the note and as indorsed was in itself sufficient to throw the loss upon the drawee, but was apparently of the opinion, even apart from that consideration, that the loss must fall upon the drawee bank: repudiating its contention that by delivering the check to Wm. H. Daley and accepting a receipt signed by him in that name, the drawer's agent identified him as the person to whom payment might be properly made, or upon whose in-

dorsement the drawee would be authorized to pay.

In the earlier note a distinction is pointed out between a case where the impostor assumes to be the person by whose name the payee is described in the check, and a case where he merely assumes to be the agent of such person; it being conceded even by the courts which hold that in the former case the loss will fall upon the drawer, that in the latter case it will fall upon the drawee, at least in the absence of negligence on the part of the drawer.

This distinction was also expressly recognized and applied in *Houser v. National Bank* 27 Pa. Super. Ct. 613 which held that the loss must fall upon the drawee bank rather than the drawer, where an attorney who had acted for his grandmother in other transactions including the investment and reinvestment of her money, falsely represented to another member of the bar that she desired to sell her share in a judgment, and by forging her name to an assignment of her interest in the judgment procured the delivery to himself of a check naming her as payee, forged her signature, and cashed the check at another bank, to which it was subsequently paid by the defendant (the drawee).

The same distinction is made in *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 683, holding that the loss must fall upon the drawee where an attorney at law, then in good repute, purporting to act as agent for a person who was in fact dead, negotiated a loan to be secured by a mortgage on the latter's real estate, and procured a check for the amount of the loan, which described the payee by the name of the deceased person. The check was subsequently paid by a trust company to one whom the attorney identified as the payee, it being indorsed both in the name of the payee and in the name of the attorney, and was ultimately paid by the drawee bank to the trust company. The court specifically distinguished the case from *Meyer v. Indiana Nat. Bank*, 27 Ind. App. 354, 61 N. E. 596, upon the ground

Ave., Chicago, Ill.," and the statements attached to the vouchers were changed in the same manner. The altered papers were returned by mail to the office of the auditor of disbursements, where a new warrant was prepared. This new warrant was made payable to "The G. E. Fairbanks Coal Co." to accord with the altered voucher, and when some further entries in relation to the transaction had been made the papers were, in the regular course of business, laid before the chief clerk of the auditor of disbursements for his approval. The new warrant above mentioned was signed by the auditor of disbursements without any knowledge or suspicion that the name of the payee had been changed after the voucher had been signed by the purchasing agent, general

manager, and president of the company. The warrant was then sent to the treasurer of the company, who signed it, and mailed it to the payee at Chicago, at the address shown in it. The indorsements stamped upon the warrant by the different banks through which it passed indicate that the warrant was cashed by someone at a Denver bank, forwarded by that bank to a bank in Chicago, which forwarded it to the American Exchange Bank of Detroit, which collected the amount of the warrant from the defendant bank through the Detroit Clearing House after an indorsement by the American Exchange Bank of a guaranty of prior indorsements. This is all the light we have upon the history of the warrant from the time it left the office of the rail-

that the impostor assumed merely to be the agent of the payee, and not as in that case to be the payee himself.

Recurring again to the case where the impostor assumed to be, and induced the drawer to believe he was, the person by whose name the payee was described in the check: It seems doubtful whether the drawer has any right to complain of the failure of the bank which pays the check to have the payee properly identified. As a bank which pays a check upon a forged indorsement is, in the absence of any negligence or mistake on the part of the drawer as to the identity of the payee, absolutely bound as against the drawer, to bear the loss however great care it may have exercised to avoid error, it would seem that the duty in respect of identification is one which, so to speak, it owes to itself rather than to the drawer. At all events it seems a hardship to devolve upon the bank the duty of protecting the drawer against the consequences of his own mistake, even though that mistake was induced by the fraud of a third person. It is true that the fraud might have been frustrated if the bank had insisted upon a proper identification, but so might it have been had the drawer himself insisted upon a proper identification. Having failed to do so, the justice of throwing the loss upon the drawee because of its omission of a similar precaution is not apparent. The earlier note suggests that the theory that the drawee by paying the check to the impostor carries out the actual intention of the drawer, which is frequently invoked in support of the doctrine that throws the loss upon the drawer rather than the drawee, is objectionable for the reason that, if logically followed, it would impose the loss upon the drawer where he was completely deceived, and relieve him from it where he was not completely deceived, but, being in doubt, intended to throw the responsibility upon the bank; whereas the equities would seem to be stronger in favor of the drawee in the latter case than in the former. In lieu of that theory the theory of estoppel, which would operate in either case,—certainly in the latter case,—was 17 L.R.A. (N.S.)

suggested. The purpose of identification is to insure the payment of the check to the real payee. If that result has been accomplished the want of identification is immaterial. The question is, then, whether the impostor is the real payee, or at least whether the drawer is not estopped to deny that he is such payee. In any case a bank in paying a check must rely largely upon the identification afforded by the fact that the person to whom the check was paid, or who indorsed the same, had it in his possession. It is obvious that the mere fact that he is identified to the bank as an individual who bears the name by which the payee is described, is not in itself an absolute identification of him as the real payee intended by the drawer, since it is obvious that a check payable to the order of one person by the name of "John Smith" might be stolen and cashed by another person named "John Smith." In that case, *i. e.*, when the check was stolen, either before or after delivery to the proper payee, the bank (in the absence of negligence on the part of other parties) would have to bear the loss. In such case, however, the deceptive appearance arising from the fact that the check is in possession of the person to whom it is paid, is not due to any act on the part of the drawer. If, however, the drawer delivers a check payable to order of John Smith to an individual whom he believes to be John Smith and the owner of the property, and who, for the sake of the illustration, may be conceded rightfully to bear that name, but who is not in fact the owner of the property, does it lie in the drawer's mouth to deny as against the drawee that such individual was the payee? The mere fact that the impostor may not have rightfully borne the name by which the payee in the check was described does not make the case of a drawer any stronger, except perhaps as it furnishes an additional opportunity to the bank to discover and frustrate the fraud. The drawer who in such a case seeks to throw the loss upon the drawee in effect asks the court to go behind his own conviction as to the identity of the person with whom he was dealing, and to whom he delivered the

road company's treasurer. The railroad company had no contract with the G. E. Fairbanks Coal Company, never had any dealings with such a company, had never heard of the existence of such a company, and had no coal contract with anyone in Chicago. The warrant came to the defendant in the usual course of business, and was paid. This suit is brought to recover the amount paid on the warrant on the ground that it was a forgery. The plaintiff requested the court to direct a verdict in his favor. This was refused, and the case submitted to the jury upon the theory that the railroad company was negligent in making and issuing the warrant, and that, where one of two parties must suffer, the loss must be borne by the one whose negligence caused it. The jury rendered a verdict of no cause of action.

Messrs. Stevens, McPherson, & Bills, for plaintiff in error:

In an action to recover a debt, the payment of the debt is an affirmative defense, of which the defendant must give notice with his plea, and which he has the burden of proving.

Adams v. Field, 25 Mich. 16; *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195; *Doolittle v. Gavagan*, 74 Mich. 11, 41 N. W. 846; *Coon v. Bouchard*, 74 Mich. 486, 42 N. W. 72; *Dillon v. Pinch*, 110 Mich. 149, 67 N. W. 1113.

The fraud or negligence of an employee of the company in the preparation of the warrant will not relieve the bank of its burden of proving that payment was made to the payee named in the warrant.

Armstrong v. National Bank, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131; *Chism v. First Nat. Bank*, 96 Tenn. 649, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387; *Murphy v. Met-*

check as the person who owned the property constituting the consideration for the check, and relieve him from the consequences of his own mistake. If the drawer was completely convinced as to the identity of the person with whom he was dealing, he would, presumably, except as a matter of convenience, have been willing to pay him the amount in cash, in which event the loss would necessarily have fallen upon him. If he was not so completely satisfied of the identification that he would have been willing to pay the amount in cash had it been otherwise convenient to do so, it seems unreasonable to hold that he might deliberately absolve himself from the duty of requiring a complete and satisfactory identification

Metropolitan Nat. Bank, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693.

Mr. Harrison Geer, with **Mr. Henry A. Harmon**, for defendant in error:

To charge the bank, the maker of the check must be free from blame, and not by his negligence place in the hands of a third party the means of committing the fraud.

Bolles, *Modern Law of Banking*, p. 720; *Morse, Banks & Banking*, 4th ed. § 461; *Land Title & T. Co. v. Northwestern Nat. Bank*, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420; *Iron City Nat. Bank v. Ft. Pitt Nat. Bank*, 159 Pa. 47, 23 L.R.A. 615, 28 Atl. 195; *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141; *Maloney v. Clark*, 6 Kan. 82; *United States v. National Exch. Bank*, 45 Fed. 163.

Grant, Ch. J., delivered the opinion of the court:

The facts in this case are not in dispute, and are sufficiently above stated. The conclusion to be drawn from them is that a trusted employee of the railroad company erased, or caused to be erased, with the aid of others, the name of the real payee and the substitution of another payee, and thus caused to be issued a forged warrant or voucher. The payee in the forged instrument was either a fictitious person or a real one unknown to the drawer. The plaintiff made a *prima facie* case of a fictitious payee. The defendant introduced no evidence that the payee was a real entity. The record is barren of any evidence tending to show to whom the payment was made by the bank in Denver, Colorado, or under what circumstances it was paid. All that the record shows is that it was cashed in the Denver bank, and reached the drawee, the defendant, through other banks, and was paid by it on July 1, 1905.

As between the depositor and the bank the burden of proving payment by valid check or other voucher is upon the bank. No citation of authority is needed that he who re-

fication and throw that duty upon the bank, whose suspicions may be lulled by the very fact that the person has the check in his possession. These suggestions do not apply to the case where the impostor merely assumes to be the agent of the person named as payee, and not the payee himself; for while the drawer by delivering the check to such a person may be regarded as vouching for him as the agent of the payee, he does not vouch for his right to indorse the payee's name. The fraud might have been perpetrated in such a case, even if the impostor had been in fact the agent of the payee and had forged the latter's name to the check.

ceives money of another must account for its payment. As between the plaintiff and the defendant the question is, Upon whom must the loss fall? There is no claim of bad faith on the part of either. The facts being conceded, the question is one of law. Plaintiff contends that the fraud or negligence of its employee does not relieve the bank of its burden of proving that payment was made to the payee named in the warrant. Defendant insists that the officers of the company were negligent in not ascertaining that the voucher was forged; that it exercised due care in honoring it, bearing as it did the genuine signatures of the officers of the company. If the payee named in this voucher, the G. E. Fairbanks Coal Company, pay G. E. Fairbanks, treasurer, had been presented to the defendant by one claiming to be G. E. Fairbanks, the treasurer of the Fairbanks Coal Company, would the defendant have been protected in payment without any investigation to determine the identity of the presenter with the payee named in the warrant? It seems to us clear that it would not. The same rule must apply when the warrant or check is presented to it, coming through other banks. If the drawee chooses to rely upon the identification by the bank which cashed the check, it does so at its own risk, and its recourse is upon that or some intermediate bank. If the G. E. Fairbanks Coal Company was a fictitious payee, the bank cannot defend under the statute (Comp. Laws, § 4870) that the check was payable to bearer. That statute applies only to cases where the drawer knowingly draws the check to the order of a fictitious payee. *Armstrong v. National Bank*, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131; *Chiam v. First Nat. Bank*, 96 Tenn. 649, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693; 2 *Bolles*, *Modern Law of Banking*, 716; 7 *Cyc. Law & Proc.* p. 564. In *Shipman v. Bank of State*, it is said: "We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person."—citing authorities. There are au-

thorities to the contrary in this country, but the clear weight of authority in both England and the United States is in favor of this rule. If this warrant had been changed so as to make it a forged instrument after it had been issued by the railroad company, under all the authorities the defendant would not have been justified in paying the forged instrument. The time and place of the forgery are immaterial, unless the forgery was committed under such circumstances as to show negligence on the part of the drawer. But the drawee's duty to use due diligence in identifying the payee of the check or warrant is not changed by the time and place of the forgery. This is not the case of *United States v. National Exch. Bank* (C. C.) 45 Fed. 163. In that case the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was of course with the drawer, and not with the drawee. To render that case applicable to this it should have appeared that the proper officer of the railroad company went to the bank and identified the payee. It was held in *Robarts v. Tucker*, 16 Q. B. 560: "That a banker cannot debit his customer with the payment made to one who claims through a forged indorsement, and so cannot give a valid discharge for the bill, unless there be circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position so as to preclude the customer from showing it to be forged." It is held in *Murphy v. Metropolitan Nat. Bank*, *supra*: "The ordinary rule is well established that a banker on whom a check is drawn must ascertain at his peril the identity of the person named in it as payee. It is only when he is misled by some negligence or other fault of the drawer that he can set up his own mistake in this particular against the drawer,"—citing authorities.

In this case the defendant took no precautions before paying the warrant to ascertain the identity of the payee. It did not show that it paid the warrant to the payee named therein. It evidently relied upon the identification made by the bank in Denver, Colorado, where the warrant was cashed, and whether that bank took the requisite precaution we do not know. It would naturally excite suspicion that a check drawn in Detroit, payable to a corporation in Chicago, on a bank in Detroit, should be presented to a bank in the distant city of Denver. It was clearly the duty of the Denver

bank to take proper means to assure itself that it was paid to the proper party; in other words, to take proper means to identify the payee. 2 Morse, Banks & Banking, § 466 (b); Ellis v. Ohio Life Ins. & T. Co. 4 Ohio St. 628, 64 Am. Dec. 610. The court in that case said: "Where the negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument." The negligence of the Denver bank is imputable to the defendant. In *Graves v. American Exch. Bank*, 17 N. Y. 205, a draft was sent payable to order of Charles F. Graves. It reached a person in the same place by the same name, and by him was indorsed and paid by the drawee. It was held that the payment, although made in good faith, did not divest or impair the title to the true owner, who had not seen or indorsed the paper. It was held in fact to be a forged indorsement. It was held in *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun, 475, 27 N. Y. Supp. 1070, that it is the signature of the payee that transfers title to a check; that the signature of another person by the same name as the one to whom it was drawn is just as much a forgery as if the names had been different. It is the signature of the payee that transfers title to the check. A similar holding is in *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85. It was held in *First Nat. Bank v. Pease*, 168 Ill. 40, 48 N. E. 160, that the fact that the drawer of a check delivers it to a party representing himself as the payee's agent, without investigating the alleged agent's authority, is not such negligence as will relieve the bank from liability for the payment of the check on a forged indorsement of the payee's name by the alleged agent.

If the payee named in the paid warrant was a fictitious person, the indorsement in the name of such fictitious party is in effect a forgery. *Hatton v. Holmes*, supra. If the G. E. Fairbanks Coal Company and G. E. Fairbanks, treasurer, were fictitious parties, the indorsement was a forgery. If they were real parties, the indorsement by any other without authority would be a forged indorsement, and would not excuse defendant's payment. It was incumbent upon it to show the existence or nonexistence of such a payee, and that the Denver bank took the proper means to identify the payee. It failed to sustain this burden, and therefore the verdict and judgment are set aside, and a new trial ordered.
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DISTRICT OF COLUMBIA COURT OF APPEALS.

CENTRAL NATIONAL BANK OF WASHINGTON CITY, Appt.,

v.

NATIONAL METROPOLITAN BANK OF WASHINGTON.

(31 App. D. C. 391.)

Check — fraudulent payee — effect of payment.

1. In an action by a bank which has returned money paid on a forged check, to recover the amount from the bank to which it paid the check and which guaranteed prior indorsements, evidence is admissible which tends to show that the one who made the first indorsement was the one whom the maker of the check intended should receive the money.

Appeal — reopening of case.

2. The reopening of a case to receive additional evidence is a matter within the discretion of the trial court, which will not be interfered with on appeal except for abuse.

Check — fraudulent payee — burden of loss.

3. One who cashed a check on indorsement by the payee of the assumed name in which he had fraudulently obtained it from the maker, and who received the amount from the drawee, cannot, upon discovery of the fraud and return of the amount by the drawee to the drawer's account, be compelled to return to the drawee what he received from it on the ground that he guaranteed the indorsement, since he made payment as intended by the maker, who should bear the loss caused by his own negligence.

(May 5, 1908.)

A PPEAL by plaintiff from a judgment of the Supreme Court in defendant's favor in an action brought to recover the amount of a check which had been paid by plaintiff to defendant upon its guaranty of prior indorsements one of which proved to be a forgery. Affirmed.

The facts are stated in the opinion.

Messrs. Edwin C. Brandenburg and A. A. Birney, for appellant:

Plaintiff was not negligent in paying the check in the usual course of business, upon the faith of the guaranty.

Second Nat. Bank v. Guarantee Trust & S. D. Co. 206 Pa. 617, 56 Atl. 72; *Willard v. Crook*, 21 App. D. C. 237; *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Rogers v. Ware*, 2 Neb. 29; 5 Cyc. Law & Proc. p. 548, note 45; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Horstman*

Note. — See note to preceding case, *Harmon v. Old Detroit Nat. Bank*.

v. Henshaw, 11 How. 183, 13 L. ed. 656; Tolman v. American Nat. Bank, 22 R. I. 462, 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480; Beattie v. National Bank, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602; Atlanta Nat. Bank v. Burke, 81 Ga. 597, 2 L.R.A. 96, 7 S. E. 738; La Fayette v. Merchants' Bank, 73 Ark. 561, 68 L.R.A. 231, 108 Am. St. Rep. 71, 84 S. W. 700; White v. Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; Marine Nat. Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Crawford v. West Side Bank, 100 N. Y. 53, 53 Am. Rep. 152, 2 N. E. 881; Corn Exch. Bank v. Nassau Bank, 91 N. Y. 80, 43 Am. Rep. 655; Bank of British N. A. v. Merchants' Nat. Bank, 91 N. Y. 106; First Nat. Bank v. Whitman, 94 U. S. 347, 24 L. ed. 231; Armstrong v. National Bank, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; Dodge v. National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648, 30 Ohio St. 1; Roberts v. Tucker, 16 Q. B. 560; Canadian Bank of Commerce v. Bingham, 30 Wash. 484, 60 L.R.A. 955, 71 Pac. 43, 46 Wash. 657, 91 Pac. 185; Central Nat. Bank v. North River Bank, 44 Hun, 114; Buckley v. Second Nat. Bank, 35 N. J. L. 400, 10 Am. Rep. 249; Kearny v. Metropolitan Trust Co. 110 App. Div. 236, 97 N. Y. Supp. 276; Murphy v. Metropolitan Nat. Bank, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693.

Messrs. William F. Mattingly and John B. Larnier, for appellee:

The drawer of a check, who delivers it to an impostor, must, as against the drawee or bona fide holder, bear the loss where the impostor obtains payment of, or negotiates, the same.

Land Title & T. Co. v. Northwestern Nat. Bank, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420; Robertson v. Coleman, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619; United States v. National Exch. Bank, 45 Fed. 163.

Shepard, Ch. J., delivered the opinion of the court:

The declaration of the Central National Bank alleged that, on March 17, 1905, one Wharton E. Lester, by his check, directed plaintiff, as his banker, to pay to the order of Mrs. A. E. McKnight the sum of \$1,949.75. That said check was indorsed in the name of said A. E. McKnight to the Washington Loan & Trust Company; said company indorsed the said check to the defendant, the National Metropolitan Bank, and defendant, on March 18, 1905, indorsed the same to the plaintiff. That defendant guaranteed the genuineness of the prior indorsements, including that of A. E. McKnight. That plaintiff, relying on the guar-

anty of the defendant of the validity of said prior indorsements, paid the amount of same to defendant. That said check was never indorsed by Mrs. A. E. McKnight, payee therein, and the same is not her genuine signature, but a forgery. That plaintiff has, by reason of the same, lost the value of said check, which defendant refuses to pay, etc.

The check introduced in evidence is in ordinary form, executed by Wharton E. Lester on March 17, 1905, and directing the Central National Bank to pay to the order of Mrs. A. E. McKnight the sum of \$1,949.75. It bears the indorsements, first, of Mrs. A. E. McKnight; second, the Washington Loan & Trust Company; third, National Metropolitan Citizens' Bank, the name of which has since been changed by dropping the word "Citizens." Both the last indorsements are followed by the words: "Prior indorsements guaranteed." The cashier of plaintiff testified that Wharton E. Lester, the drawer of the check, was a depositor with plaintiff; that the defendant's indorsement is genuine; that the check was received by plaintiff from the defendant, in the usual course of business, through the clearing house of said city of Washington, and was paid by it on the faith of defendant's indorsement, without regard to the prior indorsements thereon, and charged to the account of said Lester. That thereafter said Lester advised plaintiff that the indorsement of the name of "Mrs. A. E. McKnight" was a forgery, and demanded the return of the money which had been charged to his account. That, acting upon said demand, plaintiff repaid the said sum to said Lester, and made demand on defendant for the payment of the same, under its guaranty of the prior indorsements on said check, which was refused.

Mrs. A. E. McKnight, called by the plaintiff, testified that that was her name, and that she resides in the city of Washington and knows no other person of that name residing there or elsewhere. That the indorsement of her name on said check was not made by her or her authority; and that she had never seen the check until at the time of the trial of one Miss Puckett for forgery. That she had only a slight acquaintance with the said Puckett, and did not know said Lester.

Richard J. Marshall, called by the plaintiff, testified that he is an agent and loan broker. That he first saw the check at the office of Lester, who received from the person now known as Miss Puckett a note for \$2,000 secured by a trust deed. That Lester dealt with her as Mrs. A. E. McKnight. That the difference between the amount of the check and that of the note

represented certain expenses of examination of title, etc., none of which went to Lester. That, at the time, witness and Lester supposed her to be Mrs. A. E. McKnight. That witness, at the request of the party, identified her as Mrs. A. E. McKnight at the office of the Washington Loan & Trust Company. That she indorsed the name of Mrs. A. E. McKnight on the check and received the money. That he supposed her to be Mrs. A. E. McKnight at the time. That the said Puckett had since been convicted of the forgery of said indorsement, and is now in the penitentiary.

Plaintiff rested, and the defendant moved the court to direct a verdict. After argument the court indicated that he was about to grant said motion. Thereupon plaintiff moved the court to reopen the case and permit plaintiff to call Lester as a witness. It appears, also, from the bill of exceptions, that the court took the following facts into consideration: The case was at the foot of the assignment on the day it was called. Defendant requested postponement until the following Monday. Plaintiff objected to postponement on the ground that Lester was a necessary witness and could not be in court on Monday by reason of an engagement to try a case in another court. Lester had been at the trial table with plaintiff's counsel continuously, and in conference with them. He and said counsel engaged in a consultation, before the announcement was made closing the evidence, which the court believed had reference to the question of calling Lester as a witness. The application to call Lester was not made until the court had announced his reasons for granting defendant's motion, and was on the point of formally granting it. For these reasons, the court refused the motion to reopen the case, and instructed the jury that the evidence conclusively established that Lester intended that the woman who had indorsed the check in the name of "Mrs. A. E. McKnight" should cash the check and should get the money; "in short, that the indorsement on the back of the check of the name of 'Mrs. A. E. McKnight' in fact identified the person whom Mr. Lester intended to get the money, and that the person who got the money was the person whom he intended to get it, and that they should return a verdict for the defendant."

The bill of exceptions showing the foregoing concludes: "There was no evidence tending to show who were the parties to the deed of trust aforesaid; and no evidence tending to prove that the witness, Mrs. A. E. McKnight, was ever the owner of any real estate."

1. The first assignment of error is founded on an exception taken to the admission 17 L.R.A. (N.S.)

of the evidence of the witness Marshall relating to the facts and circumstances surrounding the execution and delivery of the check to the supposed Mrs. McKnight, and the receipt of the money by her from the Washington Loan & Trust Company. For reasons that will be apparent in the discussion of the main question in the case, we think this evidence was competent. It is true that Lester was not a party to the action, but the plaintiff, having recognized his right to the return of the money as having been improperly paid to the party receiving the check from him, has taken his place, and is bound by whatever would bind him had it refused his demand for repayment and the action had been by him against it to recover money paid under a forged indorsement of his check.

2. The motion to reopen the case for the purpose of introducing evidence was addressed to the sound discretion of the trial court. While it would have been more satisfactory to have had evidence from Lester regarding the circumstances under which the check had been given, under our view of the point on which the case must be made to turn, we are not prepared to say that, under the circumstances disclosed in the bill of exceptions, there was an abuse of discretion by the court.

3. Unquestionably it is the duty of a bank to pay the money of its depositors to the person named in his check, and payment to a different person upon a forgery of the payee's name will not bind the drawer. It is also true that the indorsement of a check or draft is a guaranty of the genuineness of prior indorsements thereof.

In our opinion, however, these principles, on which the appellant relies, are not sufficient for the determination of the question raised by the evidence in this case. Nor is there any provision of the negotiable securities act, contained in our Code, which is intended to apply to and govern the particular facts and circumstances here disclosed.

It is clear that the transaction involving the loan of the money was between Lester and the party to whom the check was delivered. She did not profess to be the agent or representative of a real Mrs. McKnight, but that person herself. The transaction was with her under the assumed name, and the check was delivered to Marshall for her, and it was intended that she should receive the proceeds. Marshall, knowing that she was the person intended to receive the money, and believing her to be in fact named Mrs. A. E. McKnight, went to the Washington Loan & Trust Company, identified her, and saw her indorse her name and receive the money. The real Mrs. Mc-

Knight had nothing to do with the transaction and had no interest in the check. Lester and Marshall were the victims of a fraud. What inquiry they may have made to determine the identity of the party, unfortunately, does not appear. Whatever it was, they were the victims of deception. It was their act in accepting the woman as Mrs. McKnight and dealing with her under that name that enabled the deception to be practised upon the Washington Loan & Trust Company, which, under the law as contended for by the appellant, would be ultimately liable as the one accepting the indorsement of the supposed Mrs. McKnight, and guaranteeing it to the defendant. Regarding the plaintiff, by reason of its repayment to Lester, as standing in his place, the question is, whether the Washington Loan & Trust Company made itself liable to him through paying the check to the person shown to be the one intended by him to receive the money. In other words, was it its duty to go back of his acts and representations, and ascertain that the presenter of the check, who Lester intended should receive the money, was not the person he supposed her to be? This question has been answered in different ways. Some of the cases relied on by the appellant as answering it in the affirmative will first be reviewed.

Tolman v. American Nat. Bank, 22 R. I. 462, 464, 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480, is directly in point. Louis Potter, representing himself to be Ernest A. Haskell, obtained a loan from the plaintiff, giving him a note signed under his pretended name of Haskell, and receiving a check on defendant payable to Haskell. Potter, indorsing the name of Haskell, obtained the money from defendant, who charged it to plaintiff's account. Dealing with the contention that the plaintiff intended the impostor to have the money, it was said: "Of what consequence is the intent of the drawer of the check when the direction is to pay to the party named? He has the right to assume that the bank will pay to the party as directed. In this case the money was intended for Haskell, because his was the only name suggested. . . . It is a perversion of words to say that it was intended for Potter simply because he had fraudulently impersonated Haskell."

It was further said that the negotiable securities act also covered the question of defendant's liability for paying the money to the impostor upon a forgery of the name of Haskell.

Beattie v. National Bank, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602, is not directly in point, but analogous. In that case a draft was made pay-

able to George A. Bent when it should have been made to George P. Bent. It was mailed to George A. Bent, and came into the hands of a party by that name, who knew that the draft was not intended for him. He presented it at the bank, indorsed it, and obtained the money. This was held to constitute a forgery, and the bank was declared liable for payment to the wrong person.

Atlanta Nat. Bank v. Burke, 81 Ga. 597, 2 L.R.A. 96, 7 S. E. 738. In that case one Knapp forged his wife's name to a trust deed, and took a check payable to her on which he procured the money by forging her name. The case does not decide the question here, because the check was not payable to Knapp, but to his wife. He, at least, was not the person intended to have the money.

Shipman v. Bank of State, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371. One Bedell was a confidential employee in charge of the money-lending department of Shipman's business. Dodge, the bookkeeper of Shipman's, kept the account with the bank, in which they kept their money. Bedell made out a number of statements, as was his custom, showing money needed to advance on certain loans, for which Dodge filled up the checks which were signed by a member of the firm. Among these were twenty-seven checks, the payees of sixteen of which were fictitious. Bedell forged the indorsements on these checks and obtained the money. All but three of the checks were paid by the bank through the clearing house, and in each case without inquiry as to genuineness of the indorsements; the others were paid to Bedell. The checks were returned to Shipman, who later discovered the fraud, tendered the checks back, and demanded payment. The court found that the bank paid the checks without any inquiry as to the genuineness of the indorsements, in reliance upon the responsibility of the persons presenting them for payment, and not in reliance upon anything done or forbore by Shipman, except the fact that the checks had been drawn by them, and held the bank liable; in other words, it found that the loss was not due to the negligence of Shipman.

Armstrong v. National Bank, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866. There Grimes, professing to act for one Brown, obtained a check payable to Brown, and, indorsing Brown's name, obtained the money. It seems there was no such person as Brown. The check was not intended for Grimes, and he obtained the money by forging the name of the person for whom it was intended.

Dodge v. National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648, sec. 30 Ohio St.

1. Dodge holding a certificate of indebtedness issued by a paymaster of the United States Army, indorsed the same in blank, and mailed it to paymaster Bonister in Cincinnati for payment. The letter was stolen and the certificate was presented to Bonister for payment. He required identification and the party did not return. Thereafter it was presented to one Stryker, another paymaster, who asked for proof of identity. The party told him that he could have himself identified at the bank on which the check was to be drawn. Stryker made out a check on a blank form, striking out the words "or bearer" and making the same payable to Frederick B. Dodge or order. Inducing someone to identify him as Dodge, the party indorsed the check in the name of Dodge and received the money. In an action by Dodge against the bank, he was held entitled to recover. A serious question in the case, on which there was dissent, was whether Dodge had the right to maintain any action against the bank at all. In discussing a question relating to the failure to offer proof of the entire transaction, the majority of the court took occasion to say that the bank would have had the right to show that the person to whom the check had been delivered was, in fact, the person whom the drawer intended to designate by the name of Dodge. Had such proof been made it would seem that the decision would have been different.

The following cases answer the question in a different manner: *Robertson v. Coleman*, 141 Mass. 231, 232, 55 Am. Rep. 471, 4 N. E. 619. In that case a person registered at a hotel in Boston by the name of Charles Barney. On the next day he took a stolen wagon and team to Coleman, who was an auctioneer, to sell for him, representing himself to be named Charles Barney. Before selling the property, Coleman learned by telegraph that Charles Barney, of Swansey, was a reliable man, but took no other steps to ascertain that the seller was really Charles Barney. Having made the sale, he gave the party a check drawn to the order of Charles Barney. The hotel keeper took the check indorsed by the party as Charles Barney, paying him the amount of the same, less the bill due by him. It was held that payment to the party who was intended to receive the money on the check bound the drawer.

Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141. Application was made by mail for a loan on certain land the title to which was in one Daniel Guernsey, who formerly lived in Kansas, but had removed to Iowa. The application was signed "Daniel Guernsey." The title was passed, a note and mortgage

were executed by the pretended Daniel Guernsey, and a check was sent to him for the amount of the loan. He indorsed it as "Daniel Guernsey" and obtained the money from the bank before the fraud was discovered. For the reason that the payment was made to the person for whom it was intended, the bank was held not to be liable as for the payment of it under a forged indorsement of the name of the designated payee.

Land Title & T. Co. v. Northwestern Nat. Bank, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420. A party giving his name as Ashley obtained the title papers of one Bissey, who owned a lot which he wished to sell, by pretending that he wanted to purchase the same. He went to a conveyancer, representing himself to be Bissey, showed the title papers, and applied for a loan of \$5,000 on the property. The conveyancer, believing him to be Bissey, negotiated a loan. The mortgagee wishing title insurance from the Land Title & Trust Company, deposited the amount of the loan with it to be paid to the mortgagor when the mortgage should be executed. When ready for settlement, Ashley went to the office of the company with the conveyancer, who introduced him as Bissey. He executed the mortgage in that name and received the company's check drawn on itself to the order of Herman S. Bissey. This check, indorsed "Herman S. Bissey," was deposited in the Northwestern National Bank by a person who opened an account as C. B. Rogers, and was collected by the bank in due course of business and paid to Rogers. Whether Ashley and Rogers were the same person did not appear. The fraud was not discovered until about six months later, when the real Bissey received a notice to pay interest. All of the parties, save Ashley, and possibly Rogers, who got the money, acted in good faith. The Title & Trust company sued the bank, claiming that there had been a forgery by Ashley of the name of Bissey, and that it had paid the money on the guaranty of genuineness given by the bank's indorsement. The court, in denying the liability of the bank, gave its reasons as follows: "Generally a bank is not bound to know the signature of the indorser of a check, and, if it pays a check on a forged indorsement, it can recover the money of the party to whom it was paid, if it proceeds promptly on discovery of the fraud. This is upon the principle that the indorsement of a check is an implied warranty of the genuineness of the previous indorsements. But, in order that a bank may recover, it must appear that it has sustained a loss. If it can charge the payment to the account of the

depositor, it has lost nothing, and has no cause of action. The question is, then, the same, whether we consider the check as having been drawn by an ordinary depositor in the trust company, or as having been drawn, as it was, by the real-estate department of the company, on the banking department. While, as between the bank and the trust company, as a banker, the former is bound by its implied warranty of the indorsement, still, there is no cause of action, unless the payment of the check was not, as against the drawer of the check, a good payment. The reason of the rule that, when a bank pays a depositor's check on a forged indorsement, or a raised check, it is held to have paid it out of its own funds, and cannot charge the payment to the depositor's account, is that there is an implied agreement by the bank with its depositor that it will not disburse the money standing to his credit, except on his order. The rule applies where a check has been lost or stolen and the payee's name has afterwards been forged; but it does not protect a depositor who is in fault, as in intrusting a check to one who he has reason to suppose will make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person. It is confined to cases in which the depositor has done nothing to increase the risk of the bank. It should not apply when the check is issued to one whom the drawer intends to designate as the payee: First, because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used. The bank is deprived of the protection afforded by the fact that a bona fide holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks. There is thrown upon the bank the risk of antecedent fraud practised upon the drawer of the check, of which it has neither knowledge, nor means of knowledge. Secondly, because in such a case the intention with which the drawer issued the check has been carried out. The person has been paid to whom he intended payment should be made. There has been no mistake of fact, except the mistake which he made when he issued the check, and the loss is due, not to the bank's error in failing to carry out his intention, but primarily to his own error into which he was led by the deception previously practised upon him."

United States v. National Exch. Bank, 45 Fed. 163. In that case an impostor had come into possession of postoffice money orders payable to another person. By fraud-

ulent representations he induced a person to believe that he was the payee of the orders, and to identify him at the postoffice. The orders were taken up and a check given him on the bank, payable to the payee named in the orders. The same person identified him at the bank, which cashed the check that was indorsed with the same name, and charged the same to the account of the United States. In giving reasons for refusing recovery in an action by the United States against the bank, the court said: "The question for the bank is, 'For whom was this money intended by the drawer?' and the name is but one means of determining that question. . . . It was the duty of the department to ascertain the true individual and to pay it to no one else. Without doubt the postmaster would have paid currency instead of a check, if he had had it on hand, rather than in bank. If he would not, it would be very good evidence of neglect to deliver a check to a party, and put it in his power to draw the money on a forged indorsement in circumstances where the postmaster would not have been satisfied to part with the cash. Allowing the drawer and drawee to be equally innocent, the loss should fall upon that one who, by his act, has been the occasion of the loss, which in this case, I think, was the department. Though there may have been no express negligence on the part of the officials of the postoffice, it was a mistake to deliver the check to a person not entitled to it, and that mistake has been the occasion of the loss. The postoffice officials had every reason to believe that the bank would pay upon the identification and proofs which had actually induced them to deliver the check. The fraud—the imposition—had been mainly accomplished when a check for the money was delivered to Schuman as the true payee named in the money orders, and it does not seem to the court either just or legal, after all that had taken place, to shift the responsibility for the loss upon the bank. Where both are innocent, and the loss must fall upon one, it should be upon the one who, in law, most essentially facilitated the fraud. *Stout v. Benoist*, 39 Mo. 281, 90 Am. Dec. 466. So, in respect to two persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with loss in exoneration of the former; or, if both are equally innocent and equally ignorant, the loss should remain where the chance of business has placed it."

We are of the opinion that the cases last mentioned express the true doctrine that should govern in such cases as this. It is a principle of natural justice that, as be-

tween two innocent persons, the one whose act was the cause of the loss should bear the consequences. As the transaction in this case began with Lester, it was his duty to use diligence to ascertain the identity of the party with whom he dealt. Failing to make this discovery, he became the victim of a fraud. The impostor having succeeded in this first and essential step in the practice of the fraud, the next was comparatively an easy one. The bank had a right to believe that Lester had acted with full knowledge of the party to whom he gave the check for the money, and its duty to him was discharged when it satisfied itself that the payment was intended to be made to the party who presented it. This information it obtained from Marshall, who was connected with the transaction in some way, and to whom Lester delivered the check, not for the real Mrs. McKnight, who had nothing to do with the transaction and with whom Lester was not acquainted, but for the perpetrator of the fraud, who, he believed, bore that name. Marshall, in apparent good faith, knowing that the money was intended to be paid to her, and believing that her true name was given in the check, introduced her to the officers of the bank and enabled her to obtain the money. What further inquiry was it reasonable for the bank to make under such circumstances?

Lester, having delivered the check to her in perfect good faith, would, no doubt, have performed the same service for her, at her request, had Marshall not been present, or had it been inconvenient for him to perform it. Had Lester himself performed this service, he would clearly be estopped to question the payment; and we see no reason why his conduct which led Marshall to perform it should not have the same effect. The view that we have taken of the law of this case finds strong support in a carefully considered decision of the House of Lords in England. *Bank of England v. Vagliano Bros.* [1891] A. C. 107. In that case a confidential clerk of Vagliano Brothers forged letters, purporting to inclose drafts on them from a foreign correspondent, which he had also forged. Believing them to be genuine, the firm accepted the drafts, which were payable to the order of a firm doing business in Russia. The same clerk abstracted the drafts from the mail of the firm directed to the payees, forged the indorsements of the latter, and obtained the money from the bank, with which the firm did a large business. The primary cause of the loss was the acceptance of the forged drafts by Vagliano Brothers. Some of the lords justices regarded the entry of the names of the foreign payees as equivalent to ordering payment to fictitious persons 17 L.R.A. (N.S.)

under the English negotiable securities act, but the substantial ground of the decision in favor of the bank was the negligence of Vagliano Brothers, which was held to be the inducing cause of the payment of the checks. Lord Chancellor Halsbury said, in the course of his opinion: "It seems to me that, if all these circumstances acting upon and inducing the bankers to make the payments they did make, are acts which are the fault of the customer, it is the customer, and not the banker, who ought to bear the loss." (P. 117.) Lord Selborne (p. 123), after stating that a prima-facie case is made by showing that the drafts had been paid to an unauthorized party, said there may be circumstances which answer this prima facie case. Among these is negligence on the customer's part. He then proceeded: "I think that a representation made directly to the banker by the customer upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that prima facie case."

Treating this case, as we must under the facts proved, as if the action was one by Lester to recover the money as paid to the wrong person, we think it would be unreasonable and unjust to permit him to escape the natural consequences of his own neglect or mistake, by holding the bank at fault for not making the complete inquiry that he ought to have made primarily to ascertain if the person to whom he gave the check was, in fact, the person whom he believed, and thus represented, her to be.

We think the court was right in directing the verdict for the defendant, and the judgment will therefore be affirmed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MERCHANTS' BANK OF VALDOSTA,
Plff. in Err.,

v.

LYMAN D. BAIRD, Receiver of First National Bank of Faribault, Minnesota.

(— C. C. A. —, 160 Fed. 642.)

Bank — guaranteeing paper — notice.

1. An agreement by a national bank to "protect" the checks of its customer and

Case Note. — Liability of national bank upon its promise to honor checks to be drawn upon it by one who has no funds on deposit to meet the same.

In *Bowen v. Needles Nat. Bank*, 36 C. C.

raise the limit of its "guarantee" so that the customer may draw to any amount is sufficient to charge the other party with notice that the bank is exceeding its powers. National bank — guaranteeing checks — liability.

2. A bank which cashes the checks of a customer of a national bank with notice that the bank has loaned its credit to the customer cannot enforce its guaranty to pay the checks.

Same — profit — effect.

3. That a national bank which guaranteed payment of a customer's checks profited by the agreement to the extent of exchange in the payment of checks and kept the profit does not prevent its denying liability on its guaranty where the profit was all swallowed up in losses growing out of the transaction.

(March 2, 1908.)

ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in defendant's favor in an action brought to enforce a guaranty of checks cashed by plaintiff. Affirmed.

Statement by Hook, Circuit Judge:

The Merchants' Bank of Valdosta sued the receiver of the First National Bank of Faribault to recover upon eight checks drawn by the Minnesota Lumber Company upon the latter bank, and cashed by the former upon the authority of a letter and two telegrams. The case was tried by the court upon the pleadings and an agreed statement of facts. The defendant had judgment, and the plaintiff prosecuted this writ of error. The facts are substantially as follows: At the time of the transactions in question the plaintiff was a bank organ-

A. 553, 94 Fed. 925 (writ of certiorari denied in 176 U. S. 682, 44 L. ed. 637, 20 Sup. Ct. Rep. 1024) the circuit court of appeals of the ninth circuit, upon the principle that a banking corporation has no power to become a guarantor of the obligation of another, or to lend its credit to any person or corporation unless its charter or governing statute expressly permits it, held that a promise by a national bank to pay checks to be drawn upon it by a party who had no funds on deposit with it was *ultra vires*, and that the bank was not estopped to rely on that defense as against the promisee, who cashed the checks in reliance on the promise, but with knowledge that the drawer was without funds. The contention of the plaintiff that the transaction was to be deemed a certification of checks was expressly repudiated. The majority opinion, while conceding that there are expressions in some of the opinions of the Federal Supreme Court sufficiently broad and inclusive to justify the contention that a corporation is estopped to plead *ultra vires* as against a person who has relied to his disadvantage upon its act, said that that court, in its adjudications, had limited the application of the principle to cases in which the corporation has, by the plea of *ultra vires*, sought to retain unjustly the fruits of a contract which has been performed by the other party thereto; and that in all such cases the action has been maintained, not upon the contract to enforce its terms, but upon an implied obligation resting upon the defendant, resulting from the fact that it has received money or property which it ought either to return or make compensation for. Ross, J., dissented, not because he differed from the majority on the proposition that a national bank has no power to guarantee the debt or obligation of a third party except as an incident of a transfer of paper by it, but upon the ground that the alleged causes of action were not upon the guaranty, the first three being upon drafts drawn by defendant (the promisor) upon a New York bank and sent to the plaintiff (the promisee) in payment of checks which he

had cashed in reliance upon the promise, and the fourth upon such a check. The majority opinion appears to assume, without referring specifically to the form in which the alleged causes of action were pleaded, that the principle declared by it was sufficient to defeat all the causes of action. The findings of fact included findings that, neither at the time of the drawing of the drafts by the defendant upon the New York bank, nor at the time of the receipt by the plaintiff in payment of the checks, were there funds in the hands of the drawee to pay the same; and, further, that the defendant provided for the payments of the drafts by drawing counterdrafts at the same time upon the person whose checks it had agreed to pay, payable at the New York bank upon which the drafts were drawn, and that said counterdrafts were not paid, but that, from the prior course of dealing between the parties, the defendant bank had reason to believe, and did believe, that they would be paid. No reference is made in the majority opinion to these facts, and they are treated in the dissenting opinion as of no effect for the reason that there was no finding that the plaintiff (the drawer of the checks, the drawee of the drafts) had knowledge thereof.

This case and MERCHANTS' BANK v. BAIRD appear to be the only ones which have passed upon the specific question as to the liability of a national bank upon its promise to pay checks to be drawn upon it by a third person having no funds on deposit with it, although there are other cases, like National Bank v. Sixth Nat. Bank, 212 Pa. 238, 61 Atl. 889, and First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059, holding that an agreement by a national bank to pay drafts to be drawn upon a third person is *ultra vires*, and not binding upon the bank, and at least one case, Hutchins v. Planters' Nat. Bank, 128 N. C. 72, 38 S. E. 252, holding that the bank, in such a case, was estopped to plead *ultra vires* as against one who shipped goods in reliance upon the agreement. Cases of this class, however, do not fall within the scope of this note.

ized under the laws of Georgia, and doing business at Valdosta, in that state. The lumber company was a corporation engaged in manufacturing lumber in Georgia. The First National Bank of Faribault, as its name indicates, was a banking association organized under the laws of the United States. It was engaged in business at Faribault, Minnesota, and its capital was \$50,000. For some years prior to September 6, 1904, the lumber company had an account with the national bank, but in one form or another it was always indebted to the bank. On September 6, 1904, it owed the bank \$11,848.66 on its own notes and notes of others made for its benefit. Besides this, the bank had purchased and then held bonds of the lumber company, unsecured by mortgage or other lien, amounting to \$33,500. Prior to the date mentioned, the plaintiff, the Georgia bank, had been paying checks drawn by the lumber company upon the national bank, obtaining in each case the authority of the latter to do so, but, in order to obviate the trouble and expense incident to that course, it wrote the national bank on September 1, 1904, for general authority to pay such checks. On September 6, 1904, T. B. Clement, as president of the national bank, replied as follows:

Faribault, Minn., 9-6-04.

Merchants' Bank of Valdosta,
Valdosta, Ga.

Gentlemen:—

In reply to your letter of the 1st regarding checks drawn by the Minnesota Lumber Company on this bank, would say that there is no reason for Mr. Trump acting for the Minnesota Lumber Company, drawing any checks that this bank would not honor, but think there should be some limit placed; and we will say that checks of the Minnesota Lumber Co.'s drawn by J. H. Trump or H. O. Clement on this bank will be paid up to the amount of \$5,000.00 in any one week. If any more than \$5,000.00 should be drawn in any one week, have them wire for permission.

On December 6, 1904, the national bank wired the Georgia bank as follows:

Faribault, Minn., 6 Dec. 1904.

Merchants' Bank,
Valdosta, Ga.

We will protect checks of Minnesota Lumber Company for five thousand dollars per week in excess of present guarantee.
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And on December 22, 1904, it further wired the Georgia bank as follows:

Faribault, Minn., Dec. 22, 1904.

Merchants' Bank,
Valdosta, Ga.

You can pay checks Minnesota Lumber Company on us this week in excess of guaranty on personal request of H. O. Clement.

T. B. Clement, as president signed the name of his bank to both telegrams. H. O. Clement, mentioned in the last telegram, made the personal request therein required. He was a son of T. B. Clement. In reliance upon these communications, and upon the previous course of dealing, the Georgia bank cashed the checks of the lumber company amounting to \$125,000 between September 6, 1904, and January 1, 1905, all of which were honored and paid by the national bank excepting the last eight for \$1,000 each, and excepting that upon one of the eight a part payment was made. The national bank became insolvent and was closed by the Comptroller of the Currency January 2, 1905. The lumber company was also insolvent. At the close of the bank the lumber company owed the national bank \$33,500 on unsecured bonds and \$43,560.32 on other account. The directors of the defunct bank had left the management thereof wholly to T. B. Clement, the president, and they were not aware of the transactions carried on between the two banks and the lumber company. The national bank was not interested in the business of the lumber company excepting as a creditor. The Georgia bank knew that the proceeds of the checks were for use in the business of the lumber company. Between September 6, 1904, and the 1st of the following January, the account of the lumber company upon the books of the national bank generally showed a credit balance, but this condition was largely due to the "kiting" of checks and drafts. When the national bank was closed, there were outstanding and unpaid drafts and checks amounting to over \$35,000, for which the lumber company had received credit in its account, and, by charging them back, a large overdraft would result. It was stipulated that the Georgia bank was not aware of the condition of the lumber company's account with the national bank, and that it believed that the latter was a bank in good standing, well managed, and that its president was a person of integrity, of good business management, and deserving of trust and credit; but it also appeared that the keeping of checks and drafts afloat, corresponding in amount with checks cashed by the Georgia bank, was known to it, for in part they were sent to that bank with remit-

tances for checks paid by it. In other words, when the national bank sent the Georgia bank money or drafts in payment of checks cashed by the latter, it would also send for collection a corresponding draft or check of the lumber company. Checks drawn by the lumber company on the Georgia bank were employed in the kiting process; also drafts drawn by the lumber company upon itself. The time required for transmission of the collection items from Georgia to Minnesota and back again to Georgia made the plan feasible. The agreed statement of facts contained this clause: "When the First National Bank paid checks in cash and sent drafts therefor to its correspondent, if the drafts were paid, the said First National Bank saved the charges for exchange incident to the shipment of actual money to keep up its balance in the hands of such correspondent."

Argued before Sanborn and Hook, Circuit Judges, and Philips, District Judge.

Mr. Robert Mee, for plaintiff in error:

The contract between the banks was an original and absolute undertaking, and is therefore distinguishable from a guaranty.

18 Am. & Eng. Enc. Law, pp. 232, 233.

The bank ratified the contract which the president had made as president of the bank; and the receiver of the bank must be estopped to deny the authority of the president to write the letter.

People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. ed. 907; First Nat. Bank v. Greenville Oil & Cotton Co. 24 Tex. Civ. App. 645, 60 S. W. 829; 2 Cook, Corp. § 681, p. 1373; American Nat. Bank v. National Wall-Paper Co. 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 85; 5 Thomp. Corp. §§ 6016, 6025; Denver F. Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771; Camden & A. R. Co. v. May's Landing & E. H. City R. Co. 48 N. J. L. 530, 7 Atl. 523; Ten Broek v. Winn Boiler Compound Co. 20 Mo. App. 19; Lungstrass v. German Ins. Co. 57 Mo. 109; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 644, 19 L. ed. 1018; Southgate v. Atlantic & P. R. Co. 61 Mo. 94; Green's Brice, Ultra Vires, 474-784; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; Louisiana v. Wood, 102 U. S. 204, 26 L. ed. 153; Wood v. Corry Waterworks Co. 12 L.R.A. 168, 44 Fed. 146.

Mr. Thomas H. Quinn, for defendant in error:

The contract attempted to be entered into by it, evidenced by its letter and telegrams, if outside the charter power of the bank, 17 L.R.A. (N.S.)

was wholly void; and plaintiff in error was bound to know that such was its character.

Rev. Stat. subd. 7, §§ 5136, 5200; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 48, 35 L. ed. 64, 11 Sup. Ct. Rep. 478; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Taylor, Priv. Corp. § 283; First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059; Thilmany v. Iowa Paper Bag Co. 108 Iowa, 357, 75 Am. St. Rep. 259, 79 N. W. 261; Commercial Nat. Bank v. Pirie, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; Bowen v. Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925, 176 U. S. 682, 44 L. ed. 637, 20 Sup. Ct. Rep. 1024.

Hook, Circuit Judge, delivered the opinion of the court:

It was known to both the national bank and the lumber company that the credit and resources of the former were being used to uphold and further a venture in which it could not lawfully engage. But the question remains: How did it appear to the Georgia bank? Did it have the aspect of legitimate banking business, or of a guaranty for another? The letter of September 6, 1904, purported to obligate the national bank unconditionally to pay all checks of the lumber company up to the amount of \$5,000 in any one week. No limitation was expressed in the letter that had regard either to the condition of the company's account, whether in credit or in debit, or to its future conduct or solvency. The president of the national bank did not say he was confiding the lumber company would not draw checks in excess of its rights as a customer, but that there was no reason for its drawing checks his bank would not honor. There was no pretense of a certification of checks in the customary meaning of that phrase. The certification of a check, like the acceptance of a draft, creates an original liability on the part of the bank upon which an action may be maintained, and if implies that at the time the check is certified the drawer has sufficient funds with the bank, and that they have been set apart and will be retained for the holder, whoever he may be, and whenever the check may be presented. The bank undertakes that the check is good at the time it is certified, and that it shall continue so until finally paid. Though an officer may bind his bank by certifying a check in the absence of funds of the drawer, Congress has made the act a misdemeanor. U. S. Rev. Stat. § 5208, U. S. Comp. Stat. 1901, p. 3497. In some respects a certified check is not unlike a certificate of deposit payable to the order of the depositor. The customary and proper practice is

for the certifying bank to at once charge the account of the drawer with the amount of the check, and thus protect itself against loss from its assumption of liability by completing the withdrawal of the amount from his further control. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 648, 19 L. ed. 1008, 1019.

But the letter of September 6 had no reference to checks then in existence. The amount of checks that would be drawn in the future within the prescribed limit was not known, nor was there any definite time limit to the duration of the undertaking evidenced by the letter. The power of the bank to put an end to its continuing promise to pay checks of the lumber company was not a safeguard against loss. Under the terms of the letter, a liability would arise in Georgia before it would be known in Minnesota. Regarded most favorably, the letter evidenced a transaction that was of doubtful regularity. Since the proper certification of a check signifies that the maker has sufficient funds with the bank an agreement to certify checks to be drawn in the future is so out of the usual banking course as to challenge attention.

The true purpose of the writer of the letter and the real relation between his bank and the lumber company was disclosed by the telegrams of the 6th and 22d of December. In the first of these the limit per week was raised to \$10,000, and in the second the limit was entirely removed. In both telegrams the obligation attempted to be assumed by the letter of September 6th was referred to as a guaranty. Neither of the telegrams authorized the inference that the checks to be drawn by the lumber company were upon its funds then with the bank, or that payment depended upon funds being placed there by it. The first one is particularly significant, in that the undertaking was to "protect" checks of the lumber company for \$5,000 per week in excess of "present guarantee." Even more significant of the true situation is the telegram of December 22d. It referred to the undertaking as a guaranty, and purported to bind the national bank to pay all checks that might be drawn upon it within the given period without regard to the amount. This was manifestly beyond the power of the bank as it put at hazard, upon the mere act of the lumber company, the duty of the bank to the government, the interests of its shareholders, and the funds of its depositors. In this connection, it is said that the amount of the eight checks in controversy, \$8,000, was within the limit prescribed by the tele-

gram of December 6th, but these checks were drawn between December 27th and 31st, inclusive, and at that time the Georgia bank had before it the letter and both telegrams, and was therefore advised of the character of the obligation which the national bank was attempting to assume. The letter and telegrams taken together were sufficient to advise the Georgia bank at the time it cashed the checks in controversy that the national bank was lending its credit to the lumber company. If the latter had the right to draw the checks, and if it was the duty of the bank on which they were drawn to pay them, it would not have agreed to "protect" them, or referred to its obligation as a "guaranty." The term "guaranty" has a different signification, and ordinarily a bank does not agree to protect a check which it is its duty to pay. Both terms employed pointed quite clearly to the real relation between the national bank and the lumber company, and, if there was otherwise any doubt, the removal of all limit to the obligation attempted to be assumed should have dispelled it.

A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of notes or other obligations which it rediscounts or sells because to do so is incidental to the business it is authorized to transact, and to the disposition of property it has lawfully acquired. But it cannot lend its credit to another by becoming surety, indorser, or guarantor for him. It cannot for the accommodation of another indorse his note or guarantee the performance of obligations in which it has no interest. Such an act is an adventure beyond the confines of its charter, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction. *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; *Bowen v. Needles Nat. Bank*, 36 C. C. A. 553, 94 Fed. 925, Id. 87 Fed. 430. An act that is void because beyond the power of a national bank cannot be made good by estoppel. *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831. It is urged that the national bank profited by the transactions to the extent of exchange, and that it retained the benefit. It is difficult to find any profit to the bank in these transactions. If there was any, it was swallowed up in losses.

The judgment is affirmed.

TEXAS COURT OF CRIMINAL APPEALS.

H. E. SMITH, Appt.,
v.
STATE OF TEXAS.

(— Tex. Crim. App. —, 109 S. W. 118.)

Embezzlement — agency or employment.

Money delivered by an agent who sells an article from a stock in charge of another agent, to the latter to be carried to the principal, comes into his possession by virtue of his agency or employment, within the meaning of a statute providing for the punishment of one who shall fraudulently misappropriate or convert to his own use money so obtained, although the contracts of the agents require each to report to the principal on his own account.

(Davidson, P. J., dissents.)

(March 11, 1908.)

Case Note. — Embezzlement as affected by want of authority of defendant to receive the money or property in the first instance.

This note is limited to cases involving either embezzlement or statutory larceny based upon statutes substantially similar to the one under which prosecution was had in *SMITH v. STATE*.

Cases are also excluded that involve common-law larceny and embezzlement, and also statutory larceny or embezzlement by bailees or public officers, without reference to the form of the statute.

Some of the language of the opinion in *SMITH v. STATE*, especially that employed in distinguishing *Brady v. State*, 21 Tex. App. 659, 1 S. W. 462, would, perhaps, taken by itself, indicate that the court intended to place the decision upon the ground that there was sufficient evidence in the case to warrant a finding that the defendant had implied authority to receive the money. The discussion, however, appears to be with reference to the question considered in this note, whether the lack of authority to receive the money in the first instance will necessarily defeat the prosecution.

State v. Brady was based on *State v. Johnson*, 21 Tex. 775, wherein it was held that a clerk of a fraternal society, who had nothing to do with its fiscal affairs, but who happened to be in possession of its money for safe-keeping, was not guilty of embezzlement for its appropriation to his own use, because, as the court said, "the institution is not his principal in that sense, and has not employed him for that purpose, and has not trusted him with the money."

The doctrine of the *Johnson* and *Brady* cases receives some support in *State v. Johnson*, 49 Iowa, 141, wherein one intrusted by the Federal marshal with prisoners to be transferred from one prison to another, who, because of this employment, was in-

A PPEAL by defendant from a judgment of the District Court for Hood County convicting him of embezzlement. Affirmed. The facts are stated in the opinion. Mr. F. J. McCord for the State.

Ramsey, J., delivered the opinion of the court:

Appellant was indicted in the district court of Hood county for the offense of embezzlement, and upon trial was convicted, and he now appeals to this court.

The indictment, in substance, alleged the embezzlement of the sum of \$55, the property of J. H. Wilder, which had come into the possession of appellant as the agent and employee of said Wilder, and that said money was under his care by virtue of said agency and employment. The facts show, in substance, that Wilder was engaged in the sale of musical instruments, and that he lived at Dublin, Erath county, where he

trusted by the turnkey with money belonging to the prisoners, which he appropriated to his own use, was held not guilty of embezzlement because the receipt of the money by him was not contemplated by either party at the time of his employment, and was not within his authority. The doctrine as to the necessary elements of an embezzlement under such a statutory provision as is here under consideration was said to be that "the servant or employee must have been authorized to receive the property; or the nature, scope, and extent of the employment must have been such as to warrant the receipt of the property embezzled."

A somewhat similar doctrine was enunciated in *Pullam v. State*, 78 Ala. 31, 56 Am. Rep. 21, wherein, in considering the necessary elements to a conviction for embezzlement under the Code provision of that state, substantially similar to the Texas Code, the court said: "In order to convict of the statutory offense charged in the indictment, it is essential that the prosecution establish the three following propositions: (1) That the accused was the clerk, agent, servant, or apprentice of a private person; (2) that the money came into his possession by virtue of his employment; (3) that he embezzled, or fraudulently converted it to his own use, or fraudulently secreted it with intent to convert to his own use. . . . 'Agent,' as employed in this section, imports a principal, and implies employment, service, delegated authority to do something in the name and stead of the principal,—an employment by virtue of which the money or property came into his possession."

To the same effect, also, is *Brewer v. State*, 83 Ala. 113, 3 Am. St. Rep. 693, 3 So. 816. While the doctrine was stated in these cases, in neither of them was it applied, but they were disposed of on other questions.

had been engaged in this business for some years. It further appears that appellant and one J. V. Haley were both working for him, in the capacity of traveling salesmen, during the year 1906, and their headquarters and place of business was at Tolar, in Hood county, Texas. It appears that, during the year 1906, Wilder shipped several pianos and organs to Tolar, and placed same in a rented store there, for sale. The following appears, in this connection, in the statement of facts: "That the defendant herein was in charge of said house for the said Wilder, and was also at said time a traveling salesman of said instruments for the said Wilder." It is further stated in the statement of facts: "That, about the 1st day of November, 1906, by the consent of the defend-

ant, he (Haley) took an organ out of the house at Tolar, Texas, which was under the control of the defendant, and sold same to a farmer living near said town, receiving cash in payment for same." It further appears that this was an Estey organ that had been shipped to Tolar by Wilder, among a lot of other organs for defendant to sell. About the day of the sale of the organ by Haley, the purchase price was delivered to appellant. Appellant told Haley that he was going in to headquarters at Dublin, on the 5 o'clock train that afternoon, and Haley asked him if he would take some money to Wilder for him, and thereby save buying a draft or money order for same, which defendant agreed to do. Thereupon Haley turned over to him the said sum of \$55, to

But in *Lowenthal v. State*, 32 Ala. 589, this Code provision was construed to cover a case wherein one received property of another by virtue of his employment, although not within his authority. A clerk was held guilty of embezzlement for appropriating the proceeds of a bill of exchange due his employers from third persons, which had been given to him to present to them for acceptance, which, however, he presented for payment instead of acceptance, and receipted therefor in the name of his employers.

In Indiana there are two statutes relating to appropriation of property or money by agents, etc.,—one making such an appropriation larceny, and the other, embezzlement. Punishment under the embezzlement statute is more severe than under the larceny statute. Under these circumstances, in holding an indictment for embezzlement, which alleged that the defendant, as an employee, had control and possession of certain money charged to have been embezzled, insufficient because it did not show that the possession was by virtue of the employment, the court said: "Where there is, at most, but a naked possession or control,—that is, a bare charge,—or where the access consists of a mere physical propinquity as an incident of the employment, the felonious appropriation should be regarded as larceny. The reference in the embezzlement statute to officers, agents, attorneys, clerks, servants, and employees is plainly indicative of the intent to limit the denouncement of the statute to cases in which such persons have, as an element of their employment, a special trust concerning the money, article, or thing of value that involves an actual possession thereof or a special right of access to or control over the same. This requirement would not be satisfied, as we may indicate by way of illustration, by the mere control, possession, or physical opportunity of access, which a watchman in charge of a store might have. As before indicated, the relationship contemplated by the statute is one of special trust and confidence; a relationship in which there inheres, either for the particular transaction, or for all purposes, 17 L.R.A. (N.S.)

a special right of access to, control or possession of, the money, article, or thing of value which is appropriated. And so here, the charge that the defendant had control and possession of the money as an employee falls short of showing that there inhered in his employment the right to such control and possession." *Vinnedge v. State*, 167 Ind. 415, 79 N. E. 353.

And in *Colip v. State*, 153 Ind. 584, 74 Am. St. Rep. 322, 55 N. E. 739, in discussing the same statute, the court said: "The access to, control or possession of, property of the servant or employee, intended by the statute, is such access to, control, or possession as arises from the nature of the employment with reference to the particular article of property feloniously appropriated. Something more than mere physical access, or opportunity of approach to the thing, is required. There must be a relation of special trust in regard to the article appropriated, and it must be by virtue of such trust that the servant has access to, or control or possession of, it."

This case was followed as authority in *State v. Winstandley*, 155 Ind. 290, 58 N. E. 71, same case, 154 Ind. 443, 57 N. E. 109.

A substantially similar statute has been construed by the English courts to require proof that the money or property appropriated by an agent or employee was received by him within the scope of his authority, in order that the offense constitute the crime of embezzlement. It was so construed in *Rex v. Hawtin*, 7 Car. & P. 281, wherein it was held that the subsequent appropriation by a servant of money paid him by a debtor of his master, who believed he had authority to receive it, did not constitute embezzlement.

So, in *Reg. v. Wilson*, 9 Car. & P. 27, one who was employed as a town traveler and collector, to receive orders from customers, and collect pay therefor, but who had no authority to take or direct the delivery of goods from his employer's place of business, was not guilty of embezzlement by directing the delivery of an order of goods, and including only a part thereof on his invoice, and accounting for that portion, but

be, by him, delivered to said Wilder. Haley testified that he told defendant that the money was the proceeds of the sale of said organ, at the time he turned it over to him. Haley further testified: "That it was the duty of every salesman to report sales to the said J. H. Wilder, at Dublin, and deliver to him whatever was received in exchange for musical instruments." It appears that Wilder had reports and settlements on all the instruments shipped to Tolar, except the one organ in question, for which he had neither received money, notes, or other thing of value. Appellant never turned over to him any money for the organ. Wilder testifies that Haley had told him that he had sold this instrument, and delivered the money to appellant, to be by

him delivered to him, the said Wilder. It appears further from the testimony of Wilder that it was the duty of appellant, under his contract, as well as the duty of all other salesmen, to report to him (Wilder) the sales they made, and to make settlement with him personally for such sales, and to turn over to him personally the proceeds of such sales every week. But he says he allowed his salesmen a good deal of discretion, and permitted them to take notes, cash, cattle, or other property in exchange for instruments sold. He also testified that, soon after learning that appellant had received the money for this organ from Haley, he met him at Dublin, and asked him what he had done with the money, and if, in fact, Haley had given it to him. Appellant acknowledged

not for the portion not included, the pay for which, however, he collected and appropriated to his own use; the court holding that he did not receive the money on account of his master, but all that he did in the matter was adverse to, and in fraud of, his master.

One employed as a carrier of mail between certain points, who received a letter to be carried between other points, did not receive it by virtue of his employment, within the terms of the statute relating to embezzlement; and was, therefore, not guilty of embezzlement for afterwards appropriating it. *Rex v. Salisbury*, 5 Car. & P. 155.

A miller of a gaol, instructed not to grind grain unless it was accompanied by a ticket issued by his employers, but who ground grain without requiring such a ticket, was held not guilty of larceny in appropriating the pay therefor. *Reg. v. Harris*, 6 Cox, C. C. 363.

So, one employed to lead a stallion, and who was to charge a specified amount for its service, and who received a substantially less sum and appropriated the same to his own use, was held, in *Rex v. Snowley*, 4 Car. & P. 390, not to have thereby committed embezzlement.

One who was employed to take orders, but who was not authorized to take money due his employer, was held, in *Rex v. Mellish*, Russ. & R. C. C. 80, not to have been guilty of embezzlement for appropriating money so received.

But where one authorized to sell at fixed prices sold at a different price, and afterwards collected pay for the articles so sold, and appropriated the same to his own use, he was held guilty of embezzlement where it also appeared that the principal authorized the buyer to pay the employee. *Reg. v. Aston*, 2 Car. & K. 413.

And in *Rex v. Williams*, 6 Car. & P. 626, an employee instructed to receive money in behalf of his employer from a certain class of customers, who received money from a different class of customers, and appropriated it to his own use, was held guilty of embezzlement.

So, a clerk, authorized to receive money at 17 L.R.A. (N.S.)

home from outdoor customers, who receives money away from home from outdoor customers, is guilty of embezzlement if he appropriates the money so received to his own use. *Rex v. Beechey*, Russ. & R. C. C. 398.

The doctrine may be said to be established by the weight of authority that the courts will not rigidly inquire into the question as to whether or not the money or property appropriated was received within the authority of the appropriator, where it appears that it was received by him because of his employment. In this respect the cases are more in harmony with the doctrine as it was applied in *SMITH v. STATE*, than the more strict doctrine applied and enunciated in *Brady v. State*.

Thus, in *Ker v. People*, 110 Ill. 629, 51 Am. Rep. 706, a bank clerk, who took money from a bank vault, and appropriated it to his own use, although acting clearly outside his authority in taking the money from the vault, was nevertheless held guilty of embezzlement under a substantially similar statute. In answering the contention that the taking of the money out of the vault by defendant was not within his authority, and, therefore, constituted common-law larceny rather than embezzlement, the court said: "No such subtle reasoning as that will satisfy the common understanding. It is not denied that defendant converted to his own use large sums of money and securities belonging to the bank while he was in its employ as a clerk, and that such funds did in some way come to his possession. How did he come to get possession of such funds and securities for money if it were not by virtue of his employment? Had he not been in the employ of this banking house he could have had no access to their vaults. No attempt will be made to ascertain defendant's exact relation with the bank. It is enough to know his position, whatever it was, gave him access, for some purposes at least, to the vaults where the funds and securities were kept, and that brought the funds and securities embezzled into his possession, or, what is really the same thing, under his care, in a measure, by virtue of employment. It was simply by virtue of his

receiving the money from Haley, and stated that he took it with him when he went to Ft. Worth, and while there he was robbed.

One Mitchell, bookkeeper for Wilder at Dublin, testified that he had been his bookkeeper for a number of years, and had charge of his books during November and December, 1906; that this organ and other instruments were shipped to Tolar consigned to appellant, to be sold for Wilder, and, at the time of shipment, a notation was made on the stock book, showing to whom the goods were shipped; that these goods were not charged to appellant's account, but his name was written, opposite the name and number of each instrument shipped, on the stock book, thus showing to whom they had been shipped; that in their business they did not charge these instruments to the salesmen taking same out of the house other than to mark their names on the stock book,

opposite the instrument shipped. It was the claim and defense of appellant that he had borrowed this money from Haley, and that same was a personal loan from Haley to him, and that he had no knowledge that the money in question belonged to Wilder. On this question the appellant testifies as follows: "That he asked said Haley if he had any money, and he replied that he did; that he then asked him if he would loan him \$50 or \$75, and he said he would; that the said Haley then counted out to him the said sum of \$55 in bills, and asked him if they would be enough, and he told him it would; that he did not know whose money it was at the time he borrowed same, but supposed it was Haley's, and he told Haley he would pay it back to him in a few days; that then he went to the house at Dublin, about a week after said transaction, and J. H. Wilder asked him what he had done with

employment, and not otherwise, that he got possession of his employers' money and securities, and converted the same to his own use; and that is embezzlement."

To the same effect, also, is *People v. Butts*, 128 Mich. 208, 87 N. W. 224, wherein the secretary of a corporation was held to be guilty of statutory embezzlement for appropriating funds of the corporation to his own use, although, under the by-laws of the corporation, he, as secretary, had no right to the possession of the funds, and they came into his possession contrary to the terms of these by-laws. The objection that the money did not come into defendant's hands while acting within his authority was said to be of no merit where it appeared that in the practical management of the business the funds he appropriated did come into his hands because of his position.

So, in *Morse v. Com.* (Ky. App.) 111 S. W. 714, a traveling salesman for a wholesale liquor house, who had no authority to collect for the house, was, nevertheless, held guilty of embezzlement for issuing certificates in the name of his principal for the sale of liquor in bond, collecting money thereon, and neither informing his employers of the sale, nor remitting to them any part of the proceeds. As to the point that defendant's acts would not constitute embezzlement because outside of his authority, the court said: "Nor is the point well taken that, because, under the contract, appellant was not permitted to collect anything except commissions, he could not be guilty of embezzlement in collecting and converting to his own use money which, as agent, he had no right to collect. It would be giving a very narrow and inefficient construction to the statute to hold that, when an agent of a corporation, by virtue of his agency, was placed in a position where he might collect money for the corporation, he could not be charged with the crime of embezzlement if his contract provided that he should not

have the right to collect. It is manifest that, if appellant did in fact obtain any money, . . . he was enabled to get it because he represented himself as the agent of the company; and if, as such agent, and in the course of his employment, he collected money for the company represented by him, and converted it to his own use, he committed the offense denounced by the statute. The money collected by him, if any, came into his possession by virtue of his agency; and he will not be allowed to escape the penalty of converting it to his own use upon the ground that he was not authorized by the company to collect it, although in fact he did collect it as agent."

Although the foregoing case does not apply the term "estoppel" to the doctrine enunciated, yet it is apparently based upon that doctrine. In this connection, it is worthy of note that the doctrine of estoppel as to this class of cases is well established in California, and it is there held that one who received money or property as the agent or servant of another, and who appropriated it to his own use, is, on a prosecution for embezzlement because thereof, estopped from denying that the act was within the scope of his authority, or that he actually received it as agent or servant. *Ex parte Hedley*, 31 Cal. 108; *People v. Treadwell*, 69 Cal. 226, 10 Pac. 502; *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80.

People v. Gallagher, supra, on this subject, quotes with approval Bishop on Criminal Law, 3d ed. § 367, as follows: "In reason, whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel, known throughout the entire civil department of our jurisdiction, apply in the criminal? If it is applied here, then it settles the question; for, by it, when a man has received a thing from another under a claim of agency, he cannot turn around

the money he had borrowed from Haley." He also says, in substance, that Wilder then told him that the money belonged to him, and for him not to pay Haley, but to pay it to him (Wilder), and that he then told Wilder that was the first he knew of it being his, and that he told Wilder, then, to charge it to his personal account, and he agreed to do so. The court gave an unexceptional charge in the case, in which he submitted every defensive matter arising under the facts, including, in substance, the only two special charges requested by counsel for appellant.

On motion for a new trial, counsel for appellant raised the question that the verdict is unsupported by the evidence, and that the facts will not sustain a conviction for embezzlement. This matter is raised in the fourth ground of his motion for new trial, as follows: "Because the verdict of the jury is

and tell the principal asking for the thing, 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.'"

In *State v. Costin*, 89 N. C. 511, one who received money out of his ordinary course of employment, but in pursuance of special directions, was held guilty of embezzlement. The court said: "The language of the statute in respect to the possession of the money, goods and chattels, and credits named is, 'which shall have come into his possession, or under his care, by virtue of such office or employment.' The possession and care are not confined to such as come in the ordinary course of business, but as well such as come by virtue of the relation. The words 'by virtue' are very broad, and serve well to effectuate the object for which they were employed. . . . An agent, clerk, or servant cannot thus throw off his relation to his employer and evade the statute. It does not lie in the mouth of the defendant to say that he did not sell the shoes for his employers, and the money was not theirs. He is estopped in this respect. He cannot be allowed thus to take advantage of his own wrong and evade the law. *Nullus commodum capere potest de injuria sua propria* is a wholesome maxim of the law, and we see no substantial reason why it should not apply in a case like this."

This question was raised in *Barton v. People*, 78 N. Y. 377, in the prosecution of a cashier of a bank and also a savings institution, for embezzling funds intrusted to him for the savings institution; but the case was disposed of on the ground that the evidence showed that the defendant received the money as the cashier of the bank, and not as cashier of the savings institute, and that, as he appropriated the money to the use of the bank, he was not guilty.

The doctrine was also applied in *State v. Jennings*, 98 Mo. 493, 11 S. W. 980, wherein it was held that a statute similar to the one involved in *SMITH v. STATE* covered the receipt of property by an agent or employee

wholly unsupported by the evidence in this: That, before the jury would be authorized to convict the defendant, they must find from the evidence that the defendant, by virtue of his agency, was charged with the duty of receiving the particular money in question, when the evidence wholly fails to show that defendant, by virtue of his employment or agency under the said Wilder, was, at any time, chargeable with the duty of receiving money or property from the other agents and employees of the said Wilder; but, on the contrary, the whole evidence shows that he was not charged with said duty, but that each salesman was required to report to said Wilder on his own account, and, if the said Smith undertook to deliver the money in question to the said Wilder, for the said Haley, he did so, not under and by virtue of his employment with Wilder, and not because he was chargeable with the duty so to

"in consequence of his employment," and that, therefore, one who received money for, and in behalf of, his employer, after the termination of his employment, and who appropriated it to his own use, is guilty of statutory embezzlement because he received it in consequence of his employment.

And in *Strobhar v. State* (Fla.) 47 So. 4, a similar statute was held to cover property or money received by an agent or employee "in the nature of his employment;" and that an indictment charging the receipt of money or property by one in the nature of his employment was sufficient compliance with the statute.

This doctrine was also recognized in *McAleer v. State*, 46 Neb. 116, 64 N. W. 358, wherein the court criticized an instruction to the jury because it did not include the element that the money alleged to have been embezzled must have come into defendant's hands by virtue of his employment.

In *Johnson v. State*, 9 Baxt. 279, the statute was held not to apply to one who received property under a mere casual employment. The case was disposed of on this ground rather than on the ground of lack of authority.

It is well settled that an indictment for embezzlement must allege that the property or money which the defendant is charged with having embezzled came into his hands by virtue of some confidential relation with the owner. In none of the cases, however, which pass upon the sufficiency of an indictment in such a case, is it held that an indictment must allege that the money or property was received within the scope of defendant's authority. *People v. Hemple*, 4 Cal. App. 120, 87 Pac. 227; *Griffin v. State*, 4 Tex. App. 390; *People v. Allen*, 5 Denio, 76; *State v. Roubles*, 43 La. Ann. 200, 26 Am. St. Rep. 179, 9 So. 435; *Moore v. United States*, 160 U. S. 268, 40 L. ed. 422, 16 Sup. Ct. Rep. 294; *United States v. Allen*, 150 Fed. 152.

do, but as an accommodation to the said Haley." We do not believe that this contention can be, or should be, sustained. That the appropriation of the money was wilful and corrupt is not only affirmed by the verdict of the jury, but is shown by the evidence, in our judgment, practically beyond controversy. Our statute, on the subject of embezzlement, provides: "If any officer, agent, clerk, or attorney at law or in fact of any incorporated company or institution, or any clerk, agent, attorney at law or in fact, servant, or employee of any private person, copartnership, or joint-stock association, or any consignee or bailee of money or property, shall embezzle, fraudulently misapply, or convert to his own use, without the consent of his principal or employer, any money or property of such principal or employer which may have come into his possession or be under his care by virtue of such office, agency, or employment, he shall be punished in the same manner as if he had committed a theft of such money or property." Penal Code, art. 938.

The question arises, then, under the facts of this case, Did the money in question come into the possession of appellant by "virtue of such office, agency, or employment?" The affirmative of this, we think, under the evidence, is indisputable. The practically uncontradicted evidence shows that appellant was in charge of the business at Tolar, and in custody and control of this organ, by virtue of his employment. It is shown by the evidence that, when the organ was taken from the building by Haley, it was done by appellant's consent. It is shown that this organ, as well as other property at Tolar, had been charged upon the stock book as being in possession of appellant. Haley (the man who took the organ from the possession of appellant by appellant's consent) returns with the money, representing the value of the organ, and, knowing the employment and relation of appellant, that he was in control of the business at Tolar as the agent of Wilder, knowing that he had received the organ from appellant and by his consent, and the trust relation and agency between appellant and Wilder, delivers the money (\$55) to him, for the purpose of being transmitted and paid to Wilder. Was such receipt of the money by appellant by virtue of his office, agency, or employment? We think it must be so held. While there are some expressions in the opinions of this court which might, without careful analysis, seem to lend some support to the contrary of the view here expressed, it is not believed that, as applied to the facts of this case, they are in conflict with the rule here laid down. In the case of *Brady v. State*, 21 Tex. App. 659, 1 S. W. 462, Judge Hurt

lays down this rule: "To constitute embezzlement, under the Code of this state, the conversion must be of money or other property of the principal or employer, and it must have come into the possession of the agent or employee by virtue of his agency or employment." And, as applied to the facts of that case, he holds, in substance, that no such relations were shown. In that case it seems that the appellant presented Dahlich a bill or account against him, in favor of his employer (Patterson), for the price of a bale of cotton. It seems that Dahlich, knowing the bill to be due and owing to Patterson, and knowing that defendant was or had been in the employ of Patterson, and believing defendant authorized to collect the money, paid it to him; but it appears from the testimony of Patterson that Brady was not authorized to present the bill or collect said money, and his collection of same was without any authority from him. Quoting from the facts as they appear in the opinion, we find the following: "I never authorized him to collect this money, and he had no authority to receive it. He acted outside and beyond his employment by me." Clearly, in any case where the money was received outside of and beyond the terms of employment, it cannot be held that it came into the possession of the agent by virtue of his office, agency, or employment.

A proper solution of the decision in this case can only be arrived at by a fair and reasonable construction of our own statute, having in mind the crime denounced by it, and its proper constituent elements. It was said by Judge Winkler, as far back as 1878, in the case of *Griffin v. State*, 4 Tex. App. 390: "The only safe guide in determining what constitutes the crime of embezzlement, and what persons are amenable to the charge, is to be found in our own Code and statutes, and in the adjudications thereupon. Decisions of other states are to be consulted with great caution, in view of the very diverse character of their enactments on this subject." We think our statute was intended to include and embrace cases where money was received by virtue of the express terms of the employment or agency, or where such money was received by virtue of the implied authority of the agent, or the authority fairly and reasonably resulting from the express terms of his employment or agency; and that the better view is, that, where such money was received by authority, either direct, or such as might be reasonably implied from the situation of the parties and their course of dealing, having in view their position and attitude and the confidential nature of their relations, in every such case it ought to be held that such money or property was in the care of such agent, by virtue of such office,

agency, or employment. In other words, a reasonable rule of interpretation ought to be employed in testing this statute. Such a rule, if it may fairly be adopted, having in mind the language of the Code, ought to obtain as would discourage defalcation, and protect the employer and society. It ought not to be required by the state that in prosecutions for embezzlement it should be in peril of sustaining defeat in a just prosecution, because of some technical lack of specific authority in respect to some particular act, if, under all the circumstances, such authority might reasonably be implied and found as a fact by the jury in the light of the relation existing between the parties. To hold any other rule would frequently, if not universally, make it impossible to convict in the most flagrant case of embezzlement. If we only suppose a bank cashier, collector, bookkeeper, clerk, or agent to have stolen the bank's money, if in such case a defendant could defeat a prosecution, on the claim that the particular act was somewhat beyond the precise and express limits of his particular duties, though the money and funds in fact came to him according to the customs and usages of the institution, by the color of his authority, and by means of his employment, the result would be to render the statute a vain and foolish and idle thing. Nor do we believe there is any well-considered authority holding to the contrary. Under the old common-law system, in some jurisdictions, where the shadow was more important than the substance, and where highly technical rules seem to be the delight of the profession, such a doctrine did once obtain.

In discussing the question of receipts in excess of authority, the following appears in 10 Am. & Eng. Enc. Law, 2d ed. p. 991: "Some courts have held that it is not embezzlement under such a statute for a servant, agent, or other person to convert property if in receiving the same he acted in excess of his authority, or contrary to his master's or employer's direction." This is supported, among other cases, by the case of *Rex v. Snowley*, 4 Car. & P. 390 (Parke, J.) It is also stated that this case was followed in two other English cases cited by the author, but the author says: "Other courts have taken a different view, and have held that a man may receive property by virtue of his employment, or in the course of his employment, within the meaning of such a statute, though in receiving it he acts in excess of his authority." This rule is supported by many English cases, one of which in express terms overrules the earlier case of *Rex v. Snowley*. The only cases cited in America by the author of this work are in support of the doctrine that, if the 17 L.R.A. (N.S.)

property was received by virtue of the agent's employment, or in the course of his employment, such receipt was in the meaning of the statute, though in receiving it he acts in excess of his authority. *Ex parte Hedley*, 31 Cal. 109; *Ker v. People*, 110 Ill. 629, 51 Am. Rep. 706. This doctrine is a reasonable, just, and fair rule, and seems to be well supported by authorities. Nor do we understand that the rule laid down in the *Cyclopedia of Law & Procedure*, vol. 15, p. 494, is out of harmony with the views here expressed. On the contrary, as we understand the author, he expressly affirms the construction which we here place on this statute. In subd. F, p. 493, the author says: "If a servant, clerk, or agent has merely the custody of the money or goods, which he feloniously appropriates, the offense is larceny; if he has the possession, it is embezzlement. Under the English statutes, and those of some of the United States, it is held that the property embezzled must have come into the possession of the servant from one other than the master, for, if it has first come into the possession of the latter, the conversion by the servant is larceny, and not embezzlement; but the weight of modern authority is to the contrary." The author also lays down the rule which is in strict harmony with our statute: "In order to constitute embezzlement the accused must occupy the designated fiduciary relation, and the money or property must belong to his principal, and come into the possession of the accused by reason of such employment." The author quoted also cites with approval the case of *Rex v. Beacall*, 1 Car. & P. 454, which says: "If a servant receives money on his employers' account, and embezzles it, he is guilty of a felony, though his employers had no right to it, and were wrongdoers in receiving it."

The only case we have found which, by its language, might seem to be out of harmony with the view here expressed, is the case of *Goodwyn v. State* (Tex. Crim.App.) 64 S. W. 251. In that case Goodwyn was indicted for embezzling \$29, the property of M. P. Griffin, who was justice of the peace. It seems that Griffin, the justice of the peace, gave certain money to one Zulch to hand to Goodwyn, to be delivered to the county treasurer of Madison county. In the opinion this language appears: "Appellant's fourth proposition is: 'The money was not the property of Griffin nor of Zulch, but the proof showed it belonged to Madison county; and, for want of proof of Madison county or E. E. Day, its treasurer, the court erred in failing to instruct the jury to return a verdict of acquittal.'" Now, at first blush, this might seem to be analogous to the case here, and there might seem to be some plausibility

in the contention that the money here charged to have been embezzled in fact belonged to Haley, who had given it to appellant to be delivered to Wilder. Judge Brooks evidently thought it unnecessary to state the grounds upon which he held, in that case, that the money belonged to Griffin, and not to the county. A moment's reflection, it seems to us, should be sufficient to disclose the difference of the cases. Griffin was a public official in Madison county. His relation to the county was personal, and due to his election and qualification as an officer of that county. He had no authority to pay funds or money belonging to the county to anyone, except some person authorized by law to receive it; and, therefore, when he delivered the money to someone else, to be delivered to Madison county, such money remained his money and continued his property, and never was the money of Madison county until it reached the treasurer of said county.

We believe that the court did not err in overruling appellant's motion for a new trial, and that, under the facts as here presented, the charge of the court was sufficient, and that the verdict and judgment were abundantly sustained by the evidence. So believing, the verdict and judgment of the court below ought to be, and is in all things, hereby affirmed.

Davidson, P. J., dissenting:

I respectfully dissent from the opinion of my brethren. Appellant was charged, as agent and employee of a private person, to wit, J. H. Wilder, with embezzling the sum of \$55, which money had come into his possession, and was under his care, by virtue of said agency and employment. The facts show that Wilder was engaged in the sale of musical instruments at Dublin, in Erath county, and had been so engaged for some years; that J. V. Haley and appellant were both working for him in the capacity of traveling salesmen, during the year 1906. At some time in the fall of 1906, Wilder shipped some pianos and organs to Tolar, Hood county, and rented a house, and opened up a branch business there, or, rather, he made it a distributing point for sales of instruments made in the territory surrounding Tolar. Haley and appellant were his traveling salesmen in that territory; the instruments being shipped to Tolar in care of appellant. Witness had reports and settlements on all the instruments shipped to Tolar, except one organ for which he had neither money, notes, or other thing of value. Appellant never turned over to him any money for the organ. Wilder further testifies that Haley had told him that he had sold said instrument, and delivered the money

to appellant, to be delivered, by appellant, to the said Wilder; that Haley never wrote witness anything about the matter, and that he (witness) had never heard of the transaction until about the 1st of December; that the organ in question was never charged to appellant on his personal account, but was charged to him on the general stock book. This witness paid all his salesmen's traveling expenses and salary when they were working as salesmen, as was appellant at the time of this transaction. This witness further states it was the duty of appellant, under his contract, as well as the duty of all other salesmen, to report to him (Wilder) the sales they made, and to make settlement with him personally for such sales, and to turn over to him personally the proceeds of such sales every week. He says he allowed his salesmen a good deal of discretion, and permitted them to take notes, cash, cattle, or other property in exchange for instruments sold, but required them to report to him and make settlements with him personally for any such sales, and that they usually came in to the house at Dublin once per week to make settlements for sales that were made during that week. Said he never had any settlement concerning the organ in question, and learned, about December 1st, that appellant had received the money for same, but he never delivered the money or its equivalent to him. Soon after learning that appellant had received the money, he met him in Dublin, and asked him what he had done with it, and further asked him if Haley had, in fact, given him the money, which appellant acknowledged, and said that he took it with him when he went to Ft. Worth, and, while there, was robbed.

Mitchell, the bookkeeper for Wilder at Dublin, testified: That he had been bookkeeper for Wilder at Dublin for a number of years, and had charge of the books during November and December, 1906. The books did not show that Wilder had ever received anything for this particular organ. That this organ and other instruments were shipped to Tolar to appellant, to be sold for Wilder, and at said time were marked on the stock book, showing to whom shipped. That same were not charged to appellant's account, but appellant's name was written opposite the name and number of the instruments shipped, on the stock book, thus showing to whom said instrument had been shipped. That in their business they did not charge these instruments to the salesmen taking same out of the house other than mark their names on the stock books opposite the instrument. Haley testified: That, some time in the early part of December, along about the 1st of the month,

he was a traveling salesman of pianos and organs for J. H. Wilder, of Dublin, Erath county, Texas; that, prior to the 1st of November, 1906, Wilder had shipped several pianos and organs to Tolar, Hood county, and placed them in a rented storehouse for sale; that appellant was in charge of the house for said Wilder, and was also at the same time a traveling salesman for the sale of said instruments, for their mutual employer Wilder; that they sold said instruments from wagons, throughout the country, to farmers, and other parties wishing to buy; that, about the 1st of November, by consent of appellant, he took an organ from the house at Tolar, and sold it to a farmer living near said town, and receiving himself the cash in payment for it; that, on returning to Tolar, after making the sale, the appellant, witness, and Cap. Smith (also a witness in the case) were at their boarding house in Tolar; that appellant stated to witness that he was going in to headquarters at Dublin on the 5 o'clock afternoon train, whereupon, he (witness) asked appellant if he would take some money to Wilder for him (witness), and thereby save buying a draft or money order for same, to which appellant assented, and thereupon witness turned over to appellant the sum of \$55.25, to be, by him, delivered to the said J. H. Wilder. He further testifies that it was the duty of each salesman to make reports of their own sales to Wilder at Dublin, and to deliver to him whatever received in exchange for musical instruments sold. This witness says he wrote Wilder the next day after the above transaction, but Wilder testifies he never received the letter.

The witness Cap. Smith testified: That appellant stated to Haley at the boarding house that he would like to borrow some money from him (Haley). Haley told him he did not have any to loan, but stated he had some money belonging to Wilder, and appellant stated he was going to Dublin on the 5 o'clock train, whereupon Haley asked appellant if he would take the money to Wilder for him (Haley), and thereby save expense of buying exchange or money order. To this appellant agreed, and Haley then gave appellant \$55 and some cents. Appellant testified: That he was working for Wilder, as was Haley, and that they were salesmen, and testified practically as did Smith with reference to the borrowing transaction, except that he testified positively that Haley loaned him the money; that he did not know whose money it was at the time he borrowed it, but supposed it was Haley's, and told Haley that he would pay it back to him in a few days. That he went into the house at Dublin about a week after said transaction, and Wilder asked him

about the money he borrowed from Haley. Witness told him he had spent part of it, and had part of it, and would pay Haley as soon as he got the money on some sales. That Wilder then told him that the money belonged to him, and for appellant not to pay Haley, but to pay it to him (Wilder); that Haley had not paid him for the organ he had sold. Appellant then told Wilder it was the first he knew of it being his money; and, if such was the fact, he would pay it to him, and not Haley, and that he had that much coming to him, and to charge it to his personal account, which Wilder agreed to do. He further testified that he was not aware that Wilder had any interest in the money he had borrowed from Haley until Wilder told him of it as above mentioned. That of this amount he had paid out, for the benefit of Wilder, as traveling expenses, the sum of \$15.25, and that this was taken into account when Wilder requested him to pay same to him for Haley; that he settled the balance by having it charged to his personal account, to all of which Wilder agreed, in order that he might collect the debt due him. This is the case on the facts as made by both sides. The evidence excludes the idea that it was within the scope of appellant's employment to collect from another agent money or other property belonging to Wilder.

It is contended, among other things, that this evidence does not support a conviction against appellant for embezzling Wilder's money; that the relation of agent and principal did not exist so as to make appellant criminally responsible under any of the testimony. The statute provides that, "if any officer, agent, clerk, or attorney at law or in fact of any incorporated company or institution, or any clerk, agent, attorney at law or in fact, servant, or employee of any private person, copartnership or joint-stock association, or any consignee or bailee of money or property, shall embezzle, fraudulently misapply, or convert to his own use, without the consent of his principal or employer, any money or property of such principal or employer which may have come into his possession or be under his care by virtue of such office, agency, or employment, he shall be punished in the same manner as if he had committed a theft of such money or property." Penal Code, art. 938. Now the question is, Was the fiduciary relation existing between appellant and Wilder of such character, under the facts and this statute, as would constitute one principal and the other agent in regard to the money received by appellant for Haley? The testimony is without contradiction that appellant was the agent or traveling salesman of Wilder, his duty being to sell musical instruments

indicate that appellant, receiving money from Haley, another salesman, did not occupy the fiduciary relations necessary to constitute him an embezzler of Wilder's money. If the testimony of Wilder, Haley, and appellant state correctly the fiduciary relation or the office of trust between appellant and Wilder, then appellant's only fiduciary or trust relationship was found in his authority, as agent or salesman, to sell musical instruments and collect the money for such sales as he personally might or did make. Nor am I of the opinion that the fact that the organs were shipped to Tolar and placed in a house under the charge of appellant changes such fiduciary relation or agency. If appellant had converted any of these organs or money for those he sold while in his possession, it would have been within the scope of his agency; but, when Haley took the instrument out from the house at Tolar and sold it, it passed into the possession and agency of Haley, and out of the possession and away from the agency of appellant; and the testimony of Wilder, Haley, and appellant all prove this clearly. Appellant was not authorized to settle with or pay over money to Haley. Haley understood this to be so; for, when he ascertained that appellant was going to Dublin, he requested him to take the money and pay it over for him (Haley) to Wilder. Haley, Wilder, and appellant all recognized the want of agency on the part of appellant to handle that money as Wilder's agent; for it is shown by Haley, appellant, and Wilder that appellant did this, not as agent of Wilder, but as an act of courtesy or accommodation to Haley. It seems to be settled by the Brady Case, 21 Tex. Civ. App. 659, 1 S. W. 462, above quoted, that the debt due from Haley to Wilder still existed. If appellant was authorized to receive as Wilder's agent from Haley, then Haley's obligation to Wilder was discharged, and his responsibility ceased.

It occurs to me that this matter may be tested, in part at least, in this form: Suppose Wilder had sued Haley for the money turned over to appellant, to be carried by appellant to Wilder; could Haley have plead payment of the debt to Wilder by reason of the fact that he turned the money over to appellant to be carried to Wilder? The answer to this question must be in the negative. Haley had no authority to send money to Wilder, and thus discharge his trust. Appellant had no authority, as agent of Wilder, to receive it. Under the terms of his agency to Wilder, it was Haley's business to settle personally with Wilder every week at the Dublin house, for his own sales. This he did not do, and there is no pretense that he did. He only sent it by appellant in order to save the trouble and expense of

purchasing a postoffice order or draft. Appellant had no authority to receive Haley's sale money or settle Haley's matter with Wilder, and the evidence fully shows he had no such authority. So, upon the whole case, and the authorities cited, I am of the opinion that the receipt of the money by appellant from Haley, and his accommodation, or agreed accommodation, to Haley, would not bring him within his (appellant's) scope of agency to and with Wilder. It was beyond his agency, in excess of his authority, and he was performing an act which was in no sense within the scope of his agency. It was in excess of and beyond that agency. If this is correct, then appellant was not guilty of embezzlement of Wilder's property.

So believing the law to be, I am persuaded the judgment ought to be reversed.

INDIANA SUPREME COURT.

CHICAGO, INDIANAPOLIS, & LOUISVILLE RAILWAY COMPANY, Appt.,
v.

DOLLY M. BARKER, Admr., etc.

(169 Ind. 670, 83 N. E. 369.)

Appeal — overruling demurrer — exception.

1. Overruling demurrers to the several paragraphs of the complaint is brought to the attention of the appellate court by an exception to the overruling of the several demurrers to the "complaint," where all paragraphs relate to the same injury, and the record shows that the only complaint ever on file appears in it.

Pleading — master's duty — open switch.

2. A cause of action against a railroad company for the death of its engineer is not stated by an allegation that it negligently

Case Note. — Duty to keep switch closed, as a delegable one.

The great weight of authority supports the proposition that the duty to keep a railroad switch closed is not such a positive or absolute duty of the company that it cannot delegate the same to an employee. A clear statement of this rule of law, and of the reasons therefor, is found in *St. Louis, I. M. & S. R. Co. v. Needham*, 25 L.R.A. 833, 11 C. A. 56, 27 U. S. App. 227, 63 Fed. 107, in which it was held that the duty of opening and closing a switch in the ordinary operation of a railroad was not one of the personal duties of the master, which could not be delegated to a servant, so as to bring negligence in respect to it within the rule as to fellow servants. The court said that the line of demarcation between the absolute duty of the railroad company and the duty of its servants was the line that separated "the work of construction, preparation, and preservation from the work of operation."

permitted a switch to be left open so as to carry decedent's train from the main track onto a siding, since the closing of the switch is not part of the master's duty.

Same — switch lights — statutory duty.

3. The statutory duty of a railway company to display a light upon the switch target when the day is "dark and foggy" is not charged by allegations that the weather was cold, the air filled with flying frost, that the railroad company well knew that the day was dark and hazy, and that it was impossible for an engineer injured by running into an open switch to see but a short distance along the tract ahead of the engine.

Same — insufficient window.

4. Liability of a railroad company for death of an engineer whose engine ran into an open switch is not charged by allegations

of negligence in failing to provide double windows to prevent the accumulation of frost thereon, with nothing to show that the engineer attempted to use the windows to learn the condition of the switch, or that he would have seen the switch had the windows been double, or that he was ignorant of the fact that the frost would accumulate on single windows, or that he did not assume the risk.

Same — duplicity.

5. A single paragraph of complaint, in an action for death of an engineer by running into an open switch, is insufficient which alleges that the engineer could not see the target because of ice on the cab windows; and that the railroad company was negligent in permitting the color of the target to become obscured by a coating of ice.

. . . It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but, when this duty is performed, the duty rests upon the servants to operate it carefully." Hence, the court went on to say, "the duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master, but a duty of operation,—a duty of the servant,—for negligence in the discharge of which another servant of the same master, engaged in operating a train over the same railroad, cannot recover."

And in *Daves v. Southern P. Co.* 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708, in which recovery was refused for the death of a section hand caused by the failure of his foreman to close a switch, the court made use of the following language: "It is the duty of the master to provide a suitable switch and competent servants for its operation; when he has done this, his duty is at an end and his liability ceases. The keeping of it in position, and its use and operation, is a duty belonging to the servant, the negligent performance of which, to the injury of another servant employed in the same general business, is a risk which the injured servant assumed when he took the employment, and for which the master is not liable. . . . The duty violated [by leaving the switch open] did not relate to the place of work, but to the negligent use of an appliance or instrumentality which was proper and suitable for the purpose for which it was furnished by the master; and such use of it was simply a detail of the work or management of the business, therefore a duty of the servant, which he, and not the master, was bound to perform."

And in *Dixon v. Grand Trunk Western R. Co.* 147 Mich. 667, 111 N. W. 200, it was held that the duty of keeping a switch closed and locked while not in use was not one of the absolute duties of the railroad company, but an assignable one relating to a detail of operation which could properly be delegated to an employee.

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So, in *Davis v. Staten Island Rapid Transit R. Co.* 1 App. Div. 178, 37 N. Y. Supp. 157, which was also an action for injuries caused by a switch being negligently left open by other employees of the defendant, it was held that the defendant had discharged its duty to its employees by promulgating a rule imposing the duty upon conductors to look after the switches used by their trains.

To the same effect are *Denver & R. G. R. Co. v. Sipes*, 23 Colo. 226, 47 Pac. 287, and *Miller v. Southern P. Co.* 20 Or. 285, 26 Pac. 70, in which it was further held that this rule of law was not changed by the fact that the company had promulgated a rule making it the personal duty of certain of its employees to see to the proper adjustment of the switches on its line of road.

And the rule of law here discussed finds indirect support in the following cases, which, without considering the specific question of the delegation of the duty to keep switches closed, hold that an employee cannot recover for injuries caused by a switch being negligently left open, when the negligence is that of a fellow servant, thus implying that the duty is one which may be delegated: *Oakes v. Mase*, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345, reversing 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114; *Naylor v. New York C. & H. R. R. Co.* 33 Fed. 801; *Vizelich v. Southern P. R. Co.* 126 Cal. 587, 59 Pac. 129; *Illinois C. R. Co. v. Swisher*, 74 Ill. App. 164, affirmed in 182 Ill. 533, 55 N. E. 555; *Wabash R. Co. v. Thomas*, 117 Ill. App. 110; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Gilman v. Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635; *Walker v. Boston & M. R. Co.* 128 Mass. 8; *Roberts v. Chicago, St. P. M. & O. R. Co.* 33 Minn. 218, 22 N. W. 389; *Sammon v. New York & H. R. Co.* 62 N. Y. 251; *Harvey v. New York C. & H. R. R. Co.* 88 N. Y. 481; *Corcoran v. Delaware, L. & W. R. Co.* 126 N. Y. 673, 27 N. E. 1022; *Bennett v. Long Island R. Co.* 163 N. Y. 1, 57 N. E. 79, reversing 21 App. Div. 25, 47 N. Y. Supp. 258; *Pearsall v. New York C. & H. R. R. Co.* 189 N. Y. 474, 82 N. E. 752; *Tinney v. Boston & A. R. Co.* 62 Barb. 218; *Ponton v.*

Same — switch target.

6. A railroad company is not shown to be negligent, so as to be liable for the death of an engineer caused by his running into an open switch, by the fact that it permitted the color of the target to become obscured by ice, where there is nothing to show that the condition of the switch might not have been seen by the shape of the target wings, although the color was obscured.

Master — fellow servant — engineer — section foreman.

7. A railroad company is not liable for the death of an engineer through the negligence of its section foreman in leaving a switch open.

Same — signals — statutory duty.

8. A railroad company is not, under a statute making it liable for the negligence of an employee having charge of a signal, liable for the death of an engineer who ran into a switch negligently left open by such employee, where the signal upon the switch showed that it was open, and, in any event, it could not be seen because of weather conditions.

Same — signal — switch yard.

9. The painted target on a switch is not a signal or a single switch at a siding a switch yard, within the meaning of a statute making a railroad company liable for the negligence of an employee having charge of any signal or switch yard.

Pleading — conclusion.

10. An allegation that it was the duty of

a servant to do certain acts is not sufficient, in an action to recover for the death of a coservant for failure to perform them, which does not show how it became his duty to perform them.

Same — failure to state facts.

11. In an action against a railroad company for the death of an engineer by running into an open switch, based on the negligence of the railroad company in placing an obstruction between the switch and a semaphore, which prevented the one in charge of it from seeing that the switch was open, and signaling the train, the complaint is insufficient if it is not shown that such person could have seen the switch in the absence of the obstruction, or, except by inference, that there was a signal available to warn the engineer.

Same — duty of employee.

12. The duty of one in charge of a semaphore to determine the condition of a nearby switch cannot be inferred from allegations that it was his duty to manage and control the semaphore, and communicate to persons operating trains whether the track was in good condition and safe to proceed, and whether the switch was open or closed.

(January 17, 1908.)

A PPEAL by defendant from a judgment of the Circuit Court for Owen County in plaintiff's favor in an action brought to

Wilmington & W. R. Co. 51 N. C. (6 Jones, L.) 245; *Pleasants v. Raleigh & A. Air Line R. Co.* 121 N. C. 492, 61 Am. St. Rep. 674, 28 S. E. 267; *Parker v. New York & N. E. R. Co.* 18 R. I. 773, 30 Atl. 849.

Attention should here be called to the following cases, in which the language of the opinions may fairly be said to indicate that the courts considered the duty to keep a railroad switch closed one which the company could delegate to an employee, though recovery was allowed on other grounds: *Chicago & A. R. Co. v. House*, 172 Ill. 601, 50 N. E. 151; *Hallett v. New York C. & H. R. R. Co.* 167 N. Y. 543, 60 N. E. 653, reversing 42 App. Div. 123, 58 N. Y. Supp. 943 (in both of which the plaintiff was held not to be a fellow servant of the employee who negligently left the switch open); *Town v. Michigan C. R. Co.* 84 Mich. 214, 47 N. W. 665 (in which it was held that, where a railroad company, after abandoning a switch, began to use it again without notifying an engineer or placing a switch light thereon, a recovery would be allowed the engineer for injuries received by running into such switch when open, though such condition was caused by the negligence of his fellow servants); *Ellingson v. Chicago & A. R. Co.* 60 Mo. App. 679 (in which the plaintiff was allowed to recover because the failure of the defendant to place a light on a switch negligently left open by a fellow servant was held to be a concurring cause of the accident); *Coppins v. New York C. & H. R. R.* 17 L.R.A. (N.S.)

Co. 122 N. Y. 557, 19 Am. St. Rep. 523, 25 N. E. 915 (in which the plaintiff was allowed to recover because the habitual neglect of duty of the employee charged with the care of the switch was known to the company).

There are some cases, however, that are opposed to the rule here under discussion, and which hold that the duty to keep a switch closed cannot be delegated by a railroad company to any of its employees, so as to relieve the company of liability for injuries caused by a failure to perform such duty. These cases are *Mase v. Northern P. R. Co.* 57 Fed. 283, affirmed regardless of this question in 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114, which was reversed in *Oakes v. Mase*, supra (the decision of the trial court was also specifically disapproved of in *St. Louis, I. M. & S. R. Co. v. Needham*, supra); *Coleman v. Wilmington, C. & A. R. Co.* 25 S. C. 446, 60 Am. Rep. 516; *Richey v. Southern R. Co.* 69 S. C. 387, 48 S. E. 285.

In *Southern R. Co. v. Blanford*, 105 Va. 373, 54 S. E. 1, a charge of the trial court that the plaintiff was entitled to recover if the switch which caused the death of her intestate was negligently left open by the crew of another train, was held to be without error, but whether upon the ground that the duty to keep the switch open was a nondelegable one, or because the offending employees were not fellow servants of the plaintiff's intestate, does not appear.

There are a few other cases in which re-

recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Messrs. E. C. Field, H. R. Kurrie, and I. H. Fowler for appellant.

Messrs. Charles E. Thompson and Homer Elliott for appellee.

Hadley, J., delivered the opinion of the court:

Appellant owns and operates a railroad from Chicago to Louisville, through Indiana, and by way of Quincy, Owen county. At Quincy there is a station house on the west side and a switch on the east side of the main track. Four hundred and fifty feet north of the station is the north connection of the switch with the main track. The switch is operated by a switch stand, located on the west side, and about 6 feet from the west rail of the main track. The switch stand is 8 feet high, and has on top two wings, one painted red and the other white, and which serve as targets to signify to approaching trainmen whether the switch is open or closed; the red, when standing at right angles with the main track, indicating danger, or an open switch, and the white, when standing at right angles with the main track, indicating safety, or a closed switch. In the opening or closing of the switch the wings of the stand work

automatically, and when in repair cannot mislead. Between the switch stand and the station house a country highway crosses the railroad, and on the west side of the main track is a signboard to warn travelers on the highway. In the north end of the station house is an observation window from which an unobstructed view up the track northward may be had for a long distance. The company also maintains at the station house a semaphore signal which is 20 feet high, and has on top two blades 5 feet long and 6 inches wide, painted white and in colors, and by which device the telegraph operator signals to approaching trainmen any orders he has to deliver, and whether or not the train should be stopped at the station. Said signal is under the care and management of the telegraph operator, who is also the station agent. In approaching Quincy from the north the track is on a heavy down grade. On December 30, 1902, the decedent Barker was in the employ of the appellant as a locomotive engineer, and as such had charge of a south-bound, through freight, the running time of which was scheduled at 30 miles an hour, and which, as the same approached Quincy, was running at that rate. There were loaded cars standing on the switch. The switch had been left open, and Barker's train took the siding, collided with the standing train, and he

covert was allowed to a servant injured by reason of an open switch, which would seem at first glance, also, to be opposed to the rule as established by the weight of authority; but in every one of them there was, in addition to the fact that the switch was negligently left open by other employees, a failure on the part of the railroad company to perform one of its absolute and positive duties owing to its employees with reference to the switch, which, had it been fulfilled, would have avoided the accident. Thus, in *St. Louis, I. M. & S. R. Co. v. Needham*, 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 823, which was another appeal of the case with the same title, heretofore reviewed in this note, recovery was allowed for the death of a fireman caused by an open switch, because the defendant had failed to maintain a target upon the switch in question.

The same result was reached in *Stucke v. Orleans R. Co.* 50 La. Ann. 188, 23 So. 342, in which it appeared that, up to the day of the accident, the plaintiff had been employed as a conductor on one of the defendant's cars, but on that day was ordered to repair a car, and it was while engaged in such work that he was injured by a collision between the car at which he was at work and another car which came through a switch negligently left open. It was held that the defendant could not escape liability, even though the employees who had left the switch open should be deemed fellow servants of the plaintiff, as the master had

failed in his nondelegable duty to furnish his servant with a safe place to work.

And in *Young v. Syracuse, B. & N. Y. R. Co.* 166 N. Y. 227, 59 N. E. 828, recovery was allowed for the death of an engineer caused by his train running into a switch negligently left open by the crew of another train, because of the failure of the company to employ a switchman to tend to the switch, upon the ground that it was the duty of the railroad company to furnish a sufficient number of employees to insure reasonable safety in the operation of its road.

So, in *Texas P. R. Co. v. Johnson*, 76 Tex. 421, 18 Am. St. Rep. 60, 15 S. W. 463, recovery was allowed the plaintiff for injuries received by reason of an open switch, the condition of which was due to the fact that it was defective. The court said that, if the machinery relied upon by the master to keep the rails in proper position was so defective that it did not accomplish that purpose, then he had failed in his duty to the employee, which fact fixed his liability, and he could not be relieved therefrom by the fact that some other employee, by the use of some unusual means, might have placed and held the rails in proper position, thereby avoiding the accident.

And in *Rombough v. Balch*, 27 Ont. App. Rep. 32, the ground of recovery for the death of an employee caused by a switch negligently left open was the defectiveness of the switch.

was killed in the wreck which followed. Dolly M. Barker, his widow, qualified as administratrix, and brought this action for the benefit of herself and children. The foregoing facts are set forth in all the four paragraphs of complaint, to each of which paragraphs a demurrer for insufficiency of facts was overruled and the cause put at issue by the general denial. The case was submitted to a jury, which returned a verdict for appellee. With the general verdict were also returned answers to a large number of interrogatories.

The record shows that the only demurrers filed by appellant were addressed to the several paragraphs of the "amended" complaint. These demurrers were overruled, to which rulings exceptions were reserved. In its assignment of errors in this court it is complained that the court below erred in overruling the several demurrers to the "complaint." Upon this showing, it is contended by appellee that no question is raised here on the sufficiency of the several paragraphs of the complaint, because the record shows that there was no demurrer filed, and no exceptions reserved to any such pleading. We think otherwise. It further appeared from the record that, when the demurrers were presented, the only complaint then, theretofore, or thereafter, on file was the complaint that now appears in the record. There was, and is, therefore, no possible chance for a mistake in the identity of the complaint demurred to. In this respect the record before us is radically different from the records in the cases cited by appellee. All the paragraphs of the complaint relate to the same injury.

Was the first paragraph sufficient? It is first alleged in this paragraph "that it was the duty of the defendant to keep the switch and appliances and mechanical devices attached, as a part of the defendant's railroad, in good repair, and safe for use by its employees, and that on the day aforesaid the defendant negligently suffered said switch to become, and remain, out of repair, and in an unsafe and dangerous condition in this, to wit: Said defendant, on said December 30, 1902, carelessly and negligently permitted said switch to become unlocked, and so turned open and adjusted, as to cause the train on which said Barker was then and there performing his duties as engineer, and which was running at a high rate of speed, to pass from the main track onto the switch and collide with certain heavily loaded cars standing thereon, whereby said train was wrecked and said Barker killed." All the default and negligence that resulted in the switch being left open is charged directly against the defendant. It is a well-established rule of pleading that a complaint for

negligence against a railroad company must show by proper averments the violation of a duty owing to the plaintiff by the company, or by someone else for whose particular acts the company is held, by statute, to be responsible. It is not sufficient to allege in general terms that it was the duty of the defendant to do this or to do that. Such an averment is the statement of a conclusion, not of a fact. *Pittsburgh, C. C. & St. L. R. Co. v. Peck*, 165 Ind. 537, 540, 76 N. E. 163, and cases cited. The general rule in such cases is that the pleader must distinctly set forth in his complaint the facts which he claims create the duty that has been violated, and from the facts so stated the court will determine, as a matter of law, the existence or the nonexistence of the duty. *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660; *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 100, 102 Am. St. Rep. 185, 69 N. E. 669; *Cleveland, C. C. & St. L. R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86; *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 160, 33 N. E. 355; *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 325, 28 N. E. 989; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 163, 5 N. E. 187; *South Bend Chilled Plow Co. v. Cissne*, 35 Ind. App. 375, 74 N. E. 282; *Creamery Package Mfg. Co. v. Hotsenpiller*, 24 Ind. App. 122, 56 N. E. 250. The duties of master and servant are correlative. On the one hand, it is the duty of the master to employ none but competent servants, to use due care in providing his servants with safe machines and appliances to work with, and to exercise reasonable care in keeping them in good repair; and, to that end that they be kept in good repair, he is required to make inspection at reasonably frequent intervals. These duties are duties the master owes his servants, the performance of which he cannot delegate to another so as to relieve himself from responsibility for their nonperfect or imperfect performance. 20 Am. & Eng. Enc. Law, 2d ed. p. 55, and cases cited. On the other hand, the duty of operating the machine in all its details and departments is a duty the servant owes the master, and, when any duty connected with operating any part of the machine is delegated to another by the master, such person performing such duty is a fellow servant of all others engaged by the master in carrying on the common enterprise. *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669; *Hodges v. Standard Wheel Co.* 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; *Baltimore & O. S. W. R. Co. v. Little*, 149 Ind. 167, 48 N. E. 802; *Indianapolis & G.*

Rapid Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145; Cleveland, C. C. & St. L. R. Co. v. Brown, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; St. Louis, I. M. & S. R. Co. v. Needham, 25 L.R.A. 833, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107; Labatt, Mast. & S. p. 1726. In the last case it is said: "The roadbed, ties, tracks, stations, rolling stock, and all the appurtenances of a well-equipped railroad, together, constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but, when this duty is performed, the duty rests upon the servant to operate it carefully."

In the complaint under consideration it is not averred that the switch, or any of its appliances, was unsound, defective, or out of repair. The negligence complained of was not in construction, preparation, or repair of the railroad, but in its operation. The switch, as a part of the railroad, was safe before it was made unsafe by someone, who in doing it was not imperfectly performing a duty of the master. The allegation is that the defendant negligently permitted such switch to become unlocked and open and so adjusted as to carry the decedent's train from the main track onto the siding. According to the averments, the situation resulted from no defect in the switch, or any appurtenances by which it was operated. It was made to unlock, open, and shift the continuity of the rails from the main track to the siding. So far as the averments show, the master, or defendant, had not failed in any particular to furnish the plaintiff's decedent with a safe place in which to work and safe instrumentalities to work with, nor in any way failed to employ competent servants, nor to keep such place and instrumentalities inspected, and in good condition for the performance of all duties required of its employees. As relates to the defendant company, the averments show affirmatively that it had done all pertaining to the switch that the law requires of it. As was said in Davis v. Southern P. Co. 98 Cal. 19, 26, 35 Am. St. Rep. 133, 32 Pac. 708: "It is the duty of the master to provide a suitable switch and competent servants for its operation; when he has done this his duty is at an end, and his liability ceases. The keeping of it in position, and its use and operation, is a duty belonging to the servant." The averment that the "defendant" negligently permitted the switch to become and remain open adds no strength to the pleading. Opening and closing and manipulating a switch in conducting the busi-

ness of railroading is not a duty belonging to the master, and will not be held the master's act, even though performed by an officer of the highest rank. "There are certain duties which pertain to the position of master," says Mitchell, Ch. J., in Indianapolis & St. L. R. Co. v. Johnson, 102 Ind. 356, 26 N. E. 201, "and whoever performs them is, for the time being, in the master's place. There is also certain work which pertains to the duty of employee or servant, and whoever else beside the master does this is, while so engaged, a fellow servant with any other employee who is in the same general employment." The full test of liability is not the condition of the place, nor the machinery, at the instant of the injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation? Southern Indiana R. Co. v. Martin, 160 Ind. 280, 286, 66 N. E. 886; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262; Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse, 163 Ind. 247, 253, 71 N. E. 218, 660; Miller v. Southern P. Co. 20 Or. 285, 26 Pac. 70. Under the foregoing rules, the first ground of negligence is insufficient.

As a second ground, it is averred that at the time of the accident the day was extremely cold, and the air filled with flying frost; that, by reason of the frost in the atmosphere and the hazy condition of the weather, it was impossible for said Barker to see and observe the defective and open condition of said switch until within a few feet of the same; that he was wholly ignorant of its condition until said engine left the track; that said switch stand, by means of painted wings upon the top, was used to inform approaching trainmen whether said switch was opened or closed; that on said day the defendant well knew the condition of the weather, and knew said day was dark and hazy, and that the air was filled with flying particles of frost, and that it was possible for Barker, as such engineer, to see but a short distance along the track ahead of his engine; that, under the circumstances, it was the duty of the defendant to maintain a signal light upon said switch stand to enable said decedent to determine, as he approached the same, whether said switch was open or closed; that, if such light had been maintained, the decedent would have observed the condition of the switch in time to put his train under control, and avoid the accident; that the defendant, disregarding its duties, then and there carelessly and negligently failed to

place or maintain a signal light of any kind upon said switch stand. The allegations in reference to the signal light do not exclude the inference that the accident happened in the full light of day; and the averment that the day was extremely cold and the air filled with flying frost, and, "by reason of the hazy condition of the weather, it was impossible for Barker to see the open switch," is not a sufficient charge that the day was "dark and foggy," or that any other reason existed for maintaining a light on the switch in daytime. The statute only requires the display of a light in the daytime when the day is "dark and foggy." Burns's Anno. Stat. 1901, § 5173a. The mere allegation in the complaint that it was the duty of the defendant, under the circumstances, to maintain a light on the switch, cannot be considered. The facts set forth must show the duty, if it exists. The statements that the defendant knew the day was dark and hazy, and the atmosphere filled with flying particles, and that it was possible for Barker to see along the track but a short distance, are mere recitals, and not allegations of fact. A demurrer admits only such facts as are well pleaded. Facts merely recited are not well pleaded, and will not be considered in determining the sufficiency of a pleading on demurrer. *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245; *Indianapolis & G. Rapid Transit Co. v. Foreman*, supra; *Jackson School Twp. v. Farlow*, 75 Ind. 118; *Cleveland, C. C. & St. L. R. Co. v. Lindsay*, 33 Ind. App. 404, 70 N. E. 283, 908. In *McElwaine-Richards Co. v. Wall*, 169 Ind. 557, 65 N. E. 753, the complaint averred that the "defendant's" superintendent negligently ordered him to climb upon a plate or chord constituting a part of the building; that the plaintiff did not know how it was placed and held in position, and did not know how it should be held or fastened in position; that he did not know of the unsafe condition of said chord or plate, or that the same was not properly fastened in position; that the defendant and its superintendent knew at the time that said plate or chord was not fastened, and was unsafe to go upon. It was held that these statements were mere recitals, and could not be considered in determining the sufficiency of the complaint. Likewise, in *Lake Erie & W. R. Co. v. Mike-sell*, 23 Ind. App. 395, 55 N. E. 488, the averments in the complaint were: The defendant was unlawfully engaged in running its engine and cars over the streets of Frankfort and within the city at a faster rate of speed than 4 miles an hour, contrary to and in violation of an ordinance of the city of Frankfort. It was held that this recital was not a sufficient allegation 17 L.R.A. (N.S.)

of the fact that there was an ordinance of the city to that effect in force at that time. To the same effect, see *Laporte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277; *Malott v. Sample*, supra; *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669; *Erwin v. Central Union Teleph. Co.* 148 Ind. 371, 46 N. E. 667, 47 N. E. 663.

The third charge of negligence in the first paragraph of complaint is, in substance, as follows: It was the duty of the defendant to furnish the cab of the engine the decedent was running with double or frost windows, to prevent the accumulation of frost or ice on the windows; that, by reason of the carelessness and negligence of the defendant, each of the windows of the cab at the time of the accident to the decedent consisted of a single pane of glass, and, by reason of the heat on the inside of the cab and the extreme cold on the outside, and the pressure of steam from the engine on the outside, said glass became covered with frost and ice, thereby obstructing the view and preventing the decedent from seeing the open and dangerous condition of the switch.

These allegations are not only subject to the same infirmities as the preceding, but they also fail to show that the absence of frost windows in the engine cab was either the proximate or remote cause of the accident; it not appearing that the windows of the cab were used by the engineer to look for the switch, or that he could have seen the switch through the windows had there been no ice or frost upon them. Neither is it averred that the decedent was ignorant of the fact that frost would accumulate on single window glass during a run on a cold day; nor are there facts alleged showing that he did not assume the risk of its doing so. To constitute actionable negligence all these things should have been affirmatively shown. *American Rolling Mill Co. v. Hurlinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460, and cases cited; *Day v. Cleveland, C. C. & St. L. R. Co.* 137 Ind. 206, 36 N. E. 854; *Bedford Belt R. Co. v. Brown*, 142 Ind. 659, 42 N. E. 359; *Louisville & N. R. Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214.

The second paragraph of the complaint also averred, in addition to the allegations common to them all, that appellant had Emory McCullough in its employ as a section foreman; that he, as such section foreman, had supervision of that part of appellant's track that included said switch at the station of Quincy; that it was his duty as such section foreman to maintain the part of appellant's track under his supervision in good repair and safe condition for use of defendant's trains and defendant's employees operating the same; that it was

the duty of the defendant to keep said switch closed so as to avoid accident to the company's servants engaged in running its trains; that, in connection with said switch, and used in opening and closing the same, and for the purpose of informing the servants of said company, engaged in running its trains, as to the condition of said switch, whether open or closed, a certain switch stand, with two painted metal signals, disks, or panels attached to the top thereof, one painted white and the other red, was maintained by the appellant, and that these signals, under ordinary weather conditions, inform the company's servants operating its trains, on approaching said switch, whether the same was open or closed; that said switch signals were, on said day, under the control of said McCullough, and that it was his duty to adjust the signals and to keep the switch closed, and to keep them in proper repair; that said McCullough, in violation of his duty, negligently opened said switch and permitted it to remain open until the engine operated by the decedent ran into the same and killed him; that said McCullough was guilty of negligence in permitting snow and frost to remain on the red painted signal, on account of which the engineer was prevented from observing the condition of the switch upon approaching the same with his engine. There are also the same averments in this paragraph of the complaint that are contained in the first paragraph regarding the failure of the appellant to maintain signal lights on the switch stand, and double glass windows in the engine cab. There is no averment in either paragraph to indicate that the accident did not happen in broad daylight, and no direct averment that the day was dark and foggy. There is this direct averment: "The 30th day of December, 1902, at the time of the accident, was extremely cold, and the air was filled with flying particles of frost," and, because of the hazy, cloudy, and foggy condition of the weather, it was impossible for said Barker to see the open condition of said switch; and this further recital: "On the day aforesaid said defendant company well knew the condition of the weather, and that the day was dark and hazy." There was no direct averment in either paragraph of the complaint that the weather was either dark, hazy, or foggy; nor is there any averment that, if the condition of the windows of the cab of the engine had been different, the accident would have been prevented. Nor are there any allegations showing that Barker did not know the windows were of single glass, and liable to become frosted over in a fast run; nor that he did not assume the risk. *American Rolling Mill Co. v. Hullin*. 17 L.R.A. (N.S.)

ger, supra. Nor is there any averment that, had there been no frost or snow on the switch target, the engineer would have seen the target; and, in fact, in this same paragraph there are contradictory averments, namely, that, on account of the weather conditions, "it was impossible for said Barker to see and observe the defective condition of the switch until within a few feet of the same;" and on a previous page it is averred that Barker failed to see the open condition of the switch because McCullough permitted snow to get upon and obscure the red signal on the switch stand. Parties may set up a contradictory state of facts in different paragraphs of either complaint or answer, but it is not proper for them to set up a conflicting state of facts in the same paragraph. Nor does the complaint in this respect show that the color of the signal panels was the only means by which the engineer could tell the condition of the switch. The pleading does not repel the inference of the fact as it actually existed, that is; that these signal panels could be as readily distinguished by their form as by their color, the one being oval in shape with a hole 4 inches in diameter in the center of each disk, and the other being square in form with sharp-pointed ends; and the complaint wholly fails to show that the result would have been different to the engineer had there been no snow or ice at all formed on the signal disks.

It is evident, however, that in the second paragraph the principal theory of the pleader was to charge McCullough, the section foreman, with being a vice principal, and acting for the master when he opened the switch and negligently left it open. It is averred that, as section foreman, he had charge and supervision over that part of appellant's road that included the switch at Quincy, and that it was his duty to keep the same in good repair, and safe for appellant's trains and trainmen; that he neglected his duty, and opened the switch and failed to close it, and, in consequence, the accident occurred. It has more than once been held in this state that section or repair men are fellow servants of those operating trains. *Slattery v. Toledo & W. R. Co.* 23 Ind. 81; *Gormley v. Ohio & M. R. Co.* 72 Ind. 31; *Thompson v. Citizens Street R. Co.* 152 Ind. 461, 53 N. E. 462; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259. It has also been held that *prima facie* all who enter the same employment are fellow servants, and the burden is on him who denies this to show the contrary. *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 286, 66 N. E. 886. The averment that McCullough was charged with the duty of keeping the track in repair does not fix his character

as a vice principal while engaged in handling the switch. Handling a switch is not a master's duty, and it cannot be made such by averring that it is. It is the act itself, and not the title of the actor, or the fact that he does superior duties, that characterizes a performer a vice principal or fellow servant. *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262; *Thacker v. Chicago, I. & L. R. Co.* 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605; *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 352, 26 N. E. 200. When the section foreman, McCullough, arrived in Quincy, he found a safe machine, with a switch and all its appliances in good working condition. He found that the railroad company had done all that it was required to do for the safety of its employees. As one employed to assist in operating the railroad, McCullough owed the company a duty to do his part carefully as pertained to the public, and to the company's property and employees. The railroad was safe before he made it unsafe by going away and leaving the switch open. The negligence was his, and not that of the company. Any other holding would completely overthrow the coservant rule. Neither do we think the paragraph good under the employer's liability act. As we understand the pleading, an effort is made to charge liability under clause 4 of § 7083, Burns's Anno. Stat. 1908 (Acts 1893, p. 294, § 1), which relates to the negligence of an employee "having charge of any signal, . . . switch yards," etc., by alleging that the printed targets on the switch stand is a "signal," and a single switch to a siding is a "switch yard," and that the section foreman may be properly in charge within the meaning of the statute. As such person in charge, McCullough is alleged to have been negligent in two particulars: First, in turning the switch stand upon which the signal rested so as to open the switch, and, second, in permitting frost and snow to accumulate on the red signal so that the decedent could not determine which it was as his train approached it. Neither of these grounds is tenable. First, it is affirmatively shown that no error was made in operating the signal of the switch. The alleged signal worked automatically, and showed the red, or danger, side, just as it should appear when the switch is open. It was the moving of the switch that moved the signal; not the moving of the signal that moved the switch. Besides, it is not averred that Barker, the engineer, could have seen the signal, if there had been no snow upon it, in time to have avoided the accident: and in another part of the same paragraph it is charged

that he could not have seen the signal on account of the weather conditions. The effect of the averments concerning the signal is to show that the negligence charged in relation thereto was not the cause of the injury. Furthermore, switch targets are not signals within the meaning of the statute referred to. As before observed, they work automatically. They are fixtures to the switch stand, and cannot be manipulated independently of the switch. They are devices so adjusted to the switch stand that the switch cannot be opened or closed without shifting the targets, the white to a right angle position to the main track when the switch is closed, and the red to a similar position when the switch is open. When in repair they cannot be manipulated so as to mislead anyone acquainted with them.

The statute manifestly refers to such signals as are complete within themselves, and not subsidiary parts of another device,—signals which may be controlled, and, by the display of lights or colors, manipulated, by the person in charge, to communicate information to approaching trainmen; and that can, by the negligence of the operator, be made to speak falsely to the company's servants, to their injury. We therefore think the second paragraph fails to state a cause of action, and the demurrer thereto should have been sustained.

In the third paragraph it is alleged to be the duty of the defendant to maintain an unobstructed view between the window of its station house and the target on the switch stand, so that the station agent might see from his position at the window in the station house whether said switch was open or closed, and from said position signal to trainmen approaching with their trains the true position of the switch: that the defendant's track was in plain view from the agent's window in the station house, and it was the duty of Orrell, the station agent and telegraph operator, to look from his said window and examine the defendant's railroad track, and note the condition of the switches and see that the same were properly set. But the defendant negligently, on the day aforesaid, maintained at a point midway between the depot and switch stand a large warning board to caution travelers on the highway, so constructed as completely to obstruct the station agent's view of the switch stand, and completely to prevent his observing and noting whether the switch was open or closed, and signaling the true condition to those running trains and thereby averting such an accident as befell the decedent. The defendant at the time knew of the existence of the said board, and that the same

prevented the station agent and telegraph operator from taking note of the condition of the switch from his place at the depot. If the defendant had maintained an unobstructed view of the switch stand from the depot window, thus enabling the agent Orrell to observe the condition of the switch, he could and would have erected the signal or semaphore in his charge at the depot, and thereby would have warned engineer Barker of the open condition of the switch, thus avoiding the accident. This paragraph is drawn upon the theory that the appellant was guilty of negligence in obstructing a view of the switch from the station window by maintaining in the line of vision a warning board at the country highway crossing, and thus preventing the agent from seeing the open switch, who would, if he had been able to see it, have warned the decedent by erecting the signal in his charge. The paragraph is bad for more reasons than one. In the first place, it is not stated how it became the duty of Orrell to inspect and note the condition of the railroad tracks and switches, whether by rule, contract, or custom, which omission carries the material fact clearly within the rule declared in *Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser*, 163 Ind. 247, 253, 71 N. E. 218, 660, and *Pittsburgh, C. C. & St. L. R. Co. v. Peck*, 165 Ind. 537, 540, 76 N. E. 163. In the second place, the distance between the station house and the switch stand is not given, and there is no allegation stronger than a mere recital that the station agent could have seen the target on the switch stand if the warning board had not intervened. Neither is it averred, except by inference, that there was a semaphore signal available to the agent at the station, nor that he could otherwise have signaled the decedent that the switch was open. The demurrer to the third paragraph should also have been sustained.

It is apparent that the fourth paragraph of the complaint is founded on the fourth clause of § 1 of the employer's liability act (§ 7083, Burns's Anno. Stat. 1908), and relies upon the negligence of one Orrell, alleged to be in the employ of the defendant as station agent and telegraph operator, and in charge of the semaphore signal at the Quincy station. It is alleged that, on December 30, 1902, the defendant maintained at Quincy, as a part of its railroad system, a side track connected a short distance north of the station house with the main track by a switch, which switch was operated by means of a switch stand and other devices; that the switch stand had constructed at

the top certain painted wings as targets, designed and used by the defendant as a means of informing its servants operating its trains of the condition of the switch, as to being open or closed; that the switch targets are in full view from the station house, and in the station house the defendant maintains a semaphore signal, which, on the 30th day of December, 1902, was in charge of one A. L. Orrell, who was employed by the defendant for the purpose of managing and controlling said semaphore, and which signal was used as a sign to trainmen operating trains on the defendant's railroad whether the main track was in good condition and safe for them to proceed, and whether said switch was open or closed; that the switch targets were in full view from the station house, and but 400 feet distant therefrom, and Orrell was present at the station and engaged in his said employment; that the switch was open and had been left open continuously for forty minutes before the arrival of the train in charge of the decedent and before the same was due to arrive, and the target on the switch stand during all the said time showed red, indicating that the switch was open and the main track unsafe; that it was the duty of Orrell, before the arrival of trains, to look out of his station window and examine the defendant's railroad track, and ascertain the condition, and observe and note the condition of the switches, whether open or closed; and that for forty minutes before the arrival of Barker's train the target of the switch stand indicated that the switch was open, and Orrell could, and with the exercise of reasonable diligence would, have seen that the switch was open, and could have raised his semaphore danger signal in time to have enabled the decedent to have stopped his train before the same ran into said open switch; but said Orrell carelessly and negligently set said semaphore signal so as to indicate to the decedent that said main track was clear and safe, when he well knew, or might with reasonable diligence have known, that said track was not clear and safe. By reason of said negligence and the display of said erroneous signal by Orrell, the decedent was misled and ran his train at a great speed into said open switch, collided with other cars, and was killed. In this paragraph there are sufficient averments that the company maintained at Quincy, within plain view of the telegraph operator and station agent, a switch stand surmounted with painted wings or blades that indicated automatically whether said switch was open or closed; and that it also maintained at its Quincy

station a semaphore signal that was in charge of one Orrell, who was employed by the company to operate the same for the purpose of informing appellant's servants who were engaged in operating trains running over appellant's road of the condition of the track, as to whether it was clear and safe for them to proceed, or obstructed and dangerous, and whether the switch was open or closed. It is also averred that it was the "duty" of Orrell, before the arrival of trains, to look out of the window and examine the defendant's track, and observe and note the condition of the said switch, as to being open or closed, and to signify by the use of the semaphore the safe or unsafe condition of the track and switch to those employees approaching the station with their trains; but, as in the preceding paragraphs, there is a total failure to inform the court by averment how it became Orrell's duty to inspect the switch before the arrival of trains,—whether it was enjoined upon him by the terms of his contract of employment, as it was to operate and control the semaphore, or whether by a rule of the company, or a prevailing custom, or whether it sprang from the mere surmise of the pleader. If it was not a duty of his employment to inspect the switch, his failure to do it would not be negligence. The language falls far short of alleging that Orrell was employed by the defendant for the purpose of inspecting the switch and track before the arrival of trains, and to communicate to approaching trainmen, by means of the semaphore, the true condition they were in. From the language used, the purpose of the employment by defendant was limited to managing and controlling the semaphore so as to communicate to trainmen operating trains on the defendant's railroad whether the track was in good condition and safe for them to proceed, and whether the switch was open or closed. From the averments we cannot infer that it was the duty of Orrell to determine the condition of the switch. See authorities heretofore cited.

There are other questions arising upon appellant's motion for judgment on the answers to interrogatories and upon the overruling of its motion for a new trial, that are left unconsidered because not likely to arise again upon a retrial.

The judgment is reversed, with instructions to sustain the demurrer to the first, second, third, and fourth paragraphs of the complaint, and for further proceedings not inconsistent with this opinion.

17 L.R.A. (N.S.)

KANSAS SUPREME COURT.

BOARD OF COUNTY COMMISSIONERS
OF JACKSON COUNTY, Kansas, et al.,
Pliffs. in Err.,

v.

JOHN KAUL.

(— Kan. —, 96 Pac. 45.)

Interest — liability of county for — statute.

The general-interest statute allowing creditors to receive, in the absence of contract, interest upon money after it becomes due, cannot be interpreted to impose a liability upon a county, which is a political subdivision of the state, organized for purely governmental purposes, and endowed with quasi corporate powers only; and, in an action against county officers to recover taxes wrongfully exacted over the protest of the taxpayer, and through the compulsion of a tax warrant, interest on the money from the time it was paid (it then being due) cannot be recovered.

(April 11, 1908.)

Headnote by BURCH, J.

Case Note. — Liability of county for interest on its obligations in absence of statute or express contract.

This note is confined strictly to cases in which there was no specific statutory provision or express contract whereby interest on the obligation was provided for.

County warrants or orders.

The rule adopted by the weight of authority, as to county warrants or orders, is that, in the absence of some statutory provision or express contract allowing interest, none can be recovered.

This general rule was applied in *Madison County v. Bartlett*, 2 Ill. 68, where it was held that a county was not liable for interest upon its orders which did not provide therefor. The court said: "From this view of the subject, it will appear that in the greater part of the cases where counties contract debts and issue their orders for payment or compensation the probability of delay or uncertainty in the time of payment had been estimated in the enhanced price agreed on for the services, work, or materials contracted for. In all such cases, then, it would be manifestly improper to allow interest; for interest, by statute, is allowed as damages for the unjust detention of money; and here these damages have been considered by the parties, in the extra price agreed on. . . . It might also with propriety be insisted that the financial means of the respective counties to discharge their contracts were, or could have been, known by those persons who, either as officers or individuals, became creditors to the county. They may therefore be presumed to have consented to

MOTION for direction to the trial court to allow interest as prayed in the petition after modification on cross writs of error to the District Court for Jackson County to review a judgment in plaintiffs' favor for a portion of the amount claimed in an action brought to recover illegal taxes. Denied.

The facts are stated in the opinion.

Messrs. E. D. Woodburn, A. E. Crane, and F. T. Woodburn, for plaintiffs in error:

The protest set out in the petition is insufficient.

Peninsular Iron Co. v. Crystal Falls Twp. 60 Mich. 82, 26 N. W. 840; Meek v. McClure, 49 Cal. 623; Hinds v. Belvidere Twp. 107 Mich. 664, 65 N. W. 544; Redinger v. Jones, 68 Kan. 627, 75 Pac. 997; Frenzer v. Dufrene, 58 Neb. 432, 78 N. W. 719; Ballou

v. Sherwood, 32 Neb. 666, 49 N. W. 790, 60 N. W. 1131; Bankers' Life Asso. v. Douglas County, 61 Neb. 202, 85 N. W. 54; Davis v. Otoe County, 55 Neb. 677, 76 N. W. 465; Sandefur v. Hines, 69 Kan. 168, 76 Pac. 444; Union P. R. Co. v. Dodge County, 98 U. S. 541, 25 L. ed. 196.

Mr. Charles Hayden, for defendant in error:

Interest should be allowed upon the amount paid by plaintiff below.

Gen. Stat. 1901, § 3590; Boston & S. Glass Co. v. Boston, 4 Met. 181.

Burch, J., delivered the opinion of the court:

The plaintiff sued the county officials to recover a sum of money which was illegally charged against him as personal-property taxes, and which he paid under protest and

receive the payment of their claims whenever the revenues of the county would enable it to pay its debts. If this is a reasonable presumption,—and it seems to be,—then the time of payment of these county orders did not arrive until there was money in the treasury to pay them; and provision is made by statute to pay orders according to their seniority."

And the general rule as before laid down was applied in the following cases:

Thus, in Vincent v. Gilmer, 51 Ala. 387, it was held that, when a claim against a county is authorized and allowed by the commissioner's court, and the party to whom it is payable accepts the warrant on the county treasurer for its payment, he does so with the knowledge that it can be paid by the treasurer only in the order of its presentation, and, unless there is a failure so to pay, the principal is not detained and the interest does not accrue, and, if there is such failure, it is the fault of the treasurer, and not of the county; so that the county is not liable for interest. The court said: "If the treasurer pays the claim in its order, he can pay only the amount specified in the warrant. It is an authority to him to pay only that sum. If he should pay more, he would exceed the authority, and could not claim from the county the allowance of the excess. The creditor, receiving the amount specified in the warrant, receives all to which he is entitled. He contracted with the county, not for the payment of a sum certain, when his claim was audited and allowed, but for the payment of the amount allowed him, in the order of payment prescribed by the law. There is no breach of contract or duty imputable to the county, and no ground on which to rest a claim for damages or interest."

In Beals v. Amador County, 28 Cal. 449, the rule was applied as to county warrants given by one county to another, from which, by act of the legislature, it had been formed, the warrants in question being given

for the purpose of paying a portion of the debt of the latter county, the legislature having made no provision for the payment of interest. And this was held although a general provision for interest was in force as to warrants issued for usual county expenses. To the same effect is Clay County v. Chickasaw County, 64 Miss. 534, 1 So. 753.

And in Ashe v. Harris County, 55 Tex. 49, it was held that county warrants which were silent as to interest, and specified no time of payment, did not bear interest; the court saying that they were mere evidences of indebtedness allowed, but not contracts in writing bearing interest.

So, in Allison v. Juniata County, 50 Pa. 351, it was held that no interest accrued on a county warrant after refusal by the treasurer to pay the amount because of want of funds, since, by taking and retaining the orders, the holder took his chances of funds coming into the treasury, and thereby undertook to accept alone what the treasurer could pay.

So, in Com. v. Philadelphia County, 4 Serg. & R. 125, the same rule was applied, and the court refused mandamus to compel the payment of interest on an order drawn on and accepted by the county treasurer. The court said: "We believe the custom throughout the state has been not to pay interest, and those persons who deal with the commissioners understand that the time of payment depends on the state of the treasury."

And the same holding was made in Alexander v. Oneida County, 76 Wis. 56, 45 N. W. 21, where the statute provided that no interest should ever be paid by any county on county orders. The court added that especially was this so, since it did not appear that, at the time the order was presented for payment, and payment refused, there were sufficient funds in the treasury for that purpose, to pay the same.

A like result was reached, as to county warrants, in Camp v. Knox County, 3 Lea,

under the compulsion of a tax warrant. In his petition he prayed for interest at the rate of 6 per cent per annum on the amount paid, from the date of payment. The district court rendered judgment for the recovery of a portion only of the sum claimed, and allowed no interest. On proceedings in error in this court, brought by both parties, the judgment of the district court was modified, and an order was made that the plaintiff be given judgment for the whole amount he had wrongfully been compelled to pay. *Jackson County v. Kaul* (Kan.) 96 Pac. 45. The question of interest was overlooked, and a motion is now made for a further direction to the trial court to include in its judgment interest as prayed for in the petition.

The action being grounded upon official

conduct in a matter affecting the public interest, and the object being to obtain reimbursement for funds paid into the county treasury, the suit is in fact one against the county. *People ex rel. Reeder v. Wexford County*, 37 Mich. 351. If interest be recoverable, it must be by virtue of § 3590, Gen. Stat. 1901, which reads as follows: "Creditors shall be allowed to receive interest at the rate of 6 per cent per annum, when no other rate of interest is agreed upon, for any money after it becomes due." The word "creditors" is here used in the broad sense of those who have the legal right to demand and receive the payment of money, and includes the plaintiff in the transaction under investigation. The money having been wrongfully extorted from the

199, the court observing that neither the character of the instrument, nor the intention of its issuance, contemplated payment of interest on the warrants, their payment being provided for at the earliest day when there was money in the treasury.

So, in *National Bank v. Duval County*, 45 Fla. 496, 34 So. 894, where a county was without sufficient funds to pay warrants, and agreed to pay interest to one if he would cash them, it was held that such interest could not be recovered. The court said: "The plaintiff, at the time the alleged agreement was made, was not a creditor of the county. The county owed it no debt for the payment of which it was the duty of the county to provide. The outstanding county warrants were bearing no interest. No power to provide for payment of such warrants was given otherwise than from the current revenues flowing through the county treasury, except by means of bonds to fund outstanding indebtedness, which could only be issued after an election held in accordance with §§ 591 et seq., Rev. Stat. To permit the county commissioners to evade the requirements of these sections, by sanctioning the contract declared upon in this case, would be to enable them to fix upon the county the burden of a refunding of the county indebtedness at a rate of interest to be fixed by themselves, without imposing upon them the duty of submitting to the people at an election the question of the propriety of funding the indebtedness and the rate of interest to be paid thereon. While the contract made with plaintiff may have been wise from a business point of view, tending, as it did, to sustain the credit of the county, we have been unable to find a statute granting the power to make it, or granting any other power from which we can clearly imply the one here attempted to be exercised." To the same effect is *State ex rel. Walker v. Stewart*, 49 Fla. 259, 38 So. 600.

So, the general rule was approved in *Seton v. Hoyt*, 34 Or. 272, 43 L.R.A. 634, 75 Am. St. Rep. 641, 55 Pac. 967, where the question before the court was whether the rate on interest-bearing warrants was

changed by a statute subsequently passed providing for a different rate than formerly, the court saying: "We take it, therefore, that a county is not liable for the payment of interest under the general provision of the statute regulating the rate upon the demands enumerated in said § 3587, as an individual would be where there is no contract to pay interest."

And in *Cooper v. Wait*, 106 Ky. 628, 51 S. W. 161, in a case involving a county order, the court said that it did not find it necessary to decide, but that, in its opinion, the holder of such an order could not demand interest from the treasurer where no provision had been made therefor, although the order itself had been allowed by the county court.

In *Jocks v. Turner*, 36 Ark. 89, where the Constitution of 1874 prohibited counties from issuing any interest-bearing evidences of indebtedness except bonds as may be authorized, etc., it was held that county warrants did not draw interest, not coming within the exception.

So, in *Warren County v. Klein*, 51 Miss. 807, it was said that interest was the creature of statute: and, where the general statutory provision did not embrace county warrants, but merely had reference to the contracts of individuals, it was held that no interest could be recovered; and, this being so, they obviously could not be made to bear interest by a demand of payment.

In *Hardin County v. McFarlan*, 82 Ill. 138, where it was provided that a special tax might be levied by the county court to enable counties to liquidate their indebtedness, and this was the only authority the county board had, it was held that they could not issue interest-bearing bonds to take up noninterest-bearing outstanding orders, since interest-bearing obligations could be issued only by statutory authority.

And, following this case, in *Hall v. Jackson County*, 95 Ill. 352, it was held that the county court could not allow interest on common county orders issued for current county expenses.

A statute validating county debts incurred in excess of the limit of indebtedness

plaintiff by the threatened seizure of his property under the tax warrant then in the sheriff's hands for execution, the county had no right to retain it for a single day. It owed the plaintiff the duty to make restitution at once. See 22 Cyc. Law & Proc. p. 1506. No demand was necessary because the money had been exacted over the plaintiff's protest and denial of liability. Therefore the money was "due" as soon as the county had taken it.

So far the statute has been looked at from the creditor's side. Considered from the view point of the debtor, it imposes a duty and a liability outside of contract, and which would not otherwise exist. Do its merely general terms extend to counties? The general rule that the state is not bound

by statutes limiting rights or imposing burdens, unless it be expressly named, or be intended by necessary implication, is familiar. *State v. American Book Co.* 69 Kan. 1, 24, 1 L.R.A.(N.S.) 1041, 70 Pac. 411, and authorities there cited. To bind the state by an implication, it must be one that is unavoidable. If there be a doubt upon the subject, that doubt must be resolved in favor of the state. *State v. School Dist. No. 3*, 34 Kan. 237, 242, 8 Pac. 208. Counties are mere political subdivisions of the state. *Shawnee County v. Carter*. 2 Kan. 115. They are mere instrumentalities of the state in the exercise of its governmental functions, and are given corporate power only so far as may be necessary to

does not validate county warrants so far as they provide for interest. where, at the time of their issuance, there was no law authorizing interest-bearing warrants to be issued. But, where a statute allowing interest on such warrants from the time of presentation was passed subsequently to the issuance of the warrants, interest was allowed from the date when they were rendered valid, where a demand had previously been made. *Daggett v. Lynch*, 18 Utah, 49, 54 Pac. 1095; *McIntosh v. Salt Lake County*, 23 Utah, 504, 65 Pac. 483.

The court, in *Daggett v. Lynch*, in holding that a county court, in the absence of legislative authority, has no power to issue interest-bearing warrants, said: "Experience and observation in the past disclose the evils and dangers of intrusting county boards with the general power to issue interest-bearing warrants. Some of the counties and cities of the late territory, as well as similar municipalities in the various states, have been greatly embarrassed and injured by the exercise of such power. Such discretion holds out the temptation to create needless debts and make extravagant expenditures, and affords opportunities and facilities for fraud."

There is, however, authority for a contrary view,—some courts holding counties to be liable for interest on their warrants.

Thus, in *Brown v. Johnson County*, 1 G. Greene, 486, it was held that county orders made payable from a particular fund would not draw interest until such fund was created; but the court, in passing, said that an order drawn to be paid on presentation bore interest from the date of presentment, and further said: "In some counties in this state orders are drawn by the boards of commissioners upon the treasurer, to be paid on presentment and without any qualifications. In some counties orders are drawn in both forms. When orders are drawn without the words of limitation as to payment, interest is usually allowed, and we think with great propriety. The board of commissioners, in such orders, undertake that money is in the hands of treasurer to pay the same; and, having the control of

the revenues of the county, and for the purpose of giving them character and value, and to be enabled to procure services and property at their true value, they make such orders due on presentment to the treasurer, and from that time pay interest on the same."

So, in *Marks v. Purdue University*, 37 Ind. 155, although an order of a board provided for payment of the sum donated for a public institution without interest, it was held that a warrant issued for an instalment due would bear interest from the date it was presented for payment.

And in *Jackson County v. Rendleman*, 100 Ill. 379, 39 Am. Rep. 44, it was held that the county board had authority to contract to pay for the work of repairing a courthouse in interest-bearing orders. The court distinguished the case from *Hardin County v. McFarlan and Hall v. Jackson County*, supra, on the ground that the orders were not, as in those cases, issued for a prior indebtedness incurred with reference to non-interest-bearing orders, but, with their interest-bearing clause, were the contract price to be paid for the work afterwards to be performed. To the same effect is *Frankford Real-Estate Trust & S. D. Co. v. Jackson County*, 39 C. C. A. 355, 98 Fed. 942.

And in *Davis v. Burney*, 58 Tex. 364, it was held that county commissioners had power to bind the county for interest; and, where a citizen had the option to pay taxes in money or script, an order of the commissioners providing for the registration of script and making the same bear interest from the date of registration was held valid.

And in *Yellowly v. Pitt County*, 73 N. C. 164, interest was allowed, under a general statute, upon a county order from the date of demand upon the county treasurer. Answering the argument that the county ought not to pay interest, the court said: "A county, like an individual, may enter into contracts and sue and be sued. And, if there is any difference between an individual and a county, it would seem to be the greater obligation on a county to keep its faith.. The reason most urged, why this should not be, is the alleged fact

the general rule, they would have expressly stipulated for the payment of interest."

So, in *Holmes v. Charleston County*, 14 S. C. 146, where the demand was an open account which did not bear interest, the court said that they could not hold that the commissioner erred in not allowing it.

And in *Grundy County v. Hughes*, 8 Ill. App. 40, it was held that interest could not be recovered from a county on a bounty under which the county agreed to pay a certain sum to volunteers for the War; the doctrine being that, upon a contract, liability for interest arises only upon express agreement.

In *Coles County v. Goehring*, 209 Ill. 142, 70 N. E. 610, where a contract to repair a courthouse did not provide that the amount for which it was to be repaired should draw interest, but only that the county orders in which that amount was to be paid were to draw interest, it was held, where the orders proved void, that no interest could be recovered.

So, in *People ex rel. Reeder v. Wexford County*, 37 Mich. 351, on an amount due from a county in settlement between two townships of a sum for delinquent taxes, it was held, in the absence of an express contract or statute to pay interest, that none could be recovered. The court said that it was uncommon, in administering mandamus where such municipal bodies were the litigants, to recover payment of interest, unless some statute or contract relation pointed clearly to the justice of the allowance.

In *Kline v. Jefferson County*, 30 Ky. L. Rep. 1344, 101 S. W. 358, where, at the time of purchase by a county court of a piece of property, neither party understood or expected that there was to be any interest on warrants given in payment, a subsequent voluntary attempt on the part of the county court to pay interest was held void, being without consideration; and this was true although the county court, at the time of purchase, had the power to pay cash and to enter into an agreement to pay interest in order to obtain it.

In *Humphreys County v. McAdoo*, 7 Heisk. 585, where a railroad company accepted subscriptions to be paid by taxes to be assessed, it was held, until these were assessed and collected, the company could not receive payment; and, it not appearing that the railroad had demanded an assessment, they were not entitled to interest, since the claim was not on the footing of a past-due indebtedness.

But, under certain circumstances, interest has been allowed. Thus in *La Salle County v. Simmons*, 10 Ill. 513, where county commissioners were authorized to impose an annual tax for a license to operate a ferry, and, exceeding their authority, gave notice that they would grant the license to the person making the largest contribution to the county, and the one then carrying on the ferry in order to retain the right, offered the largest amount. It was held that it might be recovered back, since undue advantage had

been taken; and it was further held that interest might also be recovered.

So, in *Aplin v. Shiawassee County*, 74 Mich. 537, 42 N. W. 143, a county was held liable to the state for interest upon taxes charged back, and for items erroneously credited to the county, and therefore charged back; also upon moneys paid by the state for the use of the county for the benefit of the deaf and dumb. And it was further held proper to charge it with compound interest on annual balances due to the state.

In *Washington County Court v. McKee*, 12 Ky. L. Rep. 102, 13 S. W. 909, where taxpayers employed counsel, and successfully assailed a subscription by the county to capital stock of a railroad, and the legislature later authorized the county court to pay the amount of counsel fees, and to impose taxes; and also, in the alternative, empowered it to pay the debt from funds on hand, or issue its bonds with interest from date, the interest not to exceed a certain rate,—it was held that the county was liable for interest, although it took the former course and assessed the taxes; and it could not escape liability on the ground that it was an ordinary appropriation not arising from contract.

As to interest as a valid claim against the state, see not to *Northwestern & P. Hypotheek Bank v. State*, 42 L.R.A. 62.

KANSAS SUPREME COURT.

FAIRBANKS, MORSE, & COMPANY, Plff.
in Err.,
v.

MARGARET S. WALKER et al.

(76 Kan. 903, 92 Pac. 1129.)

Sale — oil tank — rescission.

1. An oil tank for the storage of oil, as between buyer and seller, is a chattel; and the contract of purchase may be rescinded by the purchaser for failure to furnish one of the kind and quality agreed upon, the same as in the sale of other chattels.

Same — status quo.

2. In such a case, the right to rescind, when otherwise existing, will not be denied on the ground that the parties cannot be placed *in statu quo*, when the purchaser has not received and accepted the tank, and

Headnotes by GRAVES, J.

Note. — Although it is difficult to think of a contract wherein some incidental labor or material has not been employed, which on the rescission of such contract cannot be restored, an extended search fails to reveal any other cases wherein, as in *FAIRBANKS, M. & Co. v. WALKER*, and the case therein cited, it was contended that, because of such labor or material, the parties could not be placed *in statu quo*, preventing, therefore, the rescinding of the contract.

where the seller has parted with nothing by reason of the sale, except the waste of material incident to putting the previously manufactured parts together and the cost of labor in so doing.

Same — literal restoration.

3. The rule that, upon the rescission of a contract for the purchase of a chattel, the parties must be placed *in statu quo*, does not require, in all cases, that an absolute and literal restoration shall be had; but it will be sufficient if such restoration be made as is reasonably possible, and such as the merits of the case demand.

(December 7, 1907.)

ERROR to the District Court for Neosho County to review a judgment in defendants' favor in an action brought to recover the value of an oil tank. Affirmed.

The facts are stated in the opinion.

Messrs. W. C. Forsee and J. S. Detwiler for plaintiff in error.

Messrs. B. F. Shinn, Otto J. Briley, and J. L. Denison for defendants in error.

Graves, J., delivered the opinion of the court:

This is an action to recover the value of an oil tank furnished by Fairbanks, Morse, & Co. to the defendants in error. Action was commenced before a justice of the peace, where the defendants recovered judgment, and plaintiff appealed to the district court of Neosho county. Judgment was again given in favor of the defendants, and the plaintiff brings the case here for review.

The plaintiff is located in Kansas City, Missouri, and is engaged in the business of manufacturing and selling oil supplies and machinery. The defendants, at the time the transactions in controversy occurred, were engaged in the oil producing business at Chanute, under the name of Walker Oil Company. J. M. Glover was a traveling salesman for the plaintiff, and C. E. Derenberger was "field manager" for the defendants. On August 17, 1903, Glover took an order from Derenberger for an oil tank, which reads:

Messrs. Fairbanks, Morse, & Co.:—

Please ship *via* frt. to Walker Oil Co., at Chanute, Kans. Notify C. E. Derenberger 1 12x20' 2" Cypress Oil tank, price \$260.00. Erected on our lease you to furnish bottom and deck, and make the tank hold oil. Hoops—three 4" hoops on bottom balance 3" and one 1 2½" on top. We will haul out the material. Terms net thirty days from date of shipment, without any deduction for freight, express, or exchange charges. This order is subject to 17 L.R.A. (N.S.)

approval of Fairbanks, Morse, & Co., — the undersigned have examined the above order and the same is correct.

[Signed] C. E. Derenberger.

This order was accepted, the material shipped, and the tank erected. The tank was completed about September 16, 1903. Oil tanks are used for storing oil, and are worthless if they leak. A tank that is water-tight may not hold oil. Some of the witnesses testified that oil will escape through the staves of a tank if they are "sappy." The tank in question never would hold water, and a number of its staves were "sappy." The staves did not fit close together, and water ran through the cracks between them. The tank was never fit for the use intended, and was practically worthless as an oil tank. On October 12, 1903, plaintiff drew a draft on the defendants for the price of the tank, to which an answer was made, as follows:

Chanute, Kansas, 10-14, 1903.

Fairbanks, Morse, & Co.,

Kansas City.

Gentlemen:—

I will not oner your draft by no means against the Walker Oil Co., in the first place your bill is but \$260, as I ordered the other goods of Glover to be delivered in not to exceed six days as I was at the time equipping, it was not sent for three weeks. So it is your stuff not mine and whenever you put this tank up as my contract calls for I will decide to pay you, and not before.

Your respect,

C. E. Derenberger.

After receipt of this letter, the plaintiff made some further efforts to make the tank acceptable to the defendants, but did not succeed, and commenced this action June 25, 1904. The district court entered judgment in favor of the defendants, as follows: "And now on this 23d day of November, 1905, came the above-named parties by their attorneys, and the court having had said cause under advisement, and being fully advised in the premises, does find for the said defendants, and that the prayer of said petition be denied, and that said defendants have and recover of said plaintiff their costs in their behalf expended, taxed to \$98.85. Hereof let execution issue. And it is further ordered that at any time within sixty days from this date the said plaintiff may take possession of the tank involved in this action and remove the same from the premises where it now is. Should plaintiff fail to remove the said tank in said time, then the defendant Margaret S. Walker can remove said tank from

said premises (if she desires to do so), doing as little damage to said tank in removing as possible. Plaintiff to be notified by mail of the removal of said tank and the place to which it may be removed. In any event said tank to remain the property of plaintiff."

Several assignments of error have been presented, but they are all involved in one, and only that one need be considered. It is contended that the contract between the parties was one wherein the plaintiff agreed to furnish the materials and build an oil tank upon the premises of the defendants, and not one for the sale of an oil tank, and therefore should be classified as a building contract, and not one for the sale of a chattel, in which case the defendants cannot refuse to accept the tank and avoid payment, even if it is defective and not according to the contract, but must resort to an action for damages. It is also argued that the parties in this case cannot be placed *in statu quo* if the contract is rescinded, and, under the doctrine which denies the right of rescission in such cases, no recovery can be had here. We do not see any serious difficulty, however, in placing the parties to this action in practically the same situation they were before the contract was made. Indeed, this seems to have been successfully accomplished by the judgment of the district court. It is insisted that the plaintiff cannot be placed *in statu quo* unless the tank and wasted material, together with the cost of labor expended in the construction of the tank, be returned. But such an application of the rule does not seem to be practical or reasonable. The cases where this rule can be applied in such an absolute and unqualified sense are very rare. Where a tailor agrees to furnish the material and make a coat, if the garment, when finished, is so small that the person for whom it was made cannot wear it, the purchaser may refuse to take it, and yet the tailor cannot be placed *in statu quo* under the rule here insisted upon, as the material would be practically destroyed for other purposes, and the labor thus expended lost. The same is true in every case where the seller manufactures the article sold. We understand the rule to be that the person who rescinds must always return all benefits received from the contract, and restore the *status quo*, not absolutely, but so far as possible, or the merits demand. 24 Am. & Eng. Enc. Law, 2d ed. p. 620, (3); 6 Pom. Eq. Jur. § 688; Neblett v. Macfarland, 92 U. S. 103, 23 L. ed. 471; Brown v. Norman, 65 Miss. 369, 7 Am. St. Rep. 663, 4 So. 293; Myrick v. Jacks, 33 Ark. 425. As applied to this case, the plaintiff undertook to make an oil tank that would hold oil and be suitable for the pur-

pose of storing it. The defendants had no use for a tank that would not serve this purpose. The plaintiff fully understood the needs of the defendants in this respect, and contracted with reference to this known situation. The tank, as erected, is defective in every respect, the materials are unsuitable, and the workmanship unskilful. The plaintiff had abundant time in which to construct, repair, and make the tank according to contract, but failed to do so. The tank, when completed, and at all times thereafter, has been worthless, except as the materials of which it is constructed are valuable. It would be inequitable and unjust to compel the defendants to keep this tank at any price. They received nothing whatever of value from the contract, and have nothing to return to the plaintiff. The situation is the direct result of the plaintiff's conduct. It has no reason to complain. The material shipped to Chanute is on the defendants' premises in a condition where it may still be properly denominated material, and can be removed and used for some purpose for which it is adapted, without serious loss.

The plaintiff has cited, in support of its contention, the case of Tower v. Pauly, 51 Mo. App. 77. The facts of that case, however, differ so much from this that it has very little, if any, application. That was a case where a hot-air furnace was placed in a residence, and, when completed, it was paid for. Its capacity was not tested for more than a year after completion, and then, when found to be deficient, and not equal to the warranty, the owner tendered it back, less the brick casing, which he used in the construction of another furnace, and brought suit to recover the money paid. The majority of the court held that he could not recover: First, because he waited too long; second, he did not tender back all that he received; and, third, the furnace was a structure when completed, and built into a house, which could not be returned so as to place the parties *in statu quo*, and therefore the remedy was an action for damages, and not a rescission of the contract. Judge Rombauer concurred in the two first propositions, and dissented to the third. Judge Biggs dissented generally. We are not inclined, therefore, to regard this case as an authority here. We conclude that the plaintiff sold a chattel—an oil tank—to the defendants, which failed in every important particular to comply with the contract of purchase. The defendants, because of such failure, rightfully refused to accept the tank. By such refusal, the ownership of the property has never changed. It has at all times belonged to the plaintiff.

We think the rights of the parties were

correctly disposed of by the district court. For more than twenty years this court has been reviewing the decisions of the eminent judge before whom this case was tried, and it has noticed with satisfaction the vigilant care and patient industry given by him to the discharge of his official duties. His thorough knowledge of legal principles and his clear perceptions of natural justice made him peculiarly fitted for judicial service, and contributed in a large measure to the success which gave him prominence as a jurist, and caused him to be generally recognized as an able and impartial judge. In view of his recent voluntary retirement from the bench by resignation, thereby severing his long-continued official relations with this court, we deem it proper to make this reference thereto.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY, Appt.,
v.

COMMONWEALTH OF KENTUCKY.

(— Ky. —, 104 S. W. 771.)

Railroad — street crossing — nuisance.

1. A railroad company is guilty of a nuisance in running its trains across a much-used street in a town, wilfully, habitually, and for an unreasonable length of time, at such an unreasonable and unsafe rate of speed as to endanger the lives and safety of persons using the crossing, without customary and usual warning signals.

Same — precautions.

2. A railroad company which, in running trains rapidly over a street crossing in a town, gives the customary statutory signals, and maintains a watchman at the crossing from 6 A. M. to 6 P. M., relieves itself from the charge of committing a nuisance in so running its trains.

Case Note. — Power of municipal corporation to regulate speed of, and signals from, trains at highway crossings.

It has been held that ordinances of cities regulating the speed of railroad trains are police regulations; and therefore the power to pass such ordinances need not be given in express terms, but may be implied from the power of the city to abate nuisances and provide for the general welfare. Chicago, B. & Q. R. Co. v. Haggerty, 67 Ill. 113; Bluedorn v. Missouri P. R. Co. 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103; Jackson v. Kansas City, Ft. S. & M. R. Co. 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32; Stotler v. Chicago & A. R. Co. 200 Mo. 107, 98 S. W. 509.

But in State, New Jersey R. & Transp. 17 L.R.A. (N.S.)

Same — absence of signals.

3. To sustain a penal prosecution against a railroad company for running its trains over a street crossing at a dangerous rate of speed, the running of the trains must be shown to have been attended with a failure to give the usual and necessary signals of their coming.

Municipal corporation — authority — speed regulation.

4. Charter authority to enact and enforce all local, police, sanitary, and other regulations as do not conflict with general laws empowers a municipality to require railroads running through its limits to adopt such precautions as to speed of trains crossing its streets as may be needed for the safety of the public.

Railroad — nuisance — evidence — good faith.

5. In a prosecution against a railroad company for nuisance in the manner of running trains over a street crossing, evidence is admissible that it acted on the suggestion of the railroad commissioners and placed a watchman at the crossings, as tending to show its good faith in attempting to protect persons using the crossing, against the dangers arising from the passing of its trains.

(October 16, 1907.)

A PPEAL by defendant from a judgment of the Circuit Court for Mercer County convicting it of maintaining a nuisance in the manner in which it ran trains over a highway crossing in a town. Reversed.

The facts are stated in the opinion.

Messrs. E. H. Gaither and John Galvin for appellant.

Messrs. N. B. Hays, Attorney General, and Charles H. Morris for the Commonwealth.

Settle, J., delivered the opinion of the court:

This appeal is prosecuted from a judgment entered by the court below upon the verdict of a jury finding appellant guilty

Co., Prosecutor, v. Jersey City, 20 N. J. L. 170, it was held that a city's charter power to declare nuisances and provide for their removal did not authorize the city to pass an ordinance declaring the running of a locomotive or train within the city at a greater speed than 1 mile in six minutes to be a nuisance, since the nuisance intended by the charter was one that was stationary, and could be removed.

The power of a city to pass such an ordinance may be implied from the power conferred upon the city to pass "all ordinances necessary to the health, peace, convenience, good order, and protection of the citizens." Seaboard Air Line R. Co. v. Smith, 53 Fla. 375, 43 So. 235.

And it may be implied from the power given the city "to provide for the safety

of committing a public nuisance, and fixing its punishment at a fine of \$500. The indictment under which the trial was had specifically charges that appellant did "unlawfully, wilfully, habitually, and for an unreasonable length of time run its trains at an unsafe and unreasonable rate of speed and so rapidly as to endanger and hazard the safety and life of persons traveling upon the turnpike leading from Harrodsburg to and through Burgin, which was and is a public highway, at a point where said railroad crosses said pike in Burgin, an incorporated town, and at a point where there is much travel in buggies and vehicles and by pedestrians, and this without sufficient and necessary warning to prevent the danger, hazard, and inconvenience to public

travel." Appellant filed a demurrer to the indictment, which was overruled, as was its motion for a peremptory instruction, made at the conclusion of the commonwealth's testimony, and motion for a new trial following the verdict and judgment.

According to the evidence, Burgin is a town of the sixth class, with a population of about 1,000. Appellant's road runs through it north and south, and the turnpike mentioned in the indictment is its principal thoroughfare or street, and the only one of the town crossing the railroad. The Burgin postoffice, school, and churches, as well as its principal business houses, are situated east of the railroad, and its main residence section west thereof. There is a large amount of travel over the crossing

and prosperity and good order of the city, . . . and the comfort and convenience of the inhabitants." *Meyers v. Chicago*, R. I. & P. R. Co. 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896.

Independent of any statutory authorization, it would seem that a city or large town has power to pass and enforce such an ordinance as a police regulation. *Seaboard Air Line R. Co. v. Smith*, supra; *Whitson v. Franklin*, 34 Ind. 392; *Evison v. Chicago*, St. P. M. & O. R. Co. 45 Minn. 370, 11 L.R.A. 434, 48 N. W. 6; *White v. St. Louis & S. F. R. Co.* 44 Mo. App. 540; *Merz v. Missouri P. R. Co.* 88 Mo. 672, 1 S. W. 382.

The reasonable regulation of the speed of railroad trains within a city's limit is a proper exercise of the police power granted to the city by the state. *Evison v. Chicago*, St. P. M. & O. R. Co. supra; *Gratiot v. Missouri P. R. Co.* 116 Mo. 450, 21 S. W. 1094; *Kunz v. Oregon R. & Nav. Co.* (Or.) 94 Pac. 504.

Even though a city is expressly authorized by statute to pass ordinances limiting the speed of trains, such ordinances will be held void if unreasonable or oppressive. *Plattsburg v. Hagenbush*, 98 Mo. App. 669, 73 S. W. 725.

But it will be presumed that a speed ordinance enacted pursuant to an exercise of police power is reasonable. *Kunz v. Oregon R. & Nav. Co.* supra.

Where the power to regulate speed was specifically conferred by statute, an ordinance which required railroad trains to cross the streets of the city at a rate of speed not to exceed 6 miles an hour was held reasonable on its face, in *Buffalo v. New York, L. E. & W. R. Co.* 152 N. Y. 276, 46 N. E. 496.

Such an ordinance was assumed to be reasonable, in *Missouri, K. & T. R. Co. v. Owens* (Tex. Civ. App.) 75 S. W. 579.

An ordinance limiting the speed of trains to 5 miles an hour within the city limits was held not unreasonable as applied to a street crossing within three blocks of the railway station in the city, in *Washington Southern R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834.

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Where an ordinance limiting the speed of railroad trains to 4 miles per hour was enacted under express statutory authority, it was held, in *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37, that the trial court did not err in refusing to hear evidence that it was unreasonable.

In *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730, it was held that, where a city was expressly authorized by the legislature to regulate the speed of railroad trains within its limits, the fact that the ordinance would prevent the railroad company from giving its passengers the service they demanded, and would also prevent its successful competition with rival roads, not running through that city, did not make the ordinance void for unreasonableness.

The mere fact that an ordinance of this character may operate to restrain trade will not make it void if it is necessary and reasonable as a police regulation. *Knobloch v. Chicago*, M. & St. P. R. Co. 31 Minn. 402, 18 N. W. 106; *Weyl v. Chicago*, M. & St. P. R. Co. 40 Minn. 350, 42 N. W. 24.

In *Chicago & A. R. Co. v. Carlinville*, supra, it was held that an ordinance limiting the speed to 10 miles per hour was not unreasonable where the road ran for a mile and a quarter within the city limits, and across four streets, two of which were main thoroughfares, and buildings located near the road obstructed, to a considerable extent, the view of the tracks and approaching trains, although the most of the buildings were located on one side of the road.

An ordinance limiting the speed of railroad trains within the city limits to 4 miles (*Meyers v. Chicago*, R. I. & P. R. Co.; *Evison v. Chicago*, St. P. M. & O. R. Co.; and *White v. St. Louis & S. F. R. Co.*,—supra), or to 6 miles an hour (*Burg v. Chicago*, R. I. & P. R. Co. 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680), is unreasonable and void as to a section of the road which, after entering the limits of the city and before reaching the inhabited portion thereof, for a long distance passes through sparsely settled and comparatively

during the day, but the night travel is less than a third as great. Each day and night several of appellant's fast trains, both passenger and freight, pass through Burgin without stopping. At and near the crossing are numerous side tracks, which are often occupied by empty or loaded freight cars, both day and night; and, when this is the case, it is difficult for persons approaching the crossing to see appellant's trains coming from the south. According to the commonwealth's evidence appellant's through trains usually pass Burgin at a speed of 40 to 70 miles an hour. On the other hand, appellant's testimony was to the effect that these trains ran through the town at 25 to 50 miles an hour. The commonwealth's testimony also showed that a

watchman was kept at the crossing by appellant from 6 A. M. to 6 P. M. each day, but wholly failed to show that the trains of appellant, in approaching and passing through Burgin, did not give the usual and proper signals, while that of appellant showed that such signals were invariably given; and there was no contrariety of evidence as to the further fact that no one had ever been injured at or near the crossing by appellant's manner of operating its trains.

Appellant's complaint of the trial court's action in overruling its demurrer to the indictment cannot be sustained. If, as charged in the indictment, appellant wilfully, habitually, and for an unreasonable length of time ran its trains through Burgin at

uninhabited land essentially rural in character, and the track is fenced on both sides.

But in *St. Louis Southwestern R. Co. v. Bolton*, 36 Tex. Civ. App. 87, 81 S. W. 123, the court refused to hold unreasonable an ordinance limiting the speed to 6 miles an hour where it appeared that the legislature had expressly delegated to the city the authority to regulate the speed of trains within its limits, and the railroad company had voluntarily adopted rules forbidding its employees to run trains in the city at a greater rate of speed than 6 miles an hour, although it also appeared that that portion of the city at the place of the accident was sparsely settled, no streets being opened across the track from that point to the city limits, and the right of way was fenced on both sides.

And it has been held that a city had the right, by ordinance, in the protection of the public, to regulate the speed of trains to a reasonable limit, where no unreasonable extent of territory was included in the city, and there were public streets and road crossings through a sparsely settled portion that crossed the tracks of the railroad. *Kunz v. Oregon R. & Nav. Co. supra*; *Houston & T. C. R. Co. v. Dillard* (Tex. Civ. App.) 94 S. W. 426.

In *State, New Jersey R. & Transp. Co., Prosecutor, v. Jersey City*, 29 N. J. L. 170, it was held that the charter power to regulate the speed of railway trains did not authorize such regulations, except where the railroad crossed the streets or public grounds.

In *Green v. Delaware & H. Canal Co.* 38 Hun. 51, it was held that an ordinance limiting the speed of trains within a city should be held to apply to street crossings only, and not to the switch yards of a company, located within the city limits.

But in *Crowley v. Burlington, C. R. & N. R. Co.* 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918, it was held that such an ordinance should not be held applicable to street crossings only, but also to the switch yards of a company located within the city limits.

Where a city is expressly prohibited by the legislature from limiting the speed of 17 L.R.A. (N.S.)

railway trains to less than 10 miles an hour, an ordinance limiting the speed to 8 miles an hour is void. *Duggan v. Peoria. D. & E. R. Co.* 42 Ill. App. 536.

In *Lake View v. Tate*, 130 Ill. 247, 6 L.R.A. 268, 22 N. E. 791, it was held that, although a city was expressly authorized by the legislature to regulate the speed of railroad trains, an ordinance was void which discriminated between two rival and competing railroads running nearly parallel to each other through distinct sections of the city, such sections not being materially different in density of population, amount of business transacted, or other circumstances.

An ordinance limiting the speed of trains at street crossings is not unreasonable because it excepts from its operation the street-car lines (*Erb v. Morasch*, 8 Kan. App. 61, 54 Pac. 323), or a belt line which, under statute, can charge only 5 cents for each passenger (*Buffalo v. New York, L. E. & W. R. Co.* 152 N. Y. 276, 46 N. E. 496); or because, after its adoption, an electric street-car line is established and put in operation, and the city fails to limit the speed of the electric cars (*Indianapolis Union R. Co. v. Waddington*, 169 Ind. 448, 82 N. E. 1030).

In the following cases it was admitted, or assumed, that the municipality had the power to regulate the speed of trains at highway crossings within the city limits: *Chicago, B. & Q. R. Co. v. Pollock*, 195 Ill. 156, 62 N. E. 831; *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181; *Chicago, B. & Q. R. Co. v. Thorson*, 68 Ill. App. 288; *Larkin v. Burlington, C. R. & N. R. Co.* 85 Iowa, 492, 52 N. W. 480; *Martin v. Chicago, R. I. & P. R. Co.* 118 Iowa, 148, 59 L.R.A. 698, 96 Am. St. Rep. 371, 91 N. W. 1034; *Gratiot v. Missouri P. R. Co. (Mo.)* 16 L.R.A. 189, 16 S. W. 384, 19 S. W. 31; *Graney v. St. Louis, I. M. & S. R. Co.* 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 246; *Haywood v. New York C. & H. R. R. Co.* 35 N. Y. S. R. 748, 13 N. Y. Supp. 177; *Texas & P. R. Co. v. Nelson*, 9 Tex. Civ. App. 156, 29 S. W. 78; *Texarkana & Ft. S. R. Co. v. Frugia* (Tex. Civ. App.) 95 S. W. 563.

such a rapid, unreasonable, and unsafe rate of speed as to endanger the lives or safety of persons using the crossing, and this, as in substance further alleged, was habitually done without the customary and necessary warning signals of their approach, these acts were sufficient to constitute the offense charged. In *Louisville, C. & L. R. Co. v. Com.* 80 Ky. 143, 44 Am. Rep. 468, an indictment for a common-law nuisance, charged to have been committed by appellant at a crossing of the turnpike and its railroad by "habitually running its trains at an unsafe and unreasonable rate of speed, and so rapidly as to endanger, hazard, and injure persons traveling upon the turnpike, without giving warning signals or taking precautions to avoid injuring such persons

by approaching trains," was held to sufficiently state a public offense. As in language and meaning the indictment in the case at bar is substantially the same as that of the case *supra*, we are constrained to hold that the demurrer to it was properly overruled.

We are of opinion, however, that the evidence introduced by the commonwealth in this case did not warrant a conviction; for, in order to find appellant guilty of the offense charged, it was necessary, not only that it should have proved such habitually rapid running of its trains by appellant as was reasonable calculated to endanger or injure persons using the crossing, but also that such running of its trains was without the necessary warning signals or other

Signals from trains.

In *Texas & P. R. Co. v. Nelson*, 1 C. C. A. 688, 2 U. S. App. 213, 50 Fed. 814, it was held that a city had power to prevent or prohibit the running of locomotive engines within the city without a bell attached thereto being rung before starting and continuously while in motion, where the city charter authorized it "to regulate or prohibit the blowing of locomotive whistles within the city, to direct the use, and regulate the speed, of locomotive engines in said city, or to prevent or prohibit the use or running of the same within the city;" and also authorized it "to pass . . . police regulations, not contrary to the Constitution of this state, for the government, peace, and order of the city."

In *Missouri, K. & T. R. Co. v. Owens* (Tex. Civ. App.) 75 S. W. 579, it was assumed that a city expressly authorized in its charter "to regulate the speed and use of engines and locomotives within the city" had power to pass an ordinance making it a misdemeanor to run any railway engine or locomotive within the city without ringing a bell attached thereto, all the time the engine was in motion.

In *Illinois C. R. Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724, it was held that a statute which authorized cities "to require railroad companies to . . . provide protection against the injury to persons and property in the use of such railroad," empowered the city to require, by ordinance, the ringing of a bell on an engine running within the limits of the city.

An ordinance providing that a bell attached to the locomotive shall be rung while the locomotive is in motion within the city limits is not unreasonable (*Illinois C. R. Co. v. Gilbert*, *supra*),—especially as applied to a locomotive approaching a street crossing within three blocks of the railway station in the city (*Washington Southern R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834).

In *Merz v. Missouri P. R. Co.* 88 Mo. 672, 1 S. W. 382, the court said that, aside from the express power given the city to regulate the use of all its streets, and to regulate all vehicles, and to declare, abate,

and prevent nuisances on public or private property, the authority may well be derived from a general supervision over the police which the city has, to pass an ordinance requiring the bell on moving locomotives to be constantly sounded within the city limits, and requiring a man to be stationed on the rear of any train moving backwards, to give danger signals.

Under a general statute authorizing cities to "provide by ordinance for security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same," it was held that a city had the power to require those in charge of a locomotive to ring the bell when running in or through the city, and to require that a watchman be placed on the rear end of any train running backwards, in order to avoid accidents. *Pittsburgh, C. C. & St. L. R. Co. v. McNeil*, 34 Ind. App. 310, 69 N. E. 471.

A city charter giving the power "to direct the use and regulate the speed of locomotive engines within the city" authorizes the passage of an ordinance making it an offense to run any railway locomotive without ringing the bell attached thereto before starting, and all the time while in motion within the limits of the city. *Missouri, K. & T. R. Co. v. McGlamory*. (Tex. Civ. App.) 34 S. W. 359.

Such an ordinance is held applicable to locomotives or trains running in or through the private yards of a company located within the city limits (*Baltimore & O. S. W. R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *Missouri, K. & T. R. Co. v. McGlamory*, *supra*; *Gulf, C. & S. F. R. Co. v. Melville* [Tex. Civ. App.] 87 S. W. 863), or through the company's uninclosed private property located within the city (*Merz v. Missouri P. R. Co.* *supra*), or upon a wharf (*Galveston, H. & H. R. Co. v. Levy*, 35 Tex. Civ. App. 107, 79 S. W. 879).

As to power of municipality to require safety gates at crossing, see case note to *Pennsylvania R. Co.'s Appeal*, 3 L.R.A. (N.S.) 141.

As to right to limit speed of interstate and mail trains, see case note to *Peterson v. State*, 14 L.R.A. (N.S.) 292.

precautions to avoid injuring those using the crossing. According to the evidence, appellant's trains, in approaching the Burgin crossing, always gave the customary statutory signals, in addition to which appellant took the precaution to keep a watchman at the crossing from 6 A. M. to 6 P. M. each day. This view of the law was adopted by the court in *Louisville, C. & L. R. Co. v. Com. supra*. The opinion, after stating the facts as to the character of the crossing in that case, the obstructions near it, its large and constant use by the traveling public, and the speed at which the railroad company ran its trains in approaching it, proceeds to say: "This evidence clearly establishes the fact that the safety of the numerous persons passing over the crossing requires that warning signals should be given of the approach of trains. The jury, by their verdict, in effect found that the appellant habitually failed to give such signals, and, as they were necessary to the safety of the public from danger of approaching trains, the appellant was legally convicted, unless the finding of the jury is without evidence to support it. There is evidence of failure to give any warning signals on several occasions, and the testimony introduced by appellant to establish the custom of ringing the bell or sounding the whistle on the approach of trains to the crossing does not show that such warning signals were universally given, and it lacks some of the elements of certainty." *Louisville & N. R. Co. v. Com.* 13 Bush, 390, 26 Am. Rep. 205.

We have in this state no statute regulating the rate of speed at which railroads shall operate their trains; and while, in civil actions brought by persons for injuries resulting from the alleged negligence of railroad companies, this court has time and again held that such rapid running of a train over the streets or crossings of a town or city as would render unavailing signals that may have been given of its approach was such evidence of negligence as would entitle the person injured thereby to recover damages, it has never undertaken to fix a rate of speed at which trains should be operated in towns or cities, and manifestly could not do so, in the absence of a statute or ordinance authorizing it. Its rulings have gone no further, therefore, than to decide whether the facts of such cases as were brought to it for review did or did not show negligence. The rule announced by this court in civil actions for injuries alleged to have been received on the streets or crossings of a town or city through the negligence of those operating railroad trains is that greater care should be used in running trains on the streets or crossings of a town

or city than is required to be exercised in approaching highway crossings in the country, because of the larger amount of travel and constant presence of persons on the streets and crossings. Under such circumstances, in addition to giving and continuing the customary signals and keeping a constant lookout, the trainmen should reduce the speed of the train, so as to lessen the danger of injury to persons on the street or crossing from its movements. *McCabe v. Maysville & B. S. R. Co.* 28 Ky. L. Rep. 536, 89 S. W. 683. On the other hand, the rule as to the degree of care to be used by those in charge of a train in approaching a country crossing is, not that the speed of the train be slackened, but that, where the speed of the train is great, care in giving warning of its approach to the crossing should be commensurate with the danger to be avoided. *Louisville & N. R. Co. v. Molloy*, 122 Ky. 219, 91 S. W. 685.

But, in order to sustain a penal prosecution against a railroad company for running its trains in city or country at a high or even dangerous, rate of speed, either upon a street, or in approaching a crossing, it must be shown that such running of the trains was attended with a failure on the part of those operating them to give the necessary and usual signals of their coming. Section 786, Ky. Stat. 1903, provides: "Every [railroad] company shall provide each locomotive engine passing upon its road with a bell of ordinary size and steam whistle, and such bell shall be rung, or whistle sounded, outside of incorporated cities and towns, at a distance of at least 50 rods from the place where the road crosses upon the same level any highway or crossing at which a sign-board is required to be maintained; and such bell shall be rung, or whistle sounded, continuously or alternately, until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require." It will be observed that the last clause of § 786 confers upon the legislative authorities of all cities and towns of the commonwealth the exclusive power to determine, and by ordinance declare, what signals shall be given therein by trains running through their corporate limits, whether upon the streets or crossings. In *Chesapeake & O. R. Co. v. Maysville*, 24 Ky. L. Rep. 615, 69 S. W. 728, the validity of an ordinance of the appellee city compelling the appellant railway company to erect and maintain gates at certain crossings in the city was attacked upon the ground that it was unconstitutional and its enforcement would amount to usurpation on the part of the city of power vested by law

in the railroad commissioners and which could be exercised by them alone. Both contentions were rejected by this court; the opinion declaring that the charter of Maysville, a city of the fourth class, expressly authorized the enactment of the ordinance, and, in addition, that § 774, Ky. Stat. 1903, under which the power in question was claimed for the railroad commissioners, only authorized them to compel the erection and maintenance of gates at highway crossings within a mile of the corporate limits of any city or town of this commonwealth.

Not only may the town of Burgin, under the power conferred by § 786 of the Statutes, supra, by ordinance require appellant to adopt such signals as may be reasonably necessary to give warning of the approach of its trains to the crossing in question, but it may require of it such other reasonable precautions as to the speed of the trains in approaching the crossing or passing through the corporate limits of the town as may be needful for the safety of the public; for a town of the sixth class, like Burgin, is, by the provisions of subsection 7, § 3704, Ky. Stat. 1903, empowered, through its board of trustees, "to . . . enact and enforce within the limits of such town all other local, police, sanitary, and other regulations as do not conflict with the general laws." While, in requiring appellant to keep a watchman at the Burgin crossing, the railroad commissioners may have transcended their authority, it was a precaution which inured to the benefit of the citizens of that town. The testimony as to the stationing of the watchman at the crossing and the purpose thereof having properly been admitted by the court, we do not think it would have been improper to admit the testimony offered by appellant to the effect that, in placing the watchman at the crossing, it acted upon a suggestion or requirement of the railroad commissioners, as it tended to show appellant's good faith in attempting to protect persons using the crossing against the dangers arising from the passing of its trains. We do not mean to say that appellant should have been acquitted because of the failure of Burgin's board of trustees to adopt an ordinance with respect to the signals to be given by appellant's trains in approaching the crossing, or running through the town; but as, according to the evidence, appellant's trains, in approaching the Burgin crossing, universally gave the warning signals required by statute in respect to crossings outside of incorporated towns and cities, and it in addition kept a watchman at the crossing each day during the hours mainly devoted to travel on the turnpike and crossing, these facts, in the absence of an ordinance of the town of Burgin requiring

ing other than the statutory warning signals from appellant's trains in approaching the crossing, entitled appellant, notwithstanding the fast running of its trains, to an acquittal at the hands of the jury. We are of opinion, therefore, that the trial court, after the introduction of all the testimony, should have peremptorily instructed the jury to find appellant not guilty.

For the reasons indicated, the judgment is reversed, and case remanded for a new trial and other necessary proceedings consistent with the opinion.

KENTUCKY COURT OF APPEALS.

NEW GALT HOUSE COMPANY, Appt.,

v.

CITY OF LOUISVILLE.

(— Ky. —, 111 S. W. 351.)

Hotel-license fee — restaurant.

The change by a hotel keeper who has paid a hotel-license fee from the American to the European plan does not subject him to the payment of an additional fee as a restaurant keeper, although he may serve meals to persons not rooming in the hotel, and the ordinance defines a restaurant as a place where food is prepared for casual customers, and sold for consumption therein.

(June 20, 1908.)

APPEAL by defendant from a judgment of the Criminal Division of the Circuit Court of Jefferson County imposing a fine for nonpayment of a license fee. Reversed.

The facts are stated in the opinion.

Mr. Henry W. Sanders for appellant.

Case Note. — *Proprietor of a hotel conducted on European plan as keeper of a restaurant, within license statute or ordinance.*

Careful search has revealed but one case squarely in point with *NEW GALT HOUSE Co. v. LOUISVILLE*, although other cases have been found deciding that the proprietors of hotels conducted on the European plan are liable as innkeepers.

In *McClure v. Krumbholz*, 9 Pa. Dist. R. 544, it was held that a statute providing for a license tax upon restaurant and eating-house keepers did not apply to a hotel conducted on the European plan, the proprietor of which had already taken out a hotel license, since it was no less a hotel, by reason of the fact that its guests might pay for board and lodging separately, or might board at other places.

And it has also been held that the proprietor of a hotel conducted on the European plan is responsible for his guests' effects as an innkeeper. *Krohn v. Sweeney*, 2 Daly, 200; *Bullock v. Adair*, 63 Ill. App. 30.

Messrs. A. E. Richards and Elmer O. Underwood, for appellee:

A person who pursues several distinct occupations, all of which are subject to license or taxation, must take out the separate license, or pay the separate tax, required of each.

21 Am. & Eng. Enc. Law, 2d ed. p. 814.

Barker, J., delivered the opinion of the court:

The appellant, the New Galt House Company, and its predecessors, have for many years conducted a hotel in the city of Louisville known as the "Galt House." Formerly this hotel was conducted on what is called the "American plan;" that is, meals were provided at regular hours for its patrons, who paid a stipulated sum per day, which included both meals and room rent. Some time prior to this litigation, the management of the hotel changed the manner of conducting it from the "American plan" to what is known as the "European plan;" the difference being simply in the fact that, under the latter, the guests patronize the hotel table or not, as they please, and, when they do so, pay for what they order. The proprietors of the hotel in question have always paid a hotel license; but the city, after the change in the management above mentioned, conceiving that the appellant was conducting and operating a restaurant in addition to the hotel, demanded an additional license for the operation of the former. This being refused, an ordinance warrant was sued out, with the result that the appellant was fined \$60 in the circuit court; and of this judgment it now complains.

There is no contrariety whatever about the facts of the case. The appellant has paid the hotel license of \$150 for the year 1907. It provides no table or meals for its guests other than the restaurant in question, and any person, whether he be a lodger or not, may visit the restaurant and obtain such food as he desires upon payment of the price charged therefor; and undoubtedly it is true that many persons who do not lodge in the hotel patronize the restaurant. The question is, therefore, whether or not the change in the management of the hotel from the "American plan" to the "European plan" authorizes the city to charge a restaurant license in addition to the hotel license. Section 46 of the license ordinance of the city of Louisville, relating to the subject in hand, is as follows: "Every person, firm, or corporation operating or conducting a tavern, hotel, . . . in the city of Louisville shall pay a yearly license as follows: First-Class. One having 150 rooms or over, \$150 per year. [Remainder of grading 17 L.R.A. (N.S.)

omitted.]" Section 37 of the ordinance is as follows: "Every place where food or refreshments of any kind—not including spirituous, vinous, or malt liquors—are prepared for casual visitors, and sold for consumption therein, shall be deemed a restaurant or eating house, and every person, firm, or corporation conducting or operating any such place shall pay a license as follows: All restaurants or eating houses wherein the yearly sales amount to the sum of \$50,000 and over, the license shall be \$150 per year. [Remainder of grading omitted.]"

Undoubtedly, if the city's contention is upheld, the appellant must pay two licenses of \$150 each. It may be admitted that, if the restaurant, as conducted by appellant, were separate from the hotel, the owner would be required to pay a restaurant license therefor; but the question remains whether or not the mere change from the "American plan" to the "European plan" authorizes the city to impose upon the appellant two licenses of \$150 each,—one for keeping a hotel, and the other for operating a restaurant. And, assuming that this may be done, are we authorized to conclude that such was the intention of the municipality when the ordinance above set forth was enacted? We do not think such a deduction is maintainable. It is a matter of common knowledge that hotels or taverns, whether conducted upon the "American" or "European" plan, permit persons other than the regular guests to purchase meals whenever desired. The main business, of course, is the conducting of the hotel or tavern. The furnishing of meals to persons other than the regular guests is a mere incident to the business. This incidental business does not change the nature of the regular business, or impose upon the proprietor a double license. It is immaterial whether the hotel is conducted on the "American" or "European" plan. Hotels as they are ordinarily conducted (perhaps universally so) furnish both lodging and food to their patrons. Indeed, a hotel could hardly be conducted successfully if the proprietor did not afford the guests an opportunity to obtain food within the building. Some men might readily lodge in a hotel and secure their meals at another place; but the general traveling public, including women and children, could not do this; and we may assume that no hotel could be successfully conducted which did not provide food for its guests. If the appellant operated on the "American plan," and, in addition, conducted a restaurant in connection with its business, there would be some ground to claim that a double license was due. But it must be assumed that, when the city imposes upon appellant

the payment of a license of \$150 for conducting a hotel, it intends that it shall have the privileges ordinarily included in the business of the hotel; and certainly, if this was not the intention, it was incumbent upon the city to declare a contrary intention in clear and unmistakable language. If appellant is required to pay a restaurant license of \$150 per annum, then it will have paid twice the sum that any other first-class hotel in the city of Louisville pays which simply conducts a hotel on the "American plan." We do not feel authorized to assume that the city intended to segregate the different parts of the business of keeping a hotel, and charge a separate license for each.

The conclusion we have reached—that the city did not intend by the ordinance under discussion to impose upon the proprietor of a hotel, who had paid the regular license, the additional burden of a restaurant license, when that constitutes the only means adopted for furnishing his guests with food—renders it unnecessary that we should discuss or decide whether or not, under the charter, the city has the power to separate the different parts of the hotel business and charge a license for each; and therefore this question is not decided. We simply hold that, putting a reasonable and just construction upon the ordinance under consideration, the appellant is not required to pay the additional license under the facts as developed in this record.

Judgment reversed, with directions to dismiss the warrant.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ALICE A. FLYNN
v.

PRINCE, COLLINS, & MARSTON COMPANY.

(198 Mass. 224, 84 N. E. 321.)

Servant — assumption of risk.

1. An employee does not assume the risk of injury from a shaft running through the dressing room should the box be left off, by agreeing to work in the factory, where it is inclosed in a box, and runs so smoothly that its presence is not known to him.

Master — safe place — exposed machinery.

2. An employer who provides a dressing room for employees through which runs a shaft inclosed in a box which is likely to be left off and thereby expose the machinery while in motion, without warning them of the danger, may be found not to have used due care in furnishing them a safe place.

17 L.R.A. (N.S.)

Same — boxed shaft — duty.

3. A master who, in order to render safe a dressing room for employees through which runs a shaft, incloses it in a box the removal of which is not required in the daily operation of the factory, has the burden of keeping the box in place, which cannot be delegated to an employee.

(March 7, 1908.)

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County in plaintiff's favor in an action brought to recover damages for personal injuries to plaintiff from a revolving shaft while in a dressing room provided by defendant for the use of employees. Overruled.

The facts are stated in the opinion.

Mr. D. N. Crowley for defendant.

Messrs. John J. Cahill and Joseph F. Quinn for plaintiff.

Loring, J., delivered the opinion of the court:

We assume that the case was tried on the second count. That was a count at common law for not providing a safe place for the plaintiff in the course of her employment.

The arrangement of the dressing room adopted and maintained by the defendant

Case Note. — Master's duty to guard machinery as a delegable one.

There is very little authority upon the question here presented for discussion, but that little would seem to be in accord with the Massachusetts court in the rule laid down by it as gathered from *FLYNN v. PRINCE, C. & M. Co.*, and *Wosbigian v. Washburn & M. Mfg. Co.* 167 Mass. 20. 44 N. E. 1058, which is sufficiently set forth in *FLYNN v. PRINCE, C. & M. Co.* That rule may be expressed as follows: Whether or not the duty to guard machinery is a delegable one depends upon the character of the act which, by its negligent performance or omission, caused the injury complained of: that is to say, if the duty to guard the machinery arose by reason of the master's absolute duty to use due care to furnish his servants a safe place or safe appliances, the duty is one that cannot be delegated, and it is so enunciated in *FLYNN v. PRINCE, C. & M. Co.* On the other hand, if the duty of the master to furnish a safe place or appliances has been discharged in the first instance by furnishing a machine properly guarded, and, during the course of its operation, it is necessary for the guards to be removed,—in other words, if the removal of the guards is a mere detail of the work,—the master can delegate the duty of replacing them to a servant, and, for the latter's negligence in failing to replace, the master will not be held liable; and such was the conclusion reached in *Wosbigian v. Washburn & M. Mfg. Co. supra.*

was, or at any rate could be found to be, an extraordinary, dangerous, and negligent one. To make a dressing room for its employees, the defendant company inclosed a corner of the stitching room by carrying the partition wall over the shaft, leaving a foot and a half of the shaft on the dressing room side of the partition wall. Among the hooks which it put up for the employees to hang their working clothes on when not on duty and their street clothes when on duty, was one, and perhaps more than one, immediately over the shaft. The danger incident to this arrangement of the dressing room is apparent. It seems to have been recognized by the defendant, for it covered the shaft with a box. Added to this, the machinery ran so smoothly that when the box was in place the shaft made no sound, or at any rate not enough to attract attention, if the plaintiff and two of her fellow employees are to be believed. The danger therefore was a hidden one, and for that reason not one which an employee assumed by agreeing to work in that factory.

It might be found that the box was likely

to be left off and the shaft exposed while in motion, and that, if it was, such an accident as that here complained of would be likely to happen. These findings would warrant the conclusion that the defendant, in maintaining such a dressing room for the use of its employees without warning them of the situation, had not used due care to furnish them with a safe place.

The defendant's contention is that it did its whole duty when it furnished the box to be used as a guard, and that, if Jenness was negligent in leaving it off, his negligent act was the negligence of a fellow servant. In support of that, it cites *Wosbigian v. Washburn & M. Mfg. Co.* 167 Mass. 20, 44 N. E. 1058, and the rule laid down in *Falardeau v. Hoar*, 192 Mass. 263, 267, 78 N. E. 456.

The distinction between *Wosbigian v. Washburn & M. Mfg. Co.* and the case at bar is this: In *Wosbigian v. Washburn & M. Mfg. Co.* supra, the machine was not out of repair. Further, there was no hidden danger, for the guard was taken off when

This was the conclusion reached, also, in *McManus v. St. Regis Paper Co.* 100 App. Div. 510, 91 N. Y. Supp. 1102, which was an action to hold the defendant liable for negligence, as under the common law, for a failure to replace a guard upon the cogwheels of a machine which the plaintiff was operating, and in which it was held that the defendant was not liable for injuries received by the plaintiff coming in contact with such cogwheels while unguarded, for the reason, among others, that the failure to replace the guard was a mere detail of the work, and that the neglect of the defendant's superintendent to replace it was the neglect of a fellow servant.

To the same effect is *Hood v. Argonaut Cotton Mill Co.* 23 Ky. L. Rep. 460, 62 S. W. 1043, in which it was held that a master was not liable for an injury to a servant by having an arm cut in the wheels of a machine from which the covering had been removed, where there was nothing to show when, why, or by whom the covering was removed, and the machine in its ordinary condition was a safe one, and it was at times necessary to remove such covering in the operation of the machine. That the court considered the duty to replace this covering a delegable one is evident from its remark while speaking of the lack of evidence as to who removed it, that it might have been removed by a fellow servant of the plaintiff.

That branch of the rule applied in the *FLYNN CASE* was also applied in *Darby v. Duncan*, 23 Sc. Sess. Cas. 2d series, 529, cited in 2 Labatt, Mast. & S. p. 1490, where the negligence of a foreman or general superintendent of a factory in permitting fencing around machinery to become defective was held to be the negligence of the master.

In the case last cited, and in the *FLYNN* 17 L.R.A. (N.S.)

CASE, the master's negligence because of his failure to maintain a guard arose from the neglect of his duty to furnish a safe place. Upon the same principle, the rule would be the same where the master's negligence in failing to furnish a guard arises from the neglect of his duty to furnish a safe appliance. Such is the logical deduction from the result arrived at in the Massachusetts cases. And this seems to be the underlying principle of the decision in *Godwin v. Newcombe*, 1 Ont. L. Rep. 525, in which it appeared that the plaintiff was injured while operating a jointer in the defendants' mill, the knives of which were not guarded, which fact rendered the machine dangerous, and this condition was known to the defendants' foreman, who was intrusted with the duty of seeing that the jointer was in a proper condition. It was held that the absence of a guard was a defect in the machine, and that the foreman's knowledge of this defect and his failure to remedy it constituted negligence for which the defendants were liable.

In some jurisdictions it has been enacted by statute that a master must guard dangerous machinery and see to it that such guards are maintained; and it has been held that these statutes impose a positive and absolute duty upon the master which he cannot delegate. Therefore, if a servant is injured by reason of the failure of a fellow servant to replace a guard, though it was necessary to remove it in the operation of the machinery, the master will be held liable. Such was the conclusion reached in *Espenlaub v. Ellis*, 34 Ind. App. 163, 72 N. E. 527; *McManus v. St. Regis Paper Co.* 107 App. Div. 29, 94 N. Y. Supp. 932; *Pinsdorf v. Kellogg*, 108 App. Div. 209, 95 N. Y. Supp. 617; *Groves v. Wimborne* [1898] 2 Q. B. 402.

the gearing was oiled, and the gearing had to be oiled when the reducing rolls were changed, two or three times a day. The cause of the accident was the negligence of the operator in not putting back the guard when changing the rolls and oiling the machine. This was the negligence of a fellow servant. To sum up that case, the accident was caused by the negligence of a fellow servant in operating a dangerous machine which was in perfect repair and which had no hidden danger.

That is not true of the case at bar. In the case at bar the arrangement of the dressing room could be found to be a negligent one unless the shaft was covered by the box. This box was not taken off in the daily operation of the machinery of the factory. Since the guard made safe what otherwise would be a negligently unsafe place, it was the duty of the defendant to keep the guard on, or to give a warning if it was off. That duty of the defendant was the duty of an employer to provide a safe place for its workmen, and therefore is one which cannot be delegated.

Falardeau v. Hoar, 192 Mass. 263, 78 N. E. 456, has been cited by the defendant. Falardeau v. Hoar is a case where an employee fell through an open trapdoor which was opened to take out ashes twice a week. The defendants, who were the owners of the building, asked for an instruction that they were not liable if their janitor was in the habit of using a settee as a guard when the trapdoor was open, and the accident was caused by the janitor's neglect to set up the settee on the occasion in question, for that neglect was the neglect of a fellow servant. The only exception before the court was one taken to the refusal to give that ruling. That exception was overruled. The opinion in Falardeau v. Hoar goes further, and states that the charge of the presiding judge was correct. The presiding judge told the jury that, if the defendants knew that the settees were being used as guards, and so were in the position of having furnished barriers, a failure to put them up was the negligence of a fellow servant. In addition, there is an implication in Johnson v. Field-Thurber Co. 171 Mass. 481, 483, 51 N. E. 18, where guards had not been furnished, that, if they had been furnished, the failure to set them up in that case would have been the negligence of a fellow servant. In the earlier case of Young v. Miller, 167 Mass. 224, 45 N. E. 628, the trapdoor was not a hidden danger and the employee was held to have assumed the risk of it. In Hogarth v. Pocasset Mfg. Co. 167 Mass. 225, 45 N. E. 629, the trapdoors were not obvious, and the court held that "a jury might have found the plaintiff entitled to be warned to look

out for the opening of the doors." We find nothing in these decisions to the contrary, and we are of opinion that in the case at bar, under its duty to furnish a safe place for its employees, the defendant was bound to see that the box was over the shaft when it was in motion; that a warning was given if the shaft was exposed, and that that duty cannot be delegated to another.

Exceptions overruled.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JAMES S. HEY

v.

WINFIELD F. PRIME.

(197 Mass. 474, 84 N. E. 141.)

Action — abatement — how effected.

1. If the declaration and facts stated in opening the case show that the cause of action did not survive the death of the original defendant, his successor may move to dismiss, although he has not demurred to the declaration, or requested the rendition of a verdict in his favor.

Same — consequential injuries.

2. The injury to the husband through deprivation of his wife's services or matrimonial companionship because of a personal injury to her is not damages to the person, within the meaning of a statute providing that actions for tort for assault, "or other damages to the person," shall not abate by death.

(February 28, 1908.)

Case Note. — Does husband's action for damages sustained by him on account of personal injury to wife abate by his own death or that of the wrong-doer?

In Ott v. Kaufman, 68 Md. 56, 11 Atl. 580, the court gave the phrase "action for personal injuries," in a statute on the subject of survival and abatement, a construction diametrically opposite to that which the court, in HEY v. PRIME, gives the phrase "damage to the person;" but, as the phrase in the former case was employed in a clause which excepted actions for personal injuries from the general statutory declaration that personal actions of every kind should survive, the result reached was the same as in HEY v. PRIME. It was contended in this case that the action was not one for personal injuries, but one for damages arising from the consequent loss of services, etc. The court held that the meaning of the statute included an action founded on a personal injury without regard to the nature of the damage claimed, and that therefore the plaintiff could not maintain the action against the executrix.

A search has disclosed few cases passing

EXCEPTIONS by plaintiff to a ruling of the Superior Court for Suffolk County dismissing an action brought to recover damages for incidental injury to plaintiff through a wrongful injury to his wife. Overruled.

The facts are stated in the opinion.

Mr. Everett W. Crawford for plaintiff.

Messrs. William J. Drew, William W. Kennard, and Winfield F. Prime for defendant.

Braley, J., delivered the opinion of the court:

If, upon an opening, the plaintiff fails to state a case, ordinarily the defendant may request that a verdict be ordered in his favor. The presiding judge, in his discretion, may either then give a decision, or wait until the plaintiff's, or the entire, evidence has been introduced, before deciding the question. But, although no demurrer had

upon the effect of the husband's death to abate his action for loss of services, etc.

The New York cases hold that a right survives to his personal representative for damages incurred for medical attendance, etc., but that his injury by reason of the loss of the wife's society does not survive.

In *Cregin v. Brooklyn C. T. R. Co.* 75 N. Y. 192, 31 Am. Rep. 459, an action was originally brought by the husband for a wrongful injury to his wife whereby he suffered the loss of her services and society and incurred expenses for her care and medical attendance. Pending the action the husband died and the action was revived, his administrator being substituted as plaintiff. The statute preserved from abatement by death actions "for wrongs done to the property, rights, or interests of another," and included all injuries to the rights of a deceased party except "actions for slander, libel, assault and battery, false imprisonment, and actions on the case for injuries to the person of the plaintiff." It was held, under these provisions, that the right of action for the husband's loss survived. The court said: "Adopting the construction that pecuniary rights and interests only are protected by the statute, these were plainly involved, and, if the pleader had left out the word 'comforts,' the complaint would have disclosed an injury to pecuniary interests exclusively. We do not think that because, in addition to the injury to these interests, the personal comfort of the plaintiff was interfered with, that circumstance should deprive his representatives of their remedy for the pecuniary injuries which he sustained, and which diminished his estate; nor do we think that it can be laid down as a rule of universal application to all classes of society that in such a case the injury to the personal feelings and comfort of the husband is the gravamen of the wrong, and the pecuniary injury a mere incident, of which the law will not take notice independently of the former."

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been filed, or request made, it was not too late for the defendant to move to dismiss if the declaration, and the facts stated in the opening, showed that the cause of action did not survive, as the court was left without jurisdiction. *Allin v. Connecticut River Lumber Co.* 150 Mass. 560, 563, 6 L.R.A. 416, 23 N. E. 581, and cases cited; *Merriman v. Currier*, 191 Mass. 133, 77 N. E. 708. By the common law, the right of the husband to recover damages for an injury to his wife, whereby either her services or *consortium* became lost, perished with the death of the wrongdoer. The injury inflicted, being the act of the tortfeasor who escaped by death, his executor or administrator could not be held, because the executor or administrator had committed no wrong in his personal capacity, and the plea, which must have been not guilty, raised only the issue of the decedent's guilt. *Wilbur v. Gilmore*, 21 Pick. 250, 252. But,

In *Cregin v. Brooklyn C. T. R. Co.* 83 N. Y. 595, 38 Am. Rep. 474, this case was again before the court, and, reversing the holding below, reported in 19 Hun, 341, it was held that damages for expenses, etc., incurred by reason of the wife's injury survived to the husband's personal representative; but that no recovery could be had after his death for the loss of her society and comfort. The court said: "The loss of his wife's services, the expenses necessarily incurred by reason of the injury, were a pecuniary loss, and diminished his estate, and so survived to his administrator; but the loss of his wife's society, . . . and the right of action for that, died with him." To the same effect is *Foels v. Tonawanda*, 48 N. Y. S. R. 150, 20 N. Y. Supp. 447.

In *Forbes v. Omaha* (Neb.) 112 N. W. 328, where the wife sued as assignee of the husband's demand for the pecuniary loss and damage suffered by him by reason of being deprived of her services and of moneys expended for medical treatment, etc., it was claimed that the cause was not assignable. The court said it understood counsel to concede that causes of action which survived were assignable; and, under the statute enacting that, "in addition to the causes of action which survive at common law, causes of action for mesne profits, or for injury to the real or personal estate, or for any deceit or fraud, shall also survive," it was held that this action would have survived to his personal representative in the event of his death, and was therefore assignable.

In *Fordyce v. Dixon*, 70 Tex. 694, 8 S. W. 504, it was held that the cause of action did not cease upon the husband's death, where the damages for injury to the wife would have been community property. This case is not strictly within the scope of this note as the action appears to have been a joint one by husband and wife to recover for injury to the wife.

this rule having been modified by statute, the question is whether such an action survives under Rev. Laws, chap. 171, § 1. This section, which follows previous revisions, provides that ". . . actions of . . . tort for assault, battery, imprisonment, or other damage to the person . . . shall not abate by death." Gen. Stat. 1860, chap. 127, § 1; Pub. Stat. 1892, chap. 165, § 1. Unless the case comes within the last clause, the plaintiff is not relieved. It has uniformly been held since the enactment of Stat. 1845, chap. 89, § 1, p. 539, to which this clause runs back for its origin, that the nature of the damages sued for, rather than the form of remedy, is the test. By this construction, the language, "or other damages to the person," includes such damages only as result from direct bodily injury, but excludes consequential damages suffered by those who are injured from a wrongful interference with their rights, arising from the negligence of the decedent. *Smith v. Sherman*, 4 Cush. 408, 413; *Cutter v. Hamlen*, 147 Mass. 471, 1 L.R.A. 429, 18 N. E. 397; *Wilkins v. Wainwright*, 173 Mass. 212, 53 N. E. 397, and cases cited; *Dixon v. Amerman*, 181 Mass. 430, 63 N. E. 1057. If the common-law doctrine of unity of husband and wife, by which she was deemed a part of his person, has been almost wholly abrogated by legislation, yet the right to her exclusive conjugal fellowship still remains, and he may recover damages for its impairment by the wrongful acts of strangers. *Nolin v. Pearson*, 191 Mass. 283, 285, 286, 4 L.R.A.(N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890. But, while this right has been preserved, if, during coverture, she suffers personal injury, whether it results from the direct act of the decedent by the use of force, or is caused by his negligence, she alone, by reason of our statutes conferring upon her absolute control over her person, and the right to sue as if sole, can maintain an action for damages, which, upon recovery, become her separate property. *Nolin v. Pearson*, *ubi supra*; *Duffee v. Boston Elev. R. Co.* 191 Mass. 563, 564, 77 N. E. 1036. But, where the husband also brings suit, because the disability arising from the tort has deprived him of either her services, or matrimonial companionship, his right to recover rests upon the ground that the wrong suffered by him, while personal in effect, is regarded as purely consequential in character. *Barnes v. Hurd*, 11 Mass. 59; *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 308, 311, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063.

It is plain that, under the statute, such an injury cannot be classed as "damages to the person," and the motion to dismiss was properly granted.

Exceptions overruled.
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NEVADA SUPREME COURT.

RE PETER BREEN.

(— Nev. —, 93 Pac. 997.)

Attorney — comment on decision — disbarment.

The entry upon his records by the trial judge, after reversal of his decision by the supreme court, of a statement that the supreme court made a statement of facts not supported by the record for the purpose of bolstering up a decision, neither founded on law nor supported by facts, its opinion being an abnormally strange document, and a reversal of a decision that had been accepted law for forty years; all of which was reprehensible if the court knew what it was doing, pitiful if it did not,—is such a violation of his duty as an attorney and officer of the supreme court as to justify his suspension or disbarment, although he declares under oath that he meant no disrespect for that court, and the matters on which the statement by the supreme court was based came to its attention during the argument of the case before it, of which fact the trial judge was ignorant.

(February 19, 1908.)

Case Note. — Criticism of decision or opinion after case has been determined, as contempt or ground for disbarment.

This note is limited to cases of criticism not directed to the court in person; for the latter class of cases, see *Re Hart*, post, 585, and note thereto.

The general integrity and impartiality of judges in their official duties have placed the courts of this country on a plane so much higher than that of other public officials that it has sometimes given rise to the erroneous idea that judges differ from other public officers in that they are not subject to criticism for their official acts. Few cases, however, are found wherein this idea has been recognized by the courts. The great weight of authority holds to the contrary, deeming that to restrain or punish a criticism of the official conduct of judges as to matters terminated would be an infringement upon the constitutional guaranty of freedom of speech, and that in this respect, they stand in no better position than other public officers.

These cases recognize that respect to the courts cannot be compelled; that it is "the voluntary tribute of the public to worth, virtue, and intelligence, and, whilst they are found upon the judgment seat, so long and no longer will they retain the public confidence. If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the country; and, if he has received an injury, ample remuneration will be made." *Stuart v. People*, 4 Ill. 402.

Considering this subject, the court, in *People ex rel. Elliott v. Green*, 7 Colo. 237,

PROCEEDINGS for the disbarment of Peter Breen, an attorney at law and judge of a District Court. Suspension decreed.

The facts are stated in the opinion.

Mr. R. C. Stoddard, Attorney General, for the State.

Messrs. Campbell, Metson, & Drew, W. B. Putnum, and Bartlett & Thatcher for respondent.

Per Curiam:

In the case of *State v. Dwyer*, 29 Nev. —, 91 Pac. 306, on appeal to this court from a conviction of murder in the first degree and sentence of death, the judgment and order denying a motion for a new trial were reversed on the 12th day of August,

244, 49 Am. Rep. 351, 3 Pac. 65, 374, said: "In this country, and in England also, the utmost liberty of speech is guaranteed by statute and enforced by the courts; the right to discuss all matters of public interest or importance is everywhere fully recognized; judicial decisions and conduct constitute no exception to the rule; the judge's official character, and his acts in cases fully determined, are subject to examination and criticism; in most of the states the office is elective, and it is proper and right that the people should be informed of the occupant's mental and moral fitness. True, under the guise of criticism in the public press, and otherwise, judges are often compelled to endure the sting of misrepresentation and calumny, with no other redress than an ordinary civil action; and doubtless it sometimes happens that their efficiency in office is thereby lessened to the detriment and injury of the public service; but it is wisely considered better that these wrongs and injuries should be tolerated, than that the sacred liberty of speech, printed or spoken, should be abridged by lodging an arbitrary power to interfere therewith in the hands of the court or judge, so long as such criticism or libel is not designed to influence the mind of the judge in a cause still undetermined." Comparing the right of an attorney with that of a private citizen, the court continues: "He may talk with his neighbors, and freely comment upon the judge's official conduct in matters no longer pending, and he may criticize the same through the public press; for such acts he will be answerable only as other citizens are." (Quoted from rehearing opinion, page 244.)

Published criticism of proceedings not then pending was held, in *State v. Dunham*, 6 Iowa. 245, not to amount to contempt of court. The court, in holding that such a publication did not come within the terms of the statute of that state relating to contempts of court, said: "It would be a perversion of the entire language used, and a palpable violation of the spirit and policy of the provision, to say that a judge could bring before him every editor, publisher, or 17 L.R.A. (N.S.)

1907. The reversal was upon the sole ground that the trial court erred in not granting defendant's motion for a change of venue. The opinion was a lengthy one, written for the court by Norcross, J.; the full bench concurring. During the course of the opinion the following statement was made: "The theory of the state, if we understand it, was that the defendant killed Williams by mistake, thinking the latter was one O'Brien, a man with whom defendant had had trouble during the day over a prostitute." It will appear from an examination of the opinion in the case that this statement quoted was only an incidental observation of what this court understood was the fact, and was not the statement of anything in any way deemed essential to the deter-

citizen, who might in his office, in his house, in the streets, away from the court, by printing, writing, or speaking, comment upon his decisions, or question his integrity or capacity. The law never designed this. It is not thus that an independent and intelligent court will be apt to secure public confidence. Such a power is not necessary, for either the protection of the court or the public." Referring to the publication in question, the court continues: "If his attack was libelous, then it seems to us that he and the judge assailed should be placed on the same grounds, and 'their common arbiter should be a jury of the country.' No court can or should hope that their opinions and actions can escape discussion or criticism. When a case is disposed of, and the decision announced, such decision becomes public property, so to speak. The construction given to a statute, the reasoning and conclusion of the court upon the facts, all go to the public, and become subject to public scrutiny and investigation. In such cases it is perfectly competent and lawful for anyone to comment upon the decision, and expose its errors and inconsistencies. If such comments do not correct errors, they will, at least, lead to renewed caution and circumspection upon the part of those whose duty it is to declare the law. It would be a fruitless undertaking, in this country—where the freedom of speech and the press is so fully recognized and so highly prized—to attempt to prevent judicial opinions from being as open to comment and discussion as an opinion or treatise upon any other subject. It is well, and fortunate, that it is so. This right is fully recognized in England, and it would be strange if, under our institutions, we should be less tolerant."

The doctrine of this case was followed by that court in *State v. Anderson*, 40 Iowa, 207, wherein it was held that the publishing by an attorney of a newspaper article criticizing the rulings of the court in a cause tried and determined prior to the publication did not constitute contempt of court. To the same effect, also, is *Watson v. People*, 11 Colo. 4, 16 Pac. 329, as to oral criticism

mination of the question upon which the case was decided. The statement quoted, however, was in strict accordance with the position taken in the brief of the attorney general and in the oral argument of A. J. Maestretti, district attorney of Lander county, upon the hearing of the appeal; it being contended in this court that certain testimony, objected to by defendant's counsel, was admissible upon this theory. The testimony itself, introduced by District Attorney Maestretti in the state's case in chief, showing the quarrel between Dwyer and O'Brien on the same day and just before the killing of Williams, and that Dwyer and O'Brien threatened to kill each other on sight, was such as to suggest the theory of mistake, even if such theory had not been argued to

this court, and apparently was admissible on the state's case in chief only on this hypothesis as tending to show the motive and purpose of the shooting. The record in the Dwyer Case, however, does not show that counsel in the district court declared it to be the theory of the state that Dwyer killed Williams through mistake, and the answer of District Attorney Maestretti sets up that that was not his theory at the trial, that he offered evidence as to the trouble with O'Brien to show the state of mind of defendant at the time, although as a matter of fact he admits that the only inference to be drawn from the record is that Dwyer killed Williams by mistake, which is in accordance with his own belief. In the oral argument in this court on the

to third persons of a judge and his manner of running court.

To hold that such a publication was a contempt of court, and punishable as such, was said in *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158, to violate the constitutional guaranty "that every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." In so construing this provision, the court said: "This language, plain and explicit as it is, cannot be held to have no application to courts, or those by whom they are conducted. The judiciary is elective, and the jurors, although appointed, are, in general, appointed by a board whose members are elected by popular vote. There is therefore the same responsibility, in theory, in the judicial department, that exists in the legislative and executive departments, to the people, for the diligent and faithful discharge of all duties enjoined on it; and the same necessity exists for public information with regard to the conduct and character of those intrusted to discharge those duties, in order that the elective franchise shall be intelligibly exercised, as obtains in regard to the other departments of the government. When it is conceded that the guaranty of this clause of the Constitution extends to words spoken or published in regard to judicial conduct and character, it would seem necessarily to follow that the defendant has the right to make a defense which can only be properly tried by a jury, and which the judge of a court, especially if he is himself the subject of the publication, is unfitted to try."

In *State ex rel. Atty. Gen. v. Circuit Court*, 97 Wis. 1, 38 L.R.A. 554, 45 Am. St. Rep. 90, 72 N. W. 193, it was held that a published criticism of a judge, who was a candidate for re-election, referring to his official conduct in matters finally disposed of, was not a contempt of court, even though made by an attorney. The court said: "Important as it is that

courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guaranteed to all citizens by our Constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiments 'on all subjects' . . . the right of trial by jury. . . . Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge, and jury, and may, within a few hours, summarily punish his critic by imprisonment. The result of such a doctrine is that all unfavorable criticism of a sitting judge's past official action can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press, and subvert freedom of speech, we do not know where to find it. Under such a rule, the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence. In our judgment, no such divinity as this 'doth hedge about' a judge; certainly not when he is a candidate for public office."

The doctrine was also applied in *Ex parte Steinman*, 95 Pa. 220, 40 Am. Rep. 637, as to a publication criticizing a judge for official conduct in matters finally disposed of by him, and it was said that it would be a clear infraction of the spirit, if not the letter, of the Bill of Rights of that state, "to hold that an attorney can be summarily disbarred for the publication of a libel on a man in a public capacity or where the matter was proper for public investigation or information; for, as he certainly does not forfeit his constitutional rights as a freeman by becoming an attorney, it guarantees to him immunity from all liability to punishment in the case of 'the publication of papers relating to the official conduct of officers or men in public capacity where the fact that such publication was not ma-

appeal in the case of *State v. Dwyer*, following the point made by the attorney general in his brief, District Attorney Maestretti made the following statement: "There is one point I did not intend to touch upon, but I have been requested to do so, and in examining the record the court will find, and I suppose that is the reason the objection is taken, that the feeling or intent to take life was not as to Williams, but as to O'Brien, and, that the killing of Williams, it will be discovered by this court, must have been an accident, that Dwyer meant to get O'Brien, and not Williams; and upon that point we have collected a few authorities which we wish to call to the attention of this court. *Jackson v. State*, 106 Ala. 12, 17 So. 333; *McGehee v.*

State, 62 Miss. 772, 52 Am. Rep. 209; *People v. Torres*, 38 Cal. 141; 21 Am. & Eng. Enc. Law, pp. 104, 105." After the time had elapsed for the filing of a petition for a rehearing, and no such petition being filed, remittitur was issued. On the 13th day of September, 1907, the defendant was brought before the trial court, and the order of this court directing a change of venue, for the purpose of a new trial, carried out. After the order for a change of venue had been made, the said A. J. Maestretti, Esq., district attorney of Lander county, made the following statement in open court: "If it pleases the court at this time, I wish to rise to the question of privilege in relation to a statement made in the disposition of this case, wherein it was reversed in the

liciously or negligently made shall be established to the satisfaction of the jury." "

To the same effect is *State v. Kaiser*, 20 Or. 50, 8 L.R.A. 584, 23 Pac. 964, wherein it is said: "The inherent power of a court of justice to punish parties for contempt who commit acts which have a direct tendency to obstruct or embarrass its proceedings in matters pending before it, or to influence decisions regarding such matters, is undoubted; but it can hardly be maintained, from the adjudications had upon the subject in the various states, that such power is broad enough to vest in the court the authority to so punish anyone for criticizing the court on account of its procedure in matters which have fully terminated, however much its dignity and standing may be affected thereby, however unjust, rude, or boorish may be the criticism, or whatever may be its effect in bringing the administration of the law into disrepute." To the same effect, also, is *Re Shannon*, 11 Mont. 67, 27 Pac. 352, as to a publication in the press criticizing the practice of a police court, and setting forth abuses flowing therefrom.

In *Queen v. Lefroy*, L. R. 8 Q. B. 136, the doctrine was applied as to a published libelous criticism of a judge of an inferior court, and a distinction was drawn between a published criticism of the conduct of an inferior court and one of the higher courts of England.

In *Jackson v. State*, 21 Tex. 672, the use by an attorney of opprobrious and abusive epithets in speaking of a judge in vacation was held not to amount to contempt of court involving fraudulent or dishonorable conduct or malpractice, within the meaning of the statute of that state prohibiting the court from striking the name of an attorney or counselor at law from the rolls for contempt, unless it involve fraudulent or dishonorable conduct or malpractice.

So, in *Ex parte Cole*, 1 McCrary, 405, Fed. Cas. No. 2,973, it was held not to be contempt of court for an attorney, in a letter to his client, to criticize a judge, even though the criticism imputed to the judge a want of integrity.

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The doctrine that such criticism does not amount to contempt was also applied in *Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209, wherein an attorney was found not guilty of contempt for sticking a piece of paper to the door of the office of the then judge of the circuit court, on which was written "Sebron G. Sneed [the then judge] is a dam'd base and corrupt man," his uncontradicted answer to the contempt proceedings alleging "that he did not design anything he did as an insult or contempt to the court, as it was an out door affair."

And in *State v. Root*, 5 N. D. 487, 57 Am. St. Rep. 568, 67 N. W. 590, language of an abusive and defamatory character, used by an attorney at law with reference to a judge of the court wherein the attorney practised, and referring to the official conduct of the court, was said not to amount to contempt of court, although the court refused to pass upon the question whether it amounted to ground for disbarment. The criticism in this case apparently referred to some cases still undisposed of, but the court apparently treated it as belonging to the class of cases here under consideration.

To the same effect, also, as to published or verbal criticisms of proceedings by a court, or a court's conduct in reference thereto, where such proceedings had terminated at the time of the criticism, are *Post v. State*, 14 Ohio C. C. 111 (based on statute); *Cuyler v. Atlantic & N. C. R. Co.* 131 Fed. 95 (based on United States statute); *Ex parte Green*, 46 Tex. Crim. Rep. 576, 66 L.R.A. 727, 108 Am. St. Rep. 1035, 81 S. W. 723; *People ex rel. Barnes v. Court of Sessions*, 147 N. Y. 290, 41 N. E. 700, *dictum*; *Re Bahama Islands* [1893] A. C. 138. As to private citizens, the doctrine was applied in *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415; *Re Robinson*, 117 N. C. 533, 53 Am. St. Rep. 596, 23 S. E. 453; *Fellman v. Mercantile F. & M. Ins. Co.* 116 La. 723, 41 So. 49 (criticism in letter addressed to an attorney).

While the right to punish for contempt for criticizing a judge for his official acts in a matter finally terminated was affirmed in *McLeod v. St. Aubyn* [1899] A. C. 549,

supreme court, and that is this: In its decision the supreme court has stated, in substance, that the theory of the prosecution in this case was that Dwyer killed Williams through mistake, while looking for a man named O'Brien, with whom the defendant had had trouble during the day over a prostitute. I wish to state at this time that that is absolutely not the fact; further, that there is nothing in the records from the first page to the last which suggests or would warrant the supreme court in making such a statement in its decision, and where anything is shown on that record upon which the supreme court renders such a decision is beyond my understanding." Upon the conclusion of the foregoing statement of A. J. Maestretti, Esq., the district judge, respondent herein, made the following statement and order: "I heartily commend you, Mr. District Attorney, for the steps you have taken to set yourself right with the public in a matter so closely connected with your

onerous official duties. The statement in the decision of the supreme court which you contradict I also know to be absolutely without foundation. You were alone in the case for the state, and you did not conduct its prosecution upon the theory of mistake, nor is there anything in the records to so indicate. The supreme court, being the tribunal under our judicial system to which has been given, so to say, the last word, that tribunal, it seems to me, should be exceptionally careful to make no statement having a tendency to unjustly reflect upon or misstate the position of any officer, witness, or person connected with the trial of a cause. So far as it appears to me by the stenographic record of the case on file, the statement in the opinion as written by Judge Norcross, to which objection has been made, like some other assertions in the same abnormally strange document, in my opinion, is neither fair to you as prosecuting officer, nor to this court; and whether or not it was made for

yet the court said: "The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place, and the case is over, the judge or the jury are given over to criticism. . . . Committals for contempt of court by scandalizing the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

In *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407, on the ground that an attorney, by publishing scandalous or insulting matter concerning a judge of the court in which he practised, thereby proved himself unfit longer to hold the position of attorney, it was held competent to disbar or suspend him. It was, however, recognized that such criticism would not amount to contempt of court.

In some jurisdictions, however, the doctrine prevails, both as to attorneys and private citizens, that it amounts to contempt of court publicly to criticize and impute to a judge want of integrity because of his official conduct even with respect to matters then terminated. This doctrine was stated in *Re Chadwick*, 109 Mich. 588, 67 N. W. 1071, wherein an attorney was held guilty of contempt of court for publishing a criticism of a decision of a circuit-court judge. No application for a rehearing was pending, neither had an appeal been taken in the case at the time of publication. The court, however, stated that, because there might be an application for a rehearing or an appeal, the matter, therefore, was not

finally terminated at the time of the publication. It, however, holds the publication of the criticism to constitute a contempt of court without reference to whether or not the matter referred to had been finally disposed of by the court; the theory adopted being that the court occupies the same position as the high courts of England. Blackstone is also quoted to sustain this position.

Burdett v. Com. 103 Va. 838, 68 L.R.A. 251, 106 Am. St. Rep. 916, 48 S. E. 878, also sustains the doctrine that it constitutes contempt of court to publish a criticism of a judge in relation to his official conduct in a matter then terminated. In that case the defendant in a prosecution for a violation of the liquor law, after the termination thereof, published a statement charging the presiding judge with acting toward him in a harsh and arbitrary manner, and imputing to him corrupt motives. The court in this case cites and relies upon the doctrine of the earlier English cases based, in part at least, upon the doctrine enunciated by Blackstone and Hawkins; also the decisions of the courts of this country. However, most of the American cases referred to involved criticisms relating to proceedings then pending, or criticisms directed to a judge personally, rather than those spoken or written of him.

The argument of the court in *State ex rel. Crow v. Shepherd*, 177 Mo. 205 93 Am. St. Rep. 624, 76 S. W. 79, also sustains this position, and is likewise based upon the same line of authority as the preceding case. In this case, however, it seems that the publisher of a newspaper remote from the place wherein the court was in session published a very intemperate criticism of the supreme court of the state because of its decision in a certain case, without knowledge, however, of the fact that at the time of the publication there was pending before the

the purpose of bolstering up a decision which, to my mind, is neither founded on law, nor supported by fact, and is a palpable reversal of the Millain Case, which for forty years has been the accepted law in this state pertaining to a change of venue in a criminal case, it was highly reprehensible for its author, or authors, to have made it. I say 'reprehensible;' as a modification I shall say—'reprehensible if the court knew what it was doing, pitiful if it did not.' Mr. Clerk, you will enter in your minutes the statement of the district attorney side by side with the remarks of the court." The statements of respondent and of A. J. Maestretti so entered in the minutes of the third judicial district court in and for the county of Lander were published in the press of Lander county and widely copied throughout the state. The attention of this court having been directed to the published account of the proceedings had in the said district court, an order was

made directing the attorney general to investigate the matter, and, if he found the same to be as published in the press reports, to present the facts to this court in the form of an affidavit. Pursuant to such order, the attorney general filed an affidavit setting forth all of the facts, and upon which affidavit this court ordered citations issued, and directed to respondent herein and to the said A. J. Maestretti to appear and show cause, if any they have, why they should not be adjudged guilty of contempt of this court and punished accordingly; and, further, that they show cause, if any they have, why they should not be adjudged guilty of conduct unbecoming members of the bar of the state, and be disbarred.

Respondent appeared in response to the citation, and filed an answer to the affidavit of the attorney general. The answer admits that respondent made the statement and order heretofore quoted. As justification therefor, he avers that he was not aware

court a petition for a rehearing of the case. Under the circumstances, the criticism undoubtedly constituted contempt, because the proceeding to which it related was still pending, and the question of contempt ought not to be based or dependent upon knowledge of the contemnor as to the final termination of the proceeding, except as that may be taken in consideration by the court as a mitigation of the offense.

In this connection, it is worthy of note that the theory that a criticism of a court relating to a matter finally disposed of is a contempt of court was adopted by the high courts of England because the King originally was a member thereof, and, in theory, still occupies a place on the bench. As to these courts, the rule, therefore, is merely the application of the well-established doctrine that "the King can do no wrong." The language of Blackstone is also based upon the cases formulating this doctrine; neither can therefore be said to be any authority in this country for such a proposition. The distinction is pointed out by Cockburn, Ch. J., in *Queen v. Lefroy*, L. R. 8 Q. B. 136, wherein he says: "The power to commit for contempt is fully gone into by Blackstone and Hawkins; but, though this power is recognized in the superior courts, it is nowhere said that an inferior court of record has any power to proceed for contempt out of court; and there is an obvious distinction between the superior courts and other courts of record. In the case of the superior courts at Westminster, which represent the one supreme court of the land, this power was coeval with their original constitution, and has always been exercised by them. These courts were originally carved out of the one supreme court, and are all divisions of the *aula regis*, where it is said the King in person dispensed justice, and their power of committing for contempt was an emanation of the royal au-

thority, for any contempt of the court would be a contempt of the sovereign."

That attorneys who published a criticism, characterized as libelous, of the supreme court of that state, were guilty of contempt of court, was also held in *Re Moore*, 63 N. C. 397.

As to private citizens, the doctrine was enunciated and applied in *United States ex rel. Guaranty Trust Co. v. Gehr*, 116 Fed. 520, where a citizen was punished for oral criticisms of a judge for issuing an injunction in a case, the criticism imputing to the judge want of integrity. To the same effect, also, are *State v. Morrill*, 16 Ark. 384, with respect to the publication of a libel made during term of court, but in reference to a case then decided, in which the offense of bribery was imputed to the court; *Queen v. Gray* [1900] 2 Q. B. 36, as to a publication of an article containing personal abuse of a judge with reference to his official conduct in a judicial proceeding which was terminated.

It is to be noted that *RE BREEN* is distinguishable upon its facts from most of the previously cited cases in that there the respondent, who was a judge, caused matter characterized as unfair criticism of one of the supreme court's decisions to be spread upon the records of his court. If the language used by the court is confined to the facts, it is not inconsistent with the doctrine enunciated by the weight of authority that generally a criticism of the action of the court in a matter then terminated does not constitute contempt.

The doctrine of that case was also applied in *Re Maestretti* (Nev.) 93 Pac. 1004, as to a district attorney who made oral criticisms in the district court of a decision of the supreme court, which were also spread upon the records of the district court by order of the judge.

that the attorney general and said District Attorney Maestretti had taken the position in this court that Dwyer killed Williams by mistake, thinking the latter was one O'Brien, until he was served with a copy of the affidavit of the attorney general; that, when the district attorney made the statement in the district court copied into the minutes, respondent understood and believed that no such theory had ever been mooted by the prosecution, as none such was ever urged or adopted in said district court; that at said time respondent understood that this court, in rendering its opinion and decision, and in using the language therein relative to the theory of the state, referred solely to the proceedings in the district court during the trial of the said Patrick Dwyer, and not to the proceedings in the supreme court; that, when said case was on trial in the said district court, respondent believed the case of *State v. Millain*, 3 Nev. 409, to be the leading authority in this state upon the question of change of venue in a criminal case, and an authority upon the qualification of jurors; that respondent considered his court bound by the *Millain Case*, and believed that this court had overruled said *Millain Case* without so stating; that respondent, believing that this court, in its opinion, "was stating matters and things that happened at the trial in said district court and criticizing wrongfully and unjustly the district attorney in his conduct of said trial and the ruling of respondent therein, and being without any information whatsoever of even the word 'mistake' having been uttered in connection with the homicide in the argument before the said supreme court, as it had not been before the district court, respondent made the statements and caused them to be entered in the minutes of the district court of Lander county; that, had respondent known of the question of mistake having been mentioned when the remarks of respondent objected to were being made, he would have modified or omitted altogether the last paragraph of said remarks, and now stands ready to obey the order of the court in that respect, not that mistake was ever relied on at the trial in the district court, for such is not the fact, but because the reference to mistake by the attorney general before the supreme court might have misled said court in its ruling; that, when defendant read in the opinion of the supreme court of the state of Nevada the following language, to wit: 'The theory of the state, if we understand it, was that the defendant killed Williams by mistake,'—he, the said defendant, felt not only aggrieved, but that an unjust reflection had been cast upon his court. for the reason that, under such a theory, it

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would have been the duty of said district court to have given an instruction to the jury upon the law as to what degree of crime, if any, a homicide committed by mistake belonged to, and, as no such instruction was given or asked for, the said defendant, for the time being at least, believed certain of his rulings were not fully considered by said supreme court. Defendant, with all possible deference, claims the right at all times to differ in opinion with the supreme court, state or national, or any of the judges thereof, or their opinions on matters of law, if in his judgment they are fairly the subject of comment; but he does not believe, and never has, in criticizing unfairly any court, judge, or opinion, and will not do so; and defendant denies emphatically that in any action or word of his it was his intention to impugn the integrity, honor, or dignity of the supreme court of the state of Nevada or any of its honorable members, and defendant is surprised and disappointed that the affidavit of the attorney general should contain aught tending to question the respect of defendant for said supreme court and the members thereof. Defendant deeply regrets the happening of the incident which has given rise to these proceedings, and regrets that his language used as aforesaid should have received the construction given it in the said affidavit of the honorable attorney general, for such was not the intention of defendant at the time, and never has been."

The question is presented for determination whether or not the language and order of respondent in question, in view of respondent's answer, is contemptuous or constitutes a breach of the duty which respondent, as a member of the bar of this court, is bound to observe; and, if it does, whether the offense is sufficiently grave to warrant disbarment or other action upon the part of this court. In fact, the question is presented whether or not the language and order could, in any event, be deemed contemptuous or warrant any action upon the part of this court, upon the theory that they are but criticisms of an opinion of a court which it is the province of anyone to indulge in, irrespective of whether such criticisms are just or unjust, or whether or not they are couched in respectful language. The right to criticize an opinion of a court, to take issue with it upon its conclusions as to a legal proposition, or question its conception of the facts, so long as such criticisms are made in good faith, and are in ordinarily decent and respectful language, and are not designed to wilfully or maliciously misrepresent the position of the court, or tend to bring it into disrepute, or lessen the respect due the authority to which a court of last resort is en-

titled, cannot be questioned. To attempt to declare any fixed rule marking the boundaries where free speech in reference to court proceedings shall end would be as dangerous as it would be difficult. The right of free speech is one of the greatest guaranties to liberty in a free country like this, even though that right is frequently and in many instances outrageously abused. Of scarcely less, if not of equal, importance, is the maintenance of respect for the judicial tribunals, which are the arbiters of questions involving the lives, liberties, and property of the people. The duty and power is imposed upon the courts to protect their good name against ill-founded and unwarranted attack, the effect of which would be to bring the court unjustly into public contempt and ridicule, and thus impair the respect due to its authority. While it is the duty of all to protect the courts against unwarranted attack, that duty and obligation rests especially upon the members of the bar and other officers of the court. It would be foolish, as well as useless, for anyone to contend that the very highest courts do not make mistakes. Courts themselves prove this by overruling previous decisions. The rules of this court, as in the case of all appellate courts, provide that, after a decision is rendered, the losing party has the right of petition for rehearing in order to call the court's attention to what is deemed a misconception of the case or an erroneous view of the law. This court has frequently granted rehearings, and there are several instances where the previous decision was either modified or a contrary view of the law taken in the final decision. It is appropriate here to say that, if the district attorney in the Dwyer Case believed that this court had misconceived the facts of the case, or misapplied the law in any material particular, the way was open to him, and it was his duty to have sought to have the same corrected upon petition for rehearing. If the trial judge observed that a mistake had been made either in fact or law, or thought that the opinion was so framed as to put his court in a false light, a suggestion from him to counsel would doubtless cause the matter to be properly presented to the court and the same investigated, and, if error was found to have been made, it would be corrected. Neither the district judge, nor the district attorney, saw fit to pursue such a course. This would be, at least, a more ethical procedure than to wait until opportunity to correct an error had passed, and then abuse the court for such alleged error. Even if this court had fallen into error in the statement which it incidentally made regarding what it understood to be the state's theory of the case, we can-

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not see any occasion for such strictures as those contained in respondent's statement, especially as no ruling was based thereon. Even if counsel for the state had not specifically argued in this court the theory of mistake, the expression might have been made, as we have before stated, very naturally in view of the testimony in reference to the quarrel between Dwyer and O'Brien, and Dwyer searching for O'Brien just previous to the shooting; the record being silent as to any positive statement negating the theory of mistake, and no contention ever having been made either in this or the Dwyer proceeding that this evidence was admissible upon any other theory.

What respondent said with regard to the Dwyer Case being a reversal of the Millain Case, if it could be segregated from the balance of the statement, could hardly be considered objectionable from any view, although we would have to disagree with the learned judge as to the effect of the opinion in the Dwyer Case. The Millain Case was tried in Storey county at a time when the population of that county was many times greater than that of Lander county at the time of the Dwyer trial, and the courts have distinguished between communities with a meager and a large population. In the Millain Case, after the motion for change of venue was made, the court proceeded and apparently without difficulty obtained 12 competent jurors from the number who were in attendance. It seems that but a small fraction of the number in Storey county at that time were called or examined. In the Dwyer Case nearly all the jurors obtainable in Lander county had been summoned on different venires and examined before 12 were obtained, and several of these retained to try the case showed on *voir dire* that they had opinions bordering on disqualification. Of the numerous witnesses examined on behalf of the state and the defendant on the motion for change of venue, only one stated that he believed that Dwyer could have a fair trial in that court. Threats had been made to take him from the sheriff and execute summary vengeance. Dwyer, a migrating gambler and stranger in Austin, had, soon after his arrival there, killed an innocent, popular, and worthy young man who had long resided in that place and was well known to all the residents, and naturally, owing to this deplorable incident, a strong feeling existed there against the defendant, although it alone may not have been sufficient to warrant a change of the place of trial. In other respects the two cases are distinguishable on the facts. We quoted from the Millain Case, and had no thought of reversing it. But, however, we do not question the right of respondent to

differ with us in the view he takes of the two cases. We do not question the right of respondent to take the view he did of the Millain Case. When he came to the conclusion that the Millain Case was controlling, and, under the interpretation which he placed upon it, required that he deny the motion for a change of venue, it became his duty to decide according to his conclusion. Upon appeal the case came under the prerogative of this court, and it was our province and duty to decide the appeal as we became convinced it should be decided. There is no word of criticism in the Dwyer opinion, "or unjust reflection," upon either the conduct of the district attorney or the trial judge, unless a respectful disagreement with the trial court upon a matter of law can be called a criticism, and we do not think it properly can be so called.

Respondent, considering that this court had erroneously stated as a fact something which, in his opinion, was unwarranted from the record, and which he characterized as stated possibly "for the purpose of bolstering up a decision" which, to his mind, "is neither founded on law, nor supported by fact," proceeds to declare the opinion as a whole to be an "abnormally strange document," that it was unfair both to the district attorney and the trial court, and a reversal of a former decision which had been the accepted law of this state for forty years. All of this is further characterized as "reprehensible if the court knew what it was doing, pitiful if it did not." It cannot reasonably be claimed in this case that the remarks of respondent are mere criticisms of an opinion of this court, which were inadvertently made because of misinformation as to what transpired in the presentation of the case upon appeal. It appears from the statement quoted that the assumed error upon the part of this court in reference to the theory of mistake was only made the excuse for the offensive language used in commenting upon the opinion as a whole. That respondent was in error in regard to all of his references to the opinion of this court would not have been deemed an occasion for citation, if such comments had not been expressed in language reflecting upon the honor, integrity, and dignity of this court. But respondent did not see fit to couch his criticisms in respectful language. Upon the contrary, the whole tenor of the statement and order of respondent is not only highly disrespectful, but contains covert intimations of grave misconduct upon the part of this court. To suggest that a court uses a false statement of a fact to "bolster up" an opinion characterized as an "abnormally strange document" is an intimation that the court is

guilty of such conduct as would justly warrant the impeachment of every member. This intimation, however, is modified by its author, so that the conduct of the members of this court is declared to be "reprehensible" only in the event "the court knew what it was doing," otherwise the position of the court would be only "pitiful." These observations and intimations are made by an attorney and officer of this court while acting in his capacity as a district judge, though they are not made in any judicial proceeding pending before him. That they were made with the view of receiving public attention is evidenced by the fact that they are ordered spread upon the minutes of his court to remain a perpetual impeachment of this court. There can be but one effect of such language published to the world by one holding the high and responsible position which respondent holds. That effect is to destroy, in a measure at least, public confidence in the integrity of the highest tribunal in the state, and thus impair the respect due its authority. To publish such statements as those of respondent in a community where the feeling had recently been high, and in places bordering upon mob violence, might result in the gravest wrong. If any considerable portion of a community is led to believe that, either because of gross ignorance of the law, or because of a worse reason, it cannot rely upon the courts to administer justice to a person charged with crime, that portion of the community, upon some occasion, is very likely to come to the conclusion that it is better not to take any chances on the courts failing to do their duty. Then may come mob violence with all its detestable features. To say that respondent meant no disrespect for this court is contrary to the plain meaning of the language used, and the order directing that it be spread upon the minutes of the district court.

Is the making of the false and defamatory statement by respondent a violation of his duty as an attorney and officer of this court? "It is the duty of an attorney not merely to observe the rules of courteous demeanor in open court, but also to abstain out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. For a breach of this duty an attorney may be suspended or disbarred." 4 Cyc. Law & Proc. p. 908, and authorities cited. Both by statute (Comp. Laws, § 2625) and inherent power, the supreme court is given control over attorneys who receive a license to practise through its authority to suspend or disbar them for good cause shown, and this is in no way a violation of their constitutional privilege. If any attorney of this court unwarrantedly

and without just and legal cause maligns a court in this state, this court, upon proper showing, may disbar him. Any tribunal that cannot tolerate free discussion and criticism of its decisions is justly entitled to contempt; but, on the other hand, little respect is due to a court that will hesitate to check or discipline any of its attorneys or officers who are so devoid of professional ethics and ordinary courtesy as to misrepresent and villify it in open court without any cause or semblance of reason.

In regard to respondent's claim that he did not intend any disrespect, and that he was not aware that the prosecution in the Dwyer Case had advanced anything in this court regarding the theory of killing by mistake, it may be said that with words, as with acts, it is presumed that the offender intended their plain meaning and natural and probable consequences. If the terms "reprehensible" and "pitiful," as used by respondent, are not clearly disrespectful and scurrilous, it is hard to conceive of any that would be; and it is but reasonable to conclude that they were employed and spread upon the minutes by respondent in an effort to belittle and discredit this court in its opinion for the purpose of trying to sustain his own before the bar of public opinion in a community where a strong feeling existed in regard to the Dwyer Case. In *Re Chartz*, 29 Nev. —, 5 L.R.A. (N.S.) 916, 85 Pac. 353, a decision filed March 1, 1906, an attorney of this court had his brief stricken out, was reprimanded and warned and charged with costs of the proceedings for stating in the brief that in his opinion the decisions favoring the power of the state to limit the hours of labor, on the ground of the police power of the state, were wrong and written by men who had never performed manual labor, or by politicians and for politics, and that they did not know what they wrote about. In that case we said: "By using the objectionable language stated, respondent became guilty of a contempt which no construction of the words can excuse or purge. His disclaimer of any intentional disrespect to the court may palliate, but cannot justify, a charge which, under any explanation, cannot be construed otherwise than as reflecting on the intelligence and motives of the court." A number of decisions regarding misconduct by attorneys are reviewed in that case. We quoted with approval language holding that, where words are offensive and insulting *per se*, the offender may be punished, and that the disavowal of any intention of disrespect may tend to excuse, but cannot justify, them. We there quoted with approval from *Sears v. Starbird*, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. 531, where an attorney was censured 17 L.R.A. (N.S.)

and his brief was stricken out by the supreme court of California because it contained reflections upon the judge of the superior court. This was equivalent to saying that we will protect the district courts of this state from the abuse of attorneys who are officers of this court, and we feel justified in extending the same protection to this tribunal. In line with other decisions cited there we quoted from the opinion of the chief justice, speaking for the court, in *State v. Morrill*, 16 Ark. 384: "If it were the general habit of the community to denounce, degrade, and disregard the decisions and judgments of the courts, no man of self-respect and just pride of reputation would remain upon the bench, and such only would become the ministers of the law as were insensible to defamation and contempt. But happily, for the good order of society, men, and especially the people of this country, are generally disposed to respect and abide the decisions of the tribunals ordained by government as the common arbiters of their rights. But, where isolated individuals, in violation of the better instincts of human nature, and disregardful of law and order, wantonly attempt to obstruct the course of public justice by disregarding and exciting disrespect for the decisions of its tribunals, every good citizen will point them out as proper subjects of legal animadversion. A court must naturally look first to an enlightened and conservative bar, governed by a high sense of professional ethics, and deeply sensible, as they always are, of its necessity to aid in the maintenance of public respect for its opinions."

Nor is the fact that defendant did not know that the district attorney and attorney general had argued regarding the theory of mistake in this court any justification. As an attorney and incumbent of the high office of district judge, he knew, or certainly ought to have known, that it was not proper for him to charge this court or any tribunal or individual with any offense, however high or low, or with any shortcoming, simply because he did not know. He was aware of ample that had transpired before him when the evidence was introduced by the prosecution in its case in chief of the quarrel between Dwyer and O'Brien and that Dwyer had threatened and was seeking O'Brien on the evening he killed Williams, a stranger to him, to justify the statement made as an inference in the opinion of this court to which he took exception, even if the district attorney and the attorney general had not presented anything in their argument regarding the theory of mistake. It is the duty of all attorneys to be honest and honorable, to conduct themselves as gentlemen, and to show due respect and courtesy,

the other to the governor of this state. The first referred to three specified actions tried in certain courts and appealed therefrom, and to decisions of this court therein, in each of which the accused was counsel for the party ultimately defeated; and the letter to the governor suggested the impeachment of the justices because of their participation in the decisions so rendered. Before this, the accused proffered the letter to the chief justice to the editor of the Minneapolis Journal, who was unwilling to publish it. About the same time he gave copies of both letters to the editor of the St. Paul Dispatch, in which they were in large part published, and through whose manager they were furnished to the Associated Press, and thereupon published, in whole or in part, by various newspapers in this and other states. The cases and decisions referred to in the letter to the chief justice are the following: Minneapolis Trust Co. v. Menage, reported (1) in 73 Minn. 441, 76 N. W. 195; (2) 81 Minn. 186, 83 N. W. 481; (3) 86 Minn. 1, 90 N. W. 3; Ahern v. Hindman, 101 Minn. 34, 111 N. W. 734; and Griswold v. McGee, 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382. This letter in its entirety covers 31 pages of the printed record; and to the proper understanding of those parts which will be quoted, it may be stated that the case last mentioned involved the rights of a surviving widow in the estate of her deceased husband.

Addressing the chief justice, the accused wrote: "Sir: The organic law creating the tribunal over which you now preside renders its constituent membership immune from civil liability for any erroneous decision officially made, even though it be corrupt. The sole remedy is by impeachment. Preliminary to moving articles, I submit three specifications. They are selected as fair samples of what the court has now and then done and is doing, and not because they stand alone, or are worse than others." Then follows what purports to be a detailed history of the three causes and the disposition thereof in this court, interspersed with much offensive matter, the most conspicuous of which is the following, concerning the opinion of this court in the Griswold Case: "You assigned it [the property involved] to one who has no better right to it than the burglar to his plunder. It seems like robbing a widow to reward a fraud, with the court acting as a fence, or umpire, watchful and vigilant that the widow get no undue advantage. . . . The point is this: Is a proper motive for the decision discoverable short of assigning to the court emasculated intelligence, or a constipation of morals and faithlessness to duty? If the State Bar Association, or a committee chosen

from its ranks, or the faculty of the University Law School, aided by the researches of its hundreds of bright, active students, or if any member of the court, or any other person, can formulate a statement of a correct motive for the decision, which shall not require fumigation before it is stated, and quarantine after it is made, it will gratify every right-minded citizen of the state to read it."

The letter to the governor contains the following: "If [the decisions mentioned are] not right, is it possible in the making of them for the court to have been honestly wrong? . . . It goes to the integrity and stability of the state if the members of the court cannot be 'men learned in the law,' as required by the Constitution, or honest, as required by good morals; and, if there exist good prima facie reasons for challenging them in either regard, the matter should receive prompt attention. . . . If no proper motive for the decisions can be gathered from the decisions themselves, it seems to me that impeachment would be proper, leaving the senate free to make inquiry as to the motive outside of the decisions; and I am constrained to think that not a little evidence can be adduced relevant thereto."

In justification for the acts of the accused, above detailed, nothing is proven, except only the decisions in question and the records of this court with respect thereto. And nowhere in either letter is there any suggestion that their author had been counsel for the defeated party in any of the actions mentioned,—no indication that he was suffering from the sting of disappointment, and for that reason necessarily and inevitably biased, and, it might be, revengeful, because of his defeat. The statement, in one letter, that the decisions had been "selected as fair samples," was calculated, and was perhaps intended, to mislead the public in this regard; and we are satisfied, and find, that these letters were not composed or published with the expectation that any official action should be based thereon, and that the letter first mentioned was so sent to the chief justice for the purpose of insulting him and the other justices of this court.

The first opinion in the Menage Case, of which the accused complains, and the one determinative of the controversy, was that reported in 81 Minn. 186, 83 N. W. 481. That opinion announced the law of the case, followed in the lower court upon the last trial and in the final appeal. It was rendered August 8, 1900, upwards of seven years before the publication of these letters. The chief justice whose impeachment is now proposed dissented. Two of the concurring justices have retired from the bench. The remaining two have since been re-elected. Four

legislatures convened and adjourned before it occurred to the accused to suggest that any of the justices had been guilty of any impeachable offense. In the Ahern Case the court held that no cause of action had been either alleged or proven in the court below; and, as this court had done in scores of previous cases (but as the accused asserts it should not have done), it thereupon proceeded to refute the reasons assigned for a contrary conclusion in the trial court's memorandum, not made a part of the order appealed from. It did not hold that a right decision was vitiated on account of an erroneous reason for it, but held that a wrong decision could not be sustained because of an insufficient reason therefor so stated. In the Griswold Case the court announced the well-established doctrine that the right of a widow in her deceased husband's estate is governed by the law as it exists at the time of his death, and that a wife during her husband's lifetime has no vested right to any of his property of which she cannot be deprived by legislative enactment. At the time of Griswold's death the statute provided that, if his title to any property had been previously devested by execution sale, the widow could claim no interest therein; and it was accordingly held that her asserted claim to the land in question was without validity.

Inasmuch as the accused himself has said that "the sharp, focal point of the letter" is the decision in the Griswold Case, we take occasion to say that, so far as we are advised, its correctness in point of law has never been elsewhere questioned. Certain it is that no unbiased mind can find in these records or decisions any pretense of an excuse for the many insulting insinuations and statements with which these letters abound. Each letter was a gross libel upon the justices referred to, but each was composed and published long after the final determination of the causes in which the decisions complained of were written; and the case against the accused is, as we conclude, divisible into two distinct elements, governed by wholly different principles: (1) The publication of the letter thus addressed to the governor, and of the matter contained in the body of the other; (2) the addressing and sending of such other letter to the chief justice.

1. Our Revised Laws of 1905 provide (§ 2679, subd. 9) that an attorney, when admitted to practice, shall take an oath that he will conduct himself "as an attorney and counselor at law in an upright and courteous manner," to the best of his learning and ability, "with all good fidelity as well to the court as to the client;" (§ 2281) that every attorney shall "observe and carry out

the terms of his oath," and "maintain the respect due to courts of justice and judicial officers;" and (§ 2290) that "an attorney at law may be removed or suspended by the supreme court for any wilful misconduct in his profession," or "for a wilful violation of his oath, or of any duty imposed upon an attorney by law." These quoted words contain all of the statutes cited or relied upon by counsel for the prosecution; and no doubt they are declaratory of the common law and in harmony with the statutes of our sister states. The courts are not agreed as to whether an attorney can be removed from office on other than statutory grounds; but, inasmuch as good moral character is a prerequisite to admission, it is generally, and perhaps everywhere, held that an attorney may forfeit his office by such misconduct, professional or nonprofessional, as clearly shows that he is unfit to be an attorney or to associate with honest men. It has been held in some cases that such unfitness may be established by proof of one specific act of misconduct; and it may be (although we do not so decide) that a libelous publication by an attorney, directed against a judicial officer, could be so vile and base and of such a nature as to justify the disbarment of its author. This was the rule applied in *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407, a case greatly relied upon by the prosecution. That cause came before the court upon appeal, and involved only the right of an attorney to practise in the inferior court from which the appeal was taken. It was held that the libel published by the accused and referring to the judge evidenced such a "degree of turpitude and depravity" on the part of the attorney that the court might remove him, and, having in its discretion done so, the appellate court "ought not to reverse its action." It was expressly and in so many words held (page 255 of 33 W. Va.) that "the misbehavior was not that of an officer of the court in his official capacity, but of an individual in his private capacity."

We are not prepared to say that the acts charged against the accused bring him within the rule so applied. The letters in question, though very reprehensible, in their reference to the court, express upon their face merely the personal opinion of the accused. They charge nothing against it, other than an asserted disregard of legal principles, with unwarranted deductions therefrom as to its motives. Furthermore, the disbarment of the accused is sought for professional delinquency alone. The ground stated is a violation by him of his duty "to observe and carry out the terms of his oath" and to "maintain the respect due to courts of justice and judicial officers;" and the ques-

tion presented is, how far the accused in what he did acted in a professional or in a private capacity. It must be conceded that the letters constituted no part of the proceedings in any cause. The accused, in what he did, represented no client; and this case in this respect is distinguishable from those in which insulting or scandalous words concerning a judge were spoken or written by the attorney in a strictly professional capacity in an action in court, upon a trial, or in some paper pertaining thereto. Such cases have arisen, some of which are cited by the prosecution, in which the libelous or scandalous matter concerning one or more judges, constituting the basis of the charge, was made a part of a brief, as in *United States ex rel. Hallett v. Green* (C. C.) 85 Fed. 857, and *Re Philbrook*, 105 Cal. 471, 45 Am. St. Rep. 59, 38 Pac. 511, 884; a pleading, as in *People ex rel. Skelton v. Brown*, 17 Colo. 431, 30 Pac. 338, and *Re Snow*, 27 Utah, 265, 75 Pac. 742; a petition for a rehearing, as in *Re Woolley*, 11 Bush, 95, and *Re Robinson* (Wash.) 15 L.R.A. (N.S.) 525, 92 Pac. 929; or an affidavit in a cause, as *Re Murray*, 33 N. Y. S. R. 831, 11 N. Y. Supp. 336. Of like nature, also, is *Re Breen* (Nev.) ante, 572, 93 Pac. 997, in which a judge of the district court was disbarred for having stated in his court that a certain opinion of the supreme court was an "abnormally strange document," which was "reprehensible" only in the event "the court knew what it was doing," and otherwise "pitiful," and *Re Maestretti* (Nev.) 93 Pac. 1004, in which the prosecuting attorney before the district court made contemptuous remarks concerning the same opinion.

The appeals referred to by the accused having been fully disposed of when the letters were written, this case is also unlike those in which the libel or slander tended and was designed to influence the judge in some matter still pending. Such a case was *Ex parte Cole*, 1 McCrary, 405, Fed. Cas. No. 2,973, in which the attorney was charged with inciting newspaper publications disparaging the court, with intent to intimidate the judge in a pending suit. Such, also, was the case of *Re Collins*, 147 Cal. 8, 81 Pac. 220, in which the attorney undertook, as in this case, to prefer charges with the governor, but, unlike the accused here, caused to be published false charges against the judge "to influence his action or discredit his proceedings" in a matter still undetermined. Such publications, by whomsoever made, having reference to a particular case pending, and tending to prejudice the decision therein, are punishable summarily; and in the application of this principle an action is pending upon an appeal so long as a motion for a rehearing is permissible therein. 17 L.R.A. (N.S.)

State v. Tugwell, 19 Wash. 238, 43 L.R.A. 717, 52 Pac. 1056; *People ex rel. Atty. Gen. v. News-Times Pub. Co.* 35 Colo. 253, 84 Pac. 912; *Re Chadwick*, 109 Mich. 588, 67 N. W. 1071; *State ex rel. Crow v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79. In this respect the matter before us differs from cases cited in the brief of the prosecution. In *State v. McLaugherty*, supra, the libel for which the attorney was disbarred had reference to the conduct of the court as to indictments not yet disposed of. In *Re Brown*, 3 Wyo. 121, 4 Pac. 1085, the words were uttered on the very day the opinion which called them forth was handed down, evidently before entry of judgment, and while a petition for a rehearing was allowable. We have, indeed, found no case, Federal or state, in which an attorney was disbarred or suspended for any utterance written or spoken concerning a decision or ruling of a judge in a cause after its final determination, and not addressed to the judge in person. Previous nonexercise of such power might well indicate its nonexistence.

The great weight of authority, moreover, upholds the doctrine that every citizen has the unrestricted right to comment upon and criticise such rulings of the court (after the litigation is concluded), subject only to liability therefor in a criminal or civil action triable by a jury. A few courts adhere to the ancient common-law doctrine that criticism of a judicial officer, even though made after the determination of the cause, may constitute contempt of court. Such was the holding in *State v. Morrill*, 16 Ark. 384, and *Burdett v. Com.* 103 Va. 838, 68 L.R.A. 251, 106 Am. St. Rep. 916, 48 S. E. 878. The law is so stated, also, in *Re Chadwick*, supra, and in *State ex rel. Crow v. Shepherd*, supra, though in each of these statements were *obiter*, inasmuch as the publications complained of therein had reference to rulings in actions not finally determined on appeal. But these rulings are exceptional. In England summary punishments for what Lord Hardwicke called "scandalizing the court itself" have become obsolete. There, as elsewhere, "courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them." *McLeod v. St. Aubyn*, 68 L. J. P. C. N. S. 137, 143, [1899] A. C. 549. This, also, "may be considered the American doctrine." *Ex parte Green*, 46 Tex. Crim. Rep. 576, 66 L.R.A. 727, 108 Am. St. Rep. 1035, 81 S. W. 723, 725. In the terse, but comprehensive, language of Mr. Justice Holmes: "When a case is finished, courts are subject to the same criticism as other people." *Patterson v. Colorado*, 205 U. S. 454, 463, 51 L. ed. 879, 881, 27 Sup. Ct. Rep. 556.

In this connection, the rule and the reasons for it, as stated by other courts, are worthy of repetition. It was said, by Wright, Ch. J., in *State v. Dunham*, 6 Iowa, 245, 256, 257: "When a case is disposed of, and the decision announced, such decision becomes public property, . . . subject to public scrutiny and investigation. In such cases it is perfectly competent and lawful for anyone to comment upon the decision and expose its errors and inconsistencies. . . . And should those thus commenting leave the subject and impute dishonesty or base motives to the judge, he may be punished by indictment for a libel, he may be answerable in damages in a civil action, or he may be liable to both prosecutions." In *State v. Tugwell*, 19 Wash. 256, 43 L.R.A. 717, 52 Pac. 1062, the court, holding that a libel prejudicial to pending litigation constitutes a contempt of court, was careful, also, to add: "It is not intended to intimate or suggest that any citizen of the state has not a legal right to comment upon, criticize, and freely and without restriction from any lawful authority discuss, any cause determined by any of the courts of this state after the final disposition of such case." In *State v. Kaiser*, 20 Or. 50, 57, 8 L.R.A. 584, 23 Pac. 964, the court held that it had no inherent authority to "punish anyone for criticizing the court on account of its procedure in matters which have fully terminated, however much its dignity and standing may be affected thereby, however unjust, rude, or boorish may be the criticism, or whatever may be its effect in bringing the administration of the law into disrepute." And in *State v. Bee* Pub. Co. 60 Neb. 282, 296, 50 L.R.A. 195, 83 Am. St. Rep. 531, 83 N. W. 204, the court, referring to its rulings in causes concluded, says: "Our decisions and all our official actions are public property, and the press and the people have the undoubted right to comment on them, and criticize and censure them as they see fit. Judicial officers, like other public servants, must answer for their official actions before the chancery of public opinion." In *State ex rel. Atty. Gen. v. Circuit Court*, 97 Wis. 1, 38 L.R.A. 554, 65 Am. St. Rep. 90, 72 N. W. 193, the circuit judge was forbidden by writ of prohibition from punishing summarily the petitioners (one of whom was an attorney) for a publication charging him with being influenced by corrupt motives, which had reference to "proceedings in cases already heard and decided, and not to matters then pending or on trial." In its opinion granting the writ, the court said (page 12 of 97 Wis.): "Important as it is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there 17 L.R.A. (N.S.)

are other rights guaranteed to all citizens by our Constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiments 'on all subjects.'"

In all the Federal courts the law is, as above stated, made so by act of Congress, in its original form passed March 2, 1831. [4 Stat. at L. 487, chap. 90.] The legislation was induced by the acquittal of United States District Judge Peck, of Missouri, when impeached for having imprisoned an attorney for criticizing one of his decisions after the cause was ended. The act was drawn by James Buchanan, who was one of the managers of the impeachment. Such is the history of the legislation as detailed in a learned opinion by Judge Thomas G. Jones, of Alabama, in *Ex parte McLeod* (D. C.) 120 Fed. 130, in which it is said (page 136): "Such criticism is the right of the citizen, and essential, not only to the proper administration of justice, but to the public tranquillity and contentment. Withdrawing power from courts to summarily interfere with such exercise of the right of the press and freedom of speech deprives them of no useful power." The following decisions are also cited as enunciating the same principle: *King v. Charlier* (1803) Rap. Jud. Quebec 12 B. R. 385; *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415; *State v. Anderson*, 40 Iowa, 207; *Field v. Thornell*, 106 Iowa, 15, 68 Am. St. Rep. 281, 75 N. W. 685; *Cheadle v. State*, 110 Ind. 301, 59 Am. Rep. 199, 11 N. E. 426; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *Post v. State*, 14 Ohio C. C. 111; *Percival v. State*, 45 Neb. 741, 50 Am. St. Rep. 568, 64 N. W. 221; *Rosewater v. State*, 47 Neb. 630, 66 N. W. 640; *Re Dalton*, 46 Kan. 253, 26 Pac. 673; *Re Robinson*, 117 N. C. 533, 53 Am. St. Rep. 596, 23 S. E. 453; *Re Cooke*, 116 La. 723, 41 So. 49; *Ex parte Steinman*, 95 Pa. 220, 40 Am. Rep. 637; *Re Sturoc*, 48 N. H. 428, 432, 97 Am. Dec. 626.

Every newspaper proprietor within the state, and every other citizen therein, in his capacity as such, might, therefore, as we hold, have written and published the letter of the accused to the governor, and the matter contained in the body of the letter to the chief justice, and not be answerable for so doing, otherwise than in an action triable by a jury of his peers; and, though one became an attorney, he still retains his rights as a citizen and a freeman. "Fidelity to the court," as was said in the Pennsylvania case above cited, "includes many particulars, but they all evidently concern his

official relations." The attorney is bound to render to the court the respect which is its "due" under the law. This is the full extent of his obligation. Notwithstanding his oath, he may exercise his constitutional rights. No statute could have any validity which would undertake to impair or abridge them. He may sue a judge in his own behalf or for another, alleging every fact pertinent to the case, and not thereby fail in his professional duty. Nor is he "professionally answerable for a scrutiny into the official conduct of the judges which would not expose him to legal animadversion as a citizen." *Austin's Case*, 5 Rawle, 205, 28 Am. Dec. 657. Above all others, the members of the bar have the best opportunity to become conversant with the character and efficiency of our judges. No class is less likely to abuse the privilege, as no other class has as great an interest in the preservation of an able and upright bench. The rule contended for by the prosecution, if adopted in its entirety, would close the mouths of all those best able to give advice, who might deem it their duty to speak disparagingly. "Under such a rule," so far as the bar is concerned, "the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence." *State ex rel. Atty. Gen. v. Circuit Court*, supra.

Chief Justice Sharswood was not only a most eminent jurist, but was also in his day the very highest authority in all matters pertaining to professional ethics. "No class of the community," said he, in the *Steinman Case*, supra, "ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality, or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a courthouse, or, if they do, it is only at intervals as jurors, witnesses, or parties. To say that an attorney can only act or speak on this subject under liability to be called to account, and to be deprived of his profession and livelihood, by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system." This language was not written because of any peculiar provision of the Pennsylvania Constitution. It is applicable everywhere; and we adopt as our conclusion here these words of Justice Brewer: "After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even

his integrity free from stain." *Re Pryor*, 18 Kan. 72, 76, 26 Am. Rep. 747.

In what we have said it is not our purpose to extenuate in the least the misbehavior of the accused. Few acts could be more disgraceful than the deliberate publication by an attorney capable of correct reasoning of such baseless insinuations. The case is of that sort which, considered of itself, might easily make bad law. But the question presented is vitally important to the entire bench and bar of the state, and even more so to its people, whose servants we are. It concerns not merely the power of the court to protect itself from undeserved censure, but involves in its determination that independence of the bar, upon the preservation of which civil liberty itself in large degree depends; and suspicion and distrust of the courts will not result from this ruling or its future application, as counsel for the prosecution predict. The people can be relied upon to discriminate, in the long run, between truth and falsehood; and the profession, from which our judges are chosen, taken as a whole, are always both eager and able to protect and defend the court when unjustly assailed. This very proceeding was instituted upon the suggestion of the State Bar Association, and one of its representatives assisted in its prosecution. Such misconduct, moreover, brings its own appropriate punishment. A lawyer, however eminent, ordinarily commits professional suicide when he undertakes to thus malign the highest court of the state. By so doing he almost inevitably lessens his influence and standing among his associates, and his clients quickly seek other counsel. We have not heard that the judiciary was discredited or dishonored in Pennsylvania because it was held there to be both "the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption," [Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637], or in Wisconsin by the denial to its judiciary of that immunity from criticism asserted in *State ex rel. Atty. Gen. v. Circuit Court*. And we have yet to learn that the Federal courts or judges have failed to maintain their dignity or to retain the respect and confidence of the people because powerless since act March 2, 1831, chap. 99, 4 Stat. at L. 487, U. S. Comp. Stat. 1901, p. 583, to punish summarily those guilty of such utterances, not addressed to the judge in person. "Respect to courts cannot be compelled. It is the voluntary tribute of the public to worth, virtue, and intelligence, and, whilst they are found upon the judgment seat, so long and no longer will they retain the public confidence." *Stuart v. People*, 4 Ill. 395, 405.

2. The question remains whether the accused was guilty of professional misconduct in sending to the chief justice the letter addressed to him. This was done, as we have found, for the very purpose of insulting him and the other justices of this court; and the insult was so directed to the chief justice personally because of acts done by him and his associates in their official capacity. Such a communication, so made, could never subserve any good purpose. Its only effect in any case would be to gratify the spite of an angry attorney and humiliate the officers so assailed. It would not and could not ever enlighten the public in regard to their judicial capacity or integrity. Nor was it an exercise by the accused of any constitutional right, or of any privilege which any reputable attorney, uninfluenced by passion, could ever have any occasion or desire to assert. No judicial officer, with due regard to his position, can resent such an insult otherwise than by methods sanctioned by law; and for any words, oral or written, however abusive, vile, or indecent, addressed secretly to the judge alone, he can have no redress in any action triable by a jury. "The sending of a libelous communication or libelous matter to the person defamed does not constitute an actionable publication." 18 Am. & Eng. Enc. Law, 2d ed. p. 1017. In these respects the sending by the accused of this letter to the chief justice was wholly different from his other acts charged in the accusation, and, as we have said, wholly different principles are applicable thereto.

The conduct of the accused was in every way discreditable; but, so far as he exercised the rights of a citizen, guaranteed by the Constitution and sanctioned by considerations of public policy, to which reference has been made, he was immune, as we hold, from the penalty here sought to be enforced. To that extent his rights as a citizen were paramount to the obligation which he had assumed as an officer of this court. When, however, he proceeded to thus assail the chief justice personally, he exercised no right which the court can recognize, but, on the contrary, wilfully violated his obligation to maintain the respect due to courts and judicial officers. "This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646. And there appears to be no distinction, as regards the principle involved, between the indignity of an assault by an attorney upon a judge,

induced by his official act, and a personal insult for like cause by written or spoken words addressed to the judge in his chambers or at his home or elsewhere. Either act constitutes misconduct wholly different from criticism of judicial acts addressed or spoken to others. The distinction made is, we think, entirely logical and well sustained by authority. It was recognized in *Ex parte McLeod* (D. C.) 120 Fed. 130. While the court in that case, as has been shown, fully sustained the right of a citizen to criticize rulings of the court in actions which are ended, it held that one might be summarily punished for assaulting a judicial officer, in that case a commissioner of the court, for his rulings in a cause wholly concluded. "Is it in the power of any person," said the court, "by insulting or assaulting the judge because of official acts, if only the assailant restrains his passion until the judge leaves the court building, to compel the judge to forfeit either his own self-respect and the regard of the people by tame submission to the indignity, or else set in his own person the evil example of punishing the insult by taking the law into his own hands? . . . No high-minded, manly man would hold judicial office under such conditions."

That a communication such as this, addressed to the judge personally, constitutes professional delinquency for which a professional punishment may be imposed, has been directly decided. "An attorney who, after being defeated in a cause, writes a personal letter to the trial justice, complaining of his conduct and reflecting upon his integrity as a justice, is guilty of misconduct, and will be disciplined by the court." *Re Mannheim*, 113 App. Div. 136, 99 N. Y. Supp. 87. The same is held in *Re Griffin*, 15 N. Y. S. R. 400, 1 N. Y. Supp. 7, and in *Re Wilkes*, 24 N. Y. S. R. 292, 3 N. Y. Supp. 753. In the latter case it appeared that the accused attorney had addressed a sealed letter to a justice of the city court of New York, in which it was stated, in reference to his decision: "It is not law; neither is it common sense. The result is, I have been robbed of \$80." And it was decided that, while such misconduct was not a contempt under the statute, the matter should be "called to the attention of the supreme court, which has power to discipline the attorney." "If," says the court, "counsel learned in the law are permitted by writings leveled at the heads of judges, to charge them with ignorance, with unjust rulings, and with robbery, either as principals or accessories, it will not be long before the general public may feel that they may redress their fancied

grievances in like manner, and thus the lot of a judge will be anything but a happy one, and the administration of justice will fall into bad repute."

The recent case of *Johnson v. State* (Ala.) 44 So. 671, was in this respect much the same as the case at bar. The accused, an attorney at law, wrote and mailed a letter to the circuit judge, which the latter received by due course of mail, at his home, while not holding court, and which referred in insulting terms to the conduct of the judge in a cause wherein the accused had been one of the attorneys. For this it was held that the attorney was rightly disbarred in having "wilfully failed to maintain the respect due to him [the judge] as a judicial officer, and thereby breached his oath as an attorney." As recognizing the same principle, and in support of its application to the facts of this case, we cite the following: *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214; *Beene v. State*, 22 Ark. 149; *Com. v. Dandridge*, 2 Va. Cas. 408; *People ex rel. Elliott v. Green*, 7 Colo. 237, 244, 49 Am. Rep. 351, 3 Pac. 65, 374; *Smith's Appeal*, 179 Pa. 14, 36 Atl. 134; *Scouten's Appeal*, 186 Pa. 270, 40 Atl. 481.

Our conclusion is that the charges against the accused have been so far sustained as to make it our duty to impose such a penalty as may be a sufficient lesson to him and a suitable warning to others. In this we put aside the letter to the governor and the publication in the newspapers, and consider only the misconduct of the accused, wherein, as we hold, he was guilty of professional delinquency. He is a practitioner well advanced in life, of an age when it is hardly possible to adapt one's self to a new calling. Perpetual disbarment would be to him a punishment of the severest character. It might take from him his only source of income. So far as we are advised, he has not on any previous occasion shown like disrespect to the courts; and we are not unmindful of the rule that such disbarment should not be inflicted arbitrarily, or "unless," as was said in *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569, "absolutely necessary to protect the court and the public from one shown . . . to be unfit to be a member of an honorable profession."

It is the judgment of the court that the accused be suspended from practising as an attorney and counselor at law in any of the courts of this state for the period of six months.

Let judgment be entered accordingly.

Petitions for rehearing and modification denied.

17 L.R.A. (N.S.)

NEW HAMPSHIRE SUPREME COURT.

ETHEL L. PRESCOTT

v.

PERCIVAL M. ROBINSON.

(74 N. H. 460, 69 Atl. 522.)

Damages — injury to pregnant woman — deformity of child.

1. Damages for personal injuries to a pregnant woman may include compensation for mental suffering because of probable deformity of the child because of the injury, as well as for her disappointment at the birth of a deformed child, but not for regret because of the child's suffering on account of the deformity.

Same — child's inability to labor.

2. A pregnant woman injured by another's negligence so as to cause the child to be born deformed cannot hold the negligent person liable to her for the pain and suffering and inability to labor of the child.

(March 3, 1908.)

Case Note. — Mental anguish as an element of damages for personal injuries to pregnant woman.

The earlier cases upon this subject are collected and discussed in a note to *Tunnicliffe v. Bay Cities Consol. R. Co.* 32 L.R.A. 142. As is there shown, mental anguish may be considered as an element of damages in cases of this character in so far as it is a part of the mother's personal injuries; but any mental anguish following the birth or miscarriage is considered too remote.

In *PRESCOTT v. ROBINSON* this same general rule is followed; but the decision is apparently broader in that it also permits recovery for mental anguish suffered because of apprehension, before the birth, of the possible deformity of the child, and also for mental anguish at the time of birth because of the deformity. These points, however, are not made prominent in the cases cited in the above note.

In the recent cases the same rule is followed, and mental anguish is considered as an element of the damages in so far as it accompanies actual physical suffering and is a part of the personal injuries.

Thus, in *West v. St. Louis Southwestern R. Co.* 187 Mo. 351, 86 S. W. 140, the following charge was upheld by the court: "And, in estimating such damages, you should take into consideration the character and extent of her injuries, the fact, if you so find from the evidence, that they are permanent, together with the physical pain and mental anguish she has suffered in consequence thereof."

So, also, in *Gulf, C. & S. F. R. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278, a charge was upheld which directed the jury, in the event that the plaintiff was entitled to a verdict, to assess his damages for such

EXCEPTIONS by defendant to rulings of the Superior Court for Hillsborough County overruling a demurrer to the declaration and a motion to strike out parts thereof in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Case discharged.

The declaration sought damages for injuries caused by collision with defendant's automobile, of such a character that the child of which plaintiff was pregnant was born deformed, and for mental distress on account of the dread of the effect of the injuries upon the unborn child, and plaintiff's suffering by reason of the deformity and diseased condition of the child, which was born deformed because of the accident. She claimed a right of action for all her past, present, and future injuries, pain and suffering in mind and body, and inability to labor, and all the injuries, pain, and suffering and inability to labor of the child. Defendant demurred to the declaration, and moved to strike out the portions claiming damages for suffering because of the child's deformity.

Further facts appear in the opinion.

Messrs. Branch & Branch for defendant.

Messrs. Burnham, Brown, Jones, & Warren and Robert L. Manning, for plaintiff:

The right to one's person may be said to be a right of complete immunity.

Atlanta Street R. Co. v. Jacobs, 88 Ga.

sum as would be a fair and reasonable compensation for the injuries and physical and mental suffering sustained by his wife.

In *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315, it was held that an instruction that the damages would include compensation for mental suffering and for wounded sensibilities and affection was correct, and was not erroneous in meaning that the plaintiffs should have redress for the loss of their anticipated offspring, where in another part of the charge the jury had been expressly told that such loss could not be considered in estimating the damages.

In *Berger v. St. Paul City R. Co.* 95 Minn. 84, 103 N. W. 724, the verdict was held not to be excessive in view of the great mental and physical suffering of the plaintiff.

In *Sullivan v. Old Colony Street R. Co.* 197 Mass. 512, 83 N. E. 1091, there was some evidence tending to show that the injury to the plaintiff caused the premature birth of a child conceived about seven months after the accident. In a suit for damages for the injuries, the plaintiff included a demand for damages for the mental anguish suffered in connection with the premature birth. The court said: "The mental sufferings for which damages can be recovered . . . are limited to those which result to the person injured as the

647, 15 S. E. 825; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65, 9 So. 722; *Mann Boudoir Car Co. v. Dupre*, 21 L.R.A. 289, 4 C. C. A. 540, 13 U. S. App. 183, 54 Fed. 646; *Tunnicliffe v. Bay Cities Consol. R. Co.* 107 Mich. 261, 65 N. W. 226; 1 *Sutherland, Damages*, 3d ed. § 2; *Lunt v. Philbrick*, 59 N. H. 59.

The mental suffering directly consequential to the production of a deformed child as a result of the defendant's wrong is compensable.

Barnes v. Campbell, 60 N. H. 27; *Kimball v. Holmes*, 60 N. H. 163; *Louisville & N. R. Co. v. Hull*, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433; *Lindsay v. Oregon Short Line R. Co.* 13 Idaho, 477, 12 L.R.A. (N.S.) 184, 90 Pac. 984; *Burney v. Children's Hospital*, 169 Mass. 57, 38 L.R.A. 413, 61 Am. St. Rep. 273, 47 N. E. 401; *Walker v. Boston & M. R. Co.* 71 N. H. 271, 51 Atl. 918; *Watson, Damages for Personal Injuries*, § 195.

Plaintiff's mental suffering caused by the defendant's act, and arising from the maimed and deformed condition of her child, is an element of damages for which recovery will lie.

Barnes v. Campbell, supra.

Walker, J., delivered the opinion of the court:

The demurrer and motion present the question whether, under the allegations of the declaration, the plaintiff is entitled to

necessary or natural consequence of the physical injury, but sentiments of grief, sorrow, and mourning which are aroused by extraneous causes, thoughts, or reflections are excluded. The contemplation of the suffering and death of a child begotten long after the event complained of is too remote from the original physical injury to the parent, and too intangible and ethereal, to be connected with the original wrong of the defendant as a result to be reasonably apprehended from such a cause."

Where the allegations of a complaint as to mental anguish were coupled with the allegations as to physical injury, it was held, in *Botkin v. Cassady*, 106 Iowa, 334, 76 N. W. 722, that, whatever the right of the plaintiff might be to recover for mental anguish alone, such a case was not presented by the complaint.

There are numerous cases wherein the plaintiff sued to recover for mental and physical suffering because of injuries resulting in a miscarriage, but in none of them is there any discussion of mental suffering as an element of damages in such actions.

Upon the question of offset against damages for suffering from miscarriage, of suffering which would have resulted from natural parturition, see case note to *Morris v. St. Paul City R. Co.* post, 598.

recover damages for her mental distress due to her fear or apprehension, before the birth of the child, that it would be deformed in consequence of the defendant's negligent act, and whether her mental suffering since the birth of the child, and her prospective anxiety and disappointment on account of its deformity and diseased condition, can be considered by the jury as elements of damage recoverable in this action. Assuming that she suffered mental distress, not only in regard to the effect of the accident upon her person, but in regard to its effect upon the unborn child, it cannot be doubted that it was proximately caused in both respects by the alleged negligence of the defendant. It was a natural result reasonably to be apprehended under the circumstances. The fact that the defendant was ignorant of her condition does not lessen his liability for the natural consequences of his negligent act. *Chicago & N. W. R. Co. v. Hunerberg*, 16 Ill. App. 387; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034.

But it is contended that, while she may be entitled to recover for distress of mind due simply to her fear of the results of the accident to her person, her apprehension that the child might be deformed thereby is too remote or fanciful to be deemed in law an element of damage, although proximately caused by the defendant's negligent act. If a *fœtus* is deemed to constitute a part of the mother's person, an injury to it is plainly an injury to her, as much as an injury to her hand or arm would be. And it would seem to follow that she has as much right not to be harmed in the one respect as in the other. A denial of that proposition would be equivalent to an assertion that the law protects persons in the use and enjoyment of some parts of their physical organisms, but not of all parts thereof. Such a conclusion rests upon no logical basis, and is supported by no legal principle. If, in consequence of a blow inflicted upon his person, a man sustains an injury which may reasonably be expected to produce a deformity, or to impair his health, his right to recover damages of the negligent defendant for his mental suffering occasioned by the prospect of such a result is a recognized and enforceable right. In *Walker v. Boston & M. R. Co.* 71 N. H. 271, 273, 51 Atl. 918, 919, this principle was applied in the following language: "There was evidence that the plaintiff was suffering from partial mental disability. If, as the result of mental disability induced by the defendant's fault, the plaintiff suffered from apprehension of insanity, such suffering was an element of her damage." *Brush Electric Light & P.* 17 L.R.A. (N.S.)

Co. v. Simonsohn, 107 Ga. 70, 32 S. E. 902; *Sherwood v. Chicago & W. M. R. Co.* 82 Mich. 374, 383, 46 N. W. 773; *Schmitz v. St. Louis, I. M. & S. R. Co.* 119 Mo. 256, 277, 23 L.R.A. 250, 24 S. W. 472. The fact that one of the results of the alleged injury in this case was the deformity of the *fœtus*, which became the child's misfortune upon its birth, does not prove that no right of the plaintiff was invaded in this regard for which damages are allowable. On the contrary, it shows that her natural right to the normal action of her physical organs in the growth and development of the *fœtus* was seriously infringed. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65, 9 So. 722. Her ability to be delivered of a normal and healthy child was jeopardized, and her grief and apprehension before the birth on account of what the probable or not unreasonable effect would be upon the child is not a remote consequence of the alleged negligence of the defendant. It was her right to produce a healthy child; and, if, by the defendant's negligence, her enjoyment of that right was diminished or violated, her mental distress for the unnatural result to be expected was an element of damage for which she should be compensated, as well as her disappointment at the birth of a deformed child.

In this view of the case, it is unnecessary to consider or determine what, if any, rights a child *in ventre sa mere* has for injuries received by it, which render its existence after birth painful and burdensome. Whether it may or may not, after birth, maintain an action on that account (*Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242; *Gorman v. Budlong*, 23 R. I. 169, 55 L.R.A. 118, 91 Am. St. Rep. 629, 49 Atl. 704; *Marsellis v. Thalhimer*, 2 Paige, 35, 40, 21 Am. Dec. 66; *Harper v. Archer*, 4 Smedes & M. 99, 43 Am. Dec. 472; *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 368, 48 L.R.A. 225, 75 Am. St. Rep. 176, 56 N. E. 638; *Bedford's Case*, 7 Coke, 7b; *Trower v. Butts*, 1 Sim. & Stu. 181; *Wallis v. Hodson*, 2 Atk. 115, 117; *Thellusson v. Woodford*, 4 Ves. Jr. 227, 322; *Doe ex dem. Clarke v. Clarke*, 2 H. Bl. 399; *Scruby v. Payne*, 34 L. T. N. S. 845; *The George & Richard*, L. R. 3 Adm. & Eccl. 466; *Walker v. Great Northern R. Co.* Ir. Rep. 28 Eq. 69; 2 Witthaus & B. Med. Jur. 150-152, 159-161), is immaterial in this case. The mother's right to the damages she suffers for the defendant's wrongful act in causing her to bring forth a misshapen and sickly child, instead of a well-developed and healthy one, does not depend on the question whether, at the time of the injury, the *fœtus* is deemed in law a person, or whether, after birth, it may maintain an action to recover for the wrong

done to it before its birth. She cannot recover in her own right for the child's injuries for which, if it were deemed a person in law, it would have a right of action; and, if it is deemed not to be a person at the time of the injury, but *pars viscerum matris* (Bedford's Case, supra), she suffers no damage for its deformity merely; that is, the fact alone that it is deformed is a misfortune to the child, for which she is not entitled to damages, unless it causes her special physical pain and suffering. Such damages pertain to the child alone. The mother is no more entitled to them than the father is. Upon the birth of the child the physical consequences of the injury to it become effective. From the time of the injury to the time of the birth the mother suffers no physical damage merely because the child's limbs are distorted, or because its health is impaired. It therefore follows that the child alone suffers damage on that account; and, if that damage is held to be *damnum abaque injuria*, the mother's right thereto would not be increased. If the child cannot recover therefor, it does not follow that she can. In fact, there is no legal connection between their rights of action for their respective damages. But, while the injuries suffered by each are distinct and independent, the mother's anxiety before the birth of the child, in view of the reasonable probability that the defendant's act will cause her to produce an abnormal child, is peculiarly an element of damage to her.

This result is not in conflict with cases cited by the defendant in which it has been held that no recovery could be had by the mother for the miscarriage and death of a child. See *Bovee v. Danville*, 53 Vt. 183; *Tunnicliffe v. Bay Cities Consol. R. Co.* 102 Mich. 624, 32 L.R.A. 142, 61 N. W. 11; *Id.*, 107 Mich. 261, 65 N. W. 226; *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507, 1 L.R.A. 728, 10 Am. St. Rep. 772, 9 S. W. 598; *Hawkins v. Front Street Cable R. Co.* 3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021. These cases do not decide that the mother's solicitude consequent upon the injury and before the birth is not an element of her damage, but that the death of the child and her loss of the comfort and enjoyment of the company of a living child are too remote consequences to be considered by a jury in assessing her damages. 1 *Joyce, Damages*, § 185. In *Bovee v. Danville*, 53 Vt. 190, the decision is thus stated: "The plaintiff was entitled to recover all damages that were naturally and legitimately consequent upon the negligence of the town. If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending

the miscarriage is a part of it, and a proper subject of compensation. But the rule goes no farther. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage." But injured feelings and regret before the birth and while the mother is seeking to perform her function of childbearing through the organs of her body may be proper elements of recoverable damage, for the same reason, substantially, as led to the holding by the same court in *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751, that solicitude occasioned by the bite of a dog, including apprehension of hydrophobia, though the dog was not shown to have been rabid, were proper matters for the jury's consideration. To the same effect are *Warner v. Chamberlain*, 7 Houst. (Del.) 18, 30 Atl. 638, and *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389.

The fact that the plaintiff will undoubtedly suffer great disappointment during her lifetime, occasioned by her continual observation of her child's deformity and its probable suffering, though in some sense caused by the defendant's negligence, is a misfortune for which the law can afford no compensation in an action for negligence. If the collision which caused the injury both to her and her child had occurred while she was carrying the child in her arms, it would be a novel proposition to urge that she might recover damages for her subsequent mental distress on account of the disfigurement and ill health of the child. However severe the grief may be of the friends and relatives of the victim of a catastrophe, they can ordinarily maintain no common-law action for damages on that account. The deformity of a crippled child and its suffering may be an ever-present cause of disappointment to its parents, and their lives may be made miserable thereby, but they can obtain no redress on that ground against the person whose negligence was the cause of the child's condition. *Hyatt v. Adams*, 16 Mich. 180, 197. The policy of the law requires that no action be maintainable for that cause. *Black v. Carrollton R. Co.* 10 La. Ann. 33, 63 Am. Dec. 586. In *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633, it was held that, in an action of trespass by a father for assaulting and beating his son *per quod servitium amisit*, a jury in assessing the damages are not authorized to take into account the wounded feelings of the parents. It was suggested in the opinion that it might be otherwise if the son were not also entitled to an action to recover for his mental suffering. In *Pennsylvania R. Co. v. Kelly*, 31 Pa. 372, it was decided that, when a father brings an ac-

tion on the case for damages resulting from an injury to his child, he can only recover compensatory damages, to be measured by the loss of the child's services and the expense of nursing and curing him; that he cannot recover for his lacerated feelings or disappointed hopes; and that the personal sufferings of the child should not enter into the computation of the father's damages. *Butler v. Manhattan R. Co.* 143 N. Y. 417, 26 L.R.A. 46, 42 Am. St. Rep. 738, 38 N. E. 454; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Flemington v. Smithers*, 2 Car. & P. 292; 1 *Joyce, Damages*, § 225. Such damages are too remote and speculative to be properly estimated by a jury upon the theory of strict compensation alone for the consequences of a negligent act. In cases where the elements of malice, wantonness, or wilful indignity in causing the injury are present, it may be that a more liberal rule of damages prevails (*Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Barnes v. Campbell*, 60 N. H. 27; *Kimball v. Holmes*, 60 N. H. 163), and that injured feelings indirectly caused by the defendant's wilful act (*Friel v. Plumer*, 69 N. H. 498, 76 Am. St. Rep. 190, 43 Atl. 618) may furnish a legitimate element of damage, while, in the absence of evidence of intentional wrong, they ought not to be included in recoverable damages. If, in the case at bar, the fact was that the defendant maliciously inflicted the injury upon the plaintiff, one of the natural and intended results of the act would be to cause the plaintiff great mental distress, not merely on account of the injury to her and the unborn child, but on account of her parental anxiety for the future healthfulness of her child. It might not be incorrect to say that it would be conclusively presumed that the defendant's purpose was to inflict upon her the mental suffering she sustained, and hence that he ought to pay for it. But, if the act causing the injury is merely a negligent act, the recovery of compensation for such remote, secondary, and speculative injuries could not be justified upon that ground, since a negligent defendant is answerable only for the direct, proximate, and natural results of his act. If a negligent defendant inflicts a violent blow upon the person of the plaintiff, in consequence of which the latter falls upon another, who is crippled thereby, the sorrow of the plaintiff for the suffering of the third party could not be considered a proximate result of the defendant's involuntary act, for which he should be charged in damages. As the child's suffering in this case is his misfortune, the plaintiff's regret on that account 17 L.R.A. (N.S.)

is not a legitimate element of her damage for the mere negligence of the defendant.

It is not necessary to discuss at length the claim advanced by the plaintiff and alleged in her declaration, that she is entitled to recover for the "pain and suffering and inability to labor of said child," for the obvious reason that the child's peculiar injuries afford it, if anybody, a right of action; and, if it should be held upon consideration that it cannot maintain an action for the damages suffered by it after its birth, it is not apparent how a right of action therefor would become vested in the mother. Justice does not require that she should be paid for the sufferings of the child, and the doctrine of compensatory damages forbids it. *Fay v. Parker* and *Kimball v. Holmes*, *supra*.

When the declaration is amended in accordance with the views above indicated, the demurrer will be overruled, and the motion denied.

Case discharged.

Peaslee, J., did not sit. The others concur.

MINNESOTA SUPREME COURT.

GERTRUDE MORRIS, Resp't.,
v.

ST. PAUL CITY RAILWAY COMPANY,
Appt.

(— Minn. —, 117 N. W. 500.)

Negligence — evidence — sufficiency.

1. In a personal-injury action, the evidence considered, and held sufficient to sustain the finding of the jury that the defendant was negligent, and that the plaintiff was not guilty of contributory negligence.

Damages — injury to woman — miscarriage.

2. When an injury to a woman results in a miscarriage, she is entitled to recover such damages as will fairly compensate her

Headnotes by ELLIOTT, J.

Case Note. — *Offset against damages for suffering from miscarriage, of suffering which would have resulted from natural parturition.*

The question presented in the foregoing case seems to have been squarely passed upon in but one other reported case, and in that case the decision is to the contrary.

In *Hawkins v. Front Street Cable R. Co.* 3 Wash. 592, 16 L.R.A. 808, 28 Am. St. Rep. 72, 28 Pac. 1021, it was held that impairment of health, and suffering growing out of the death and premature birth of the child of a pregnant woman by reason of injuries negligently inflicted upon her by a third person, which would not have at-

for the pain and suffering occasioned by the miscarriage, but not for the pain and suffering occasioned by the loss of the child.

Same — additional suffering.

3. The pain and suffering which the mother would have suffered when the child was born in the natural course of events cannot be deducted from the pain and suffering occasioned by the miscarriage, which resulted from the defendant's negligence.

Same — amount.

4. The damages awarded held not so great as to show passion and prejudices on the part of the jury.

(August 7, 1908.)

APPPEAL by defendant from an order of the District Court for Ramsey County denying defendant's motion for a judgment notwithstanding the verdict in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. D. Dwyer and W. R. Duxbury, for appellant:

Where a party looks in the direction from which the car is coming before passing upon the tracks, and there is nothing to obstruct his vision, then he must be conclusively held to have seen what his sense of seeing would have disclosed.

Wardner v. Great Northern R. Co. 96 Minn. 382, 104 N. W. 1084; Kemp v. Northern P. R. Co. 89 Minn. 139, 94 N. W. 439; Griswold v. Great Northern R. Co. 86 Minn. 67, 90 N. W. 2; Sandberg v. St. Paul & D. R. Co. 80 Minn. 442, 83 N. W. 411; Schneider v. Northern P. R. Co. 81 Minn. 383, 84 N. W. 124; Clark v. Northern P. R. Co. 47 Minn. 380, 50 N. W. 365; Carney v. Chi-

cago, St. P. M. & O. R. Co. 46 Minn. 220, 48 N. W. 912; Brown v. Milwaukee & St. P. R. Co. 22 Minn. 165; Stallman v. Shea, 99 Minn. 422, 109 N. W. 824; Booth, Street Railways, p. 414, § 305; Metz v. St. Paul City R. Co. 88 Minn. 48, 92 N. W. 502.

Recovery can be had only for the pain and suffering in addition to what plaintiff would have endured at the birth of the child.

Joyce, Damages, § 185; Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 1 L.R.A. 728, 10 Am. St. Rep. 772, 9 S. W. 598; Bovee v. Danville, 53 Vt. 183.

The verdict was excessive.

Union P. R. Co. v. Milliken, 8 Kan. 647; Wright v. Southern Exp. Co. 80 Fed. 93; Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127.

Mr. James R. Hickey, for respondent:

It cannot be said, as a matter of law, that respondent was negligent.

O'Brien v. St. Paul City R. Co. 98 Minn. 205, 108 N. W. 805; Peterson v. Minneapolis Street R. Co. 90 Minn. 52, 95 N. W. 751; Fonda v. St. Paul City R. Co. 71 Minn. 439, 70 Am. St. Rep. 341, 74 N. W. 166.

This is no basis for a reversal on the ground that the respondent could have seen the approach of the car which struck her.

Wharton, Neg. 420; Beach, Contrib. Neg. 163; Hoyer v. Chicago & N. W. R. Co. 62 Wis. 666, 23 N. W. 14; Farrell v. Waterbury Horse R. Co. 60 Conn. 239, 21 Atl. 675, 22 Atl. 544; Allen v. Maine C. R. Co. 82 Me. 117, 19 Atl. 105; Bronson v. Oakes, 22 C. C. A. 520, 40 U. S. App. 413, 76 Fed. 737; Grand Trunk R. Co. v. Ives, 144 U. S. 417, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; Ernst v. Hudson River R. Co. 35 N. Y. 9, 90 Am. Dec. 761.

tended its birth at the usual time, either alive or dead, may be considered in estimating the damages to be awarded in such case. In discussing the matter of damages, the court said: "It is matter of common knowledge that every woman who is *en-ciente*, and particularly one who is so for the first time, is more or less prone to nervousness and anxiety, as well as that the travail of childbirth is a time of suffering, illness, and danger; so that it is not just to impose upon the merely careless tortfeasor, without previous knowledge of her condition, liability for more of her trouble than he has actually caused."

In Purcell v. St. Paul City R. Co. 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034, it was held that a pregnant woman injured by the negligence of a carrier was entitled to recover to the full extent of the injury so caused, without regard to whether she was more or less liable to injury owing to her condition. In this case, however, there was no discussion of the question of offset

of the sufferings which would necessarily come in the case of natural parturition.

In Bovee v. Danville, 53 Vt. 183, where the plaintiff was a pregnant woman, the court stated broadly that she was entitled to recover all damages that were naturally and legitimately consequent upon the negligence of the defendant; but the question in this case was whether mental suffering following the miscarriage was a natural and legitimate consequence of the injury, for which she could recover, and the question of offset did not come up.

Cases involving merely the effect of the previous condition of the woman on liability for causing the injuries have not been included in this note.

Upon the question of mental anguish as an element of damages for personal injuries to pregnant woman, see case note to Prescott v. Robinson, ante, 594.

Upon the question of miscarriage as an element of damages, see note to Tunncliffe v. Bay Cities Consol. R. Co. 32 L.R.A. 142.

The damages awarded by the jury in this case are not excessive.

Shartle v. Minneapolis, 17 Minn. 308, Gil. 284; *Berger v. St. Paul City R. Co.* 95 Minn. 84, 103 N. W. 724; *Chicago v. Leseth*, 43 Ill. App. 480, affirmed in 142 Ill. 642, 32 N. E. 428; *North Chicago Street R. Co. v. Smadraff*, 89 Ill. App. 411, affirmed in 189 Ill. 155, 59 N. E. 527.

Elliott, J., delivered the opinion of the court:

While crossing the street, the respondent, Gertrude Morris, was struck by one of the appellant's street cars and severely injured. In an action against the railway company, based on the alleged negligence of the company in running its car at an excessive rate of speed without keeping it under control and giving proper signals, she recovered a verdict for \$4,000. The appeal is from an order of the trial court denying the defendant's motion for judgment notwithstanding the verdict, or for a new trial.

1. The question of the defendant's negligence was clearly for the jury. The accident occurred at the intersection of Raymond and Langford avenues, in the city of St. Paul. Street cars run on Langford avenue. Mrs. Morris, after making some purchases at a grocery store, on the northeast corner, started in a southeasterly direction diagonally across Langford avenue. When she reached the first car track, the north track, on which cars run towards the west, and before stepping upon it, she turned and looked partly behind her in the direction from which a car would approach on that track. She testified that there was no car then in sight, but that, as she stepped upon the north track, she saw a car approaching from the west upon the south track. This car was coming on a down grade at a very high rate of speed, and she could not safely pass in front of it. She stopped a moment to allow this east-bound car to pass, and was struck by a car going west on the north track. The crossing was at a place which is approached by the cars from both directions on a down grade. although the grade is slightly upward a short distance toward Raymond avenue from the east. Langford avenue in this vicinity forms a curve, so that the cars are not visible in either direction for a very long distance. The cars generally run at a high rate of speed. One witness testified that they usually ran at fully 40 miles an hour in the vicinity of the Raymond avenue crossing, except when slowing down for a stop. The defendant's witness testified that the car was approaching at the rate of 15 miles an hour, and that it slowed down as it approached the other car. The plain-

tiff's witnesses place the speed much higher, although their figures are not very definite. One witness testified that the car which struck Mrs. Morris came down "on a thundering speed on the curve,—just went tearing through the streets."

The serious question is whether Mrs. Morris exercised proper care for her own safety. The rule which makes it the absolute duty of a person approaching a railway crossing to look and listen does not apply to street railway crossings. Whether, under the circumstances, it is the duty of a person to look and listen for the approaching car, is a question of fact, and not of law. But, when a person does look, he is bound to see what is clearly visible and be guided by the knowledge thus obtained. Mrs. Morris testified that she looked east just before she stepped upon the track, and that no car was then in sight. The appellant contends that at that time the car which struck her must have been visible, and that the physical facts disprove her testimony that she did not see the car. The witnesses place the distance at which the car would have been visible at from 300 to 500 feet, and at the rate at which the car was coming it would have covered this distance in a very few seconds. There was also some evidence tending to show that the view was somewhat obstructed by posts, trees, and shrubbery. Mrs. Morris testified positively that she looked and did not see the car. Her attention was directed principally to the car which was approaching from the other direction, and, under all these circumstances, it was a question for the jury to determine whether she was guilty of contributory negligence. *Peterson v. Minneapolis Street R. Co.* 90 Minn. 52, 95 N. W. 751; *Fonda v. St. Paul City R. Co.* 71 Minn. 439, 70 Am. St. Rep. 341, 74 N. W. 166; *O'Brien v. St. Paul City R. Co.* 98 Minn. 205, 208, 108 N. W. 805.

2. At the time of the accident Mrs. Morris was pregnant, and the injury resulted in a miscarriage. The court instructed the jury that, if the plaintiff was entitled to recover damages, they might consider as an element thereof the mental and physical pain which resulted from the miscarriage, but not the mental anguish and suffering caused by the loss of the child. The defendant asked the court to instruct the jury that "the damages in this case must be limited to such physical pain and suffering as was the direct result of the accident, independent of the question of the condition of pregnancy claimed on the part of the plaintiff," and that, "if you should find from the evidence that the act complained of was negligent, and that the accident resulted in a miscarriage, the damages re-

sulting therefrom must be limited to such damages for such suffering and pain as the plaintiff suffered in addition to what she would have suffered and endured had she carried the child to the full period. If it should appear that there was an increased or aggravated mental or physical pain and distress in connection with such miscarriage, in addition to what the mother would have suffered if the child had been born at the proper time, or that her health had been impaired thereby, then she would be entitled to recover for such additional pain and suffering as she endured, in addition to what she would have endured as a consequence of her condition. If you find from the evidence that she did not suffer any additional pain from the miscarriage over what she would have suffered had she borne the child at the expiration of the period at the proper time, then she is not entitled to recover anything for the miscarriage."

The rule of damages for which the appellant contends finds no support in the case and is, in our judgment, unsound in principle. It is advanced by Joyce in support on Damages (§ 185), but is not supported by the citations of any authority. *U. Tele. Co. v. Cooper*, 77 Cal. 2d 598, and *Bovee v. Danville*, 52 Cal. 2d 100, are cited by counsel for appellant, but are cases involving a woman who has suffered a miscarriage and recover damages only for the difference between the pain and suffering between what she actually suffered and what she probably would have suffered at some time in the future. The *Cooper* Case was an action against a telegraph company to recover damages alleged to have been caused by its failure to deliver a message to a physician to attend a woman in imminent danger of death. Recovery was allowed for the increased pain and suffering which resulted to the woman in the absence of the physician. The rule of damages in the other rule could apply to a failure to deliver the message resulting absence of a physician to attend an existing condition at the time of the pain and suffering. The action against the telegraph company was an action against the telegraph company for damages caused by a miscarriage which resulted in injury to the woman's premature birth. There is nothing in the appellant's position which would prevent the plaintiff from recovering for her offspring. It is too much to leave to the jury. If the children are born, the

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the authority of *Isherwood v. H. L. Jenkins Lumber Co.* 87 Minn. 388, 92 N. W. 230, and *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121. The evidence of the witness Marshall with reference to the speed at which it had been customary to run the trains in that vicinity was not prejudicial to the defendant. It appeared that, shortly before July 17th, when the accident occurred, the time schedule on the road had been changed so as to require the cars to run at a higher rate of speed at that point. Marshall testified that before the change the cars ordinarily ran at from 35 to 40 miles an hour, unless a stop was to be made at the crossing. In reply to a question, the witness stated that he was referring to the time before the change was made, but, as it appeared that the rate was greater after than before the change, the evidence could not possibly have been legally prejudicial.

The other assignments of error have been examined and found without merit. The verdict is large; but, in view of the nature of the injuries and the impossibility of measuring the damages in such a case by any exact rule, we cannot say that it is so large as to suggest that it is the result of passion and prejudice on the part of the jury. Verdicts for similar amounts in such cases have been approved and sustained. *Shartle v. Minneapolis*, 17 Minn. 308, Gil. 284; *Berger v. St. Paul City R. Co.* 95 Minn. 84, 103 N. W. 724; *North Chicago Street R. Co. v. Smadraff*, 89 Ill. App. 411, affirmed in 189 Ill. 155, 59 N. E. 527.

The order of the trial court is therefore affirmed.

NORTH CAROLINA SUPREME COURT.

HARRY STARNES, by Next Friend,
v.
ALBION MANUFACTURING COMPANY,
Appt.

(147 N. C. 556, 61 S. E. 525.)

Child labor — forbidding — constitutional rights.

1. Forbidding the employment of children under twelve years of age in factories or manufacturing establishments does not violate the constitutional rights of the child or its parent.

Same — violation of statute — negligence.

2. Violation of a statute forbidding the employment in a factory of a child under twelve years of age is negligence *per se*.

Negligence — proximate cause — injury to child.

3. That a child, when injured by a machine, was not actually performing the duties to which he had been assigned, but 17 L.R.A.(N.S.)

had gone to another floor on an errand of his own, does not prevent his employment in the factory, contrary to the provisions of a statute, being the proximate cause of the injury.

(May 6, 1908.)

APPEAL by defendant from a judgment of the Superior Court for Mecklenburg County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The issues submitted, and the answers thereto, were as follows:

(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

A. Yes.

(2) Did the plaintiff, by his own negligence, contribute to his injury as alleged in the answer?

A. No.

(3) What amount of damages, if any, is the plaintiff entitled to recover?

A. \$3,000.

Messrs. Burwell & Cansler and R. S. Hutchison for appellant.

Messrs. Stewart & McRae, for appellee:

The employment of a child in violation of the act constitutes negligence *per se*, and will make the employer liable for all injuries sustained by the infant, whether in the course of his employment or not.

Ornamental Iron & Wire Co. v. Green, 108 Tenn. 165, 65 S. W. 399; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460, approved in *Rolin v. R. J. Reynolds Tobacco Co.* 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53

Case Note. — Constitutionality of child-labor laws.

The courts have with great uniformity upheld laws looking toward the protection and well-being of children, and prohibiting their employment in dangerous or immoral occupations and places. Such laws are held to be within the police power of the state, and the courts generally hold that the legislature has full power to fix the age at which a child may be employed, and that it is to be the sole judge as to the necessity of the law.

As was said in *Re Weber*, 149 Cal. 392, 86 Pac. 809, the legislative judgment in regard to such regulations will not be interfered with by the courts.

Thus, in *Re Spencer*, 149 Cal. 396, 117 Am. St. Rep. 139, 86 Pac. 896, it was held that the provision of the statute that no child under fourteen years of age should be employed in any mercantile institution, office, laundry, manufactory, workshop, restaurant, hotel, or apartment house, or in the distribution of merchandise or messages, did not constitute an unfair discrimination against

S. E. 891; *Marquette Third Vein Coal Co. v. Delie*, 110 Ill. App. 684; *Creech v. Wilmington Cotton Mills*, 135 N. C. 680, 47 S. E. 671; *Hamilton v. Galveston, H. & S. A. R. Co.* 54 Tex. 556; *Hinckley v. Horazdowsky*, 133 Ill. 359, 8 L.R.A. 490, 23 Am. St. Rep. 618, 24 N. E. 421; *Fitzgerald v. Alma Furniture Co.* 131 N. C. 640, 42 S. E. 946.

Brown, J., delivered the opinion of the court:

It seems to have been admitted that the plaintiff was employed by defendant to work in its cotton factory, and that he was assigned to the spinning room on the second floor; that his duties were to sweep out the spinning room and to make bands; that plaintiff performed such duties from Sep-

tember, 1906, the date of his employment, until January 5, 1907, when he was injured. On that day he went down on the lower floor, as he had frequently done before, to see his father, who was running the carding machines. While there plaintiff got his hand caught and injured in the cylinder of one of the machines in charge of his father, in endeavoring to pick a piece of cotton off the card. At the time his father was some 20 steps distant, tending another machine. The plaintiff introduced evidence tending to prove that, at the date of his injury, he was not quite ten years of age, and that when he was hired to defendant by his father the defendant's agent and superintendent knew he was under twelve years of age. Defendant offered evidence tending to contradict

the particular trades mentioned, nor did it unduly and without reasonable cause restrict the right of minors to work at any and every occupation in which they might wish to engage. And the further clause in the statute, that no child under sixteen years of age should work at any gainful occupation during the hours that the public schools were in session, unless such child could read English at sight and write simple English sentences, or was attending night school, was a reasonable regulation to prevent those having control of such children from working them to such an extent as to hinder them from acquiring, or endeavoring to acquire, at least the beginning of an education, before arriving at the age of sixteen; nor was a provision that nothing in the act should be construed to prevent the employment of minors at agricultural, viticultural, horticultural, or domestic labor an unreasonable discrimination, as the character of the exempted labor was a sufficient reason for the exemption.

And in *Re Weber*, supra, the statute prohibited the employment of children under sixteen in any dangerous or immoral occupation or business, or for public entertainment, etc., except singing in churches, schools, and academies. The court held that this was not an arbitrary discrimination between those who were over that age and those who were under it; nor did the law make an unfair discrimination by allowing the employment of children as singers or musicians in churches, schools, and academies.

And in *Bryant v. Skillman Hardware Co.* (N. J. L.) 69 Atl. 23, it was held that the act of March 24, 1904, which prohibited the employment of children under fourteen years of age in factories, workshops, mills, and all places where the manufacturing of goods of any kind is carried on, is not in violation of § 1 of article 1 of the state Constitution, which is as follows: "All men are, by nature, free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and

obtaining safety and happiness." The court said: "The argument advanced under this point nullifies the words 'all men' in the section just quoted by making them mean 'all minors,' and ignores the entire mass of legislation and judicial decision that has grown up upon the practically unquestioned assumption that minors are not men, and that until they become men they are, as regards legislation aimed at their welfare and protection, wards of the state."

So, in *New York v. Chelsea Jute Mills*, 43 Misc. 266, 88 N. Y. Supp. 1085, it was held that the section of the consolidated school law which provided that it should be unlawful for any person, firm, or corporation to employ any child under fourteen years of age in any business or service whatever during any part of the term during which the public schools of the district in which the child resided were in session was constitutional and a valid exercise of the police power of the state.

And a statute prohibiting the employment of minors under the age of sixteen over ten hours a day or over six days a week, and providing that such children should have at least thirty minutes for meal time at noon, was held, in *State v. Shorey*, 48 Or. 396, 86 Pac. 881, not to be in conflict with the 14th Amendment to the Constitution of the United States, nor with § 1 of article 1 of the Constitution of Oregon, which reads as follows: "We declare that all men, when they form a social contract, are equal in rights." In regard to the constitutionality of the law, the court said: "It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interest, although the prohibited employment does not involve a direct danger to morals, decency, or of life or limb. Such legislation is not an unlawful interference with the parents' control over the child or right to its labor, nor with the liberty of the child."

So in *Lenahan v. Pittston Coal Min. Co.* 218 Pa. 311, 12 L.R.A.(N.S.) 461, 67 Atl. 642, it was held that the legislature might,

these allegations as to age and knowledge, and to prove that the boy was taken in the factory upon his father's representations as to age, and under the belief that he was over twelve years of age. In the view we take of the case, it is unnecessary to consider defendant's first, second, and fourth assignments of error, relating to exceptions to evidence. If the rulings of his Honor were erroneous, they worked no injury to defendant.

The contentions of defendant may be summarized as follows: (1) That § 3362 of the Revisal of 1905 is violative of article 1, § 17, of the state Constitution, as well as the 14th Amendment to the Constitution of the United States,—(a) the act deprives the citizen of his property rights without due process of law; (b) the act denies to certain citizens the equal protection of the law. (2) That the court erred in holding that a violation of the statute, by employing plaintiff knowing him to be under twelve years of age, is negligence *per se*. (3) That the court erred in refusing the defendant's prayer for instruction as follows: "Unless the jury are satisfied, by a preponderance of the evidence, that the plaintiff, at the time of his injury, was engaged in the work for which he was employed, then his employment, though contrary to law, was not the proximate cause

of his injury, and the jury will answer the first issue 'No.'"

The act in question was considered by this court in the recent cases of *Rolin v. R. J. Reynolds Tobacco Co.* 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891, and *Leathers v. Blackwell Durham Tobacco Co.* 144 N. C. 330, 9 L.R.A.(N.S.) 349, 57 S. E. 11. The constitutionality of the law was not called in question and therefore not discussed in the opinion of the court. It was assumed, and we think correctly so, that the law is well within the police power of the state, and violates none of the fundamental rights of the parent. We do not understand the learned counsel for the defendant to deny to the legislature the general power to regulate the employment of children, but we understand his argument to be that the act is void because it fails to designate the kind of labor which is prohibited to children under the age fixed by the statute. Child-labor laws have been adopted in nearly all the states of this Union and Canada, and are in force in nearly all the governments of Europe and of the Australian Continent. They are founded upon the principle that the supreme right of the state to the guardianship of children controls the natural rights of the parent, when the welfare of society or of the children themselves conflict with parental rights.

under its police power, fix an age limit below which boys might not be employed to labor. And this decision was cited with approval, and followed, in *Stehle v. Jaeger Automatic Mach. Co.* 220 Pa. 617, 69 Atl. 1116.

A statute prohibiting the employment or exhibition of girls under fourteen years of age as dancers or in theatrical exhibitions was held, in *People v. Ewer*, 141 N. Y. 129, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4, not to be invalid as taking away from parents the right to employ their children in any lawful occupation, but was an exercise of the power of the state as *parens patriæ* to protect the physical, mental, and moral welfare of children.

In *People v. Taylor*, 124 App. Div. 434, 108 N. Y. Supp. 796, although the constitutionality of the labor law was not involved, the court said that the regulation of the employment of children under sixteen years of age in factories was a police regulation which the legislature had full power to enforce.

In *Collett v. Scott*, 30 Pa. Super. Ct. 430, the provisions of a statute which made it unlawful to employ any minor under sixteen years of age inside of any anthracite coal mine, or to employ any minor under fourteen years in any anthracite coal breaker or colliery, or around the outside workings of any anthracite coal mine, were enforceable as a valid and constitutional exercise of the police power; but the court held unconstitutional a further provision of 17 L.R.A.(N.S.)

the statute which attempted to divide the minors who had reached the age prescribed in the statute into two classes, those who could furnish certain certificates as to date of birth, baptism, etc., and those who could not.

In the following cases statutes limiting the hours that women and children may be employed were upheld: *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *Com. v. Beatty*, 15 Pa. Super. Ct. 5. In each of these cases, however, the alleged violation of the law consisted in employing a woman more than the prescribed hours. There would seem to be little question as to the validity of such a law in reference to minors if the court upholds it as to women. Upon the general question of the constitutionality of laws limiting hours of labor, see note to *People v. Orange County Road Constr. Co.* 65 L.R.A. 33; also case note to *People v. Williams*, 12 L.R.A.(N.S.) 1130.

Upon employment of child in violation of statute as negligence which will sustain an action by the child for personal injuries, see *Rolin v. R. J. Reynolds Tobacco Co.* 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891. And upon the question, May one employing a child under the statutory age rely on contributory negligence or assumption of risk to defeat liability for personal injury sustained by the latter? see case note to *Lenahan v. Pittston Coal Min. Co.* 12 L.R.A.(N.S.) 461.

In this country their constitutionality, so far as we can ascertain, has never been successfully assailed. The supervision and control of minors is a subject which has always been regarded as within the province of the legislative authority. How far it shall be exercised is a question of expediency, which it is the province of the legislature to determine.

The constitutional guaranty of the liberty of contract does not apply to children of tender years, nor prevent legislation for their protection. "So far as such regulations control and limit the powers of minors to contract for labor, there has never been," says Mr. Tiedeman, "and never can be, any question as to their constitutionality. Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the state." 1 Tiedeman, *State & Federal Control of Persons & Property*, p. 325. Another eminent writer says: "The constitutionality of legislation for the protection of children or minors is rarely questioned, and the legislature is conceded a wide discretion in creating restraints." "Even the courts which take a very liberal view of individual liberty, and are inclined to condemn paternal legislation, would concede that such paternal control may be exercised over children, especially so in the choice of occupations, hours of labor, payment of wages, and everything pertaining to education; and in these matters a wide and constantly expanding legislative activity is exercised." Freund, *Pol. Power*, § 259. We do not think the 14th Amendment in any way limits the power of the state to regulate in good faith the labor of minors. Speaking of the scope of this amendment and its effect upon the police power of the states, the Supreme Court of the United States says in *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357: "But neither the 14th Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people." In another case the same tribunal says: "This court . . . has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each state owes to her citizens." *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115.

The statute we are considering appears to have been framed in good faith, and for the 17 L.R.A. (N.S.)

purpose of promoting the general welfare by protecting minors from injury by overwork, from liability to injury by machinery in large manufacturing plants, and by facilitating their attendance at schools. It is not an undue restriction of the right of the parent to the labor of the child, assuming that he has such right, when opposed to the general welfare. It does not close to him all fields of employment for his child, but only those in factories and manufacturing establishments, where the child is more likely to be injured in health or body, or from his childish carelessness, as in this case, than in many other useful employments. In California a statute prohibiting the employment of children under fourteen years of age "in any mercantile institution, office, laundry, manufactory, workshop, restaurant, or apartment house," was held not to be in conflict with the 14th Amendment. *Re Spencer*, 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896. In that statute there are certain exceptions and regulations which are unnecessary to notice as they do not conflict with the principle decided, that such legislation does not come within the purview and scope of the 14th Amendment, and is well within the police power of the state. The right to the labor of the child is not a vested right in the parent, nor is it of any more importance than the right to control its education. Both are subject to the paramount power of the state when it deems it necessary to exercise it for the general good. Upon this idea, compulsory education laws have been enacted in a large number of states, and their constitutionality has been sustained where drawn in question. *State v. Bailey*, 157 Ind. 324, 59 L.R.A. 435, 61 N. E. 730; Freund, *Pol. Power*, supra, § 264.

As to the second contention, it is decided squarely against the defendant in the recent case of *Leathers v. Blackwell Durham Tobacco Co.*, supra, where it is held not only that a cause of action accrues to the child, if injured, but that it is negligence *per se*, and not merely evidence of negligence, to violate the statute. The writer can add nothing to the well-considered opinion of Mr. Justice Connor in that case, and we find nothing in the well-prepared brief of defendant which induces us to reverse it.

This brings us to consider defendant's third contention, a matter not fully determined in the *Leathers Case*, and which may be thus stated: That the plaintiff cannot recover because the employment of him, although wilfully and knowingly done in violation of the statute, was not the proximate cause of his injury, inasmuch as he did not receive the injury while in the discharge of the duties to which he was assigned. It is true that the plaintiff was

not engaged in performing his duties in the spinning room, and had gone to the lower floor where the carding machines were, and got his hand caught in one and badly cut. Under such circumstances, there are respectable courts which hold that the injury is not the proximate result of a violation of the statute, because not received in performing the work the child was assigned to do, and that therefore the employer is not liable. We are not impressed with the persuasive authority of those precedents, and are not inclined to follow them. To do so would, in our opinion, unduly restrict the liability of the employer, and would be contrary to the evident intention of the legislature. The act was designed not only to protect the health, but the safety, of children of tender age, from the indiscretion and carelessness characteristic of immature years. One who knowingly and wilfully violates its provisions is not only guilty of an indictable offense, but he commits a tort upon the rights of the child, and should be judged as a culpable wrongdoer, and not as one guilty of mere negligence. The injury done the child is a wilful wrong, and does not flow from the negligent performance of a lawful act. The distinction between the two is well stated by Mr. Justice Walker in *Drum v. Miller*, 135 N. C. 208, 65 L.R.A. 890, 102 Am. St. Rep. 528, 47 S. E. 421. We think that the breach of the statute constitutes actionable negligence wherever it is shown that the injuries were sustained as a consequence of the wrongful employment of the child in the factory in violation of the law. In this case we think there is a direct causal connection between the unlawful employment of the plaintiff and the injuries sustained by him. By employing this boy of ten years in violation of the law, the defendant exposed him to perils in its service which, though open to observation, he, by reason of his youth and inexperience, could not fully understand and appreciate. "Such cases," says Judge Cooley, "must frequently occur in the employment of infants." *Torts*, p. 652.

In touching on the liability for mere negligence, independent of a statute making such employment a crime, Mr. Watson says: "The defendant will be liable if negligent though it is the act of the child injured which is proximate to his own injuries, if such act is of a character to be expected of a child and in accordance with the usual indiscretion and errors of judgment characteristic of immature years." [*Watson, Damages for Personal Injuries*, § 114.] We do not mean to hold that the employer violating the act would be liable in damages for every fatality that might befall the child while in its factory. For in- 17 L.R.A. (N.S.)

stance, had the plaintiff died of heart disease, or from a stroke of paralysis, or been seriously injured by the wilful and malicious act of a workman in knocking him against a machine, or injured from some cause wholly disconnected from the unlawful employment, the defendant could not be held liable in damages, simply on account of the employment in violation of the statute. But we do hold that the employment, when wilfully and knowingly done, is a violation of the statute, and that every injury that reasonably and naturally results is actionable. In this case the connection between the employment and the injury is that of cause and effect, and brings the defendant within the operation of the statute. It had no right to employ the boy. While in its employment and on its premises, in tampering, through childish carelessness incident to his years, with dangerous machinery, he was injured. Had he not been employed he would in all probability not have been on its premises, and not exposed to the temptation to meddle with dangerous instruments.

We think the wisdom of such legislation is strongly illustrated by the facts of the present case. We find very few decisions in point, but there are two decided by the supreme court of Tennessee which fully sustain our views, and commend themselves strongly by their force of reason to our judgment: *Queen v. Dayton Coal & I. Co.* 95 Tenn. 464, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; *Ornamental Iron & Wire Co. v. Green*, 108 Tenn. 161, 65 S. W. 399.

The judgment of the Superior Court is affirmed.

NORTH DAKOTA SUPREME COURT.

PLANO MANUFACTURING COMPANY,
Respt.,
v.

S. J. DOYLE, Appt.

(— N. D. —, 116 N. W. 529.)

Agent — assumption of debt due principal — payment.

1. The assumption by an agent of a debt due from a third party to the agent's principal, without authority from, or ratification by, the latter, does not constitute payment.

Courts — power to correct own error.

2. While an action in which a jury trial was waived is still pending in the district court, that court has jurisdiction and power to correct its own errors, and may, in the exercise of its discretion, on notice and motion, vacate its findings and judgment, and make new findings, and enter a new and different judgment.

(April 30, 1908.)

Headnotes by SPALDING, J.

APPEAL by defendant from a judgment of the District Court for Foster County in plaintiff's favor in an action brought to recover a balance alleged to be due on an account. Affirmed.

The facts are stated in the opinion.

Mr. T. F. McCue, for appellant:

Having received the money as general agent of the respondent, the act had the same force and effect as though the respondent had received the same.

Gray v. Herman, 75 Wis. 453, 6 L.R.A. 691, 44 N. W. 248; First Nat. Bank v. McClung, 7 Lea, 492, 40 Am. Rep. 66; Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847.

Messrs. Turner & Wright, for respondent:

Payment may be made in other things than money provided the parties so agree.

Scott v. Gilkey, 49 Ill. App. 116; Cleveland v. Rothschild, 132 Mich. 625, 94 N. W.

184; Lokken v. Miller, 9 N. D. 512, 84 N. W. 368.

At common law, courts of record of general jurisdiction have inherent power to vacate, amend, or modify their judgments during the term at which rendered.

17 Am. & Eng. Enc. Law, p. 813; 23 Cyc. Law & Proc. p. 860; 1 Black, Judgm. § 305; Coughran v. Gutcheus, 18 Ill. 390; Layman v. Graybill, 14 Ind. 166; Taylor v. Lusk, 9 Iowa, 444; Wolmerstadt v. Jacobs, 61 Iowa, 372, 16 N. W. 217; State ex rel. Minard v. Sowders, 42 Kan. 312, 22 Pac. 425; Com. v. Weymouth, 2 Allen, 144, 79 Am. Dec. 776; Taylor v. Gribble (Tex. Civ. App.) 33 S. W. 765.

Spalding, J., delivered the opinion of the court:

Action for a balance due plaintiff from defendant on account. Defense full pay-

Case Note. — Assumption of debt by agent as payment.

It seems to be a universal rule that assumption of a debt by an agent is not payment, in the absence of express authority or some general usage or custom to that effect.

Thus, an agent with general authority to collect cannot bind his principal, in the absence of some general usage or custom, or a subsequent ratification, by an agreement to treat the cancellation of a debt due from himself personally to a debtor of the principal, as payment, in whole or in part, of the latter's claim. Underwood v. Nicholls, 17 C. B. 239; Arnett v. Glenn, 52 Ark. 253, 12 S. W. 497; Bostick v. Hardy, 30 Ga. 836; St. John & M. Co. v. Cornwell, 52 Kan. 712, 35 Pac. 785; Merchants Mut. Ins. Co. v. Excelsior Ins. Co. 4 Mo. App. 579; Wheeler & W. Mfg. Co. v. Givan, 65 Mo. 89; Hurley v. Watson, 68 Mich. 531, 36 N. W. 726; McCormick v. Keith, 8 Neb. 143 (where plaintiff's general agent for the sale of machinery had power to receive payment, and, in case of doubtful claims, to compromise by accepting personal property in payment); Western White Bronze Co. v. Portrey, 50 Neb. 801, 70 N. W. 383; Parker v. Leech, 76 Neb. 135, 107 N. W. 217; Henry v. Marvin, 3 E. D. Smith, 71; L'Artiste Pub. Co. v. Walker, 11 Misc. 426, 32 N. Y. Supp. 151; Williams v. Johnston, 92 N. C. 532, 53 Am. Rep. 428; Union School Furniture Co. v. Mason, 3 S. D. 147, 52 N. W. 671; McAlpin v. Cassidy, 17 Tex. 450 (where the agent, with authority to promote extension of the business generally, received drafts payable to his own creditor); Chattanooga Foundry & Pipe Works v. Gorman, 12 Tex. Civ. App. 75, 34 S. W. 308; Belton Compress Co. v. Belton Brick Mfg. Co. 64 Tex. 337; Maloney Mercantile Co. v. Dublin Quarry Co. (Tex. Civ. App.) 107 S. W. 904.

This rule was applied in Scott v. Irving, 1 Barn. & Ad. 605; Bartlett v. Pentland, 10 Barn. & C. 760; Russell v. Bangley, 4 17 L.R.A. (N.S.)

Barn. & Ald. 395; and Sweeting v. Pearce, 9 C. B. N. S. 534,—where insurance brokers agreed with the underwriters to accept as payment of their principals' insurance policies, premiums due from the brokers to the underwriters.

This same rule was also followed in Gullett v. Lewis, 3 Stew. (Ala.) 23; Craig v. Ely, 5 Stew. & P. (Ala.) 354; Cost v. Genette, 1 Port. (Ala.) 212; McCarver v. Nealey, 1 G. Greene, 360; Keller v. Scott, 2 Smedes & M. 81; Chambers v. Miller, 7 Watts, 63; Wilkinson v. Holloway, 7 Leigh, 277; Kingston v. Kincaid, 1 Wash. C. C. 454, Fed. Cas. No. 7,822,—where attorneys at law accepted credit on their own debts to the debtors of their clients or some third persons, in discharge of their clients' claims the attorneys being treated as the special agents of their clients, with no implied authority to accept anything but money for the debts due.

In Barker v. Greenwood, 2 Young & C. Exch. 414, a legal representative of the creditor sued to recover the balance due on a debt from defendant, to which he pleaded payment in that he paid the creditor's agent partly in cash and partly by writing off an account he had with the agent, the agent himself being a creditor of his principal; but it was held that, while the payment discharged the debt, if the facts were as contended by defendant, yet the burden was on him to show that the agent was a creditor of his principal for the amount set off, which was a question for the master.

In Mitchell v. Printup, 68 Ga. 675, plaintiffs sued to recover the price of guano sold to defendants by their agent, against which claim defendants attempted to set off goods sold by them to the plaintiffs' agent for his personal use, the agent representing that his principals owed him and he had authority to make such trade; but the court held that a payment to an agent who is known to be such, by releasing his own debt, is not a payment to the principal.

In Cooney v. United States Wringer Co.

APPEAL by defendant from a judgment of the District Court for Cass County convicting him of the crime of forgery. Reversed.

The facts are stated in the opinion.

Messrs. Barnett & Richardson, John F. Callahan, and W. S. Lauder for appellants.

Messrs. T. F. McCue, Attorney General, A. McGee, and B. D. Townsend for the State.

Morgan, Ch. J., delivered the opinion of the court:

The defendant was convicted of the crime of forgery in the third degree, and sentenced to imprisonment in the penitentiary for the period of one year and six months. The of-

could be made as to the substance of the communication, a new trial should be granted because there should be no communication whatever between the judge and jury except in open court, and, when practicable, in the presence of counsel.

In the following cases it was held to be error for the court to send additional instructions to the jury room without the consent of, or notice to, parties or counsel: *Sommer v. Huber*, 183 Pa. 162, 38 Atl. 595; *Read v. Cambridge*, 124 Mass. 567, 26 Am. Rep. 690 (though answer to jury admitted to be correct); *Chicago & A. R. Co. v. Robbins*, 159 Ill. 598, 43 N. E. 332; *Taylor v. State*, 42 Tex. 504; *Quinn v. State*, 130 Ind. 340, 30 N. E. 300 (instruction merely as to return of verdict); *Fish v. Smith*, 12 Ind. 563; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 48 N. W. 203; *Hall v. State*, 8 Ind. 439 (withdrawing two erroneous instructions); *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200 (answering question as to manslaughter and sending the jury statute on the point; both actions error); *Norton v. Dorsey*, 65 Mo. 376 (jury called back to court room, but all others excluded except deputy sheriff); *Smith v. McMillen*, 19 Ind. 391 (sending written instructions, given orally at the trial).

It was also held to be error for the judge to answer questions sent by the jury without the consent of counsel, without regard to the nature of the communication, in *O'Connor v. Guthrie*, 11 Iowa, 80; *Johnson v. State*, 100 Ala. 55, 14 So. 627; *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Rep. 480, 51 N. W. 902; *State v. Alexander*, 66 Mo. 148 (answering written question sent by juror, and also holding conversation with juror about possibility of agreement); *Goode v. Campbell*, 14 Bush, 75; *Low v. Freeman*, 117 Ind. 341, 20 N. E. 242 (improper, though answer given was correct); *Kehrley v. Shafer*, 92 Hun, 196, 36 N. Y. Supp. 510 (giving amount of plaintiff's claim); *Chouteau v. Jupiter Iron Works*, 94 Mo. 388, 7 S. W. 467; *Bunn v. Crowl*, 10 Johns. 239; *Neil v. Abel*, 24 Wend. 185 (justice sent minutes of trial to the jury at their request). In *Coolman v. State*, 163 17 L.R.A. (N.S.)

fense is charged in the information to have consisted in fraudulently and feloniously uttering a certain road overseer's receipt, knowing that the same was a forgery, which said receipt is in the following words and figures:

Road Overseer's Receipt, North Dakota.

\$231.30. Minot, Sept. 8, 1904.

Received of the Great Northern Railway Company, two hundred thirty-one 30-106 dollars, in full payment of road taxes levied against its property for year 1904 in road district No. 1 and 2, township of Ross, county of Ward, North Dakota. Paid in labor upon the public highways of said road district by ——— days work by man and team, and ——— days work by man. Wm.

Ind. 503, 72 N. E. 568 (in which the judge, in effect, told the jury that a verdict of disagreement could not be received); and in *State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117, and *McBean v. State*, 83 Wis. 206, 53 N. W. 497 (in which the judge, in effect, informed the jury that he would consider a recommendation of mercy),—it was held that no communication should be had, though the answers themselves in these cases were doubtless prejudicial. The same result was reached in *Ruckersville Bank v. Hemphill*, 7 Ga. 396; *State v. Frisby*, 19 La. Ann. 143; and *Chinn v. Davis*, 21 Mo. App. 363,—when a juror left the jury room and held some conversation with the judge.

A number of cases have arisen in which the judge has entered the jury room, in which such conduct has been held reversible error.

Thus, in *Hurst v. Webster Mfg. Co.* 128 Wis. 342, 107 N. W. 666, the jury, after deliberating some time, sent a request to have the pleadings and papers in the case. The judge went to the jury room, and, standing in the doorway, told them he could not grant the request, but did inform them as to some undisputed figures and amounts. The court, speaking of the rule that no communication should be had between the judge and jury after submission of the case, except in open court, says: "All court proceedings should be in the open; there should be no opportunity for the doing of things in a corner, nor should a defeated party be required to show that such a communication as was here had was in fact prejudicial. He is entitled to have his case tried in open court from start to finish. There is safety in no other rule."

Similar results were reached in *Abbott v. Hockenberger*, 31 Misc. 587, 65 N. Y. Supp. 566, in which the justice was asked if verdict would carry costs, and answered, "Yes;" *Hudson v. Stearns*, 75 N. Y. Supp. 735, in which the justice answered through the doorway that costs must follow the judgment; in *Benson v. Clark*, 1 Cow. 258, in which the justice went into the jury room, but did not answer the question asked, and, shortly after, sent a certain paper to the

Crowden, Overseer of Highways in Road District No. 1 and 2, Ross township, Ward county, North Dakota.

In the information it is further alleged that in the year 1904 the Great Northern Railway Company was indebted to Ross township in Ward county, North Dakota, in the sum of \$231.30 for road taxes assessed against its property in said township for that year; that one William Crowden was the road overseer of said township, and was authorized to collect said taxes from said company and to receipt for the same, and that the defendant was authorized by said Great Northern Railway Company to pay said road taxes by doing work upon the highways of said township pursuant to a

contract between him and said railway company, under the terms of which the said company agreed to pay said defendant the amount of said taxes upon presentation to said company of the road overseer's receipt for the full amount of said taxes. Upon this appeal, there are many assignments of error, as the trial was a protracted one. The appellant, however, has argued only five assignments of error, and we will only dispose of those that have been argued in the brief. Upon the trial the defendant admitted that the name of William Crowden, or William Crowder, as it is sometimes spoken of in the evidence, was not signed to said receipt by said Crowden or Crowder, but that the same was signed thereto by the defendant himself, or by his office

jury at their request, both acts being held reversible error; *Havenor v. State*, 125 Wis. 444, 104 N. W. 116, in which the judge stepped to the door of the jury room, and, being asked a question, told the jury he could not answer it, but that the point was covered by his charge; *Kirk v. State*, 14 Ohio, 511, in which one of the associate judges, on request of the others, went to the jury room during adjournment and explained the charge to them, it being held that this violated the constitutional right to a public trial; *Ducate v. Brighton*, 125 Wis. 628, 114 N. W. 103 in which the judge went to the jury room, taking the stenographer to report all that was said, and announced that the sheriff would take them to supper, and cautioned them as to their conduct while at the meal; *High v. Chick*, 81 Hun, 100, 1 N. Y. Anno. Cas. 1, 30 N. Y. Supp. 652, in which the jury was left to deliberate in the trial room, and the court said the error could have been avoided by the justice announcing the court open and inviting the attorneys in; *Hoberg v. State*, 3 Minn. 262, Gil. 181, in which the judge merely informed the jury that they should come into open court if they wanted further instructions (see *Oswald v. Minneapolis & N. W. R. Co.* 29 Minn. 5, 11 N. W. 112, and *Helmbrecht v. Helmbrecht*, 31 Minn. 504, 18 N. W. 449, for modifications of this case); *Gibbons v. Van Alstyne*, 29 N. Y. S. R. 461, 9 N. Y. Supp. 156, in which the justice entered the jury room, but nothing was shown as to there being any conversation with the jury; *Valentine v. Kelley*, 54 Hun, 78, 26 N. Y. S. R. 481, 7 N. Y. Supp. 184, in which a justice merely suggested to the jury that they try to agree on a verdict, no partiality or coercion being shown; *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558, in which, by direction of the judge, a written statement of the stenographer that a certain question was not asked, was sent to the jury room; *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694, and *Stager v. Harrington*, 27 Kan. 414, in which it was held error for the judge to enter the jury room, and that in such cases the court will not inquire into the effect of such entry; *People* 17 L.R.A. (N.S.)

v. Linzey, 79 Hun, 23, 61 N. Y. S. R. 240, 29 N. Y. Supp. 560, in which the judge, in answer to a question by a juror as to what the charge was against the defendant, answered "petit larceny;" *Lester v. Hays*, 14 Tex. Civ. App. 643, 38 S. W. 52; *State v. Bland*, 9 Idaho, 796, 76 Pac. 780; *People v. Bowers*, 111 N. Y. Supp. 623, in which the judge answered the question as to the nature of the offense and the punishment. In *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976, the court said: "An act, a sentence, or a word, from the presiding judge, may exert a controlling influence on the verdict. It is for these reasons that a communication by the judge to the jury stands on a different basis from that of another person, and, for a like reason, the law should throw a higher degree of circumspection around such communications."

In the following cases, however, the courts, while not encouraging the practice of the judge communicating with the jury or entering the jury room for any purpose, refuse to grant a new trial, it appearing that no prejudice resulted or could have resulted: *Moseley v. Washburn*, 165 Mass. 417, 43 N. E. 182, in which the judge answered a written question as to the date from which to compute interest, it having been covered in the original instruction; *State v. George*, 8 Rob. (La.) 535, in which the judge went to the jury room to read the testimony, taken in his own handwriting so illegibly that the jury could not read it, and, later, returned at the request of the jury and wrote out the verdict,—while the case was reversed on other grounds, the court said that these irregularities might not vitiate the verdict in themselves inasmuch as it did not appear that the judge participated in the deliberations of the jury; *Galloway v. Corbitt*, 52 Mich. 460, 18 N. W. 218, in which the judge entered the jury room and answered a question,—while the court said the action was highly improper, it refused to reverse the case because the error was harmless; *Rafferty v. People*, 72 Ill. 37; *State v. Rowell*, 75 S. C. 494, 56 S. E. 23, in which a juror came to the judge in the court room

clerk under his instructions. On the trial the state, under objection, was permitted to show that numerous other receipts of a similar nature to the one set forth in the information had been uttered by the defendant. These receipts were for taxes in different road districts and for different amounts, and some of them purported to have been receipts for road taxes from the Great Northern Railway Company, and some of them purported to be receipts for road taxes from the Soo Railway Company. The introduction of these other receipts is strenuously claimed to have been erroneous and prejudicial; and the question presented on that assignment is one of the main questions argued on the appeal.

The contention of the state is that such

evidence was proper as bearing upon the intent with which the defendant uttered the receipt in question. The statute which it is claimed was violated in this case provides that the uttering of the forged instrument or receipt must have been done with intent to defraud. It therefore follows that, if Crowder authorized the defendant to sign his name to said receipt upon receipt of the money, no offense would be committed in uttering it by presenting it to the railway company in order that he might be reimbursed, as provided for by his contract with the railway company. As has been seen, this contract provided that the defendant was to be paid by the company a certain proportion of the amount assessed against it in any township upon presenting

and spoke privately, but the judge at once stated what was asked, and gave his answer openly; *Com. v. Jenkins, Thatcher, Crim. Cas. 118*, in which the jury sent a note to the judge asking advice, which the judge did not answer, but directed the officer to read a part of the opinion in *Sargent v. Roberts*, to the effect that no communication should take place between the judge and jury,—the court saying this was not error because the communication did not relate to the case under consideration; *Smith v. Holcomb, 99 Mass. 552*, in which it was held that sending a paper to the jury which had accidentally been left behind was not such a communication as must be made in open court; *Com. v. Heden, 102 Mass. 521, 39 N. E. 181*, in which it was held not error for the judge to send word to the jury that they might seal their verdict and separate; *Mahoney v. Decker, 18 Hun, 360*, in which the judge answered a written communication from the jury, and later, when the jury returned unable to agree, informed counsel as to the former communication, no objection being made, and the jury being sent back; *Gandolfo v. State, 11 Ohio St. 114*, in which it was held not improper for the court to send the statutes to the jury, calling their attention to sections relating to homicide; *Martin v. Petty (Tex. Civ. App.) 79 S. W. 878*, in which the court entered the jury room and withdrew an improper charge; *State use of Grabinsky v. Smit, 20 Mo. App. 50*, in which it was held not error for the judge to give a correct answer to a written question from the jury; *People v. Pickert, 26 Misc. 112, 56 N. Y. Supp. 1090*, in which the justice, on being sent for by the jury, went to their room and asked if they had agreed, but, on being informed that they had not, but wished instructions, he stated he had no right to be in their presence until they had agreed, and withdrew; *People v. Moore, 50 Hun, 356, 3 N. Y. Supp. 159*, in which the judge, in answer to a question as to the form of the verdict answered, "Guilty or not guilty," it affirmatively appearing that nothing else occurred; *State v. Nash, 51 S. C. 319, 28 S. E. 946*, in which it was said that, while the judge should not

enter the jury room, it was not necessarily error for a magistrate to do so for the purpose of complying with the jury's request for further instructions, they having been left in the trial room; *Denison v. State, 49 Tex. Crim. Rep. 426, 93 S. W. 731*, in which the judge, on going into the jury room to get a blank, was asked the meaning of a word used in the charge, and referred the jury to the dictionary; *Priest v. State (Tex. Crim. App.) 34 S. W. 611*, in which the judge went to the jury room to ascertain if they would soon agree on a verdict,—though it was held not error, the court recommended that in such cases the jury be brought into open court; *Cartwright v. State, 12 Lea, 620*, where the judge went to the jury room and told the jury he was going home, and, if they wanted him, they could send for him,—the court, though refusing to reverse the case because no injury could have resulted, said that strictly the judge had no right to enter the jury room and there speak to the jury about the case; *Keeler v. Lockwood, Hill & D. Supp. 137*, in which the jury sent for the justice, who went into the jury room supposing the parties would follow, but, on seeing that they did not, refused to give the instructions, and asked the jury further to consider the case; *Kerr v. Hammer, 39 N. Y. S. R. 708, 15 N. Y. Supp. 605*, in which the judge went to the jury room to secure a paper, and, on being asked if the jury could have the evidence, answered "No," and refused to answer other questions without the parties being present; *McCutchen v. Loggins, 109 Ala. 457, 19 So. 810*, in which the court said that an objection on the ground that the judge entered the jury room on request of a juror, but hold him he would not discuss the case except in the presence of the whole jury and counsel, was frivolous; *Ayrhart v. Wilheimy, 135 Iowa, 290, 112 N. W. 782*, in which the judge was called to the jury room and asked several questions, but did not answer them; *Horrman v. Neuman, 15 Misc. 449, 72 N. Y. S. R. 670, 37 N. Y. Supp. 199*, in which the jury sent two written questions regarding the case, on which the

and turning over to it a valid receipt from the proper township officer that the road taxes assessed against said railway company had been fully paid by work upon the highways of said township in compliance with the statute permitting such taxes to be liquidated in such manner. The contention of the state is that the Crowder receipt was forged and presented to the railway company, and the money drawn thereon with intent to defraud the company. The defendant's contention is, as stated before, that Crowder authorized him to sign the receipt, and that he drew the money thereon in good faith, and without any fraudulent intent whatever. The trial court admitted evidence that the defendant had drawn money from the Great Northern

Railway Company upon presentation of receipts purporting to have been signed by the road overseers of other townships in Ward county. These other receipts were in like terms with the receipt described in the information, excepting as to the date, the name of the township, the amounts, and the names of the persons purporting to have signed the same as road overseers; and some of the receipts were for the taxes assessed against the Soo Railway Company. The contention of the state as to some of the receipts not described in the information is that they were signed by the road overseers, but the amounts were changed and raised after they were signed. From these facts, it is manifest that the question of the defendant's intent in utter-

judge indorsed that he had no further charge to make; *Thayer v. Van Vleet*, 5 Johns. 111, in which the justice, on request of the jury, went to their room, and, on being asked if they could add to plaintiff's claim, answered, "No;" *Bowring v. Wabash R. Co.* 90 Mo. App. 324, in which the judge made inquiries of the jury as to whether they had or could agree on a verdict.

Other cases seem to indulge a presumption in favor of the propriety of the trial court action and sustain the verdict unless prejudice is shown, or at least probable. The strongest case of this kind is, *Philips v. Com.* 19 Gratt. 485, in which the judge took temporary charge of one juror while he was separated from the others because of illness. In speaking of the judge as custodian of the jury, the court says: "Instead of its being said, he is the last man who should have charge of a jury, he is the first and best, and the very one to whom the charge is confided by law." As to the presence of the judge with a juror creating presumption of prejudice, the court says: "Far distant be the evil day when corruption shall have so soiled the bench and tainted the streams of justice as that the accidental or necessary presence of the judge with a juror shall not be received as a fair presumption that no wrong was done or permitted, but, on the contrary, shall be accepted as proof of tampering! When that state of opinion shall prevail, all respect for the courts, all confidence in the administration of justice, all reverence for authority, will have forsaken that department of the public service, usually deemed the last and best bulwark of public virtue and morals."

In *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830, the judge answered a question of the jury, both question and answer being in writing, without informing counsel, who were in court engaged in another case. The court said that, while the better practice is to apprise the counsel of any question asked by the jury, that may affect the case, inasmuch as the answer correctly stated the law, and the verdict was plainly right, the irregularity would not vitiate the verdict. 17 L.R.A. (N.S.)

In *State v. Olds*, 106 Iowa, 110, 76 N. W. 644, in which the judge entered the jury room and had some conversation with part of the jury, the court sustained the verdict inasmuch as it was not shown that anything was said or done prejudicial to the defendant.

In *Helmbrecht v. Helmbrecht*, 31 Minn. 504, 18 N. W. 449, in which it appeared that the judge went to the jury room and remained there about one minute, nothing being shown that any communication passed, the court, in holding that this was not reversible error, said: "Whether alleged misconduct of this nature is sufficient to require a verdict to be set aside, must depend upon the facts of the particular case, and whether there appears to be reasonable ground to believe that a party is prejudiced thereby. In this case the intrusion was but temporary and apparently casual, and there is no reason to believe that any prejudice was caused to the defendant's rights. The prevailing party ought not, therefore, to be punished by setting aside a verdict for the inadvertent act or irregular conduct of an officer or other person, with which he is in no wise connected, unless there is good cause for believing that the opposite party is injured." This case and the case of *Oswald v. Minneapolis & N. W. R. Co.* 29 Minn. 5, 11 N. W. 112, modify the stricter rule laid down in *Hoberg v. State*, 3 Minn. 262, Gil. 181.

In *People v. Kelly*, 94 N. Y. 526, in which the judge answered a written communication from the jury, it not appearing what the communication was, the court, while holding that the question was not properly raised by affidavit, implied that the harmful nature of such communication should be shown, saying that the presumption is that there was no violation of duty on the part of the court.

In *Gillotte v. Jackson*, 9 Jones & S. 308, in which a question was sent by the jury which the judge answered in writing, but appellant failed to show what the answer was, the court held that, in the absence of a showing to the contrary, the answer is presumed to be proper and without

ing the receipt set forth in the information became an important one at the trial. As the signing of Crowder's name to the receipt and the uttering of it knowing that it had not been signed by Crowder, but by the defendant himself, were admitted by the defendant at the trial, the question whether Crowder had authorized the defendant to sign his name to the receipt, and the defendant's intent, were the only questions that were in issue before the jury.

By admitting the signing and uttering of the receipt, the defendant did not, of course,

admit as a fact that the uttering of the receipt was with a fraudulent intent. Whether this was done fraudulently or in good faith was not and is not ordinarily in such cases capable of proof by direct evidence; nor would it necessarily follow that the defendant uttered the receipt fraudulently, although the jury may have been justified by the evidence in finding that the defendant was not authorized, as a matter of fact, to sign Crowder's name to the receipt. The legal inference that a person is presumed to intend the natural consequences of his acts,

injury to the party, and said that communications from the court to the jury are often of a kind which should not be made known to the bar, as in this case, in which the question was as to whether the jury could find for plaintiff for \$25,000 when only \$5,000 was claimed.

A similar statement was made in *Goldsmith v. Solomons*, 2 Strobb. L. 296, in which the foreman held communication with the judge as to the form of verdict, and the court says: "The intercourse between the jury and the bench is in many respects very confidential. Often the communications from the jury are of that kind which ought not to be communicated to the bar." The court expressly disapproves of *Sargent v. Roberts*, saying that the doctrine of that case is "pushing judicial coyness to the very verge of mere prudery."

Hart v. Lindley, 50 Mich. 20, 14 N. W. 682, was a summary proceeding before a circuit-court commissioner. The commissioner, on request of the jury, went to their room and told them he could give them no instructions. The court said, there can be no presumption that his visit did any harm, especially as the jury could not well have reached a different conclusion.

In New Hampshire the doctrine of *Sargent v. Roberts* is expressly repudiated, the courts of that state holding that it is proper for the court to communicate with the jury at their request, and give them additional instruction on the law, in the absence of counsel, though such communications should be in writing and returned into court with the papers in the case. *Shapley v. White*, 6 N. H. 172; *School Dist. No. 1 v. Bragdon*, 23 N. H. 507; *Bassett v. Salisbury Mfg. Co.* 28 N. H. 438; *Allen v. Aldrich*, 29 N. H. 63.

Consent; waiver of objection.

As to what will amount to consent on the part of the party or counsel to communications between judge and jury, some of the cases hold that no consent will be implied, but must be affirmatively shown. Thus, in *People v. Bowers*, 111 N. Y. Supp. 623; *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976; *Plunkett v. Appleton*, 51 How. Pr. 469, 9 Jones & S. 159; *Moody v. Pomeroy*, 4 Denio, 115; and *Taylor v. Betsford*, 13 Johns. 487.—it was held that the fact 17 L.R.A. (N.S.)

that counsel were present and knew communications were being made, but did not object, was not sufficient to amount to consent. In *Jones v. Johnson*, 61 Ind. 257, the jury was instructed at 2 o'clock Saturday, and at 6 p. m. counsel for both parties, who resided in other towns, agreed with each other and the judge that they would go home and leave the matter in the hands of the judge, reserving the right to all motions for a new trial or objections to the verdict which was to be rendered the following Wednesday. It was held to be reversible error for the judge, at the request of the jury, to go to their room and answer questions concerning the case; but this decision was based on a statute providing that further instruction should be given in open court in the presence of, or after notice to, the parties or their attorneys, which was held to be mandatory.

In *Seeley v. Bisgrove*, 83 Hun. 293, 31 N. Y. Supp. 914, it was held that consent of the parties for the judge to enter a jury room at request of the jury did not imply consent for him to read the original answer of the defendant, which had not been read to them before.

In *State v. Wroth*, 15 Wash. 621, 47 Pac. 106, the jury requested to see the judge, and he went inside the jury room, partly closing the door, and, there being asked to have part of the charge reread, returned and informed counsel of the request made. In holding that his entering the jury room was reversible error, the court said: "In the discharge of his official duty, the place for the judge is on the bench. As to him, the law has closed the portals of the jury room, and he may not enter. The appellant was not obliged to follow the judge to the jury room in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge; and the state cannot be permitted to show what occurred between the judge and the jury at a place where the judge had no right to be, and in regard to which no official record could be made."

In *Rafferty v. People*, 72 Ill. 37, in which the verdict was sustained because no prejudice could have resulted, the court said that, if the communication was of such character as probably to operate to the prejudice of the accused, the fact that his

which is sometimes conclusive, is not necessarily of itself of much force in cases of uttering forged paper. For this reason, it is generally held that proof of similar acts of forgeries, or of uttering of forged paper, is admissible as bearing alone on the question of the intent with which the forgery or uttering of forged paper for which the defendant has been informed against was forged or uttered. Such collateral proof must be limited within such a period that it may naturally be seen to throw light as to the intent with which the act under investiga-

tion was committed. The question of time during which other acts may be proven seems to be largely within the trial court's discretion. Such collateral proof is never admitted as proof of the commission of the criminal act for which the defendant is on trial. Such evidence of collateral facts is irrelevant and inadmissible as proof of the commission of the crime in question, on the theory that the person on trial is a hardened criminal and has committed other crimes. The law takes cognizance of the fact that criminals may not be guilty of

counsel, in his absence, consented to the communication, will not, in a capital case, cure the error.

Other cases, however, take a more liberal view, and have held that consent to communications complained of may be presumed from the action of the parties or counsel. In *Henlow v. Leonard*, 7 Johns. 200, the jury, after retiring, asked to re-examine a witness; the justice asked the parties to go into the jury room for that purpose, but the defendant refused to do so; and the justice then let the witness into the jury room, and stood in the door while they examined him. It was held not error, as it was done openly after notice to the parties.

In *Bateman v. Connor*, 6 N. J. L. 109, the jury asked the justice for further instructions; the defendant could not be found, and his attorney refused to accompany the justice to the jury room, so he gave the instruction without them. It was held that, while the instruction should be given in the presence of the parties, if they cannot be found at the place of trial where they belong, or refuse to accompany the justice to the jury room, the instructions may be given without them, though a secret and private conference between judge and jury would vitiate all proceedings.

In *Rogers v. Moulthrop*, 13 Wend. 274, 22 Am. Dec. 546, where the defendant's attorney refused to go with the justice, and objected to anyone going to the jury room, and the justice, accompanied by plaintiff's attorney, went to the jury room and gave additional instructions, the court sustained the verdict.

In *Whitney v. Crim*, 1 Hill, 61, after the jury had retired the defendant informed the justice that they wanted to see him, and, both parties being present and not objecting, he went to the jury room; the jury asked to have some of the testimony read, and the justice returned to the court room and informed the parties. The jury were then brought into the court room and the testimony read to them. The court held that the action of defendant in telling the justice that the jury wanted to see him, and not protesting, amounted to consent to his entering the jury room.

In *Hancock v. Salmon*, 8 Barb. 564, the jury asked to see the justice; one of the counsel for defendants was present, and 17 L.R.A. (N.S.)

also one of the defendants, who, on seeing that the judge hesitated, said: "Esquire, the jury want to see you." This was held to amount to implied consent for the justice to read the testimony of one witness on request of the jury, while in the jury room.

In *Zust v. Linthicum*, 26 Jones & S. 478, 34 N. Y. S. R. 583, 11 N. Y. Supp. 727, the jury sent an inquiry to the court, and plaintiff's counsel objected to any communication except in open court, the objection being overruled. After that, the question was answered, but no exception was taken thereto; and the court held that in not excepting to the answer plaintiff's counsel assented to the answer as given.

In *Snyder v. Wilson*, 65 Mich. 336, 32 N. W. 642, the jury rendered a verdict which was unsatisfactory to both parties, and they agreed that the jury should reconsider, and that the justice would remain with and assist the jury. The court held that in so doing the parties constituted a tribunal of their own, and the justice had jurisdiction to render judgment on verdict.

In *Lasher v. Curry*, 9 N. Y. Anno. Cas. 260, 102 N. Y. S. R. 845, 68 N. Y. Supp. 845 (affirmed in 62 App. Div. 631, 71 N. Y. Supp. 1140), the jury were left in the trial room, the others retiring, and, on request of the jury to see the justice, defendant and his attorney and plaintiff's attorney and others went into the room, whereupon one juror said that they wanted to see the justice, all others then retired, except the justice who answered the question put to him by the jury. The court held that this amounted to consent on the part of the defendant.

In *Smoke v. Jones*, 35 Mich. 409, the justice, on request of the jury, went to the jury room in company with the parties, and, with their consent, answered questions asked by the jury. It was held that defendant could not charge error on this proceeding to which he consented.

In *Joliet v. Looney*, 159 Ill. 471, 42 N. E. 854 (affirmed in 56 Ill. App. 502), it was held that the action of defendant's counsel in not objecting to the sending of additional instructions to the jury room and requesting the court to send his refused instructions amounted to a waiver of the illegality.

all the crimes with which they may be charged, and excludes proof that the commission of one crime is proof of the commission of another crime. For the single purpose of showing what a person's intent was in uttering a forged paper, proof of a similar act is, however, admissible, although the proof may show the commission of a distinct offense. This is a general principle well fortified by text writers and precedents.

In Stephen's Digest of Evidence, art. 11, the rule is laid down as follows: "When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is deemed to be relevant to the issue." Wharton's Criminal Law, 6th ed. § 649, says: "Where the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of, the crime for which the person is charged, and proof of such guilty knowledge or malicious intent is indispensable to establish his guilt, in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute in law a distinct crime." In 7 Am. & Eng. Enc. Law, p. 62, it is said: "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned is deemed to be relevant." In 3 Greenleaf on Evidence, § 15, it is said: "In the proof of intention, it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged, for the unlawful intent in the particular case may well be inferred from a similar intent proved to have existed in other transactions done before or after that time." In *People v. Everhardt*, 104 N. Y. 595, 11 N. E. 64, it was said: "Upon the trial the people were allowed to prove against the objection of the defendant, the uttering of other forged checks by him upon other occasions. In this there was no error. The defendant, by his plea of not guilty, had put in issue everything which it was incumbent upon the people to prove. They had no direct or positive evidence that he personally forged the check which he uttered, and it was open for him to show that at the time he uttered it he had no knowledge that it was forged, and was

therefore innocent of crime; and, for the purpose of showing the prisoner's guilty knowledge in such cases, it has always been held competent to prove other forgeries. *Mayer v. People*, 80 N. Y. 364; *People v. Shulman*, 80 N. Y. 373, note. Such proof is not received for the purpose of showing other crimes than that charged in the indictment; but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged; and it can be considered by the jury only for that purpose. Although the evidence of Gaylord, corroborated as it was, as to the guilty knowledge of the defendant, was quite clear and convincing, yet the people were not bound to rest upon a *prima facie* case, but had the right to confirm that evidence by the proof as to the uttering of other forged checks." The counsel for the appellant do not attempt to controvert these general principles. Their contention is that the facts of this case bring it within the principle announced in other cases by reason of the fact that the defendant admitted the making and uttering of the receipt. The cases chiefly relied on are *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277; *State v. Vance*, 119 Iowa, 685, 94 N. W. 204; *Bink v. State*, 48 Tex. Crim. Rep. 598, 89 S. W. 1075. Some of these cases do hold that, where the facts of themselves show with certainty what the intent was, proof of other offenses is inadmissible; but we do not think that they are parallel on the facts with this case. In this case the question of defendant's intent was made an issue by his plea, and he consistently maintained throughout the trial that he acted in good faith. Under such circumstances, his intent was in issue and the rightful subject of proof. We do not understand why evidence of other offenses was rendered irrelevant by reason of the fact that the defendant claimed authority for doing what he did, or by reason of the fact that he admitted signing the receipt and uttering it and receiving the money on it. A material ingredient of the crime, the intent, still remained an issue.

The intent to defraud may not have been proven beyond a reasonable doubt in the minds of the jury, although they may have been satisfied that the proof showed beyond such doubt that Crowder did not authorize the defendant to sign his name to such receipt. It might well appear that the defendant believed that he had such authority, although he had none as a matter of fact. A mistake or misunderstanding may and often does occur that renders an act without fraudulent intent, although without authority. Under such circumstances, the legal presumption of fraudulent intent that

would follow the act would be of no force. The intent to defraud is a fact that must be proven in such cases, and the prosecution may show such intent by facts and circumstances, and are not prohibited from showing it by proof of other offenses of similar character, although the effect of such proof be to show the commission of other crimes, although the facts be admitted except the fraudulent intent. The following cases are fairly in point on this question: In *People v. Weaver*, 177 N. Y. 434, 69 N. E. 1094, it was held: "Where, upon the trial of an indictment charging the defendant with having forged an indorsement upon a promissory note and with having uttered it so indorsed, with intent to defraud, the defense is that, while she wrote the indorser's name upon the note without his express authority, she thought from prior transactions with him that she had the right to do so, and that she had no guilty intent in signing his name. A prior note purporting to have been executed by the defendant as maker, upon which she wrote the name of the same indorser, which he testified had not been indorsed by him, and to which he never authorized her to sign his name, is competent evidence to prove *scienter*." The mere fact that the name of the same person was forged in this case does not differentiate it in principle from the case under consideration. In *Higgins v. State*, 157 Ind. 57, 60 N. E. 685, the court said: "It is said that the language used was not equivocal, and the jury had a right to infer therefrom the intent charged. While this may be true, it does not render other proof of such intent or motive incompetent. When a fact is to be proved, the law requires the best evidence attainable, but it does not put any limit upon the amount of proof that may be adduced. . . . We do not think that the admission of any competent evidence can be rendered erroneous by statements or admissions of the accused made to the court and jury during the trial." In *Trogdon v. Com.* 31 Gratt. 862, the court said: "One of the counsel for the accused . . . insisted that, when the accused obtains goods by falsely representing himself a man of property, the jury must infer the guilty intent; and therefore evidence of collateral facts is unnecessary and irrelevant, and can only mislead the jury. It may be conceded that, when goods are obtained by false representations of the kind mentioned,—and this is the whole case,—the jury may justly infer the fraudulent intent. But it frequently happens in a large majority of cases there are numerous facts and circumstances, sometimes of a minute and varied character, throwing light upon the conduct and mo-

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tives of the accused. It is impossible for the court to foresee what may be developed in the progress of the trial. When evidence is offered of other transactions to show the guilty intent of the accused, is the court to say the intent is already conclusively proved, and the evidence is therefore irrelevant? . . . The opinion of this court in *Wash v. Com.* 16 Gratt. 541, has a strong bearing upon this question. There the distinction is plainly drawn between guilty knowledge or intent as a presumption of law and guilty knowledge or intent as a presumption of fact,—a mere inference to be drawn by the jury. In the latter case, while the jury may find the accused guilty upon a given state of facts, they are not bound to do so. They are to weigh all of the circumstances, and draw from them such conclusion as they may think warranted by the evidence." In *Com. v. White*, 145 Mass. 392, 14 N. E. 611, the court said: "And it might be thought that in a case like this, when the bills ran to the defendant, . . . if the jury believed that the bills were forged, it would follow almost necessarily that the defendant knew them to be so; and so it might be thought that the evidence of his use of other false bills was unnecessary for the purpose for which it was admitted, while it tended to prejudice the defendant in the eyes of the jury. But the defendant's knowledge was not admitted. On the contrary, it is still argued that there was no sufficient evidence to warrant the verdict, and evidence of knowledge which otherwise would be admissible is not made inadmissible by the fact that there is other strong evidence of knowledge in the case." In *Bell v. State*, 57 Md. 108, the court said: "It is not often possible to prove by positive and direct evidence that a party who uttered a forged paper has a knowledge that it is forged. When it has been proven that the party charged has done the act for which he is indicted, the question still remains whether he committed it with guilty knowledge, or whether he acted under a mistake; and evidence which tends to prove that he was pursuing a course of similar acts raises a presumption that he was not acting under a mistake, but with a guilty knowledge and intent, and is admissible for that purpose." *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389; *Higgins v. State*, 157 Ind. 57, 60 N. E. 685; *Anson v. People*, 148 Ill. 494, 35 N. E. 145; *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62. The evidence of similar offenses was therefore competent in this case as an aid in determining what defendant's intent was in uttering the Crowden receipt.

Although the other similar offenses were not connected with the offense with which

the defendant was charged, still they were of a similar general character, and related to a general plan or system in procuring money through means of dealings between railway companies and township officials in reference to road taxes. They were therefore substantially similar offenses, although they concerned different persons. One McAllister was a witness in the case, and was one of the overseers of highways with whom the defendant had dealings as to working out the taxes assessed against the Great Northern Railway Company in one of the townships of Ward county, and gave one of the receipts which it is claimed was afterwards altered and the amount increased. The receipt was given and some money paid, and all the conversation in reference to the making of the contract took place between the defendant and said McAllister at the buggy in the highway in front of one Schorb's dwelling house, and from 50 to 100 feet from the house. The conversation was not had in the presence of anyone besides the persons named. After the contract was made, the receipt signed, and some money paid thereon, the defendant drove away, and McAllister returned to the house, and had a conversation with Mrs. Schorb, who was a witness in the case, and was asked the following question: "When he came in, did he make any statement as to what transaction had occurred outside with Major Murphy?" And the witness was allowed to state what McAllister said, and did so as follows: "We are in luck. We have \$167 to spend in Surrey township on the roads." Then, after we talked, he said he didn't have it all to spend now, but he had in part. I think he said 'in part.' About \$55 he had in his hands. I think he pulled the money out of his pocket, and laid it on the table. I don't think he had the money in his hands when he came in from outside." The question was objected to as hearsay, and no part of the evidence of a competent transaction. On the trial there was a disagreement between McAllister and the defendant as to what transpired between them while the contract was entered into at the buggy in which the defendant was seated; and especially as to the sum of money then paid to McAllister by the defendant. The state contends that the testimony of the witness as to what was said by McAllister was proper as part of the *res gestæ*; but we think its admission cannot be upheld on that ground. The contract had been entered into and the parties had separated, and what was said of McAllister was simply a narration of what had taken place. To render declarations or evidence competent as part of the *res gestæ*, they must be so closely related to the principal fact as to show that they are spoken

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under the influence of the principal fact, and not in narration of it. The principal fact and the narration of it should be a connected fact, and not two separate disconnected transactions. The conversation between the defendant and McAllister was so disconnected with McAllister's statements to Mrs. Schorb as to be separate and independent acts. No precise rule can be laid down as to the time elapsing since the principal event when declarations may be admissible in relation to it. Each case must be determined under its own facts and circumstances. In this case negotiations had terminated and were not of such character that McAllister's declarations can be said to have been made under the influence of them. What McAllister thereafter said in reference to the transaction with the defendant is not similar to declarations as to cause of injuries rendered admissible when stated immediately after the injury, on the theory that the declarations were made while the shock of the injury was still present in the mind, and that what is said is the natural and spontaneous result of the excitement produced by the main fact. If sufficient time intervenes between the act and declarations concerning it to afford an opportunity for reflection, the declarations are inadmissible. In this case there was nothing in the nature of the transaction to bring it within any exception to the rule excluding hearsay evidence; and it was so disconnected from the original transaction as to exclude it as evidence of the *res gestæ*. Green. Ev. §§ 108, 162; 2 Elliott, Ev. § 548; Gillett, Indirect & Collateral Ev. p. 290; 1 Rice, Ev. p. 212; 11 Am. & Eng. Enc. Law, p. 523; Lund v. Tyngsborough, 9 Cush. 36.

After the jury had been deliberating on their verdict for about forty-eight hours, the trial judge was sent for by the jury, and he appeared pursuant to such request, and the following proceedings were had as stated by the trial judge in the settled statement of the case: "At some time between the hour of 8:30 and 9 o'clock on December 3, 1906, the said Honorable Charles A. Pollock, on coming to the court room and his chambers, and, being informed that the jury, or some of the jurors, desired to communicate with him, went to the room where said jury were deliberating and were confined, rapped on the door, and, the door being immediately opened by someone from the inside, and being opened from right to left, stepped inside of the door, leaving the jury-room door ajar, and, while standing in the open space, addressed the jury as follows: 'Good evening, gentlemen. I understand you want to see me. Have you agreed?' To which the foreman of the jury answered: 'No; I think we cannot agree.' Whereupon

the Honorable Charles A. Pollock, after pausing for a second, replied: 'I will ask you to consider the matter further. Good night.' Whereupon the said Honorable Charles A. Pollock closed the door to the said jury room and returned to his chambers. Thereafter, in a short time, the bailiff reported to the said Honorable Charles A. Pollock that the jury had agreed. That the visit of the said Honorable Charles A. Pollock to the said jury room and the conversation there had between himself and the juror, as aforesaid, was had in the absence of the defendant and his counsel, and was without the knowledge or consent of the defendant or his counsel, and that no person or persons were present at said conversation, except the Honorable Charles A. Pollock and the members of the jury; and that no record was made at the time of what was said and done on the occasion of the said visit of the said judge to the said jury room. I will further state that my addressing the jury as 'Good evening,' or 'Good night,' was nothing more than a salutation, and anything I said to them was not stated in a dictatorial manner, or intended or calculated as a threat. I will add, further, that in doing what I did I simply followed the practice which has obtained in this district so long as I have known anything of the practice, covering a period of twenty-six years. . . . And in going to the jury room upon the occasion in question the only object the court had was to ascertain whether anyone was sick and unable to further deliberate, and also to find out whether they had agreed, and in no manner by word, act, or deed attempted to influence their deliberations."

As to the purity of the intentions of the judge in going into the jury room in this case, and there having the brief communication with the jury, no certificate or proof is necessary so far as this court is concerned, as it well knows that his uprightness and sincere desire to be absolutely just and fair in all cases are beyond question. That admitted fact, however, does not meet the question before us, which is: Did he do that which was beyond his judicial functions in respect to the case? We are forced to the conclusion that he did. His presence in the jury room for any kind of communication with the jury is not contemplated by any provision of the statute. The opposite is the plain inference from the statute. All communication to the jury in open court is subject to exception by the parties, if deemed improper. If any communication is made to them in the jury room in the absence of the parties, no opportunity is afforded for objections and exceptions at the time. The open court is the place for com-

munications to the jury in the presence of, or on notice to, the attorneys. The jury room is for the jury alone, and no communications are allowed with them in the room except upon orders from the court through the officer in charge of them, who is permitted to ask them whether they have agreed upon a verdict. All communications to the jury in reference to the case should be made in open court, and all communications to them in the jury room avoided. In this way all distrust and fear that something improper is said or done will be without foundation, and every act be subject to exception and review. Any communication by word or writing not in open court affects the efficiency of jury trials as a means of accomplishing justice after giving all parties full opportunity of being heard at all stages of the trial. A strict compliance with this practice of having all proceedings in court in the presence of counsel, or on notice to them, unless waived, is better than to countenance violations thereof unless prejudice is shown. The state urgently insists that no prejudice could have resulted from what was done or said in this case, but we shall not consider that question. However, the fact that the foreman said that he thought they could not agree when the judge first spoke to them, and that they did agree in five or ten minutes thereafter, would be a stubborn fact for consideration if we entered upon an inquiry as to the effect upon the jury of the words spoken to them and the visit to the room. We think that any communication in this way as to the case should be prohibited and held prejudicial. It is against the policy of the law to indulge in secret communications or conferences with the jury or with jurors in reference to the merits or law of the case. To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely. The authorities are practically unanimous in condemning such communications, and in holding them prejudicial as a matter of law.

In *State v. Wroth*, 15 Wash. 621, 47 Pac. 106, the court said: "In the discharge of his official duties, the place for the judge is on the bench. As to him the law has closed the portals of the jury room, and he may not enter. The appellant was not obliged to follow the judge to the jury room in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge; and the state cannot be permitted to show what occurred between the judge and the jury at a place where the judge had no right to be, and in regard to which no official record could be made." In

Havenor v. State, 125 Wis. 444, 104 N. W. 116, the court said: "These rights are clearly of an important nature, and effect the substance of a jury trial and the right of a party to be heard or to bring in review every transaction of the court's proceedings. For the attainment of the best administration of justice, the law requiring that all proceedings of courts be open and public, and in the presence of the parties or their representatives, must be strictly enforced; and, in case of any infringement of this policy, parties are not to be put to the burden of showing that it in fact injured them, even though it be manifest that no improper motives prompted the acts complained of." In *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185, the court said, speaking through Mr. Chief Justice Parker: "As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper; and, if it was not, the party against whom the verdict was is entitled to a new trial. . . . No communication whatever ought to take place between the judge and the jury, after the cause has been submitted to them by the charge of the judge, unless in open court. . . . The only sure way to prevent all jealousy and suspicion is to consider the judge as having no control whatever over the case except in open court in the presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the convenience of the jurors is of small consideration compared with this great object. . . . It is better that everybody should suffer inconvenience than that a practice should be continued which is capable of abuse, or at least of being the ground of uneasiness and jealousy." See also *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976; *Du Cate v. Brighton*, 133 Wis. 628, 114 N. W. 103.

The other questions argued in the brief will not probably arise on another trial. Hence consideration of them is not material.

The judgment is reversed, a new trial granted, and the cause is remanded for further proceedings.

Fisk, J., concurs.

Spalding, J., concurring specially:

I concur in the reversal of the judgment in this case, but I think the evidence of other offenses, if admissible at all, should be admitted upon other grounds than that of showing intent.

1. The trial of this case occupied several weeks, and a large part of this time was 17 L.R.A. (N.S.)

spent in an attempt to prove and disprove the commission of other similar offenses. The admission of proof of other offenses in a criminal trial, it seems to me, is, at best a dangerous proceeding, and courts should restrain it within very narrow limits. The defendant is placed on trial charged with the commission of a specific act, and to permit the state to introduce evidence of other acts which are claimed to be unlawful, of which the defendant has had no notice—no opportunity to prepare his defense on them—and of which he may be entirely innocent, and yet, by reason of the surprise and lack of opportunity, be wholly unable to establish his innocence, may work great injustice. The danger of this is so great that proof of other offenses should not be admitted unless clearly within the well-established rules. Take this case as an illustration. The defendant was tried nearly 400 miles from his home, and from where the offenses were claimed to have been committed. He was informed against on only one offense, yet to all intents and purposes he was placed upon trial for four or five different offenses, and compelled to go this long distance after the trial commenced, to look for witnesses to disprove charges of which he had no prior notice. The rule seems to be that similar offenses in cases of this kind may be shown, first, to prove the intent; second, when they are part of one criminal scheme or system. There is no contention that the other offenses permitted to be shown had any connection with the crime for which the defendant was tried. But it is contended that the proof of the other forgeries was admissible for the purpose of showing the intent. I, however, am unable to see that the question of intent properly entered into the proof in this case. The defendant expressly admitted at the commencement of the trial the signing of the name which he was charged with forging to the receipt. He claimed authority from Crowder to do so. Crowder denied having given him such authority. Throughout the entire case it was conceded that the purpose with which the receipt was executed and uttered was to secure the money which it represented from the railway company. There was no occasion to question this intent, and the defendant did secure the money represented by the receipt from the company. This narrowed the issue solely to the question as to whether he was authorized to sign Crowder's name, and the admission of evidence of the other offenses claimed to have been committed in no way shed any light upon that question, and the only effect its admission could have had must have been to prejudice the jury by making it appear to them that the defend-

ant was a confirmed criminal. Again, after the attempted proof of each of the other unlawful acts of the defendant, how was the position of the state improved without proof of the intent with which they were committed? If proof of intent under the circumstances was necessary in the case at bar to have made the proof of similar acts competent, proof of intent should have been made in connection with them. If it was unnecessary to prove the intent in this case by reason of the conceded object to obtain money from the railway company, then proof of other acts was inadmissible. If proof of the intent in the present case was necessary, it was equally necessary in the other instances to constitute them any corroboration of the state's theory by showing intent. As I view the case, the question of intent to defraud rested solely upon the question as to whether or not he was authorized to sign Crowder's name, and the only evidence competent was evidence directed to that point. I think this view of the law is sustained by a great number of cases. *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *Com. v. Jackson*, 132 Mass. 16, 44 Am. Rep. 299, note; *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 649; *Coleman v. People*, 55 N. Y. 81; *People v. Shea*, 147 N. Y. 78, 41 N. E. 505; *People v. Molineux*, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; *State v. Vance*, 119 Iowa, 685, 94 N. W. 204; *Bink v. State*, 48 Tex. Crim. Rep. 598, 89 S. W. 1075; *State v. Sparks* (Neb.) 113 N. W. 154. If the admission of this class of evidence does not constitute error, it is clear to me that it is because each offense constituted part of a general system or scheme, or it might have been so construed.

2. The defense called one De Lance as a witness to prove that Crowder had stated that the receipt in question was worth, or could be made worth, \$2,500 to him, or that he could make it cost the defendant that much; and he was asked whether or not he heard Crowder make such a statement. De Lance was a witness for the state, and appears to have been hostile to the defendant, and, after more or less evasion, he answered, in substance, that Crowder had made such a statement in his presence and hearing. This was the substance of his testimony. After so testifying, the special prosecutor was permitted, over objection made by defendant, to ask certain questions in cross-examination. It is necessary to set out these questions and answers, and it appears to me that no discussion regarding their propriety is necessary. Under the guise of asking questions, the counsel made insinuations and charges against the defendant, if not improper in any case, certainly improper cross-examination of this witness.

These questions were duly objected to, 17 L.R.A. (N.S.)

and the overruling of the objections is assigned as error.

Q. Did he [Crowder] appear like a man who was acting like a jackal, going around and blackmailing a man behind his back, did he? I want to find out whether he was mad because someone was trying to commit a crime against him, or whether he was trying to commit a crime against somebody else?

A. No, he did not. I heard what he said, and saw the expression of his face and heard the tone of his voice.

Q. Did you get any impression from hearing the way he said it, and the public manner in which he said it, and the tone of his voice, and the expression of his face, that he was contemplating himself committing a crime against Major Murphy; or that he was enraged because he found that someone had committed a crime against him? Which was the impression you got?

A. Why, he seemed angered at Murphy and the others down there for having forged his name more than anything else.

Q. In other words, it seemed that he felt outraged because a crime had been committed against him, rather than that he was planning a crime against someone else?

A. It looked that way to me.

Q. Was there anything about the expression of his face, or tone of his voice, your mind being refreshed on the subject, that indicated that he had any other feeling than that of a man who discovered his name had been forged, and didn't know it before, and he felt outraged, and was angry. Was there anything inconsistent, or anything in his face or manner or expression other than that, at the time he made that remark?

A. Well, I never had any conversation with a man that had had his name forged before. He was mad,—pretty mad, in fact.

Q. You know about how a man would feel like Crowder, who had a little farm, who has had his name forged. You know about how he would express himself on the subject when he came back after having asked the party to pay it up. Was there anything in his voice at that time other than a man would naturally expect under these circumstances?

Objection being interposed that it would be impossible for the witness to tell, the court said: What was his expression; how did he express himself?

Q. And that he compelled those responsible for the forgery to pay up or dig up? And did you not also know by the same process of reasoning by which you arrived at that conclusion? Did you not also know that he would make them fellows dig up, he referred to the man who forged the receipt?

A. Or was responsible for it.

Q. Was the tone of his voice and the ex-

pression of his face during the entire conversation consistent with the statement that somebody had forged his name?

A. Yes, sir; it was consistent.

Q. Was it the expression you would naturally expect a man to have on finding and honestly believing his name had been forged, and after having compelled the party to settle?

A. His face was consistent with a man who was very angry.

Q. When he [Crowder] looked vindictive, you mean by that that he appeared to be angry because his name actually had been forged, and the statement he uttered at that time was true?

A. He had that appearance; yes.

The object of this line of questions was undoubtedly to corroborate, by showing Crowder's appearance and actions, his denial of authority to Murphy to sign the receipt. It may have been competent for the state to show whether Crowder appeared angry or pleased; but these questions go far beyond any proper examination of a witness to show the appearance of a party during a conversation. The witness was not asked to state the conversation which took place, but to give his impressions and his conclusions as put in his mouth by counsel. The impropriety of this line of questions cannot be doubted, and, as counsel for the defendant states in his brief,—with which statement I concur,—“Authority upon the subject cannot be cited, for a parallel to this proceeding, we firmly believe, cannot be found in all the judicial history of this country.” Trial courts in this state are inclined to be overlenient to counsel in permitting prejudicial questions of this character, and I deem it important to call attention to this phase of the case at bar to indicate that courts should restrain them within proper limits, and that the discretion vested in trial courts can be abused in the permission to make use of charges and innuendoes by question of the counsel.

OKLAHOMA SUPREME COURT.

HARRY N. HORNER et al., Doing Business as Hunter Realty Co., et al., Pliffs.
in Err.,

v.

MARTHA SPENCER et al.

(— Okla. —, 95 Pac. 757.)

Appeal — general finding — sufficiency.

1. In a cause tried to the court, a general finding includes the finding of all facts

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necessary to constitute the claims of the party in whose behalf the judgment is rendered, and upon appeal the court will not review the evidence upon which such finding is made, to determine its sufficiency.

Deed — failure to deliver.

2. No title will pass by a deed which is not delivered by the grantor or someone duly authorized by him.

Escrow — wrongful possession.

3. Where possession of an escrow is obtained, without performance of the condition upon which a delivery to the grantee was to be made, no title passes.

Agent — acting for adverse parties.

4. Where an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is contrary to public policy, and voidable in equity upon the application of either party.

(May 14, 1908.)

Case Note. — Right of either principal to affirmative relief from transaction in which agent acted for both parties.

If it is successfully established that an attorney who was already retained and employed to purchase outstanding interests in a mine, and who knew the great value of the mine, permitted himself to be retained and consulted as attorney by the owner of a part of the outstanding interests, and, representing to him that the mine was of little or no value, induced him to sell his interest without informing him that he was also the agent of the purchaser, such facts are sufficient to entitle the owner to have his deed canceled. *Donovan v. Campion*, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 71.

In *Levy v. Loeb*, 85 N. Y. 365, the purchasers of bonds through brokers were allowed to repudiate their purchase for the reason, among others, that the brokers had acted as the agents of both parties, charging their principals a commission for buying and receiving, also, from the seller a commission for selling.

In *Potter's Appeal*, 56 Conn. 1, 7 Am. St. Rep. 272, 12 Atl. 513, an executor, having in hand funds of his estate for distribution, advised the widow to invest her distributive share and that of her infant son, for whom she was guardian, in certain stocks and mortgages, and credited himself as executor with the sums so invested. It later developed that he was acting at the time as agent for the sale of the stocks and mortgages, and received a commission on the sales made to the widow, who, on discovering the facts, repudiated the transaction. Her right so to do was upheld by the appellate court on the ground that the act of the executor as agent in a capacity opposed to his obligations as executor and as personal adviser and friend rendered impeachable in equity the transactions resulting from the dual agency.

Where a vendor of land entered into a

ERROR to the District Court for Garfield County to review a judgment in plaintiffs' favor in actions brought to set aside certain deeds and cancel a mortgage, and to clear title to certain real estate. Affirmed.

Statement by Turner, J.:

The pleadings and proof in this case disclose that on March —, 1903, Martha Spencer, defendant in error, plaintiff below, was the owner of a quarter section of land in Garfield county where she lived; that Daisy Hutto was the owner of lots 1 and 2, block

44, in Okeene, Blaine county, upon which was built a hotel, in which she lived; that Thomas B. Cooper lived near Mrs. Spencer in Garfield county, and owned 180 acres of land in Texas county, Missouri; that Harry N. Horner and J. E. McCarty were partners in the real-estate business in Enid, Oklahoma, under the name of the Hunter Realty Company. That, about that time, Martha Spencer listed her farm, worth \$3,000, for sale with the Hunter Realty Company on commission; that, shortly thereafter, Horner went to the home of Mrs. Spencer, and told her that he had a good trade for her,

secret arrangement with his own agent whereby the vendor was to sell to the agent and others associated together by the agent's efforts for the purpose of buying on a joint venture, the agent being active in bringing about the purchase, such sale was fraudulent; and the buyers, on discovering that their supposed partner and agent was thus acting in a dual capacity, were entitled to rescind the sale. *Yeoman v. Lasley*, 40 Ohio St. 190.

In *Miller v. Louisville & N. R. Co.* 83 Ala. 274, 3 Am. St. Rep. 722, 4 So. 842, a railroad corporation was allowed to rescind a contract of sale made by its agent because the agent, who was in collusion with the purchaser, was, by an understanding and agreement with him, to have such rights in the property as to indicate conflicting and dual interests on the part of the agent.

A bill for an injunction and the cancellation of a policy of insurance was filed in *Wildberger v. Hartford F. Ins. Co.* 72 Miss. 338, 28 L.R.A. 220, 48 Am. St. Rep. 558, 17 So. 282, after an action had been begun to recover on the policy; and the court granted the decree prayed for, it appearing that the agent who represented the company, in writing the policy, had issued it to himself as receiver of a stock of merchandise.

Where an agent having the care and management of land made a written offer to the owner to purchase, signing a third person's name, and, in collusion with such third person, secured a deed of property to him, who later conveyed it to the agent, such transaction was voidable in equity; and a decree canceling the conveyance was affirmed in *Seymour v. Shea*, 62 Iowa, 708, 16 N. W. 196.

Where the president of a bank, acting as agent of another in the purchase of securities, sold her bonds upon which the bank realized a profit, he was acting as agent in a dual capacity; and the purchaser of the securities was entitled to rescind the transaction. *Carr v. National Bank & Loan Co.* 167 N. Y. 375, 82 Am. St. Rep. 725, 60 N. E. 649.

In *Young v. Hughes*, 32 N. J. Eq. 372, it was held that a vendor, upon his cross bill in a suit for specific performance, was entitled to have the contract rescinded be-

cause the purchaser had participated in the misconduct of the vendor's agent, who concealed material facts from his principal and exerted his skill and experience against him, rather than for him.

In *Panama & S. P. Telegr. Co. v. India Rubber, G. P. & Telegr. Works Co. L. R.* 10 Ch. 515, a submarine cable company owning a concession for the laying of a telegraph cable contracted with a construction company to do the work. Payment was to be made in instalments upon certificates of the engineer of the cable company that the money was due. This same engineer was in the employ of the construction company as subcontractor, and the dual agency was held sufficient to entitle the plaintiff to a rescission, as a matter of course, of the contract between the two companies.

It is perhaps well to note the exclusion of another class of cases from this note: viz., those actions in which it is sought to rescind transactions to which a corporation is a party because the agent of the one party is a stockholder or director in the corporation. In general, it is held that the principal may avoid such a contract; but the decisions are not, as a rule, made upon the theory that the stockholder is the agent of the corporation; they rest rather upon the self-interest of the agent in the subject-matter of the contract. One case, however, has been found in which a director and stockholder was considered the corporation's agent, and a deed was canceled in equity because this director and stockholder was the sole agent of the corporation's grantor. *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 553.

And again the rule was recognized in *Whitley v. James*, 121 Ga. 521, 49 S. E. 600, where an agent for the sale of land conveyed them to a company of which he was the president. The right to recover the land and have the conveyance canceled was denied because there had been a ratification, but, without this, that the court would have followed the established rule, is indicated by the following taken from the opinion: "If, on the other hand, the sale is attacked because the agent of the vendor was also president or agent of the purchaser, the effect of the dual agency would authorize the principal to repudiate the transaction."

and got her to go with him to Okeene to see the hotel property belonging to Daisy Hutto, worth some \$1,500, which he said he could trade her farm for, and which he represented to be worth \$5,500, and that it was leased for \$75 per month, and one month's rent would be due in a few days; that she went with Horner, and, after a hurried inspection of the hotel property, returned with him to Enid. Late that night she was induced by him to sign a contract binding herself, in substance, in consideration of a transfer of the hotel property from Daisy Hutto to herself, together with its fixtures and furniture, as per invoice there-to attached "and a lease to D. A. Skillen until January 1, 1904, at the rate of \$75 per month rent, and assignment of \$1,500 insurance," she would convey her farm by warranty deed, "except a mortgage of \$500, which first party assumes," and first party "agrees to pay for second party debts to the amount of \$460 in cash, and the second party agrees to give to the first party a mortgage on lots 1 and 2, block 44 and the furniture in the hotel . . . as security for the debts and \$500.00 evidenced by a mortgage on the farm herein described, total of mortgage to be \$960, on the Okeene property, with interest, etc., . . . and to pay all taxes, assessments, or impositions that may be legally imposed on said land subsequent to the year 1903." This contract was afterwards signed, "Daisy Hutto, by Her Attorney in Fact, Harry N. Horner;" but the same appears to have been done beyond the scope of his authority, and without her knowledge or consent. It was represented by Horner that this contract was to bind the trade until her brother came up from Caddo county to investigate and advise her in the matter. Her acknowledgment was taken thereto by J. E. McCarty, the other member of the firm of Hunter Realty Company. At the same time, and with the same understanding, she executed a deed conveying her land to Thomas B. Cooper, and both documents were left with said Horner. A few days after, Martha Spencer and her brother went to the office of the Hunter Realty Company, and demanded of McCarty to see the contract and deed. He told them that they were in the bank, and could not be obtained until Horner returned, which would be the following Sunday. She told McCarty to tell Horner when he got back to go no further with the trade, which McCarty agreed to do. That afternoon (March 26th) Horner put the deed on record. They came back in a day or two, and Horner was there. They again demanded the deed, stating that she did not want to trade for the hotel. Horner informed her that she could not get it; that he would

not give it up; that the trade had gone too far, and that the deed had been recorded. In the meantime, while Horner was acting as the agent of Mrs. Spencer, but unknown to her, he was trying to manipulate a three-cornered trade, and had arranged with Daisy Hutto to exchange her hotel property for 180 acres of land, belonging to Thomas B. Cooper, in Missouri, and \$1,000 "to boot," \$100 of which was to go to Horner as commissions, she to deed her property to Mrs. Spencer. With this understanding, said deed was placed by her in escrow in the Citizens' Bank at Enid, under the terms of an instrument of writing as follows:

Enid, O. T., March 30, 1903.

This deed is deposited by Daisy Hutto to be held by this bank until the abstract for 180 acres of land, S. $\frac{1}{2}$, N. E. $\frac{1}{4}$ and N. $\frac{1}{8}$, S. E. $\frac{1}{4}$ and a part Sec. 26, Twp. 30, R. 11 is brought down to date and approved by her agent, A. M. Horner, of Lawndale, and returned to the bank with instructions, then to be turned over to Harry N. Horner upon the delivery of a deed to above described land and \$500 in cash.

[Signed] A. M. Horner, Attorney in Fact for Daisy Hutto.
Harry N. Horner.

Indorsed across the face:

March 30, 1903.

I acknowledge receipt of the deed herein described.

[Signed] A. M. Horner.

In the meantime, and as his agent, Horner arranged with Thomas B. Cooper to exchange his land for that of Mrs. Spencer, by receiving her deed, obtained as aforesaid, and executing a deed to his land to Daisy Hutto, and giving her \$1,000 "to boot." With this understanding his deed, mentioned in the escrow, was turned over to A. M. Horner, agent of Daisy Hutto, that same day, for the purpose of bringing down the abstract to show title in her, and his receipt indorsed thereon. Cooper's abstract proving unsatisfactory, A. M. Horner, agent for Daisy Hutto, wrote:

Cunningham, Kan., April 22, 1903.
Citizens' Bank,
Enid, Okla.:

I have returned to Harry N. Horner abstract and quitclaim deed to 180 acres of land in Texas county, Missouri, after having had the abstract to same examined, and find the title not satisfactory. Please return to me the deed to property in Okeene, O. T., from Daisy Hutto to Thomas B. Cooper, and oblige, yours respectfully.

[Signed] A. M. Horner.

To the letter returning abstract Horner replied:

Hunter Realty Co.
Enid, Okla., April 23, 1903.

A. M. Horner, Esq.,
Lawndale, Kan.

Dear Sir:—

Your letter received containing abstract. Now this deal was made and you accepted the deed to the Mo. land. Of course Mr. Cooper guarantees the title, and he is amply able to make it all good, and the title to the hotel has passed to a third party, and I cannot see at this time how all these changes can be as they once stood. A. cannot call the deal off. I will see Mr. Cooper as soon as possible.

Yours truly,

[Signed] Harry N. Horner.

About the time he received the letter returning the abstract, Horner went to the Citizens' Bank of Enid, and, in violation of the escrow surreptitiously obtained the deed from Daisy Hutto to Mrs. Spencer, and placed the same on record, leaving at the same time a check for the \$900 mentioned in the escrow, but which was never accepted by Daisy Hutto. As a matter of fact, he received \$1,500 from Cooper on this deal, \$1,000 of which was to be paid to Daisy Hutto, of which she was to give him \$100, as commission. He retained, by this arrangement, said \$100 and \$500 from Cooper, making \$600 net to him, as commission paid by the two.

Shortly before this time, Horner was having trouble with Mrs. Spencer, who was pressing him to explain why he had placed her deed on record, and wanted to get it back. He told her the hotel was standing open and vacant. Anyone could steal what they wanted out of it; that she had better close the deal and take the hotel, or else she would gain nothing; that he would sell it to advantage for cash; that she would thereby avoid a lawsuit; that he wanted \$150 from her for commission, but finally agreed to take \$100; that, just as soon as she signed the mortgage on the hotel property, she would get a deed to it; that she owed Cooper for paying off the \$500 mortgage on the farm, and for paying off the one to Fleming for \$150, and prepared a mortgage for \$650 on the hotel property for her to sign, payable to J. E. McCarty, which she did; but nowhere in the record does it appear that Cooper ever paid said mortgage, as represented, or assumed its payment, or that Mrs. Spencer ever got a deed to the Hutto property. Horner further claimed 17 L.R.A. (N.S.)

that certain taxes remained unpaid, whereupon she was induced to sign the following:

Hunter Realty Company.
Farm and City Property. Farm Loans a
Specialty.

Enid, Oklahoma, April 17, 1903.

This agreement, made and entered the day and date above written by and between Martha Spencer, first party, and Harry Horner, a partner in the Hunter Realty Company, representing Thomas B. Cooper and Daisy Hutto, second parties, witnesseth: That, in consideration of a full and complete settlement made by all parties hereto, that, in exchange of property, that Martha Spencer is to assume and agrees to pay the taxes for the year 1902 on L. 1 and 2, B. 44, city of Okeene, known as "Okeene Hotel," and that the second parties, through their agent, agrees to assume and to pay the taxes on the S. W. ¼ Sec. 17, Twp. 23, N. R. 4 W. I. M. and pay a mortgage on the land herein named for \$150.00 held by O. J. Fleming.

[Signed]

Martha Spencer.
Harry N. Horner.

Nowhere in the record does it appear that possession of any of the property purported to be traded for changed hands. After the abstract of the Cooper land had been rejected by Daisy Hutto, she tendered back a quitclaim deed thereto, and, upon the same being refused, on May 4, 1903, brought suit against all parties in interest to clear her title, which, by consent of all parties, was, on October 21, 1903, taken on a change of venue to the district court of Garfield county. On May 11, 1903, Martha Spencer having filed her suit in the district court of Garfield county against all parties in interest for the same purpose, by order of court these cases were consolidated, and tried to the court, and resulted in a decree, on May 25, 1905, granting Daisy Hutto and Martha Spencer sweeping relief, in effect, canceling the deeds of Spencer to Cooper and Hutto to Spencer, and decreeing that Martha Spencer "pay to Thomas B. Cooper the sums of money paid upon liens and mortgages against her land, amounting to the sum of \$273.44," from which decree Harry N. Horner, J. E. McCarty, and Thomas B. Cooper have appealed, and the same is before us on case made.

Messrs. Manatt & Sturgis and Roberts & Curran, for plaintiffs in error:

So far as the rights of Cooper are involved, Spencer occupies the position of attempting to set aside her own deed on the ground that she was misled to her injury by her own agents.

Somes v. Brewer, 2 Pick. 184, 13 Am. Dec. 406; McNeil v. Jordan, 28 Kan. 7.

A contract must be promptly disaffirmed upon the discovery of a fraud that would authorize rescission.

Bell v. Keepers, 39 Kan. 105, 17 Pac. 785; Estes v. Reynolds, 75 Mo. 563; Melton v. Smith, 65 Mo. 315.

Before rescission the other party must be placed in *statu quo*.

Bell v. Keepers and Melton v. Smith, supra; McIndoe v. Morman, 26 Wis. 588, 7 Am. Rep. 96; Harvey v. Morris, 63 Mo. 475.

Ratification with knowledge of the facts terminates the right to rescind.

Crooks v. Nippolt, 44 Minn. 239, 46 N. W. 349.

A delivery of a deed to the grantee cannot be an escrow; neither is parol evidence admissible to show that a delivery to the grantee was conditional.

6 Am. & Eng. Enc. Law, p. 858; Teide-man, Real Prop. 815.

The Hutto deed was left in the bank to be delivered on payment of the money by Cooper, and, upon payment, the condition was performed and the delivery of the deed to Spencer completed; and this would be true if the deed had been left in the bank and never filed of record.

Cannon v. Handley, 72 Cal. 133, 13 Pac. 315; Hughes v. Thistlewood, 40 Kan. 232, 19 Pac. 629; Helm v. Kleinschmidt, 12 Mont. 586, 31 Pac. 542; Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298; Gammon v. Bunnell, 22 Utah, 421, 64 Pac. 958.

Mr. J. M. Dodson, for defendant in error Spencer:

It is against public policy for an agent to act for adverse parties without their knowledge.

Mechem, Agency, §§ 66, 68.

There was never any delivery of the Hutto deed, and no title passed.

Hogueland v. Arts, 113 Iowa, 634, 85 N. W. 818; Fitch v. Bunch, 30 Cal. 208; 1 Devlin, Deeds, §§ 322, 323.

The innocence of a party who has profited by a fraud will not entitle him to retain the fruits of another man's misconduct, or exempt him from the duty of restitution.

Bigelow, Fraud, p. 137.

Mr. C. C. Calkins for defendant in error Hutto.

Turner, J., delivered the opinion of the court:

The principal contention of plaintiffs in error is that the trial court erred in overruling their motion for a new trial, and, under this head, contend that the judgment is contrary to the law and the evidence. Let us see how this is. There was a general

finding in this case by the trial court in favor of the defendants in error, plaintiffs below. When this is the case the rule is, as laid down in the syllabus in Brewer v. Black, 5 Okla. 57, 47 Pac. 1089: "A general finding includes the finding of all necessary facts to constitute the claim of the party in whose behalf the judgment is rendered; and, upon appeal, this court will not review the evidence upon which such finding was made, to determine its sufficiency." See also Meyer Bros. Drug Co. v. Kelley, 5 Okla. 118, 47 Pac. 1065.

It goes without saying that Horner was guilty of the grossest fraud, while acting as the agent of Martha Spencer, to induce her to believe that it was to her interest to trade her farm, worth \$3,500, for the hotel property of Daisy Hutto, worth \$1,500, and agree to give her a mortgage thereon for \$960, \$460 of which was to reimburse her for paying certain indebtedness of Mrs. Spencer. She had a right to, and did, rely upon his judgment in the matter, and executed a deed to Cooper with the understanding that the same was not to be delivered until she could be further advised by her brother. It also goes without saying that, when she later visited Horner's office and left instructions for the sale to be proceeded with no further, the subsequent recording of her deed by Horner passed no title to Cooper, for the reason that no title will pass by a deed which is not delivered by a grantor or one duly authorized by him. Fitch v. Bunch, 30 Cal. 209; 1 Devlin, Deeds, §§ 261, 262. Neither did the title pass from Daisy Hutto to Mrs. Spencer for the reason that the terms of the escrow were not complied with. 1 Devlin, Deeds, §§ 322, 323; Hogue-land v. Arts, 113 Iowa, 634, 85 N. W. 818; Fitch v. Bunch, supra. It follows that the minds of these parties did not meet, and that their respective deeds constituted a cloud upon their respective titles.

But, independent of anything we have said, it is apparent from the record that Harry N. Horner and J. E. McCarty, partners doing business as the Hunter Realty Company, were acting as agent for all concerned in this "triangular transaction." In fact, Horner expressly admits such to be the case, when he testifies: "Q. You were agent for Daisy Hutto in this transaction, were you? A. Yes, sir; for them all, Mrs. Spencer, Daisy Hutto, and Cooper." That being true, this entire transaction, independent of the question whether any of the parties thereto were injured, was against public policy, and voidable in equity at the suit of any of the parties thereto.

In 1 Am. & Eng. Enc. Law, 2d ed. p. 1073, it is said: "When an agent acts for both parties in making a contract requiring the

exercise of discretion, the contract is voidable in equity upon the application of either party,"—citing authorities. In *Ramspeck v. Pattillo*, 104 Ga. 772, 42 L.R.A. 197, 69 Am. St. Rep. 197, 30 S. E. 962, the court, quoting approvingly from *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, says: "It is of the essence of his [the agent's] contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do where he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact, entirely within his own knowledge, which he was bound, in the exercise of good faith, to disclose to them. *Story, Agency*, § 31; *Copeland v. Mercantile Ins. Co.* 6 Pick 198–204; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416. See also *Mechem, Agency*, §§ 66, 67."

In *McKinley v. Williams*, 20 C. C. A. 312, 36 U. S. App. 749, 74 Fed. 94, the court said: "To permit the agent of a vendor to become interested, as the purchaser or as the agent of a purchaser, in the subject-matter of the agency, inaugurates so dangerous a conflict between duty and self-interest that the law wisely and peremptorily prohibits it. An agent of a vendor, who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission as agent, and becomes indebted to his principal for the profits he gains by his breach of duty,"—citing a number of authorities.

In *New York Cent. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 91, Mr. Chief Justice Denio, speaking for the court, says: "It has been settled by a long course of adjudications in the courts of equity that a trustee or agent of one person cannot make a valid contract respecting the subject-matter to which the trust or agency relates, where he has a personal interest. His constituent, it is said, is entitled to have all his skill and judgment employed in his service; but, if he is himself the other party to the contract, the utmost which could be expected from a very honest man would be the ordinary fairness of an umpire. . . . The courts of this state have followed the principle of these cases with great constancy, and the rule may be considered perfectly well settled. *Torrey v. Bank of Orleans*, 9 Paige, 663; *Van Epps v. Van Epps*, 9 Paige, 237; *Hawley v. Cramer*, 4 Cow. 736; *Bostwick v. Atkins*, 3 N. Y. 53. . . . 17 L.R.A. (N.S.)

The precise case of one person assuming to act as the agent of both parties has been considered as within the rule. *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Story, Agency*, § 211; *Paley, Agency*, by Dunlap, 33, and note 3; *Ex parte Bennett*, 10 Ves. Jr. 381."

In *Blood v. La Serena Land & Water Co.* 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252, the court says: "That a broker cannot represent both parties to a contract of sale, in which discretion, judgment, and skill are to be exercised by him, unless they have knowledge of his double capacity, and consent to be so represented, and that a party led unwittingly into a contract by means of such double agency may avoid the contract by methods suitable to the circumstances of the case, are propositions not to be denied. *Empire State Ins. Co. v. American Cent. Ins. Co.* 138 N. Y. 446, 34 N. E. 200, and cases cited; *Cassard v. Hinman*, 6 Bosw. 8; *Hunsaker v. Sturgis*, 29 Cal. 142; *Davis v. Rock Creek Lumber Flume & Min. Co.* 55 Cal. 359, 36 Am. Rep. 40."

In *Black v. Miller*, 71 Ill. App. 344, the court, quoting approvingly from *Story on Agency*, § 211, says: "Hence, it is well settled that an agent employed to sell cannot become the purchaser, and an agent employed to buy cannot himself be the seller. And, upon the same principle, it is held that a contract made by one who acts as the agent of both parties may be avoided by either principal. . . . The question in such cases does not turn upon the point whether there was an intention to cheat, or whether the purchaser has suffered an injury. It is upon grounds of public policy that the law declares such a purchase fraudulent. . . . And, for that reason, our supreme court has repeatedly held that an agent cannot, either directly or indirectly, have an interest in a sale of property of his principal which is within the scope of his agency, and that it is immaterial in such case that no fraud was actually intended."

Mechem on Agency, § 66, says: "An agent owes to his principal a loyal adherence to his interests, and it would be a fraud upon the principal, and would contravene the public policy, to permit an agent, without the full knowledge and consent of his principal, to enter into a relation involving such a duty, when his allegiance had already been pledged to one having adverse interests,"—citing authorities.

It follows that the decree of the lower court must be affirmed, and it is so ordered.

All concur.

UTAH SUPREME COURT.

JOHN S. HOUTZ, Appt.,

v.

UNION PACIFIC RAILROAD COMPANY,
Resp't.

(33 Utah, 175, 93 Pac. 439.)

Carrier — Limitation of liability.

1. The provisions of a contract whereby a shipper of sheep assumes all the risk of damage which may be sustained by reason of delay in the transportation, or loss or damage for any other cause or thing not resulting from wilful or gross negligence of the carrier; and all provisions exempting or limiting the liability for loss or damage resulting from the failure to exercise

Case Note. — Validity of stipulation in carrier's contract requiring notice of loss within a specified time, as applied to loss due to carrier's negligence.

The attempt on the part of common carriers to limit their common-law liability has given rise to a great mass of litigation. At common law, the liability was that of an insurer, and a carrier was responsible for all losses except those occasioned by act of God or of the public enemy. The doctrine that a common carrier might limit his liability by special contract was first recognized in 1804 by Lord Ellenborough in *Nicholson v. Willan*, 5 East, 507. Within twenty or twenty-five years, the doctrine seems to have been carried so far that a carrier could cast off all liability, and in 1830 a statute was passed providing that a carrier could not restrict his liability by mere notice or declaration.

The doctrine, however, has never been carried in this country to the same extreme as in England. The change in the English doctrine did not take place until after the Revolution, and consequently did not necessarily affect the rule here, yet the extreme hardships and rigor of the old common-law doctrine have gradually been modified so that in nearly every jurisdiction the common carrier may now, by contract, limit to a greater or less degree his common-law liability.

But it is the rule, very generally accepted, that a carrier cannot exempt itself from liability for losses caused by the negligence of it, its servants or agents. Under this rule, therefore, a stipulation in the carrier's contract requiring notice of loss to be given within a specified time would be void if it restricted the carrier's liability for his negligence. It is generally held, however, that the stipulation is not a restriction of liability, but is rather a condition precedent affecting, not the carrier's liability, but the shipper's remedy. The general purpose of such a stipulation is, of course, to permit the carrier to make an investigation of the claim, while the mat-

ter is fresh and easily investigated, and to protect itself from false and fraudulent claims.

Same.

2. A provision of a contract for the transportation of live stock, that the rules, regulations, and conditions prescribed by the carrier shall be binding on the shipper, and that the signing of the contract by the shipper shall be conclusive evidence of his agreement to them, is invalid.

Same — presentation of claim.

3. Stipulations in contracts between carrier and shipper, when fairly entered into and found to be reasonable under all the circumstances, requiring the presentation of a claim for loss, are not in all cases against public policy, and, for that reason, ineffectual, merely because the claim pertains to a loss occasioned by negligence.

ter is fresh and easily investigated, and to protect itself from false and fraudulent claims.

As suggested in *HOUTZ v. UNION P. R. Co.*, the great majority of the cases involving stipulations of this character in contracts of affreightment discuss the validity of the stipulation solely from the standpoint of its reasonableness: If it is unreasonable it is void; and if it is reasonable it is valid, regardless of the cause of the loss. And in numerous other cases the court indirectly holds that such stipulations may be valid by holding that they will not be construed to cover losses resulting from misdelivery, total failure to deliver, loss of market, fall in prices, or some other cause not directly resulting from the actual carriage. So, in numerous other cases the courts, by holding that, under the particular facts of the case, the requirements had been waived, or had been substantially complied with, or were not freely entered into, etc., have indirectly held that such stipulations may be valid. This note, however, is confined to cases in which the court more or less clearly recognizes the distinction between losses due to the carrier's negligence and losses due to other causes, and discusses the validity of the stipulation as applied to cases where the loss is due to the negligence of the carrier. Cases which involve the validity of a clause in the contract requiring that suit for any loss be brought within a specified time have also been excluded.

In none of the reported cases is there such a full discussion of the question as is given in *HOUTZ v. UNION P. R. Co.* It may be well at this point to call attention to the particular ground upon which the decision in that case is based. Although the court seemed to be firmly of the opinion that such a stipulation is void in a case where the loss was occasioned by the negligence of the carrier, yet, finding the great weight of authority to be to the contrary, it preferred to pass over the general question of law, and to base its decision entirely upon the particular phraseology of the contract in question.

Same — carrier — interpretation of contract.

4. A stipulation in a carriage contract that, unless claims are presented within ten days, they shall be deemed to be waived, following stipulations relieving the carrier from liability for loss not resulting from its wilful or gross negligence, refers to claims resulting from such negligence, and cannot be treated merely as dealing with the question of the presentation of claims arising from loss of all kinds, including those arising from ordinary negligence, so as to give the contract the effect, not of exempting the carrier from liability for loss through its ordinary negligence, but as imposing a condition to the liability which the shipper must observe before he can enforce it.

As has been before suggested, many cases treat stipulations requiring notice of loss to be given within a limited period merely as affecting the shipper's remedy, and not as affecting the carrier's liability.

Thus, in *Goggin v. Kansas P. R. Co.* 12 Kan. 416, concerning such a stipulation the court said: "It is undoubtedly settled that the common carrier may relieve himself from the strict liability imposed on him by the common law by a special contract; but it seems that he cannot relieve himself from liability for his own negligence. The contract pleaded does not pretend to relieve the defendant from the consequences of his own negligence. It only stipulates that the shipper shall, on his part, perform certain duties. . . . We are unable to see how it contravenes public policy that a special contract at reduced rates should stipulate that reasonable notice of injury should be given." This decision was cited with approval, and followed, in *Sprague v. Missouri P. R. Co.* 34 Kan. 347, 8 Pac. 465; *Achison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148; *Missouri P. R. Co. v. Park*, 66 Kan. 248, 71 Pac. 586; *Achison, T. & S. F. R. Co. v. Poole*, 73 Kan. 466, 87 Pac. 465.

To the same effect was the decision in *Kalina v. Union P. R. Co.* 69 Kan. 172, 76 Pac. 438, where the court said: "But the clause in question is not one exempting the carrier from its common-law liability, . . . but one imposing a condition upon the shipper which he must observe before he may recover for a breach of the carrier's duty; in other words, it is a condition of recovery, and not an exemption from liability."

Such a stipulation, however, was expressly termed a limitation of the carrier's liability, in *Cornelius v. Achison, T. & S. F. R. Co.* 74 Kan. 599, 87 Pac. 751; nevertheless, it was held, upon the authority of several of the Kansas cases cited above, which hold that the stipulation is not such a limitation, that such stipulations may be valid. The court evidently used the term in a different sense from that in which it was used in the earlier cases.

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Same — gross negligence.

5. A carriage contract which exempts the carrier from liability for loss occasioned by other than its gross negligence, in attempting to relieve the company from all liability for loss from ordinary negligence, is against public policy, and void.

Same — damage by falling market.

6. A condition in a carriage contract requiring notice of loss within a specified time as a condition precedent to recovery for negligence does not apply to damages resulting from loss due to the falling of the market.

Same — burden of proof of reasonableness.

7. In an action where there is a plea of a special contract in defense, limiting or conditioning the carrier's liability, the bur-

Such agreements were held, in *Osterhoudt v. Southern P. Co.* 47 App. Div. 146, 62 N. Y. Supp. 134, not to be invalid as relieving the carrier from any of his liability, since he would be bound to the same diligence, fidelity, and care that he would if no such stipulation had been made.

So, also, in *St. Louis & S. F. R. Co. v. Phillips*, 17 Okla. 264, 87 Pac. 471, the court, in upholding the validity of a similar stipulation, said: "The stipulation requiring notice of any claim for damages to be given cannot be regarded as an attempt to exonerate the company from negligence, or from the negligence or misfeasance of any of its servants. The company concede that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud and imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause."

And in *Missouri, K. & T. R. Co. v. Frogley*, 75 Kan. 440, 89 Pac. 903, it was apparently assumed that such a stipulation might be valid; but it was held that it was not applicable to a loss of live stock occasioned by the negligence of the shipper, where the animals were killed during transportation. The court said: "The evidence shows that the death of the animal was due to the negligence of the company; and, of course, no contract can be made which will relieve the company from liability for loss occurring through its misconduct or negligence. If the purpose or effect of the stipulation as to notice was to exempt the company from that kind of liability, it would be contrary to public policy and invalid. . . . The removal of the dead steer brought the loss to the attention of the company, and the purpose of the notice was then fully accomplished."

So, also, in *Hinkle v. Southern R. Co.* 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348, it was held that the object of such a stipulation was not to relieve the carrier from its just liability for its negligent acts, for such a purpose was clearly unlawful, but

den is upon the carrier not only to show a valid special contract, but also to allege and prove the facts and circumstances showing the stipulations to be reasonable.

Trial — findings — pleadings and proof.

8. A finding of the court that a stipulation requiring a shipper to give notice of loss within ten days after the unloading of sheep was reasonable, where the answer contained no allegation, and there was no proof on the subject, is a mere conclusion of law; and will be treated as no finding on the subject, the question of reasonableness being one of fact.

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simply to give it such notice as would enable it, by proper investigation, to protect itself against unjust claims; but such a stipulation did not apply to a case where the animals were injured during transportation and the plaintiff signed a receipt for the cattle under protest, as the receipt under protest must be deemed to be actual notice to the defendant of the claim for damages.

So there are also other cases which hold that, while a common carrier cannot stipulate against its own negligence, it may stipulate that notice of loss shall be given within a specified time; and that such a stipulation is valid even as applied to a loss due to negligence, as such a stipulation is not a limitation of the carrier's liability. *Atchison, T. & S. F. R. Co. v. Morris*, 65 Kan. 532, 70 Pac. 651; *Chicago & A. R. Co. v. Simms*, 18 Ill. App. 68; *Wabash, St. L. & P. R. Co. v. Black*, 11 Ill. App. 465, reversed on other grounds in 111 Ill. 351, 53 Am. Rep. 628; *Baxter v. Louisville, N. A. & C. R. Co.* 165 Ill. 78, 45 N. E. 1003; *Case v. Cleveland, C. C. & St. L. R. Co.* 11 Ind. App. 517, 39 N. E. 426; *Baltimore & O. S. W. R. Co. v. Ragsdale*, 14 Ind. App. 408, 42 N. E. 1106; *Ward v. Missouri P. R. Co.* 158 Mo. 226, 58 S. W. 28; *Owen v. Louisville & N. R. Co.* 87 Ky. 626, 9 S. W. 698; *Inman v. Seaboard Air Line R. Co.* 159 Fed. 960; *Selby v. Wilmington & W. R. Co.* 113 N. C. 588, 37 Am. St. Rep. 635, 18 S. E. 88; *Rice v. Kansas P. R. Co.* 63 Mo. 314; *Dawson v. St. Louis, K. C. & N. R. Co.* 76 Mo. 514; *Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 490, 107 N. W. 1087; *Anderson v. Lake Shore & M. S. R. Co.* 26 Ind. App. 196, 59 N. E. 396.

In some cases a charge to the jury that the plaintiff might recover regardless of a stipulation of this character in the contract, if the loss was due to the defendant's negligence, has been held error on appeal, thus squarely meeting the question raised in *Houtz v. Union P. R. Co.*

Thus, in *Pennsylvania Co. v. Shearer*, 75 Ohio St. 249, 116 Am. St. Rep. 730, 79 N. E. 431, it was held error to charge the jury that, if they found that the loss was caused

defendant's favor in an action brought to recover damages for injuries to live stock while in defendant's possession for transportation. Reversed.

The facts are stated in the opinion.

Messrs. **Heywood & McCormick**, for appellant:

A special contract with a carrier for the transportation of live stock, reciting that no claim for damages shall be allowed unless a claim is made within ten days after the removal of the stock from the car, is void.

Baltimore & O. R. Co. v. Hubbard, 25 Ohio C. C. 477; *Ormsby v. Union P. R. Co.* 2 McCrary, 48, 4 Fed. 710; *Smitha v. Louisville & N. R. Co.* 86 Tenn. 198, 6 S. W. 209; *Missouri P. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 577; *Adams Exp. Co. v. Reagan*, 29

by the negligence of the defendant, it was not necessary for the plaintiff to give the required notice, notwithstanding the contract.

And the judgment for the plaintiff was reversed in *St. Louis & S. F. R. Co. v. Hurst*, 67 Ark. 407, 55 S. W. 215, where the trial judge ignored the stipulation as to notice, and instructed the jury to find for the plaintiff if the goods were lost through the defendant's negligence.

So, in *Atchison, T. & S. F. R. Co. v. Morris*, supra, where the contract provided that a notice of loss should be a condition precedent to any action for such loss, it was held that an instruction telling the jury that failure to give notice was no defense if the loss was caused by the carrier's negligence would have been erroneous.

In *Pavitt v. Lehigh Valley R. Co.* 153 Pa. 302, 25 Atl. 1107, the plaintiff delivered his horses to the defendant to be transported by passenger-train service, but the defendant failed to comply with its contract in this respect, and, by reason thereof, the delivery was delayed and the horses were injured. The court held that, because of the defendant's failure to comply with the contract as to the method of transportation, its liability was fixed by the common law, but, nevertheless, it had a right to hold the shipper to that reasonable promptness in giving notice of his claim for loss which was provided in the contract for a presentation of his claim. The court said: "The distinction between a stipulation going to fix the liability of the carrier, and one for his protection against fraud either before acceptance of goods or after delivery, is obvious; the law fixes the strict accountability of the carrier while he has possession of the goods to prevent him defrauding the shipper; there is no reason why, under any circumstances, it should declare abrogated antecedent or subsequent stipulations on part of carrier to prevent shippers from defrauding him."

Southern Exp. Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118, is frequently cited as upholding the doctrine that a carrier cannot contract that he will not be liable for loss

Ind. 25, 92 Am. Dec. 332; *Wallace v. Lake Shore & M. S. R. Co.* 133 Mich. 633, 95 N. W. 750; *Engesether v. Great Northern R. Co.* 65 Minn. 168, 68 N. W. 4; *Southern Exp. Co. v. Bank of Tupelo*, 108 Ala. 517, 54 Am. St. Rep. 191, 18 So. 664; *Baltimore & O. Exp. Co. v. Cooper*, 66 Miss. 558, 14 Am. St. Rep. 586, 6 So. 327; *Brooks v. Western U. Teleg. Co.* 26 Utah, 152, 72 Atl. 490; *Gulf, C. & S. F. R. Co. v. Vaughn*, 4 Tex. App. Civ. Cas. (Willson) 269, 16 S. W. 775; *Little Rock & Ft. S. R. Co. v. Cravens*, 57 Ark. 112, 18 L.R.A. 527, 38 Am. St. Rep. 230, 20 S. W. 803.

In order to avoid its common-law liability, and shield itself under the terms of such a stipulation, the defendant must plead and prove that it was substantially injured, or

deprived of some material right, by reason of the shipper's failure to present his claim within the time specified.

Popham v. Barnard, 77 Mo. App. 619; *Ft. Worth & D. R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

Such stipulations in live-stock shipping contracts are void in so far as they relate to claims for loss from depreciation in market price.

5 Am. & Eng. Enc. Law, 2d ed. p. 324; 6 Cyc. Law & Proc. p. 506; *Leonard v. Chicago & A. R. Co.* 54 Mo. App. 293; *Kramer v. Chicago, M. & St. P. R. Co.* 101 Iowa, 178, 70 N. W. 119.

Messrs. P. L. Williams, George H. Smith, and John G. Willis for respondent.

or damage due to his negligence unless notice of such loss is given within a specified time. The contract limiting to thirty days the time within which notice of loss should be given was held invalid; but there is an implication, at least, that the ground of the decision was the unreasonableness of the time, rather than the invalidity of any such contract. After stating the general rule that it is against public policy to permit a carrier to contract for exemption from liability for damage which is caused by its own, or its servants', wilful default or tort, the court said: "For the same reason he cannot be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud. Thirty days might elapse before the consignee became aware that anything had been consigned to him,—especially if he was absent from home."

There are, however, numerous cases in which there is more or less of a modification of the general rule upheld by the above cases.

In Georgia it is a general rule that a common carrier cannot limit his liability by any legal notice given by publication, or by entry on receipts given for goods or tickets sold; but he may make an express contract independent of his receipt, and would be governed thereby. *Southern Exp. Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53. And in *Southern Exp. Co. v. Barnes*, 36 Ga. 532, the doctrine of the *Purcell* Case as to the limitation of the carrier's liability by entries on receipts was held to apply, also, to stipulations requiring notice of loss to be given within a specified time.

So, also, in *Central R. Co. v. Hasselkus*, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838, it was held that such a stipulation was an attempt to limit the legal liability of the carrier, and was not effectual without proof of assent thereto by the shipper under the provision of § 2068 of the Code, which provides that "a common carrier cannot limit his legal liability . . . either by publication, or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby." 17 L.R.A. (N.S.)

Although these Georgia decisions recognize the validity of an express contract requiring a notice of loss to be given within a specified time, they nevertheless speak of such a stipulation as a limitation of the carrier's liability, and in this respect are opposed to many of the foregoing cases.

In several New York cases it has been held that the stipulation does not apply to a loss due to the carrier's negligence, where the contract makes no reference to losses due to that cause, although the wording of the stipulation is sufficiently general to include any loss.

Thus, in *Westcott v. Fargo*, 63 Barb. 349, affirmed in 61 N. Y. 542, 19 Am. Rep. 300, where the contract did not mention losses due to the negligence or carelessness of the defendants or their servants or agents, it was held that, where a carrier stipulated for a restricted liability in case of loss, it would not be construed to embrace a loss arising from the careless and negligent acts of the carrier or his servants, unless a loss from such cause was provided for in express and unequivocal terms in the contract; and the same rule was applicable to the stipulation in respect to presenting a claim for any loss within thirty days from the accruing of the cause of action.

And in *Isham v. Erie R. Co.* 112 App. Div. 612, 98 N. Y. Supp. 609, affirmed without opinion in 191 N. Y. 547, 85 N. E. 1111, the court said: "We doubt whether the limitation applies to a case like the present. The provisions of the bill of lading extending immunity to the defendant from liabilities imposed upon it as a common carrier not including acts of negligence, the limitation prescribed ought not to embrace loss due to its lack of care."

So, in *Security Trust Co. v. Wells, F. & Co. Express*, 81 App. Div. 426, 80 N. Y. Supp. 830, affirmed on opinion below in 178 N. Y. 620, 70 N. E. 1109, a receipt given the plaintiff for an express package contained this clause: "And it is further stipulated that Wells, Fargo, & Company shall not be liable under this contract for any claim whatsoever, unless presented in writing within ninety days from date thereof." The

Straup, J., delivered the opinion of the court:

This is an action to recover damages for an injury to live stock, consisting of sheep, alleged to have been occasioned through the negligence of the defendant, a common carrier, in transporting the sheep from Soda Springs, Idaho, to Omaha, Nebraska. The case was tried to the court, who, among other things, found that the defendant, at Schuyler, Nebraska, negligently delayed the carriage of the sheep, and there negligently held and confined them on its cars for a period of seventy-two hours, and at a place where the sheep could neither be unloaded, watered, nor fed; that, during the time the sheep were there delayed, the plaintiff frequently urged the defendant to transport and convey the

sheep to a place where they could be unloaded, fed, and watered, and, although the defendant could well have done so, nevertheless it negligently failed and refused to do so; and that, in consequence thereof, the plaintiff was damaged in the sum of \$1,326 by an excess shrinkage in weight of the sheep, and in the further sum of \$954 because of a drop in the market occurring within the time of the negligent delay and detention. The court further found that the plaintiff and defendant entered into a written contract by the terms of which it was stipulated (quoting from findings): "(1) That the carrier shall not be liable for the loss or damage of, nor for any injuries received by, any of said stock, unless the same is the direct result of wilful misconduct, or

package in question was delivered to the wrong person, and no notice was given for over two years, but was given as soon as the plaintiff learned of the circumstances of the case. In the course of the opinion the court said: "This clause follows the clauses defining what constitutes the limitation upon its liability, and, as has been stated, not one refers to any restriction of that liability of a delivery to a person other than the consignee. Within the strict construction which is to be applied to stipulations designed to give immunity to a common carrier for the accountability which the law imposes upon it, . . . the general words will not be construed to relieve the appellant, but the claim will be confined to the limitations mentioned in the contract."

And in *Richardson v. New York C. & H. R. R. Co.* 122 App. Div. 120, 106 N. Y. Supp. 702, motion for reargument and for leave to appeal to court of appeals denied in 123 App. Div. 916, 108 N. Y. Supp. 1146, in discussing the validity of such a stipulation the court said: "It seems to be settled in this court that such a condition as the one in question does not apply to and will not relieve a common carrier from responsibility for negligence." But the court further said that, while this principle of law would seem to dispose of the case, nevertheless the failure on the part of the plaintiff to give the required notice was a matter of defense, and that the carrier, having failed to plead such defense, would be deemed to have waived it. In this case, the court cited as authority for its general statement that the stipulation does not apply to losses from negligence, the cases cited above, which hold that it does not apply where the contract does not refer to such losses.

In connection with the foregoing New York cases, it should be noted that it is apparently the rule in New York that it is not against public policy for a carrier to exempt himself by contract from liability even for negligence.

In *Smith v. Louisville & N. R. Co.* 86 Tenn. 198, 6 S. W. 209, in speaking of a stipulation requiring notice of loss before stock was removed from the place of des-

tination, the court said: "It is void because it undertakes to protect the carrier from loss occasioned by his own fault, by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to suit, and that, too, when that duty is to communicate facts as well or better understood by the corporation than the shipper. . . . We do not mean to hold that in no case can a carrier stipulate for notice of loss or injury if it be reasonable, definite, and certain in its terms, pointing out specifically its mode of execution."

In *Capehart v. Seaboard & R. R. Co.* 81 N. C. 438, 31 Am. Rep. 505, it was held that the defendant's liability for damage was not diminished or affected by the stipulation that the damages must be adjusted before the removal of the goods from the station and the presentation of the claim for payment within thirty days, as a stipulation must be reasonable, and the stipulation in question was unreasonable. The language in this case is somewhat ambiguous, and it is difficult to tell whether or not the court means that such a stipulation was not a limitation of the carrier's liability, or whether it was not in this particular case because the time stated was unreasonably short.

In numerous states there are constitutional or statutory prohibitions against the limitation of a carrier's common-law liability, and, under such provisions, stipulations requiring notice of loss within a specified time are generally held invalid. Cases of this character are collected and discussed in a case note to *Liquid Carbonic Co. v. Norfolk & W. R. Co.* 13 L.R.A. (N.S.) 753. With the exception of this last-named case, which is also reported in 107 Va. 323, 58 S. E. 569, all of the decisions under such a statute seem to be opposed in principle to the decisions cited above in which it is held that such stipulations are not a limitation of the carrier's common-law liability. In several, if not in all, of the states in which these cases arose, earlier decisions held that such stipulations were valid. If, however, such stipulations merely affect the

actual negligence, of said carriers, their agents, servants, or employees. (2) That shipper agreed to load and unload and reload all said stock at his own expense, and to feed, water, and attend to the same at his own risk, while it was in any stock yard. (3) That the shipper assumed all the risk of any of them being weak and maiming each other or themselves in consequence of cold or suffocation or any other defects, and the shipper agreed to assume all the risk of damage which may be sustained by reason of delay in transportation, or loss or damage for any other cause, or anything not resulting from the wilful negligence of the defendant. (4) It is also specially agreed and provided that the defendant should not be liable for any loss or damage to said

stock by causes beyond its control, or by floods or fire, shrinkage in weight, changes in weather, heat or cold, or any other thing or cause not directly the result of gross negligence on the part of said defendant, its agents, or servants. (5) Said contract further provided that, unless claims for loss or damage or detention are presented within ten days from the date of unloading said stock at destination, and before said stock has been mingled with the other stock, such claims shall be deemed to be waived, and the defendant, under said contract, was discharged from all liability thereby. (6) It was still further provided in said contract that the rules, regulations, and conditions prescribed by the defendant for the transportation of live stock, as evidenced by their

shipper's remedy, and do not affect the liability of the carrier, as is held in so many of the cases, it is difficult to see why such stipulations should be made void merely by the existence of a statutory or constitutional provision that the common-law liability shall not be limited.

The argument of one or two of these cases may be noted to show that they fairly meet the question raised in *HOUTZ v. UNION P. R. Co.*

Thus, in *Missouri P. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574, a contract limiting the time within which a notice of loss must be given was held to be a limitation of the common-law liability of the carrier, and therefore in violation of the statute forbidding any such limitation; but, as the contract in question related to an interstate carriage, the state statute would not apply. The contract, however, was declared unreasonable, and therefore was invalid notwithstanding the fact that it related to interstate commerce. As to the contract being a limitation of the carrier's common-law liability, the court said: "Such a contract would seem necessarily to operate as a limitation on the carrier's common-law liability, for, under the rules furnished by that system of laws for the determination of the liability of a common carrier to a shipper for an injury done to the property of the latter while in the course of transportation, a cause of action arises at once upon the infliction of the injury, and the requirement of an additional fact before a cause of action exists and may be enforced restricts or limits the right which the shipper would have at common law. In the absence of the special contract relied upon, when an unnecessary delay occurred and injury resulted therefrom, the shipper's cause of action was complete, and to require notice, as does the special contract, as a condition precedent to the accruing of the cause of action, is but to say that the contract limits the liability of the carrier in that it makes its liability depend on the existence of a fact not necessary to fix liability at common law." It will be noticed that this argument is very similar to that

employed by the court in *HOUTZ v. UNION P. R. Co.*

So, also, in *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L.R.A. 685, 32 S. W. 168, 36 S. W. 18, it was held that the provisions in a carrier's contract that notice of injury to cattle must be given before they are unloaded or mixed with others, and that no animal shall be considered as worth more than a specified sum, conflict with a constitutional provision that common carriers shall not contract for relief from their common-law liability. In regard to the stipulation concerning the notice of loss, the court said: "The notice required to be given as a condition precedent to appellee's right to sue or recover, if enforced, would clearly limit the liability of appellant for injury to the cattle to a much shorter time than the common law allows, and would, if enforced, relieve appellant from all liability in this case, however gross or negligent appellant might have been; and, this being true, the stipulation is void because prohibited by § 196 of the Constitution."

In *Southern Exp. Co. v. Glenn*, 16 Lea, 472, 1 S. W. 102, the contract contained a stipulation that the company was not to be liable for any loss or damage to the package or its contents, "occasioned by the acts of God, or the public enemy, mobs, riots, and other casualties mentioned, unless specially insured by this company, and so specified in this receipt. In no event is this company to be liable for a greater sum than that above mentioned; nor shall it be liable for any such loss unless the claim therefor shall be made in writing at this office within thirty days from this date." It was contended that the words "such loss," in the stipulation requiring notice, referred to loss occasioned by the acts of God, etc., as a loss from any other cause was not mentioned in the paragraph; but the court held that the phrase referred to any loss which might be sustained, and not to the particular mode of the loss. This construction of the contract differs from that in *HOUTZ v. UNION P. R. Co.* in that it interprets the contract to mean what it was evident the express company intended it to mean, and not what

published tariffs, classifications, and circulars in force and effect at said time, were binding upon said plaintiff, and that the signing of the contract by the shipper, or his agent, was and should be conclusive evidence of the knowledge, assent, and agreement to each and every stipulation and condition thereof by said shipper, the plaintiff." It was further found that no claim was presented to the defendant within ten days, nor before the mingling of the sheep with other sheep, and not until twenty-four days after the sheep reached their destination, and that the "provision requiring the claim to be presented within ten days after the unloading of the sheep and before the sheep had been commingled with other sheep is a reasonable provision under the circumstances." Judgment was rendered for the defendant on the sole ground that the claim was not presented "within ten days after the arrival of the sheep at their destination and before having been mingled with other sheep." The plaintiff appeals.

The only question presented by the appeal is with respect to the validity and effect of the contract. As a general rule common carriers are held liable as insurers of property intrusted to them, and are held responsible for any loss of, or damage to, the property, unless occasioned by the act of God or by the public enemy. The law is, however, well settled in this country that the carrier's liability as an insurer may be limited by special contract, when fairly entered into and reasonable in its terms, and that it may limit its common-law liability for any loss, provided such loss is not the result of its negligence or misconduct, or that of its servants. The rule is equally well settled that the carrier cannot make a valid contract by which it is to be exempt from liability for any loss or damage resulting from its mis-

conduct or negligence, or that of its servants; nor can its liability for a failure to exercise a proper degree of care in the transportation of property intrusted to it be limited by special contract. *Williams v. Oregon Short Line R. Co.* 18 Utah, 210, 72 Am. St. Rep. 777, 54 Pac. 991; 5 Am. & Eng. Enc. Law, pp. 288-308, and cases there cited. These principles, of course, are not disputed. The contention made by respondent is that the stipulation requiring the presentation of a claim as a condition precedent of liability is not violative of these principles. The action was grounded on defendant's negligence. The court found plaintiff's loss and damage to be the result of such negligence. That the provisions of the contract whereby it was stipulated that the plaintiff assumed all risk of damage which might be sustained by reason of delay in transportation, or loss or damage for any other cause or thing not resulting from the wilful or gross negligence of the defendant, and all other provisions exempting the defendant from or limiting its liability for loss or damage resulting from its failure to exercise a proper degree of care, contravene public policy, and are void, is not seriously disputed. For the same and other reasons not necessary to here state, it may be said that paragraph 6 of the contract is also invalid.

At a former hearing of this case we rendered an opinion, which was filed, but not published, wherein it was, in effect, held by us that the stipulation in the contract requiring the presentation of a claim as a condition precedent of liability for loss or damage should only apply to and be given effect in case of a loss or damage not occasioned by the defendant's negligence or misconduct; and, as the court found plaintiff's damage to be the result of defendant's negligence, the stipulation was held to be

the language, strictly construed, would mean. There are many other cases in which the question is raised whether the language of the stipulation included the particular loss suffered or not, but such cases are not within the scope of this note.

In *Hartwell v. Northern Pacific Exp. Co.* 5 Dak. 463, 3 L.R.A. 342, 41 N. W. 732, the question was raised, but not decided, whether such a stipulation was invalid under § 958 of the Civil Code, which reads as follows: "Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." But in *Kirby v. Western U. Teleg. Co.* 4 S. D. 105, 30 L.R.A. 612, 46 Am. St. Rep. 765, 55 N. W. 759, rehearing in 8 S. D. 54, 65 N. W. 482, a similar stipulation in a contract for sending a tele-

gram was held not to be within the provisions of that section of the Code. It may be well to call attention to the fact that stipulations of the character discussed in this note are commonly inserted in contracts for the transmission of telegrams, and the same principles apparently apply. Similar stipulations are also generally inserted in contracts of insurance; but in such cases it would seem that a different principle would apply, as the insurance companies would not be restricted by the common-law rules governing carriers.

Upon notice of loss or injury to goods required by carrier's contract as condition precedent, see case note to *Hoye v. Pennsylvania R. Co.* post, 641.

Upon reasonableness of the time fixed in a contract of shipment of live stock, for presentation of claim for damages, see case note to *Wabash R. Co. v. Thomas*, 7 L.R.A. (N.S.) 1041.

inoperative. We reached this conclusion upon the theory that, when an injury has been sustained by the negligence of the carrier, a complete cause of action arose upon the infliction of the injury; that to permit the carrier by special contract to make an additional requirement, such as the presentation of a claim as a condition precedent of liability, and before a right of action existed, restricted or limited the right which the shipper would have to maintain an action for such negligence, and to that extent limited or conditioned the carrier's liability for negligence; that, if it was against public policy to permit a carrier in advance to contract against its negligence, then it followed that it could not, by special contract in advance, impose conditions precedent of liability for a loss or damage occasioned by its negligence; that, if such a condition as here could be lawfully imposed, then other conditions could also be imposed, if fairly entered into and if found to be reasonable under the circumstances of the case; and hence the stipulation, when applied to a loss or damage occasioned by the negligence of the carrier, was against the policy of the law, and ineffectual. These views seem to be supported by the following authorities: 6 Cyc. Law & Proc. p. 505; Missouri P. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Ormsby v. Union P. R. Co. (C. C.) 2 McCrary, 48, 4 Fed. 706; Smith v. Louisville & N. R. Co. 86 Tenn. 198, 6 S. W. 209; Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Southern Exp. Co. v. Bank of Tupelo, 108 Ala. 517, 54 Am. St. Rep. 191, 18 So. 664; Baltimore & O. Exp. Co. v. Cooper, 66 Miss. 558, 14 Am. St. Rep. 586, 6 So. 327; Sanford v. Housatonic R. Co. 11 Cush. 155; Adams Exp. Co. v. Reagan, 29 Ind. 21, 92 Am. Dec. 332; Gulf, C. & S. F. R. Co. v. York, 2 Tex. App. Civ. Cas. (Willson) 718. The rule in 6 Cyc. Law & Proc. p. 505, supra, is stated as follows: "It is usual to insert in bills of lading, or other contracts for shipment, a stipulation that written notice of a claim for loss of, or damage to, the goods, shall be given to the agents of the carrier within some specified time, such as thirty or ninety days, and that, unless such notice is given, there will be no liability on the part of the carrier; and such stipulations are generally upheld so far as they are found to be reasonable. Cases holding such stipulations to be invalid are usually based on the ground that the terms thereof are unreasonable, rather than on the general invalidity of such conditions. But they are regarded as limitations of the carrier's liability, and therefore as ineffectual against a claim for loss or injury due to the carrier's negligence, and also as invalid where limitation of common-law liability is prohibited

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by statute." Cases are cited from several states in support of the text. In the case of Rathbone v. New York C. & H. R. R. Co. 140 N. Y. 48, 35 N. E. 418, the court says: "It is well settled that these stipulations in the contract will not be construed to relieve the carrier from liability for his own negligent acts. His duty and obligation to exercise a proper degree of care of the property while in his custody is not affected by them. Full and sufficient scope is given to their operation when it is held that they exempt the carrier from his common-law responsibility as an insurer of the property."

After our opinion was rendered, a petition for rehearing was filed. Upon further reflection, we became somewhat doubtful of our position in this regard. A rehearing was therefore granted, and the case has again been argued and resubmitted. That the courts greatly divide on this question, there can be no doubt. It may also be conceded that the greater number of cases hold, and many text writers seemingly declare, the law to be contrary to the views expressed by us. Among them may be cited the following: 4 Elliott, Railroads, § 1512; 1 Hutchinson, Carr. § 442; Moore, Carr. 333; 5 Am. & Eng. Enc. Law, p. 321. Many cases are cited by these text writers. It is not necessary to set them forth here. The rule declared in 1 Hutchinson on Carriers, § 442, is as follows: "It is frequently the custom for the carrier to insert in the contract of shipment a condition that, in the event of loss, the owner shall give notice of his claim within a specified time. Such conditions are usually to the effect that the notice shall be in writing and presented to some officer or agent of the carrier, either before the goods are removed from the point of destination, or within a certain time thereafter, or within a designated time after the loss has occurred; and, when such conditions are reasonable, the owner will be precluded from the right to maintain an action against the carrier, unless he has presented the notice within the time stated and in the manner provided." Whether the author, in the above quotation, is dealing with a "loss" for which the carrier is liable as an insurer, or with a loss or damage occasioned from any cause for which the carrier is liable, including his misconduct and negligence, is not clear. The same is true of the statement in 4 Elliott, Railroads, § 1512, where it is said: "A valid contract may be made requiring claims for loss or damage to freight to be presented in a certain manner or within a certain time, provided it is reasonable." In Moore on Carriers, at page 333, it is said: "The carrier may lawfully, by contract with the shipper made by clause or stipulation in the bill of

lading or shipping receipt, or otherwise, provide a reasonable time within which the shipper shall present his claim or give notice of claim for loss or damage, and the manner of giving such notice or presenting his claim, and limit its liability to cases in which the claim shall be presented or notice given in accordance with the terms of the contract." But on page 336 the following statement is made by the same author: "Most of the authorities sustain such stipulations, even where the loss is one caused by the defendant company's negligence. In Texas such a stipulation is held to be a limitation of the common-law liability of the carrier, and of no effect where the loss is one resulting from the carrier's negligence." While some of the cases cited in support of these texts pertain to claims of loss or damage for which the carrier was sought to be held liable as an insurer, yet others pertain to claims of loss or damage occasioned by the negligence of the carrier. Among the latter may be cited: *Goggin v. Kansas P. R. Co.* 12 Kan. 416; *Sprague v. Missouri P. R. Co.* 34 Kan. 347, 8 Pac. 465; *Wichita & W. R. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013; *The St. Hubert*, 46 C. C. A. 603, 107 Fed. 727; *The Westminster*, 62 C. C. A. 406, 127 Fed. 680; *Southern R. Co. v. Adams*, 115 Ga. 705, 42 S. E. 35; *Dawson v. St. Louis, K. C. & N. R. Co.* 76 Mo. 514; *Hatch v. Minneapolis, St. P. & S. M. R. Co.* 15 N. D. 490, 107 N. W. 1087. The above are not all the cases that are cited on this point; but these sufficiently show that in a number of cases the requirement of notice or the presentation of a claim was held to apply to a loss or damage occasioned by the carrier's negligence, and, by reason of their citation in support of the foregoing texts, it may fairly be inferred that the text writers intended the rule declared by them to apply to cases of loss or damage resulting from negligence or misconduct, as well as from other causes.

The cases cited from Illinois, Wisconsin, and New York are not in point, for the reason the rule obtained in those jurisdictions that it was not against the policy of the law to contract against ordinary negligence. All the courts giving effect to such stipulations, when applied to a loss or damage by negligence, in most positive terms assert that it is against public policy to permit a common carrier by special contract to relieve itself from, or limit its liability for, a loss or damage incurred by its negligence or misconduct; but it is asserted that the giving effect to such a stipulation in such a case is not violative of this principle. Some courts have given reasons for such a conclusion. Others merely discuss the question as to whether the stipulation was rea-

sonable under all the facts and circumstances of the case, and, when found to be so, merely assert that it was not against the policy of the law. In some cases the conclusion is supported by the citation of cases where the stipulation was given effect in case of loss for which the carrier was sought to be held liable as an insurer. We well can understand why a stipulation, when reasonably and fairly entered into, requiring notice of claim of loss as a condition precedent to charge the carrier with liability as an insurer, does not contravene the policy of the law under consideration; for it is readily perceived that a loss or damage may occur by accident, dangers of carriage or navigation, and from other causes for which the carrier, at common law, is liable, but against which human skill and vigilance could ordinarily not have guarded. The principle is well illustrated in the case of *Southern Pacific Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556. Many such losses will and do occur of which the carrier has no knowledge until notified; and, unless a notice is given within a reasonable time, no opportunity of investigating and ascertaining the facts is afforded it. A stipulation, therefore, that the carrier shall be relieved from the rigid and severe rules of the common law, which hold it liable as an insurer, unless notice of claim of loss shall be given in order that it may protect itself against imposition and fraudulent claims, is no longer regarded as contravening the policy of the law. When the carrier is charged with liability as an insurer, the question of negligence is ordinarily not involved. While the plaintiff in such a case must aver and show a breach of duty, he is not required to aver and prove negligence on the part of the carrier. When the carrier and shipper contract with respect to the former's liability as an insurer, they are not contracting with respect to a liability for the carrier's tort or negligence; and, as remarked by Mr. Justice Strong in the *Caldwell Case*: "The contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that, had it been such, it would have been against the policy of the law, and inoperative. . . . A common carrier is always responsible for his negligence, no matter what his stipulations may be." The reasons so well stated by that court why the stipulation was not against the policy of the law, when applied to a case of liability as an insurer, and where the question of negligence was not involved, are now given by many courts in cases of damage or injury to property by negligence, as is well illustrated in the case of *Sprague v. Missouri P. R. Co. supra*. In that case the action was

brought against the carrier for negligence in the management of its cars, by reason of which the plaintiff's horses, which were being shipped, were thrown down, bruised, and injured, so that one of them died and the others were disabled. The reason given why the stipulation in the contract of shipment requiring notice of claim as a condition precedent of liability was not against the policy of the law was that it tended to protect "the company from fraud and imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause."

As we have attempted to show, in a case where the carrier is sought to be held liable as an insurer, there is much reason requiring notice of claim; for in many instances the carrier otherwise would not have knowledge of the loss. Even in such case, where it was shown that the carrier had full knowledge of the loss, the failure to give the notice did not defeat the action. When, however, the carrier, through its negligence, inflicts an injury or damage upon property intrusted to it, the reason for the rule no longer exists. The carrier certainly is bound to take notice of its own acts of negligence and of the consequences of such acts. The servants of the carrier undoubtedly are required to be attentive and vigilant in the handling of and looking after property intrusted to their master's care. If, through their negligence, stock under their immediate charge is killed or injured, they, better than anyone else, ought to have knowledge of such fact. The carrier has, equally with the shipper, and in many instances much better, opportunity to ascertain the facts and results of its negligence and the extent and nature of the injury or damage inflicted by it. We need but to look at the case in hand to show the inapplicability of such a reason. Here the court found that the carriage of the stock was negligently delayed, and at a place where it could not be unloaded, fed, or watered; that the plaintiff at the time frequently urged the defendant to move the stock to a place where it could have been fed and watered, and, although the defendant well could have done so, nevertheless it refused; and that plaintiff's injury and damage was the direct result of such negligence. That the servants of the defendant in charge of the train, and other agents of the defendant connected with the movement and operation of the train, knew of the delay, goes without saying. That stock requires feeding and watering, and that shrinkage in weight is likely to occur if not done, must have been equally well known to them, especially when the plaintiff frequently complained at the time and urged

that the sheep be taken to a place where they could be taken care of. The evidence on the part of the plaintiff shows that the delay was unnecessary, his complaints and requests wholly disregarded, and the defendant's refusal to take the sheep to a place where they could have been watered and fed inexcusable. The court, in effect, so found. Such finding, on this record, is binding on the defendant. To say that it was not bound to take notice of the consequences of such negligent acts, and was not required to exercise any vigilance in that regard until the shipper arrived with a prepared list of injuries, is but to say that it is not bound to discharge the duties and trust with that degree of care and fidelity imposed upon it by law. Such a holding tends to relax the motives for the exercise of such care.

Why was not the defendant, equally with the plaintiff, accorded every opportunity, before the sheep were unloaded at destination and before they left the stock yards, to investigate the results of its negligence and ascertain the nature and extent of the injury inflicted in consequence of such acts? Upon what principle should the carrier, in such case, be excused from exercising any vigilance in such regard until notified by the shipper, and be discharged from all liability if such notice is not given. The facts concerning plaintiff's damages alleged to have been occasioned by a change in the market could as readily have been ascertained twenty-four days as ten days after the arrival of the sheep at destination. We cannot well see why the presentation of a claim of such a loss was necessary in order that the defendant might properly protect itself against fraud and imposition, unless it shall be said that in all cases of tort the wrongdoer shall be timely notified of the mischief done by him, in order that he may, while the transaction is fresh, the better investigate the extent of it. But it is said the servants in charge had no means of determining the extent of shrinkage, for such facts could only be determined by a comparison of the weight of the sheep when delivered to the defendant and when they arrived at destination. It is quite true that the extent of such an alleged damage is largely determined from a consideration of such facts; but, in order that the defendant may protect itself from unjust claims, it is not essential that knowledge of all the facts should be possessed by some particular servant or servants in its employ. The facts concerning its alleged negligence of delay were as easily ascertained twenty-four days as ten days after its commission. So was the condition of plaintiff's sheep when delivered to it. Whoever was possessed of

knowledge of such fact knew it twenty-four days as well as ten days after the sheep arrived at destination. Whatever was known by such persons, and whatever evidence was possessed by them of such fact, could have been ascertained by the defendant one time as well as another, at least until the matter became stale. The record of this case discloses that the sheep, on their arrival, were weighed at the stock yards, and the average weight of the different kinds of sheep ascertained. The record does not directly disclose the fact, but from the evidence in the case we think it a fair inference that there was kept a stock-yard record of such weight. But, whether there was or not, the fact that the sheep were there weighed and the result thereof was as readily ascertained twenty-four as ten days thereafter. Such facts, in the very nature of things, were not peculiarly within the knowledge of the plaintiff. They were equally well known to the persons about the stock yards who attended the weighing and the person or persons to whom the sheep were sold. The contention made that the giving of notice within ten days was essential to enable the defendant to investigate and ascertain the facts, so it might properly have protected itself against an unjust claim, is more plausible than sound. No good reason appears why the defendant, with full knowledge of its negligent acts occasioning the delay, and with knowledge that the natural and probable consequences of such acts would result to plaintiff's damage, was not, equally with the plaintiff, afforded every opportunity to investigate and ascertain the nature and extent of the injury after the sheep arrived at destination and before they left the stock yards.

A further argument made in this connection is that, owing to the vast amount of business conducted by common carriers, and to the impracticability of immediate supervision over their numerous employees, and to the limited knowledge of the servants as to the nature and extent of injuries, such as here, it is but just that notice of claim should be given before rendering the carrier liable. This position is likewise untenable. It involves the violation of the well-recognized doctrine of *respondet superior*. If it shall be once said that the master shall not be liable, or held responsible, for the negligence or misconduct of his servants in the discharge of his business and within the scope of their employment, unless notified within a reasonable time, then are not only the fundamental principles upon which the law of common carriers is founded disregarded, but also one of the essential principles of the law of negligence relaxed? Another reason given by courts is expressed in the case

of *The Westminster*, 62 C. C. A. 406, 127 Fed. 680, where it is said: "The notice stipulated for is not of the fact of damage, more or less, but of the intent to hold the carrier liable for it, which, on failure to give notice, the latter, in view of the stipulation, may well regard as being waived." With due regard to the very high standing of that court, we submit that the giving of such a reason begs the question; for it assumes the validity of the contract, the very thing to be demonstrated. Undoubtedly, if the carrier may assume such validity, then it may well act upon the assumption that, unless notice is given, all claim for damages is waived. If the stipulation is invalid, then upon what theory may it be said that the carrier may regulate its conduct upon it? Another reason given is stated in *Kalina v. Union P. R. Co.* 69 Kan. 172, 76 Pac. 438, as follows: "The clause in question is not one exempting the carrier from its common-law liability, or limiting that liability, but one imposing a condition upon the shipper, which he must observe before he may recover for a breach of the carrier's duty; in other words, it is a condition of recovery, and not an exemption from liability."

Such statements tend rather to confuse the proposition than to solve it. They consist of the making of one statement and denying it by asserting another, or the proving of a negative by an affirmative statement of its opposite. That there is a well-recognized distinction between a substantive right or liability, and remedy, though at times difficult of exact definition, is admitted. The assertion that the liability is not exempted nor limited, but the right of recovery is only conditioned, is not the making of such distinction; nor is the stipulation remedial, and not substantive, if such was intended to be declared. To say that a liability exists unrestricted, but that the remedial right shall be asserted within a prescribed time or under a certain procedure, is one thing. To say that a liability exists, but that no right of action or recovery shall exist until something else is done, is quite another and different thing. The one pertains merely to remedy; the other, to the cause of action itself. If a carrier's contract should expressly provide a liability, to the fullest extent imposed by law, for all torts committed by it, but should further provide that no recovery should be had for such wrongs,—there would not be much difficulty in holding such a contract invalid, notwithstanding the argument that might be made that the contract did not affect liability, but only the right of recovery. The natural effect of such a contract would be to destroy or impair the substantive right or liability itself. When it is said that the

liability for negligence is not exempted, nor limited, but that there should be no right of recovery with respect to it, there is a substantial denial of the one statement by the making of another. When, also, it is said such liability is not limited, but the right of recovery with respect to it is made to depend upon some condition precedent, it is, in degree, doing the same thing. If there is no right of vindication, or restoration, or recovery for a liability, except upon some condition precedent, it naturally follows that the liability is to that extent limited or conditioned. The condition goes, not to the remedy merely, but to the cause of action itself. Until performance of the condition, no cause or right of action exists; and such is the obvious meaning of the plain terms of the stipulation under consideration.

We now come to the reasons given by other courts, and which are stated in Moore's work on Carriers (page 334), as follows: "They do not relieve carriers from any part of their obligation as common carriers. As such they are bound to the same diligence, fidelity, and care as they would be required to exercise if no such stipulation had been made." We find these expressions first used by Mr. Justice Strong in the Caldwell Case, where, as we have shown, they were used with respect to a stipulation pertaining to a loss or damage not alleged to have been caused by negligence, but where the carrier was sought to be held liable as an insurer. The expressions were made because the loss and damage sought to be recovered had not been incurred by the negligence of the carrier, and because the stipulation did not pertain to such a loss. We do not think Mr. Justice Strong intended that the language used by him should apply to a case of damage or injury incurred by the negligence of the carrier. He had no such case before him. But let us see whether such language can properly be applied to a case of negligence by the carrier. Why is it against the policy of the law to allow the carrier, by special contract, to exempt itself from, or limit its liability for, negligence? It is because of the fiduciary relation between the carrier and the shipper, the inequality of their positions, and the duties owing by the carrier to the public. To permit it to make such a contract tends to make it less careful and prompt in the performance of its duties and obligations, and less faithful in the discharge of its trust. Hence the policy of the law forbids such a contract. Now, is it true that a stipulation providing that the carrier shall not be liable for its negligence, whether ordinary, wilful, or gross, except upon the presentation of a claim within a specified time, has no bearing or influence upon the exercise of its care and the dis-

charge of its trust? The question is well answered by the statement that, the more stringent the motives are for the exercise of care and diligence, the greater is the probability that the proper degree of care and diligence will be exercised; the less stringent the motives are, the less likelihood that such care will be exercised. It is readily perceived, in many instances, the motive for the exercise of a proper degree of care is not the same when the right of recovery is dependent upon some condition, as when it is made absolute upon the infliction of the injury. The more conditions precedent of recovery which are imposed, the more difficult it is made on the part of the shipper to vindicate his right, and to recover for a loss or damage sustained by him. The more difficult it is made to vindicate the right, the less probable it is that it will be vindicated. Such matters have a natural tendency to influence the carrier in part to graduate its conduct, and to relax the degree of care and fidelity imposed upon it.

From a perusal of the cases we find no satisfactory reason for the conclusion that the stipulation in question does not affect the liability, nor influence the conduct of the carrier in the discharge of its duties, and is, therefore, not against the policy of the law. We are, however, mindful that the views expressed by us are against the great weight of modern authority. We find ourselves in the position where the conclusion reached by us upon what we believe to be fundamental principles is contrary to the conclusion reached by many able courts upon a consideration of the same principles. When we find such to be the case, we confess the confidence in our original position on this point is somewhat shaken. We have therefore come to the conclusion not to rule the case upon the principle so broadly declared in our original opinion. Our holding in this regard is that a stipulation, when fairly entered into and found to be reasonable under all the circumstances, requiring the presentation of a claim for loss or damage, is not in all cases against the policy of the law, and for that reason ineffectual, merely because the claim pertains to a loss or damage occasioned by negligence. It is not necessary to consider the question when such a stipulation will be regarded reasonable and applicable, nor the circumstances under which the shipper is relieved from the giving of notice or presentation of such a claim, because of the further view entertained by us as to the invalidity of the contract before us. As we have seen, under the general doctrine of this country, a contract which exempts the carrier from, or limits its liability for, negligence, contravenes public policy. When the contract in question is

provision in a bill of lading relieving the carrier from liability for injury to property during transportation if the making of claim is delayed more than thirty days after delivery of the property is a matter of defense which will be waived by failure to plead it.

(January 31, 1908.)

A PPEAL by the defendant railroad company from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a trial term for Kings County, Part 3, in plaintiff's favor in an action brought to recover damages for injury to property while in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Case Note. — Notice of loss or injury to goods, required by carrier's contract as a condition precedent.

In the case note to *Houtz v. Union P. R. Co.* ante, 628, the validity of a stipulation in a contract of affreightment requiring the shipper to give notice of any loss within a specified time, where that loss occurred through the negligence of the carrier, is discussed; and it may also be well at this point to call attention to the case note to *Wabash R. Co. v. Thomas*, 7 L.R.A.(N.S.) 1041, upon reasonableness of the time fixed in a contract of shipment of live stock for presentation of claim for damages, and also to the case note to *Liquid Carbonic Co. v. Norfolk & W. R. Co.* 13 L.R.A.(N.S.) 753, upon the validity of a contract limiting the time for bringing action, or for the presentation of claims for damages, where a statute or Constitution prohibits the carrier from limiting its common-law liability.

As is shown by these notes, stipulations of this character are frequently declared invalid upon the ground of their unreasonableness. Other cases hold that they are invalid upon the ground that they were not freely entered into, or are unconstitutional or invalid under a statute; and in other cases the court, not directly passing upon the validity of the stipulation, holds that it is inapplicable to the loss in question, as, for instance, where such loss was due to the shrinkage of the live stock because of unreasonable delay in the carriage, or to a loss of market, etc. If the stipulation is invalid or inapplicable, of course the question presented in the foregoing case, namely, whether the notice of loss required by the contract is a condition precedent or not, would not arise. To present this question the stipulation must at least be presumed valid.

In many cases the question is not presented, and therefore not discussed. In many of these it might be possible to read into the decision an implied ruling of the court upon the question; but this note is confined to cases which more or less clearly pass upon the question.
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Mr. Norman B. Beecher, with Messrs. **Robinson, Biddle, & Ward**, for appellant:

The evidence was insufficient, and the complaint should have been dismissed.

Berkowitz v. Chicago, M. & St. P. R. Co. 109 App. Div. 878, 96 N. Y. Supp. 825.

The jury must be deemed to have found in accordance with the court's charge.

Rogers v. Murray, 3 Bosw. 357; *Dent v. Bryce*, 16 S. C. 1; *Emerson v. Santa Clara County*, 40 Cal. 543; *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 797; *Union P. R. Co. v. Hutchinson*, 40 Kan. 51, 19 Pac. 312; *Dutton v. Wabash, St. L. & P. R. Co.* 66 Iowa, 352, 23 N. W. 739.

The failure of the plaintiff to present his claim within the period prescribed by

The decisions apparently turn upon general rules, and not upon the particular phraseology of the contract. Thus, in some cases, although the contract contains the express phrase "condition precedent," the court holds that the burden of proof as to the notice is upon the carrier, evidently not giving to the phrase as used in the contract its strict technical meaning.

It is frequently difficult to determine from the reported case whether the suit is brought upon the contract or in tort for the common-law liability of the carrier, either of which remedies may be pursued. Whether the notice of loss is a condition precedent, or not, has been determined by the character of the suit brought.

Thus, in *McNichol v. Pacific Exp. Co.* 12 Mo. App. 401, the court said: "The rule, as we understand it, is that, where a person brings an action against a common carrier, sounding in tort for a breach of the common-law liability of the latter in failing to deliver goods placed in his hands for shipment; and the carrier pleads and puts in evidence a special contract containing conditions to be performed by the plaintiff,—the burden is upon the carrier of showing the nonperformance of these conditions, for that is a part of his special defense. But, where the plaintiff sues the carrier upon a special contract, and not upon his common-law liability, then, as in other cases of action upon express contracts, the burden is upon the plaintiff to prove compliance with all the obligations which the contract imposes upon him."

And in *Richardson v. New York C. & H. R. R. Co.* 122 App. Div. 120, 106 N. Y. Supp. 702 (motion for reargument and for leave to appeal to the court of appeals denied in 123 App. Div. 916, 108 N. Y. Supp. 1146), the court said that a presentation of the claim was not a condition precedent to the right to recover for negligence, though it might have been if recovery had been sought for breach of contract.

But in *Parrill v. Cleveland, C. C. & St. L. R. Co.* 23 Ind. 638, 55 N. E. 1026, which, after a long discussion in the opinion, was

the bill of lading could not be raised by the defendant, because such omission was not pleaded in the answer.

Frey v. New York C. & H. R. R. Co. 114 App. Div. 747, 100 N. Y. Supp. 225; Johnson v. Missouri, K. & T. R. Co. 107 App. Div. 375, 95 N. Y. Supp. 182; Jennings v. Grand Trunk R. Co. 127 N. Y. 438, 28 N. E. 394; Smith v. Dinsmore, 9 Daly, 188; Hirshberg v. Dinsmore, 12 Daly, 429; Osterhoudt v. Southern P. Co. 47 App. Div. 146, 62 N. Y. Supp. 134; Busch v. Interborough Rapid Transit Co. 187 N. Y. 388, 80 N. E. 197; Springer v. Westcott, 78 Hun, 365, 29 N. Y. Supp. 149; Quinn v. Pennsylvania R. Co. 114 App. Div. 663, 99 N. Y. Supp. 980; The Queen of the Pacific, 180 U. S. 49, 45 L. ed. 419, 21 Sup. Ct. Rep. 278.

held to be an action in tort, the court said: "So where, as here, there is a special contract providing a necessity for reasonable notice of claim, the giving of such notice, or the presentation of such claim, being a condition precedent, it is a part of the plaintiff's cause of action to show performance of this precedent obligation on his part, or to show a waiver of performance or of strict formality."

But in the majority of the cases this distinction is apparently passed over, cases in which the action was brought on the contract citing as authorities for the decision cases brought in tort and *vice versa*.

The weight of authority seems to be that the notice is a condition precedent, and the plaintiff must allege, or at least prove, that he has given the notice required, to be entitled to recover. It has been held in some cases that the complaint does not state a cause of action if it fails to allege that the notice had been given as required by the contract.

Thus, in St. Louis & S. F. R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470, the court said: "We take it to be the true rule of pleading that, where there is a condition precedent to be observed before an action can be maintained or a cause of action exist, the plaintiff must show that the condition has been performed, either actually or substantially, or that he has been in some way released from that condition by the act of the opposite party; and that, in the absence of such averment, the petition does not state facts sufficient to constitute a cause of action."

And an averment showing the making of the claim and the giving notice thereof, as required by the contract, was held, in Metropolitan Trust Co. v. Toledo, St. L. & K. C. R. Co. 107 Fed. 628, to be necessary to show a good cause of action.

So, also, in Chicago & S. E. R. Co. v. Fifth Nat. Bank, 26 Ind. App. 600, 59 N. E. 43, it was held that the general rule is that the giving of such notice is a condition precedent to any recovery upon the contract, and that a performance of such a condition must be averred in the complaint 17 L.R.A. (N.S.)

The record does not support the contention that the decision by the appellate division was unanimous; it therefore must be treated as otherwise in determining the questions presented upon this appeal.

Re Marcellus, 165 N. Y. 70, 58 N. E. 796; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679.

The court is not precluded from reviewing the evidence in order to determine whether such judgment is founded wholly upon immaterial evidence which was admitted over the objection and exception of the appellant, even where the affirmance is unanimous.

Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145, 73 N. E. 674; Hindley v. Manhattan R. Co. 185 N. Y. 335, 78 N. E. 276.

and proved on the trial. And to the same effect were the decisions in Anderson v. Lake Shore & M. S. R. Co. 26 Ind. App. 196, 59 N. E. 396; Louisville, N. A. & C. R. Co. v. Widman, 10 Ind. App. 92, 37 N. E. 554; Case v. Cleveland, C. C. & St. L. R. Co. 11 Ind. App. 517, 39 N. E. 426.

And in Texas & P. R. Co. v. Hamm, 2 Tex. App. Civ. Cas. (Willson) 436, where the contract expressly stated that the giving of the notice was a condition precedent to the bringing of a suit, it was held that not only should the notice have been alleged, but it must be proved, to entitle the plaintiff to recover. And to the same effect was the decision in Texas C. R. Co. v. Morris, 1 Tex. App. Civ. Cas. (White & W.) 158.

In Baxter v. Louisville, N. A. & C. R. Co. 165 Ill. 78, 45 N. E. 1003, it was held that an objection to a complaint upon a carrier's contract that it did not allege the compliance by the plaintiff with the requirements of the contract should be made by demurrer, but could not be the basis for a motion to direct a verdict.

And a complaint which failed to allege compliance with the requirements of such a contract was held bad on demurrer in United States Exp. Co. v. Harris, 51 Ind. 127.

In Osterhoudt v. Southern P. Co. 47 App. Div. 146, 62 N. Y. Supp. 134, it was held that, if the plaintiff had brought his action upon the written contract, it would have been necessary for him to have alleged compliance upon his part with all the conditions in it, or some valid reason for nonperformance; and, where the plaintiff merely alleged a general contract and the negligence of the defendant, and the answer alleged a written contract, a copy of which was made a part thereof, it then became incumbent upon the plaintiff to prove that he had complied with the terms of the contract just as much as it would have been had he originally declared upon such contract in his complaint.

And other cases hold that the burden of proof as to the giving of the notice is on

Mr. I. R. Oeland, with Mr. Stephen M. Hoye, *in propria persona*, for respondent:

The court of appeals has no jurisdiction to determine whether or not the trial court erred in not dismissing the plaintiff's complaint.

Code Civ. Proc. art. 6, §§ 9, 191, subd. 4; *Szuchy v. Hillside Coal & I. Co.* 150 N. Y. 219, 44 N. E. 974; *Ayres v. Delaware, L. & W. R. Co.* 158 N. Y. 254, 53 N. E. 22; *Reed v. McCord*, 160 N. Y. 330, 54 N. E. 737; *Meserole v. Hoyt*, 161 N. Y. 59, 55 N. E. 274; *Cronin v. Lord*, 161 N. Y. 90, 55 N. E. 397; *Kennedy v. Mineola, H. & F. Traction Co.* 178 N. Y. 508, 71 N. E. 102; *Tewes v.*

North German Lloyd S. S. Co. 186 N. Y. 151, 8 L.R.A. (N.S.) 199, 78 N. E. 864; *McGuire v. Bell Telephone Co.* 167 N. Y. 208, 52 L.R.A. 437, 60 N. E. 433.

It was not necessary for the plaintiff to show compliance with the provision of the receipt as to presentation of claim for loss or damage.

Dorr v. New Jersey Steam Nav. Co. 11 N. Y. 485, 62 Am. Dec. 125; *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 112, 18 L. ed. 171; *Hutchinson, Carr.* 3d ed. § 448; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300.

Contracts or receipts limiting the com-

plaintiff, without expressly holding that the notice must be alleged.

Thus, in *Chicago & A. R. Co. v. Simms*, 18 Ill. App. 68, it was held that the plaintiff, having made a special contract whereby he made it a condition precedent that he would give notice of loss within a specified time, could not recover where he failed to prove the giving of such notice.

So, the charge of the trial court to the jury to the effect that, before they could find for the plaintiff, he must prove by the greater weight of evidence that he had complied with the stipulation, was upheld in *Wichita & W. R. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013.

And in *The Westminster*, 62 C. C. A. 406, 127 Fed. 680, writ of certiorari denied in 194 U. S. 637, 48 L. ed. 1161, 24 Sup. Ct. Rep. 800, it was held that, as the want of giving the notice had been set up in the answer, it was incumbent on the libellants to prove it as a condition to the right to recover.

So there are numerous other cases which hold that such a provision in a carrier's contract is in the nature of a condition precedent, and is binding on the party who accepts such a contract, and precludes him from recovering without proof that the condition has been performed. *Kaiser v. Hoey*, 16 N. Y. S. R. 803, 1 N. Y. Supp. 429; *Frankfurt v. Weir*, 40 Misc. 683, 83 N. Y. Supp. 112; *Hirshberg v. Dinsmore*, 12 Daly, 429; *American Grocery Co. v. Staten Island Rapid Transit R. Co.* 23 Misc. 356, 51 N. Y. Supp. 307; *Smith v. Dinsmore*, 9 Daly, 188; *Texas & P. R. Co. v. Scrivener*, 2 Tex. App. Civ. Cas. (Willson) 234; *Texas & P. R. Co. v. Jackson*, 3 Tex. App. Civ. Cas. (Willson) 65; *McBeath v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 445; *Smith v. Chicago, R. I. & P. R. Co.* 112 Mo. App. 610, 87 S. W. 9; *Pennsylvania Co. v. Shearer*, 75 Ohio St. 249, 116 Am. St. Rep. 730, 79 N. E. 431; *Atchison, T. & S. F. R. Co. v. Crittenden*, 4 Kan. App. 512, 44 Pac. 1000.

Some cases hold that the notice of loss is a condition precedent to the plaintiff's recovery, and the defendant may introduce evidence in regard to lack of it without having pleaded it.

Thus, in *Kalina v. Union P. R. Co.* 69 17 L.R.A. (N.S.)

Kan. 172, 76 Pac. 438, it was held that as soon as the shipper admitted that he was attempting to recover under the contract he must show compliance with the condition upon which recovery might be had; and the fact that the carrier had not pleaded it in defense could make no difference. And to the same effect was the decision in *Atchison, T. & S. F. R. Co. v. Means*, 71 Kan. 845, 80 Pac. 604.

And in *Baltimore & O. S. W. R. Co. v. Ross*, 105 Ill. App. 54, it was held that, in an action for damages caused by injury to stock, a special contract limiting the carrier's liability could be introduced into evidence by the defendant without having been pleaded in the answer.

In other cases, however, it is held that the lack of notice is a matter of defense for the defendant to allege and prove.

Thus, in *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300, where the contract provided that any claim for damages should be made in writing "within thirty days from the accruing of the action," it was held that the clause assumed that the plaintiff had a cause of action which had accrued to him before the thirty days next to run, and, in that view, the provision was in the nature of a statute of limitations, and should have been set up in the answer; as that was not done, the defendant could not avail himself of it.

And in *Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879, the court said: "On general rules of pleading, inasmuch as it was not necessary for the plaintiff below to set out this provision, as it is in the nature of a condition subsequent, it would seem that a mere denial of the allegations of the declaration would not raise the issue which the defendant below has raised on this part of the case, and that, therefore, if the defendant below relied upon it, it should have been specially pleaded."

So, in *Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 490, 107 N. W. 1087, where the contract expressly provided that the giving of the notice was a condition to a right to recover, the court said: "The condition or stipulation referred to is not strictly a condition precedent, and

mon-law liability of the carrier are construed strictly against it.

Galloway v. Erie R. Co. 107 App. Div. 210, 95 N. Y. Supp. 17; Missouri P. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Mynard v. Syracuse, B. & N. Y. R. Co. 71 N. Y. 180, 27 Am. Rep. 28; Nicholas v. New York C. & H. R. R. Co. 89 N. Y. 370; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Lowenstein v. Lombard, 164 N. Y. 324, 58 N. E. 44; Security Trust Co. v. Wells, F. & Co. Express, 81 App. Div. 426, 80 N. Y. Supp. 830.

The contract limitation as to liability does not relieve the carrier where the loss

has occurred through its negligence or that of its servants.

Isham v. Erie R. Co. 112 App. Div. 612, 98 N. Y. Supp. 609; Westcott v. Fargo, 63 Barb. 349; Wheeler, Carr. 127; Wheeler v. Oceanic Steam Nav. Co. 125 N. Y. 155, 21 Am. St. Rep. 729, 26 N. E. 248; Bernel v. New York, N. H. & H. R. Co. 62 App. Div. 389, 70 N. Y. Supp. 804, affirmed in 172 N. Y. 639, 65 N. E. 1113; Rathbone v. New York C. & H. R. R. Co. 140 N. Y. 48, 35 N. E. 418.

The defendant had knowledge or notice of the damage, and was not entitled to further notice.

is not a part of the cause of action. . . . It was therefore an unnecessary allegation of the complaint. A cause of action was completely stated without it. The condition was a limitation upon the right of the plaintiff to maintain the action, and pertained to the remedy. It was therefore a matter of defense, to be raised by answer, if at all."

And in *St. Louis & S. F. R. Co. v. Kimberlin* (Tex. Civ. App.) 111 S. W. 671, it was held that the "appellee's petition was sufficient as against a general demurrer, because, having pleaded the facts, it became the common-law duty of appellant to accept and ship the cattle with proper diligence."

The defense that the plaintiff failed to give notice as required by the contract must be set up in the answer, as the plaintiff was not obliged to allege or prove that the cattle were shipped under a special contract to make the defendant liable. *Kansas City, P. & G. R. Co. v. Pace*, 69 Ark. 256, 63 S. W. 62.

In *Union P. R. Co. v. Thompson*, 75 Neb. 464, 106 N. W. 598, although the court held that such a stipulation was in violation of a constitutional provision prohibiting a carrier from limiting its liability, the court further said that in any event the burden would have been upon the defendant, and not upon the plaintiff, to show that the notice provided for was not given.

In *Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co.* 113 Mo. App. 144, 87 S. W. 553, it was held that a defendant who goes to trial on the merits of the case, having made a general denial, but not setting up the lack of notice as a defense, will be deemed to have waived it, and cannot set up lack of notice on a subsequent trial.

In Texas there are numerous cases upholding the rule that, where the validity of a contract depends upon its being reasonable, the party asserting its validity must also allege and prove the facts which make it so. *Missouri P. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Missouri P. R. Co. v. Fagan*, 72 Tex. 127, 2 L.R.A. 75, 13 Am. St. Rep. 776, 9 S. W. 749; *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104, 17 L.R.A. (N.S.)

17 S. W. 834; *Houston & T. C. R. Co. v. Davis*, 88 Tex. 593, 32 S. W. 510; *Missouri P. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. 78; *St. Louis, A. & T. R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. 1008; *Galveston, H. & S. A. R. Co. v. Williams* (Tex. Civ. App.) 25 S. W. 311; *Houston & T. C. R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308; *St. Louis Southwestern R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476; *St. Louis & S. F. R. Co. v. Bryce* (Tex. Civ. App.) 110 S. W. 529; *Missouri P. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Good v. Galveston, H. & S. A. R. Co.* (Tex.) 11 S. W. 854; *Missouri P. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. 76; *Gulf, C. & S. F. R. Co. v. Vaughn*, 4 Tex. App. Civ. Cas. (Willson) 269, 16 S. W. 775.

And in *Cox v. Central Vermont R. Co.* 170 Mass. 129, 49 N. E. 97, it was held that, where the defendant relied on the failure of the plaintiffs to comply with the stipulation, the burden was on it to show that the stipulation was a just and reasonable one.

Some other cases may be cited showing some peculiar phase of the question.

Thus, in *Frey v. New York C. & H. R. R. Co.* 114 App. Div. 747, 100 N. Y. Supp. 225, it was held that, if the plaintiff desired to plead a waiver by the defendant of any condition with which he had not complied, he must allege the condition claimed to have been waived and the facts constituting such a waiver.

And in *Welch v. Northern P. R. Co.* 14 N. D. 19, 103 N. W. 396, the plaintiff failed to plead the contract and his fulfillment of the requirements thereof, and his motion to amend in that regard was denied. The court held, however, that the plaintiff might recover, as the evidence showed a substantial compliance with the requirements.

And in *Ratliffe Bros. v. Quincy, O. & K. C. R. Co.* 118 Mo. App. 644, 94 S. W. 1005, the question whether the failure of the defendant to plead the nonperformance of the condition would be deemed a waiver was raised, but not decided.

Johnson v. Missouri, K. & T. R. Co. 107 App. Div. 374, 95 N. Y. Supp. 182.

Haight, J., delivered the opinion of the court:

This action was brought against the Pennsylvania Railroad Company and the Westcott Express Company to recover damages alleged to have been suffered by the plaintiff by reason of the destruction of a set of 40-cell storage batteries during transportation, which were shipped by the National Motor Vehicle Company at Indianapolis, Indiana, by the Pennsylvania Railroad Company, to the plaintiff in the city of New York. The evidence tends to show that, upon the arrival of the batteries in New York at the foot of Leight street, the Pennsylvania Railroad Company notified the plaintiff by telephone, and thereupon he procured the Westcott Express Company to get the property and deliver it to him; that, when the batteries were received, it was found that they had been turned upside down and the electrolyte allowed to escape therefrom, causing the batteries to sulphate and become worthless. There was also evidence tending to show that the excelsior in which the batteries were packed had turned black and was perfectly dry, from which the inference is drawn that the batteries were overturned and the electrolyte permitted to escape some days before their arrival in New York. The defendant, the Pennsylvania Railroad Company, in its answer, after denying various allegations of the complaint, for its first separate defense alleged, upon information and belief, "that, on or about the 1st day of May, 1903, the National Motor Vehicle Company of Indianapolis, Indiana, delivered to the Pennsylvania company certain storage batteries, which it believes to be the batteries referred to in the complaint; that said batteries were consigned to the plaintiff at New York city and were shipped, subject to the provision of a certain written and printed instrument known as a shipping receipt or bill of lading, wherein or whereby it was expressly agreed by and between the parties thereto on behalf of the plaintiff and the Pennsylvania company and on behalf of all subsequent carriers that no carrier or party in possession of all or any of the property herein described shall be held liable for any loss thereof or damage thereto by causes beyond its control, . . . or by leakage, drainage, chafing, loss in weight, changes in weather, heat, frost, sweat, or decay." And, for a second separate defense, that, by the terms of the bill of lading or shipping receipt, it was expressly agreed that "no carrier should be liable for loss or damage not occurring on its own road or its portion of the through route." 17 L.R.A. (N.S.)

At the conclusion of the plaintiff's case upon the trial the counsel for the Pennsylvania Railroad Company moved to dismiss the complaint upon various grounds, among which it was insisted that there was no evidence of a claim in writing made by the plaintiff and delivered to the Pennsylvania Railroad Company within thirty days, as required by the bill of lading. The motion was denied, and an exception taken. The trial then proceeded, the Westcott Express Company producing evidence upon which, at the conclusion of the trial, the court directed a nonsuit as to it, the Pennsylvania company submitting no evidence. The case was then submitted to the jury as to the liability of the Pennsylvania company, and a verdict was rendered in favor of the plaintiff.

The bill of lading contained the following provision: "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and, if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier herein shall be liable in any event." It must be conceded that no evidence was submitted on behalf of the plaintiff showing a compliance with this requirement. It also appears that, while the Pennsylvania company set forth in its answer as separate defenses the provisions of the bill of lading therein referred to, it did not allege as a defense the provision upon which the motion to dismiss was based. We have therefore squarely presented the question as to whether this provision of the bill of lading should be set forth in the defendant's answer as a defense, or as to whether compliance with it should be established by the plaintiff as a condition precedent to his right to recover.

At common law common carriers were liable for an injury resulting to property through the negligence of their employees while in course of transit. Until recently, however, they have been permitted to relieve themselves, to some extent, from the strict liability of the common law by inserting reasonable provisions in the bill of lading limiting their liability. It would therefore follow that the Pennsylvania company in this case would be liable for the damages sustained by the plaintiff were it not for the provision upon which the motion was based; and, for the purpose of this case, we shall assume, but without deciding it, that the provision was a reasonable one, and that it was the duty of the plaintiff to comply therewith. The plaintiff had submitted evidence tending to establish his cause of action under the requirements of the common law. The provisions of the bill of lading, being in

derogation of the common law, are to be strictly construed, and are not to be considered as conditions precedent to a right to recover unless it clearly appears that such was the intent, or it is so specifically stated. In *Hutchinson on Carriers*, 3d ed. § 447, it is said that "it has been held that a stipulation in the contract of shipment requiring the owner of the goods to present a notice of his claim to the carrier within a specified time after the goods have arrived at their destination is in the nature of a condition precedent to the owner's right to enforce a recovery; and that he must show in the first instance that he has complied with the condition, or that the circumstances were such that to have complied with it would have required him to do an unreasonable thing. The weight of authority, however, sustains the view that such a stipulation is more in the nature of a limitation upon the owner's right to a recovery, and that the burden of proof is accordingly on the carrier to show that the limitation was reasonable, and that the owner omitted to present the notice in proper form or within the time stated." This is a statement of the precise conflict between our own courts upon the subject.

In the case of *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300, a receipt had been given by an express company which contained a clause to the effect that the company would not be liable for loss or damage to property unless the claim therefor was made in writing within thirty days from the accruing of the cause of action. It was held that the clause was not in the nature of a condition precedent to plaintiff's right to recover, as it assumes the existence of a cause of action which has accrued, but was in the nature of a limitation, and could not be availed of upon trial unless set up in the answer.

In the case of *Osterhoudt v. Southern P. Co.* 47 App. Div. 146, 62 N. Y. Supp. 134, it was held that the defendant was not obliged to plead in its answer the plaintiff's noncompliance with such a provision of the bill of lading in order to take advantage thereof, as such provisions are conditions precedent to the defendant's liability, compliance with which must be pleaded or proved by the plaintiff, and are not in the nature of a statute of limitations. This conclusion was reached by the learned appellate division upon a deliberate consideration of the case of *Westcott v. Fargo*, *supra*, in which it was claimed that the provision of the bill of lading assumed the existence of a cause of action; and, for that reason, it held that it was distinguishable from the case which it had under consideration. The only difference that we discover be-

tween the bill of lading in the *Westcott* Case and that under consideration is, in that case the thirty days commenced to run from the time of "the accruing of the cause of action," while in this case it is from the date of the delivery of the property. Upon the delivery of the property the damage was first discovered by the plaintiff, and at that time a cause of action accrued in his favor against the defendant under the common law. True, the provision is not admission that the defendant had caused the injury to the property. That must be established in the usual way. This was equally true of the *Westcott* Case. The provision of the bill of lading was not treated as an admission of the cause of action. The plaintiff had to submit evidence showing his right to recover. The provision, "within thirty days from the accruing of the cause of action," had reference to the time when the plaintiff's right to commence the action commenced to run. The *Westcott* Case has been criticized in this court recently with reference to the provision limiting the right to recover to \$50. *Tewes v. North German Lloyd S. S. Co.* 186 N. Y. 151, 8 L.R.A. (N.S.) 199, 78 N. E. 864. But no criticism was made with reference to the conclusion reached on the question under consideration. This case is distinguishable from cases in which the right of action has been created by statute, or cases against municipalities in which the statute has provided for notice of claim to be presented for audit as a condition precedent to a right to recover.

Our conclusion is that, inasmuch as the plaintiff's right to recover existed at common law, the limitations embraced in the bill of lading are to be treated as matters of defense.

None of the other questions discussed by the appellant's counsel require further mention. They are disposed of by the unanimous affirmance of the appellate division.

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Gray, Werner, Willard Bartlett, and Chase, JJ., concur. Vann, J., not sitting.

WASHINGTON SUPREME COURT.

LEON CHARON AND WIFE, Respts.,
v.

JAMES W. CLARK AND WIFE, Appts.

(— Wash. —, 96 Pac. 1040.)

Artesian well — water right.

1. A grantee of land containing an artesian well, whose conveyance is expressly

made subject to the rights of persons who had been granted rights in the water, cannot deprive such persons of their rights, although the well is fed entirely by percolation.

Water — successive grants — rights.

2. Grantees of specific quantities of water flowing from an artesian well take in the order of the grants, so that the first grantee will be entitled to the entire quantity granted to him, although the aggregate amount granted exceeds the supply.

(August 6, 1908.)

APPEAL by defendants from a judgment of the Superior Court for Yakima County enjoining them from interfering with plaintiffs' right to the flow of water from an artesian well. Affirmed.

The facts are stated in the opinion.

Mr. William M. Thompson, for appellants:

The grantor had no such proprietary right in the subterranean waters of the land upon which the artesian well is situated

Case Note. — Effect of grant upon rights in percolating water.

The line of distinction pointed out in the note to Paine v. Chandler, 19 L.R.A. 99, which presents the earlier cases, that, if there has been a grant of the use of water in such a way that the plain meaning is that the water shall continue to flow as it does at the time of the grant, the grantor can do nothing to intercept the flow; but a mere grant of the right to draw water from a well or spring gives the right to the water only in case it continues to flow, and does not prevent the grantor from intercepting the percolating water before it reaches the reservoir,—seems to be borne out by the later cases.

Thus, a deed conveying the grantor's interest in certain described springs or wells, which contains a clause: "I also quitclaim all right and title which I have in and to what water would naturally flow into the above-described springs or wells," operates to prevent the grantor or his successor from so excavating upon the surrounding lands as to intercept or obstruct the natural passage of percolating waters to the spring or wells. Minard v. Currier, 67 Vt. 489, 32 Atl. 472.

But a grant to a railroad company of the right to use water out of one of several springs near the right of way, and to lay pipe to connect the springs with the water tank, does not authorize the drawing of water from all of the springs, and the creation of an obstruction which will cause any of them to be filled up. Louisville & N. R. Co. v. Higginbotham (Ala.) 44 So. 872.

It was held in Morrison v. Officer, 48 Or. 569, 87 Pac. 896, that, where the state conveyed to the defendant a portion of a 17 L.R.A. (N.S.)

as would vest him with the right or power to convey a perpetual right to the use of a given amount of water.

3 Farnham, Waters, p. 2710; Warder v. Springfield, 9 Ohio Dec. Reprint, 855; Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; Katz v. Walkinshaw, 141 Cal. 138, 64 L.R.A. 236, 99 Am. St. Rep. 52, 70 Pac. 663, reaffirmed in 141 Cal. 116, 64 L.R.A. 247, 99 Am. St. Rep. 36, 74 Pac. 766; Meyer v. Tacoma Light & Water Co. 8 Wash. 145, 35 Pac. 601.

Messrs. Fred Parker and Thomas E. Grady, for respondents:

The grantor had such a property right in the waters flowing from the artesian well that the same could be lawfully conveyed in specified amounts to landowners for the purpose of irrigating their lands.

Johnstown Cheese Mfg. Co. v. Veghte, 69 N. Y. 16, 25 Am. Rep. 125; Whitehead v. Parks, 2 Hurlst. & N. 870; 3 Farnham, Waters, pp. 2723, 2725, § 943; Davis v. Spaulding, 157 Mass. 431, 19 L.R.A. 102,

tract of land, upon which portion there was a spring the water from which formed a swale by making its way through the soil in no definite channel, and later conveyed to the plaintiff an adjoining part of the tract upon which the swale extended, a statute in force at the time the conveyances were made, which provided that the person upon whose land seepage or spring waters first arose should have the right to the use thereof, operated as a grant to the defendant, of which the plaintiff must be deemed to have had notice, and under which the former had the right to cut ditches from the portion of the swale on his own land and divert all of the water therefrom, notwithstanding the plaintiff was deprived of water that he obtained by previously cutting a ditch to the portion of the swale on his land.

But the mere grant of a spring without the land surrounding it does not, by implication, convey percolating water before it reaches the spring. Wheelock v. Jacobs, 70 Vt. 162, 43 L.R.A. 105, 67 Am. St. Rep. 659, 40 Atl. 41.

And a grant of the right to cut ditches on any part of "the now waste land" in the grantor's tract, for the purpose of conveying the water elsewhere to propel a mill, does not extend to water percolating or seeping through the high and dry portions of the premises; and a successor in interest of the grantor has a right to dig a well on such dry portion, and conduct a way for dairy and household purposes percolating water that may otherwise reach the waste lands. Edwards v. Haeger, 180 Ill. 99, 54 N. E. 176.

As to correlative rights in percolating water, see the case note to Erickson v. Crookston Waterworks, Power, & Light Co. post, 650.

32 N. E. 650; *Paine v. Chandler*, 134 N. Y. 385, 19 L.R.A. 99, 32 N. E. 18; *Minard v. Currier*, 67 Vt. 489, 32 Atl. 472; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576.

Hadley, Ch. J., delivered the opinion of the court:

This is a suit to enjoin interference by the defendants with the flow of water from an artesian well to land of plaintiffs. The plaintiffs are the owners of a tract of land in Yakima county, which is arid and will not produce crops without irrigation. They have all of the land under cultivation, and for twelve years they and their predecessors have raised valuable crops thereon. During all those years water from the artesian well has been used for the irrigation of the crops and for domestic uses upon the land, which is entirely dependent upon the well as a source of water supply. The defendants are now the owners of a small tract of land, containing 4.56 acres, upon which the well flows to the surface of the ground. This tract, together with other surrounding ones, was formerly owned as one entire tract by a single owner, one McDonald. At various times prior to the time McDonald conveyed the small tract upon which the well flows to the defendants' grantor, he made other conveyances of parts of the original entire tract owned by him to various persons, and executed a number of conveyances purporting to convey to various individuals certain amounts of water or perpetual rights to the use of certain quantities of water from the well for irrigation and domestic uses, on the respective tracts of land theretofore conveyed by him. It is stipulated in the case that, through McDonald as a grantor, and through various mesne conveyances purporting to convey certain amounts of water, the plaintiffs can deraign title to an amount of water flowing from this well equal to 18¾ inches miner's measure, under a 4-inch pressure, delivered at the highest point on the plaintiffs' land. The plaintiffs became the grantees of this water supply, and were in the possession and enjoyment thereof prior to the time the defendants became the owners of the immediate tract upon which the well flows. The deed under which the defendants claim contained the following condition: "Subject, however, to all existing rights of divers persons to take water from the artesian well located upon said premises. Also subject to all rights of way for irrigating ditches as now constructed and existing through, over, and upon said conveyed premises." Upon the foregoing facts, the trial court held that the plaintiffs are the owners of 18¾ inches of

water, miner's measure, under a 4-inch pressure, flowing from said well, also of the right of way through defendants' land for the conveyance of that amount of water to the plaintiffs' lands; and that plaintiffs are entitled to an injunction perpetually enjoining the defendants from in any manner interfering with the flow of the water to the plaintiffs' lands. From a judgment of the foregoing effect, the defendants have appealed.

Appellants contend that no perpetual rights or estates in the water were conveyed by McDonald's several conveyances. The source of water supplying this well, it is argued, is entirely subterranean and reaches the well through percolation. Its course is indefinite, uncertain, and unknown, and appellants seek to apply here general rules which have been applied in some cases to subterranean percolating waters. They suggest that the law with respect to such waters was not developed until a comparatively recent period, and that all rules governing the subject cannot be regarded as settled at the present time. They argue that it is now established that an action will not lie to prevent a person from diverting percolating subterranean waters. A discussion of the authorities cited upon this general subject of the mere naked right of an ordinary land owner to divert such waters without regard to any relations arising out of contract, we think is unnecessary and in appropriate here, by reason of the relation of these parties. The parties here stand in the relation of grantors and grantees. Appellants stand in the shoes of respondents' grantor. They accepted their deed under which they claim title, expressly subject to the burden of respondents' water right which had been granted by their grantor. The following statement of the rule applicable in such cases is clear and to the point: "The rule that an action will not lie against a person for intercepting or diverting subterranean waters does not apply where the rights of the parties are defined by a deed or other instrument, by which the person diverting or intercepting such waters had previously conveyed all water in a certain close, as his right must be ascertained from the instrument alone; and, if it conveyed the subterranean water, the grantor is liable for subsequently diverting or intercepting it. Therefore a grant of a well or a spring may be in such form as to preclude the grantor from doing any act which will interfere with the enjoyment of the thing granted. . . . But a grant of the right to water as then conducted from certain springs will prevent the grantor from doing anything on his remaining land which will cut off the water supply. So, a deed of

bly necessary for appellant to reduce the head of water below that point in order to furnish the inhabitants of Crookston and the municipality with water for all the purposes mentioned.

Same — supplementary supply — river water.

5. The evidence did not justify the trial court in finding that it was commercially feasible and practicable to install in the city an independent system of mains and pipes for the purpose of furnishing river water for other than domestic purposes.

(July 31, 1908.)

APPEAL by defendant from a judgment of the District Court for Polk County in plaintiff's favor in an action brought to enjoin defendant from pumping water from artesian wells on its premises in such quantities as to reduce the level of the water in the well on plaintiff's premises below its normal height. Reversed.

The facts are stated in the opinion.

Messrs. Rome G. Brown, Charles S. Albert, and Arnold L. Guesmer, for appellant:

A plaintiff is not entitled to his water exactly in the condition in which nature gives it to him.

had acquired title, situated over an underground basin from which a hundred or more artesian wells on lands of adjoining owners in the city and vicinity drew their supply, was without right to deprive such owners, or any of them, of water by the use of artificial force in pumping the water in the artesian basin to a low level in order that it might supply the city with water as merchandise. But, on the subsequent appeal, that is, the *ERICKSON CASE*, the court said that it was necessary to consider the rights of all the inhabitants of the city, and that they had rights in the artesian basin that were coextensive with those of the owners of the wells; and the conclusion was that if, in order to furnish the inhabitants with an ample supply of pure water, it was reasonably necessary so to lower the level of the water in the artesian basin as to subject a well owner to the burden of pumping the water from his well by a power pump, he should submit to the burden.

The rule of correlative rights was adopted in California in the case of *Katz v. Walkinshaw*, supra. In the subsequent case of *Newport v. Temescal Water Co.* 149 Cal. 531, 6 L.R.A.(N.S.) 1008, 87 Pac. 372, the *Katz Case* was expressly adhered to, and the court concerned itself in the later case more with the consideration of the remedy than the principle of correlative rights, holding that, where the rights of the public are involved in a suit to enjoin the abstraction of subterranean waters for use at a distance, and the court can arrive in terms of money at the loss which local land-

Mason v. Cotton, 2 McCrary, 82, 4 Fed. 792; *Logansport v. Uhl*, 99 Ind. 539, 50 Am. Rep. 109; *Fisk v. Hartford*, 70 Conn. 720, 66 Am. St. Rep. 147, 40 Atl. 906; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 426; *McGregor v. Silver King Min. Co.* 14 Utah, 47, 60 Am. St. Rep. 883, 45 Pac. 1091; *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557; *Hall v. Rood*, 40 Mich. 47, 29 Am. Rep. 528; *Potter v. Saginaw Union Street R. Co.* 83 Mich. 297, 10 L.R.A. 176, 47 N. W. 217; *Red River Roller Mills v. Wright*, 30 Minn. 253, 44 Am. Rep. 194, 15 N. W. 167.

The defendant is within its rights, whether those rights be considered on the basis of the rule *Sic utere tuo*, etc., or the rule of correlative rights, or the rule of reasonable use.

Erickson v. Crookston Waterworks, Power, & L. Co. 100 Minn. 481, 8 L.R.A.(N.S.) 1250, 111 N. W. 391; *Hoxsie v. Hoxsie*, 38 Mich. 77; *Dumont v. Kellogg*, 29 Mich. 423; 18 Am. Rep. 102; *Gould v. Boston Duck Co.* 13 Gray, 450; *Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532; *Hayes v. Waldron*, 44 N. H. 584, 84 Am. Dec. 105; *Norway Plains Co. v. Bradley*, 52 N. H. 108; *Baltimore v. Appold*, 42 Md. 466; *Platt v. Johnson*, 15

owners have sustained, an absolute injunction will not be granted, but the proceeding will be regarded as one to secure compensation to the local owners for their injury. In the note appended to this case in 6 L.R.A.(N.S.) 1008, it is pointed out that the case should set at rest the fear lest many irrigation enterprises should be wrecked by the application of the rule of correlative rights to percolating waters.

It was held in *Cohen v. La Canada Land & Water Co.* 151 Cal. 680, 11 L.R.A.(N.S.) 752, 91 Pac. 584, that percolating waters might be taken for use on land other than that where found, if it could be done without injury to adjoining owners or prior appropriators.

The owner of land who explores for and produces subterranean percolating water within the boundary of his land is limited to a reasonable and beneficial use of such water when to use it otherwise would deplete the water supply of a valuable natural spring of another on adjoining land. *Pence v. Carney*, 58 W. Va. 296, 6 L.R.A.(N.S.) 260, 112 Am. St. Rep. 963, 52 S. E. 702.

An interlocutory injunction may be awarded against owners of land over a large subterranean basin of mineral water which comes to the surface in valuable springs on neighboring property, to prevent them from pumping the water from the basin through wells dug on their own property, and letting it run to waste for the purpose of injuring the owner of the springs that have been utilized for com-

Johns. 217, 8 Am. Dec. 233; Rindge v. Sargent, 64 N. H. 294, 9 Atl. 723.

Messrs. L. E. Gossman and N. B. Moran for respondent.

Lewis, J., delivered the opinion of the court:

Upon the former trial the cause was disposed of in the court below by granting appellant's motion for judgment on the pleadings. It was held (100 Minn. 481, 8 L.R.A.[N.S.] 1250, 111 N. W. 391) that appellant had no vested right to deprive respondent of the natural use of his artesian well by the use of artificial force in pumping the basin of supply to a low level, indirectly compelling him to purchase from appellant water which had been contaminated by intermingling it with river water. The cause, having been remanded, came on for trial upon the merits, and a clear comprehension of the case requires a full statement of the facts as found by the trial court. Respondent was the owner of certain lots in Sampson's Woodland addition to Crookston, upon which was located his residence, barns, and other structures suitable for live stock, of which he owned a considerable number. About six years before the commencement of this action he caused to be

constructed upon his premises an artesian well 175 feet deep, incased in a 2-inch pipe, through which artesian water flowed to the surface in sufficient quantities for all domestic uses. Appellant is a corporation organized in 1885 for the purpose of constructing, maintaining, and operating a system of waterworks in the city of Crookston to supply the inhabitants thereof with water. From 1885 to 1899 appellant continued to operate and maintain its system of works for such purposes, supplying the inhabitants with water carried from the Red Lake river through mains, pipes, and hydrants. About the year 1899 the company extended its intake pipe further up the river to avoid contaminated water, and also constructed a filtration plant for the purpose of purifying the water. The filtration plant proved to be a failure, on account of impure substances in the sand, and appellant then began operations to secure artesian water. In addition to the facts above stated, the court found as follows:

"(7) That the artesian well water secured in the city of Crookston and vicinity is artesian water secured from underground artesian strata of sand and gravel into which the water percolates, and that these strata lie at different elevations in different local-

mercial purposes. *Gagnon v. French Lick Springs Hotel Co.* 163 Ind. 687, 68 L.R.A. 175, 72 N. E. 849. There appeared in this case an element of malice that would afford ground for relief even in those courts refusing to recognize the rule of correlative rights. Still, by the use of the following language, the court seems to indicate that it regards with favor, at least to the extent of preventing waste of water to the detriment of another, the rule that an owner should be confined to a reasonable use: "The strong trend of the later decisions is toward a qualification of the earlier doctrine that the landowner could exercise unlimited and irresponsible control over subterranean waters on his own land, without regard to the injuries which might thereby result to the lands of other proprietors in the neighborhood. Local conditions, the purpose for which the landowner excavates or drills holes or wells on his land, the use or nonuse intended to be made of the water, and other like circumstances, have come to be regarded as more or less influential in this class of cases, and have justly led to an extension of the maxim, *Sic utere tuo ut alienum non ledas*, to the rights of landowners over subterranean waters, and to some abridgment of their supposed power to injure their neighbors without benefiting themselves."

The New Jersey court still adheres to the old rule of absolute rights. In *McCarter v. Hudson County Water Co.* 70 N. J. Eq. 695, 14 L.R.A.(N.S.) 191, 118 Am. St. Rep. 754, 65 Atl. 489, the court said that it 17 L.R.A.(N.S.)

would concede for the then present purpose that subterranean waters such as may be reached only by driving wells, when thus acquired, became absolutely the property of the owner of the soil, and might be dealt with by him as merchandise. And, expressly refusing to adopt the rule of correlative rights, the court, in *Meeker v. East Orange* (N. J. L.) 70 Atl. 360, went so far as to hold that a city had an absolute right to take, through wells on its land, water located thereunder, and conduct it away at a distance for city use; and that any injury thereby to an adjoining owner was *damnum absque injuria*.

Also opposed to the trend of modern decisions is *Houston & T. C. R. Co. v. East*, 98 Tex. 146, 68 L.R.A. 738, 107 Am. St. Rep. 620, 81 S. W. 279, where it was held that a railroad company which sunk a large and deep well on its own property to secure water for the use of shops and engines was not liable for injury thereby caused to the owners of neighboring land, although it pumped therefrom such large quantities of water that the subterranean water was drawn from the surrounding land and the wells thereon were deprived of a water supply. This reverses the court of civil appeals, the opinion of which is reported in 77 S. W. 646, and the contention of which was that the railroad company should be limited to a reasonable use.

Upon the question of the effect of a grant on rights of percolating water, see the case note appended to *Charon v. Clark*, ante, 647.

ities. That underneath the surface in and about said city there are four water-bearing strata of sand and gravel from which artesian wells have been obtained: First, a stratum 70 to 80 feet below the surface, which is in two narrow streaks and does not furnish much water; second, a stratum 140 feet to 180 feet below the surface, which extends over the north part of the city and is more than two thirds of a mile wide; third, a stratum 175 feet to 225 feet below the surface, which extends over that south part of the city and is more than a mile wide; fourth, a stratum about 325 feet below the surface, about which the evidence discloses little. That the above-named strata, numbered second, third, and fourth, probably have an outcropping in the higher land 8 or 10 miles east or southeast of the city of Crookston, where the water supply is replenished by the rainfall. That they lie between hardpan and clay, impervious to water above and below, and carry water through gravel, or sand and gravel, so that, by boring through the upper stratum or strata, wells commonly known as 'artesian wells' can be obtained in a great many places and water derived from them. That at the time said pumping commenced in said Bessie-street well there were more than fifty artesian wells in said city.

"(8) That there is nothing upon the surface of the ground by which it can be determined whether at any particular place a flow of water can be obtained by boring, or as to the depth to which boring would be necessary in order to procure a flow of water, and the only means of determining whether artesian water can be got and the strata from which it is obtained is from the positions and flows of the wells already made, or the failures to get water; but, after a fair number of such wells have been bored in any locality, it can be known with a large degree of certainty, but not with absolute certainty, whether or not artesian water can be obtained at any point in such locality in the city of Crookston and vicinity, and the depth required to get it.

"(9) The waters of the Red Lake river are unwholesome and unfit for drinking and culinary purposes and other domestic purposes, and they are unsafe for drinking and culinary purposes. The waters from any of the artesian wells in Crookston and vicinity, including those of plaintiff and defendant, are pure and wholesome for all purposes, including drinking purposes, culinary purposes, and for all household purposes, and may be safely used for all such purposes and for general use. The waters of the Red Lake river, besides being generally unfit for domestic uses, are, particularly at certain

times of the year, also affected by organic substances which color and make the waters still more impure and objectionable for domestic purposes.

"(10) The said defendant, at some time prior to the year 1899, became the owner and secured the possession thereof, and has ever since been in possession of, lot 9 of block 3 and lot 3 of block 7 of Clement's addition to Crookston, Minnesota, and a certain lot in block 3 of C. M. Loring's addition to Crookston, Minnesota. At the time the said lots in Clement's addition to Crookston, Minnesota, became the property of said defendant, there was situated thereon an artesian well, known as the 'Bessie-street well,' which said well was bored to the depth of about 215 feet and had a 2-inch pipe therein. During the summer of 1902 said defendant bored a new well upon the site of the Bessie-street well, which well had a 10-inch pipe therein and was 215 feet deep, and after such enlargement flowed about 28,000 gallons of water per day above the surface of the ground. In the spring of 1903 the defendant bored in lot 3 of C. M. Loring's addition an 8-inch well, which was 170 feet deep, near the present site of the steam power house, which well is known as the 'steam power-house well.'

"(11) Immediately after it became known to said defendant that the plan of purifying the water of Red Lake river by means of filtration plant was not feasible, and that said method was a failure, said defendant formulated a plan to furnish to its customers, the citizens of Crookston and the public, through the water system of said defendant, artesian water for all purposes, which artesian water said defendant planned to procure from the Bessie-street well and the steam power-house well, and such other wells as should be necessary in order to supply the defendant's entire system with artesian water, and, for that purpose, the Bessie-street well was enlarged to a 10-inch pipe and the steam power-house well was bored with an 8-inch pipe. Tests were made for about three weeks of each of these wells by continuous pumping, and these tests showed that there could be secured from said wells enough water to supply 240,000 gallons of water each day of twenty-four hours for use in said water system without exhausting the supply in either of said wells. That, during the past year, defendant has been pumping regularly from said Bessie-street well about 200,000 gallons of water per day, and from said power-house well about 40,000 gallons per day.

"(12) That, in order to further supply said artesian water, defendant, in the beginning of the year 1907, established a third well in connection with its said waterworks system, known as the 'Maple-bay well,' and

that from said well last named it has been pumping regularly a quantity of water of about 70,000 gallons of water per day. The Bessie-street well is not connected with the power-house well or the Maple-bay well; but whether or not the two wells last named are connected is doubtful. Defendant has already expended in carrying out of its plan to furnish artesian water over \$20,000, and, so far as it may be necessary and defendant shall be permitted, as part of the same plant it is the intention of defendant to establish other wells to be similarly used.

"(13) That the total amount of water necessary for use in the system of waterworks of said defendant company, so far as the same has been extended and used, is 310,000 gallons a day of artesian water, and in case of a fire or fires river water in addition. This includes what is furnished to Northern Pacific Railway Company, which is about 20,000 gallons per day, and Palace hotel elevator, which is 10,000 to 20,000 gallons per day; and the defendant intends to pump water from the river to supply said railway company without putting it through its mains, which is quite feasible, and adopt a system which will lessen the amount of water required for said hotel elevator. Defendant, in connection with its water-supply system, has a reservoir of 250,000 gallons capacity.

"(14) As part of the plan of said defendant for furnishing artesian water in its waterworks system, defendant intends to institute a meter system to prevent the waste of water furnished by it, and by said system the amount of water used will be reduced about 25 per cent.

"(15) The method of defendant's use of its said wells, which method it intends to pursue as part of its said plan for furnishing artesian water to said city, is as follows: Defendant determines by tests what the capacity of supply of its said wells is without exhausting the supply of water coming through said wells. Defendant then pumps within said capacity, and pumps by electrical power through pumps whose cylinders draw water about 100 feet from below the surface of the ground. The effect of this pumping is and will be to diminish the height to which the water naturally rises in said wells to a point from 70 to 100 feet below the surface of the ground, and to diminish the height to which water rises in some other wells connected with the same strata to approximately the same height.

"(16) The said well of plaintiff is not connected with the said power-house well of defendant, nor with the said Maple-bay well; but, by reason of the pumping by defendant in said Bessie-street well, the height to which the water naturally comes in plaintiff's said 17 L.R.A. (N.E.)

well has been and will be diminished from the surface flow to a height of 70 to 100 feet below the surface of the ground.

"(17) The said pumping by defendant of its said wells, while having the effect to lower the head of water in said wells, has not had the effect, nor will it have the effect, of exhausting the natural supply of water in said wells, or either of them, or other wells in the city of Crookston connected with the same strata. The only effect is to diminish the head and lessen the pressure.

"(18) The method of pumping which has been followed by defendant, and which defendant intends to follow, is the best and most economical method of getting the largest supply of water from the artesian strata or basin in which the said wells respectively are situated. It is the best method of getting the largest supply possible without exhausting the supply; the only effect being to diminish the head and lessen the pressure.

"(19) These artesian wells, as artesian wells in general, will supply, without exhausting the water supply, varying quantities of water according as the height at which the water is taken varies. A well which flows at the surface may not flow at all at 10 feet above the surface. The same well again may furnish, without diminution or exhaustion of the supply of water, a very much larger quantity of water from a point below the surface than it will at the surface. The most economical and efficient way of using an artesian well for the purpose of obtaining the largest supply of water without exhaustion is to take the water by means of pumps at a point below the surface where the pressure is greatest, and where, by reason of such pressure, the supply from the well and the basin with which it is connected will be increased.

"(20) The method of pumping by defendant in its wells is, according to modern scientific and hydraulic methods, and according to the usual use of such wells, for the purpose of getting the largest supply without exhausting the same.

"(21) That, by defendant's use of its Bessie-street well, plaintiff, ever since July, 1905, has been compelled to pump the water from his well from points 70 to 100 feet below the surface of the ground by means of a deep-well pump which it is not feasible to operate by hand power, but requires power by windmill or other machinery in the ordinary and reasonable use of the same. That, by the use of such machine power, plaintiff could have at all times obtained a sufficient supply of water for household purposes and for his stock by taking out the screen at the bottom of the well and pumping out loose sand and gravel, making a small reservoir, which would cost from \$50 to \$100. That

hand pumping is not reasonably feasible in the use of artesian wells when the head of water, as it stands in the pipe when the pump is not in motion in it, is reduced more than 50 feet below the surface of the ground.

"(22) That defendant's waterworks has only one system of water-supply mains, and is the usual and ordinary system of supplying cities of the size of Crookston, and what it is likely to grow to be for some time at least, with water, where there is a plentiful supply of water suitable for such purposes from one source, either running or standing on the surface of the ground, or from an artesian supply. Crookston is a city of about 8,000 inhabitants, and defendant's system of waterworks does not supply more than one half of these people with water, and the probabilities are that not enough artesian water can be got by defendant for fire protection, fire company's practice, and flushing gutters which it is required to furnish to the city, and for street and lawn sprinkling, and the requirements of the people of the city for household purposes and watering live stock; but that the artesian water supply available in the city of Crookston is sufficient for its inhabitants for household purposes and watering live stock kept in the city without lowering the artesian head of water more than 50 feet lower than the surface of the ground at the said well of plaintiff. That it is practicable to install and operate a separate system to supply artesian water for household or drinking and culinary purposes only, and another system for other purposes. About the only additional cost of such double system would be the expense of putting in and maintaining other mains and making connections. This would increase the cost of furnishing to the consumer, but the probabilities are it would much increase the demand for artesian water from defendant, even though the cost of it should be increased.

"(23) That the costs, expense, and damages not too remote or speculative for recovery to plaintiff, so far as any such are unlawfully caused by reason of defendant's said pumping as the same exists and is likely to exist under defendant's proposed plan of improving its water supply as aforesaid, are and will be always capable of being approximately ascertained, and can be recovered by action or actions at law.

"(24) The defendant, besides its system of waterworks, operates a power plant by which electrical power and light are furnished throughout the city. Defendant has been, for compensation, furnishing to plaintiff power to run plaintiff's pump by which water is pumped from plaintiff's artesian well, and it is feasible for plaintiff to take and

for defendant to furnish power to plaintiff by which, from plaintiff's well, there may be obtained by plaintiff water of a quantity and quality equal to that obtained and used by plaintiff previous to the pumping by defendant, and as much as would be required in ordinary use of plaintiff's said premises without any more inconvenience than before, if a reservoir were made and maintained at the bottom of plaintiff's well as before stated. By such substitution of power by defendant, and the payment of all expenses caused by such substitution and maintenance of same, and cost of making and maintaining reservoir at the bottom of plaintiff's well as aforesaid, plaintiff would be put in as good position in regard to the use of water from his said well as he was before the same was affected by defendant's pumping, and, if such power and expense were furnished by defendant, the plaintiff would not suffer any further damages by reason thereof in the manner defendant has been doing it.

"(25) That, as part of its plan of improvement of said city's water supply, it is the purpose and intention of defendant, if it can do so, to supply artesian water through its single line of mains for all purposes for which water is used from its system.

"(26) That mixing river water with artesian water and furnishing the same to the people of the city of Crookston for domestic purposes in the manner defendant has been mixing and furnishing it is unsanitary and dangerous to the public health.

"(27) That a large portion of the people of the city of Crookston live outside of the limits of extension of defendant's waterworks system and cannot get water from it.

"(28) That the head of artesian water in several other wells in the city of Crookston and vicinity, along with the well of plaintiff, has been lowered from 70 to 100 feet below the surface of the ground by the said pumping in the Bessie-street well, and made so it is not practicable by hand pumps to procure sufficient supplies of water from them for general household purposes; and all wells in Crookston and vicinity which are supplied with water from the same stratum as the Bessie-street well have been lowered by such pumping.

"(29) That defendant's said pumping in the Bessie-street well and the lowering thereby of the head of artesian water in plaintiff's said well to more than 50 feet below the surface of the ground is an unreasonable and wrongful use of said Bessie-street well; and, by reason thereof, plaintiff has been damaged \$290.

"(30) That, unless restrained by this court, defendant threatens to and will continue to use its artesian wells in the city of

Crookston, including said Bessie-street well, in the future as in the past, and will impair the use of plaintiff's said artesian well as aforesaid, requiring a multiplicity of actions on the part of the plaintiff, and that he has not an adequate remedy at law in the premises.

"Conclusions of law: (1) That plaintiff is entitled to judgment against the defendant that he have and recover from defendant the sum of \$290, besides his costs and disbursements herein. (2) That the plaintiff is entitled to the judgment of this court that the defendant, its agents, officers, and employees, be enjoined and restrained from operating said Bessie-street well so it will reduce the head of artesian water in plaintiff's said well more than 50 feet below the surface of the ground when plaintiff is not pumping or otherwise taking water from the same. In case it should hereafter appear that furnishing artesian water for household and domestic purposes and watering live stock kept in the city through a separate system of mains will not reduce the head of water in plaintiff's well more than 50 feet below the surface of the ground, then the injunction should be modified to allow all artesian water required to be taken for such purposes by the defendant through such separate system of water mains."

Upon the former appeal, appellant attempted to justify its conduct under the law which it deemed applicable to percolating waters, as expounded in the leading English case of *Chasemore v. Richards*, 17 H. L. Cas. 349, followed in several American courts, viz., that, with respect to underground waters which have not been proven to be flowing in a well-defined channel, they belong to the owner of the soil, or, as stated by Chief Justice Tindal in *Acton v. Blundell*, 12 Mees. & W. 324: "That principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action." In calling attention to the manifest injustice of a strict application of this rule to underground waters, Mr. Justice Jaggard (100 Minn. 481, 8 L.R.A. (N.S.) 1250, 111 N. W. 381, referred to some of the English and many of the American authorities, and said: "A rigid rule applying to underground wa-

ters the law applicable to surface waters in various jurisdictions might work insufferable hardship, and put the control of an element as necessary to life as air itself into the hands of a monopoly. . . . Arbitrary and artificial restrictions might readily make large areas uninhabitable, save by an unnatural tribute to exclusive individual control. The American courts, taken as a whole, in recognition of such considerations, have viewed the matter from the point of view of public interests and of the natural use of natural advantages; that is to say, they have modified the supposedly absolute right of a man to use his own as he sees fit, under the maxim, 'Whose the soil is, his it is from the heavens to the depths of the earth,' by reference to the maxim of the civil law, that 'one must use his own so as not to injure another.'"

Much confusion has arisen upon the subject from the fact that, in attempting to apply the law of water courses and navigable waters to underground waters, and not finding the analogy complete, several of the American courts have rejected it entirely, while others have limited the application to an unwarranted degree. A decision in this case does not call for a discussion of the legal principles applicable to percolating waters, strictly so called, and we reserve for the future, as occasion may arise, a consideration of that delicate and unsettled question. Percolating, as distinguished from artesian, waters, filter through the ground and collect in underground cavities, forming springs, or in what are commonly known as wells. The source of supply is limited, depending largely on the annual rainfall, and, if found in bodies of sand, gravel, or porous rock, such formations are not extensive. To waters of this character the English and many of the American courts have applied the rule of absolute ownership. The maxim *Sic utere* has no place, and one owner may destroy his neighbor's well by digging deeper into the soil which holds the common supply. Without admitting the justness or correctness of the law so applied even to percolating waters, we proceed with more confidence to a consideration of the proper rule which should govern the use of waters located in well-defined strata. As to such waters the legal principles have become very well established. The difficulty generally exists in applying these principles to the facts of any given case. The decision on the former appeal was limited to the single question: Does the rule of correlative rights apply to the owners of land which contains a well-defined water basin, upon which source of supply all are dependent? But we now have before us an additional question, viz.: What is the proper application of the law to the

WEST VIRGINIA SUPREME COURT
OF APPEALS.

JOHN V. BOYD

v.

JAMES C. BEEBE, Plff. in Err.

(— W. Va. —, 61 S. E. 304.)

Promissory note — allegation of ownership — sufficiency.

1. Prima facie, the payee of a negotiable note is the owner thereof, and, in declaring on it in an action of debt, it suffices, as to title, to aver that the defendant, by it, promised to pay the plaintiff the amount named in the note, no indorsement thereof being disclosed.

Headnotes by MCWHORTER, J.

Case Note. — When does statute of limitations commence to run against action to recover money collected by agent not an attorney?

This note is limited to those cases in which the question is discussed as to when the statute of limitations begins to run against an action to recover money collected by an ordinary collecting agent, and does not, therefore, include those cases which deal only with the question whether demand is necessary in order to hold such agent liable, without discussing the question whether or not the statute of limitations begins to run from that time, since, conceding that demand on the part of the client is necessary in order to hold an agent liable for money collected, it does not necessarily follow that the statute of limitations begins to run against the principal from that time. Those cases in which the question has arisen as to when the statute of limitations commences to run against a principal for money collected by a factor or broker, as proceeds of the sale of goods, have been expressly excluded from this note, as well as those cases in which the agent, if so called, bears a peculiar fiduciary relation to the principal, as an administrator or executor, or a public officer. The cases in which the collecting agent was an attorney at law have been gathered in a note to Goodyear Metallic Rubber Shoe Co. v. Carpenter, post, 687.

It is held in a number of cases that, since it is the duty of ordinary collecting agents to pay over money collected for their principals as soon as it is received, or within a reasonable time thereafter, and, on their neglect or refusal to do so, the principal having an immediate right of action therefore, the statute of limitations, in the absence of fraudulent concealment, begins to run against the principal from the time the money is received by the agent, and not from the time when the principal demands it, or from the time the agent notifies the principal of its collection.

Thus, in Campbell v. Boggs, 48 Pa. 524 (also reported as Glenn v. Cuttle, 2 Grant. Cas. 273), the court, after confessing that 17 L.R.A. (N.S.)

Limitations — fraud — interpretation of statutes.

2. The fact that money is obtained by fraud will not prevent the running of the statute of limitations, against an action to recover it back, from the consummation of the transaction, unless investigation is prevented by affirmative efforts on the part of the wrongdoer; mere silence is not sufficient.

Same — offsets.

3. The rule is that the statute of limitations does not cease to run against the offsets of the defendant, until the time the defendant files his plea of offsets in the case.

Promissory note — allegation — proof.

4. In an action of debt on a negotiable note, the declaration alleges that "the defendant made and signed his certain promissory note in writing," setting out a full

it could not see any distinction between attorneys in fact and attorneys at law, held that, in the absence of fraudulent concealment, the statute of limitations begins to run against a person who seeks, in an action of assumpsit, to recover money collected for him by his attorney in fact, from the time the money is collected, and not from the time when notice is given of the receipt of the money.

In Wood v. Young, 141 N. Y. 211, 36 N. E. 193, where a person collected insurance money for his half-sister, it was held, in an action to recover such money, that the law imposed upon the former the duty to pay it over to the plaintiff as soon as received, or at least within a reasonable time, and, therefore, no demand being necessary, the statute of limitations commenced to run from the time of collection. In this case a distinction was recognized between a collection made by an ordinary agent and a collection made by an attorney or a foreign factor, the court saying that an attorney at law has a lien upon the funds of his client, collected in his professional capacity, and that, when he has acted in good faith with respect to the money of his client, which he has collected, he should be protected from the costs of a suit until, upon demand, he neglects or refuses to pay. The court took occasion to say further, however, that, even if it could apply the same rule governing the actions against an attorney at law, still the fact that the plaintiff had knowledge of the receipt of the money would set the statute running from that time, and so defeat the claim.

Other cases in which it is held that the statute of limitations begins to run against a principal for whom an agent collects money at the time of the receipt of the money are: Cagwin v. Ball, 2 Ill. App. 70 (action for money had and received, against agent for money collected on notes); Hawkins v. Walker, 4 Yerg. 187 (assumpsit against agent for money collected on notes); Yates v. Wing, 42 App. Div. 356, 59 N. Y. Supp. 78 (sale of real estate and collecting of rents for heirs under will); Arnett v. Zinn,

description of the note, including the place of payment. Held, such note is admissible in evidence.

Appeal — continuance — discretion.

5. The matter of granting a continuance of a case is within the sound discretion of the trial court; and, unless it is plainly apparent that such discretion has been abused, the appellate court will not reverse a judgment for the refusal of a continuance.

(March 31, 1908.)

ERROR to the Circuit Court for Cabell County to review a judgment in plaintiff's favor in an action on promissory notes. Affirmed.

The facts are stated in the opinion.

20 Neb. 591, 31 N. W. 240 (money collected by husband for wife, and sought to be recovered by latter's daughter); *Estes v. Stokes*, 2 Rich. L. 133 (action of assumpsit); *Hart's Appeal*, 32 Conn. 520 (proceeds from sale of lands as well as rents collected by agent).

In *Lawrence University v. Smith*, 32 Wis. 587, the defendant was appointed as agent to solicit donations for plaintiff's use. As such agent he received a note, which, however, he was unable to collect, and, in consequence, returned it to the donator. Several years after his relations with the plaintiff terminated, he claims to have made a new arrangement, as his own private matter, with the donator of the note, and this time was successful in its collection. The plaintiff now brings an action for money had and received to recover the amount so collected. Among the defendant's defenses was the statute of limitations, in regard to which the court said: "The objection that the statute of limitations has run upon the demand of the plaintiff is untenable. Upon the supposition that the defendant was acting, and received the money, as agent, and for the use of the plaintiff, the statute began to run only when the money was received, which was less than six years before this action was commenced."

In *Jewell v. Jewell*, 139 Mich. 578, 102 N. W. 1059, the court said: "It seems to be the better rule, and better supported, although there is some conflict as to when a right of action accrues to a principal against his agent who collects his money,—that, if the duty of the agent to remit is fixed, he is liable to an action for the money, and that a statute of limitations worded as is ours begins to run when action might be brought." In this case the decedent had collected claimant's money at periods running from nine to eleven years before action brought, and therefore there was no occasion to consider the question of what would be a reasonable time to make remittance, or to discover the agent's dereliction. It appeared further in this case that the statute of limitations had been interrupted, 17 L.R.A. (N.S.)

Messrs. Simms, Enslow, Fitzpatrick, & Baker, for plaintiff in error:

In a suit on a negotiable note, the declaration must aver the plaintiff to be the payee, indorser, or holder of the note, as the case may be.

Bank of Huntington v. Hysell, 22 W. Va. 142.

Laches cannot be imputed to a person who is ignorant of his rights.

Jones v. Lemon, 26 W. Va. 635; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

The rule is especially applicable between a trustee and the *cestui que trust*.

Key v. Hughes, 32 W. Va. 184, 9 S. E. 77; *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579.

and, for that reason, was not a bar to this action.

So, in *Hasher v. Hasher*, 96 Va. 584, 32 S. E. 41, where an heir under a will appointed an agent to collect his share of the estate, and evidently made a contract with him to turn it over to him at once, it was held that limitations commenced to run against the claim for the share collected, from the date of collection.

In *Lyle v. Murray*, 4 Sandf. 590, after recognizing that, as a general rule, it is the duty of a collecting agent to pay over moneys he collects as soon as he receives them, and that, even in those cases where demand is necessary to hold the agent liable, it does not follow that until a demand no cause of action accrues, the court held that a replication to the statute of limitations that demand had not been made of the agent for the money collected, was bad.

But in *Carder v. Primm*, 52 Mo. App. 102, it was held that, in the absence of proof that it was the agent's duty, on making the collection, to turn the money over immediately, the statute of limitations did not commence to run until the client had notice of the collection.

In *Hopkins v. Hopkins*, 4 Strobb. Eq. 207, 53 Am. Dec. 663, where it appeared that a son, for several years among other things, had sold cotton for his mother, but never accounted for the proceeds, it was held, in an action by her assignees to recover the proceeds, that, if there was a general or continuing agency, the statute would not commence to run until the termination of the agency; but, if the agency was special, and related to isolated transactions, then the statute would commence to run from each of those several transactions, each of which would be barred, or not, according to the time which had elapsed from the respective dates to the filing of the bill. It would seem in this case that the court considered the agency general, and the action, being brought within one year from the agent's death, was not barred.

In *Quinn v. Gross*, 24 Or. 147, 33 Pac. 535, the court, after recognizing a distinction between a general agent and a special

of said sum, and fraudulently concealed the actual state of the account between them, and so obtained these notes for money which the defendant did not owe him; and that said Boyd was indebted to defendant when said notes were executed; that the said notes were executed without consideration, and the consideration had failed, and that the defendant had sustained damages to the amount of the plaintiff's demand and in excess thereof, to wit, \$5,600. To the filing of which plea the plaintiff objected, which objection was overruled. The plaintiff tendered and asked leave to file a replication in writing of the statute of limitations to the supposed cause of action alleged and set forth by the defendant in his special plea in writing in the nature of a plea of equitable offset, to the filing of

which replication defendant objected. The court overruled the objection, and the replication was filed, to which ruling of the court the defendant excepted. The defendant, as to the plea of the statute of limitations by the plaintiff in this cause pleaded to the equitable plea by the defendant herein filed, tendered his rejoinder in writing averring that the facts in the said plea of equitable set-off alleged were exclusively within the knowledge of the plaintiff, John V. Boyd, and were unknown to the defendant, and were fraudulently concealed from the defendant by the plaintiff, and by such ways and means defeated and obstructed the defendant from asserting his said equitable right by plea or by action within the time limited; that the said facts were unknown to defendant until September 22,

to run from the time collection is made, are those cases which take the view that an agent is not liable to his principal for money collected, until demand, and say that a cause of action does not accrue to the principal until such demand. These naturally hold that the statute of limitations begins to run against the principal only after he has demanded such money from the agent. Cases supporting this proposition are: *Dodds v. Vannoy*, 61 Ind. 89 (collection of money on note); *Kimball v. Kimball*, 16 Mich. 211 (same); *Ewers v. White*, 114 Mich. 266, 72 N. W. 184 (money collected by husband for wife, and sought to be recovered by latter's heir); *Cole v. Baker*, 16 S. D. 1, 91 N. W. 324 (trading in of lots by agent for note and mortgage); *Hutchins v. Gilman*, 9 N. H. 359 (assumpsit for money collected from an estate); *Hyman v. Gray*, 49 N. C. (4 Jones, L.) 155 (assumpsit for money collected in compromising a lawsuit); *Waring v. Richardson*, 33 N. C. (11 Ired. L.) 77 (action of assumpsit for money collected on note).

In *Merle v. Andrews*, 4 Tex. 200, it was said: "The statute surely could not begin to run until the principal had notice that it had been collected; and a majority of the court believe that, between an agent and his principal, it does not commence running until a demand has been made of the agent. Until that demand has been made, it seems to me that the possession of the money by the agent would be the possession of his principal."

In *Lever v. Lever*, 1 Hill, Eq. 62, where a father, for several years, had received the avails of the crops, as well as large sums of money, for his ignorant son, it was held that the statute of limitations did not commence to run against the latter until demand. In this case recovery was sought by bill in equity, but the court said: "When there is a concurrent remedy in law and equity upon the case made, the limitation is the same in both courts, and the present case is to be considered as at law."

In *Wall v. Colbert*, 36 La. Ann. 893, where 17 L.R.A. (N.S.)

a suit was brought to recover money collected by an agent, it was said that prescription begins when a settlement has been demanded and refused, or at the termination of the agency.

In *Green v. Williams*, 21 Kan. 64, it was held that, where an agent who lives in one state collects money for his principal who resides in another state, and there is no contract between them as to when or how the agent shall send or pay the money to his principal, no action accrues against the agent for the money until the principal has made a demand of him therefor, and he has refused to pay the same; and consequently the statute of limitations does not begin to run in favor of the agent until after such demand and refusal.

But in *Jett v. Hempstead*, 25 Ark. 462, where an attorney or collecting agent (the record does not disclose which) collected a sum of money for his client, notice on the part of the attorney and demand thereafter on the part of the client were recognized to be essential for the maintenance of an action by the client for the money collected. But the court said: "But, where an attorney or agent has collected money, and neglects to advise his client or principal of the fact, although his client or principal might maintain suit against him without demand, on the principle of his bad faith, the statute of limitations will not commence to run until the client or principal has notice by some means that his attorney or agent has collected the money, unless the attorney or agent shows affirmatively, by satisfactory evidence, that his client or principal could, by the exercise of ordinary diligence, have known that the money had been collected, and was in the hands of the attorney or agent. And this, we think, is so, because the attorney, or agent, by concealing the fact of the collection, commits a fraud upon his client or principal."

As to when statute of limitations commences to run against action to recover money paid by mistake, see case note to *West v. Fry*, 11 L.R.A. (N.S.) 1191.

1906, and for this defendant's right of equitable plea and set-off would accrue to the defendant within the period of limitations by the plaintiff pleaded in manner and form as by him pleaded. To the filing of which special rejoinder, the plaintiff objected, and the same was rejected by the court, to which ruling of the court the defendant excepted. and the defendant then traversed the said special replication of the statute of limitations. The defendant then moved for a continuance of the case, and took evidence in support of said motion, which, being considered by the court, was overruled. A jury was impaneled and, after hearing the evidence, returned a verdict in favor of the plaintiff for \$5,008.60, the debts and interest in the declaration mentioned. The defendant moved the court to set aside the verdict and grant a new trial on the ground that the verdict was contrary to the law and the evidence, etc., which motion the court overruled, and entered judgment upon said verdict. The defendant took four several bills of exceptions which were made a part of the record.

The first bill of exceptions goes to the rejection of the defendant's special rejoinder to the plaintiff's plea of the statute of limitations to defendant's plea of equitable set-off. The rejoinder simply refers to the facts alleged in the special plea; that the facts there stated were within the knowledge of plaintiff, and not within the knowledge of the defendant. And yet the special plea alleges that he, the defendant, sold his interest in the said building and loan company to J. H. Scudder. So that he must have known the price he was to be paid for it, and certainly knew to whom he sold it, having made the sale himself as alleged by him. It does not charge plaintiff with any specific or affirmative act, nor of fraudulent representations, but with mere silence, and that too in a matter he transacted himself. Section 3511, Code 1906, treating of the limitation of actions, provides that, "when any such right as is mentioned in this chapter shall accrue against a person who had before resided in this state, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, or if such right has been, or shall be hereafter, obstructed by war, insurrection, or rebellion, the time such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted." No part of this provision can apply in this case unless it would be the phrase "or by any other indirect ways or means." There is no allegation either in the special plea nor the spe-

cial rejoinder, except the mere fact that the plaintiff remained silent. The statute, it will be observed, is dealing with the actions of the party, and mentions the act of departing without the state, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the party in his remedy; but, in order to avail himself of the benefit of said statute, the pleader must allege what action was taken by the party which would interfere with his rights, not a mere statement of the fact that it was known to the one and not to the other, or concealed from the other by mere silence. In *Thompson v. Whitaker Iron Co.* 41 W. Va. 574, 23 S. E. 795 (syl. point 8), it is held: "Under § 18, chap. 104, Code [Code 1906, § 3511], it requires some positive—that is, affirmative—act by the defendant to operate under the clause, 'or, by any other indirect ways or means, obstruct the prosecution of such right.' Merely silence will not do, but there must be some act designed to conceal the existence of liability, and operate in some way upon the plaintiff, and prevent or delay suit for it." And point 7: "Where a cause of action arises out of a fraud, the statute of limitations runs from its perpetration. This does not apply to fraudulent transfers." In *Smith v. Blackley*, 198 Pa. 173, 53 L.R.A. 849, 47 Atl. 985, it is held: "That money is obtained by fraud will not prevent the running of the statute of limitations, against an action to recover it back, from the consummation of the transaction, unless investigation is prevented by affirmative efforts on the part of the wrongdoer." In *Allen v. Mille*, 17 Wend. 202, it is held: "It is no answer to a plea of the statute of limitations that the cause of action was fraudulently concealed by the defendant until after the statute had attached, and that the suit was brought within the time limited by the statute after the discovery of the right to sue." *Troup v. Smith*, 20 Johns. 48; *Leonard v. Pitney*, 5 Wend. 30; *Cole v. McGlathry*, 9 Me. 131; *McKown v. Whitmore*, 31 Me. 448, *Nudd v. Hamblin*, 8 Allen, 130; *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807; 4 Minor. Inst. pt. 1, 622, 623; *Sanborn v. Gale*, 162 Mass. 412, 26 L.R.A. 864, 38 N. E. 710; *Mereness v. First Nat. Bank*, 112 Iowa, 11, 51 L.R.A. 410, 84 Am. St. Rep. 318, 83 N. W. 711; *Carrier v. Chicago, R. I. & P. R. Co.* 79 Iowa, 80, 6 L.R.A. 799, 44 N. W. 203. In § 276, *Wood on Limitation of Actions*, it is said: "The provision that, if a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action, applies to causes of action for fraud, as

well as to other causes of action; but the concealment contemplated by the statute is something more than mere silence; it must be of an affirmative character, and must be alleged and proved so as to bring the case clearly within the meaning of the statute." This question is well discussed in *Smith v. Blachley*, supra. The authorities generally hold that some affirmative action to prevent discovery, and not mere silence on the part of the wrongdoer, is necessary to prevent the running of the statute from the time of the commission of the fraud.

In case at bar defendant knew to whom the stock was sold, and he and Scudder, the purchaser of his interest in the company, were both members and directors in the company. "The presumption is that, if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." Angell, *Limitations of Actions*, § 187; 2 Story, *Eq. Jur.* § 1521. Angell on *Limitations of Actions*, at § 183 says: "In regard to this subject, some of the cases make a marked and manifest distinction between a plea of the statute in a court of law and a court of equity." In 1 Rob. Pr. 101, we find: "*Oothout v. Thompson*, 20 Johns. 277, was an action on the case, brought to recover damages for a deceit in the sale of a negro, and issue was joined on the plea of not guilty within six years. It was insisted, on the evidence, that the defendant was to be considered as having, within six years, admitted the fraud, and declared he was willing to do what was right. And the question was whether such admission and declaration could take the case out of the operation of the statute. *Spencer, Ch. J.*, delivered the opinion of the court, that the fraud was consummated when the sale took place; that was more than six years; and proof that the defendant had acknowledged the fact within six years did not support the issue which required the plaintiff to prove that the fact itself was committed within the six years. See also *Boydell v. Drummond*, 2 Campb. 157." In 9 Enc. Dig. 429, it is said: "The present rule is that the statute of limitations did not cease to run against the offsets of the defendant until the time the defendant's answer and account of offsets are filed in the cause;" citing Va. Code 1904, § 3303; W. Va. Code 1906, § 3895; *Hurst v. Hite*, 20 W. Va. 183; *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544; *Moore v. Luc-kess*, 23 Gratt. 160.

Defendant relies principally upon the case of *Vanbibber v. Beirne*, 6 W. Va. 168, and 17 L.R.A. (N.S.)

quotes from the opinion in that case, where the judge who delivered the opinion of the court says, at page 179: "I think, where it properly appears by the pleadings that the facts on which the cause of action was founded were exclusively in the knowledge of the defendant, that he fraudulently concealed these facts, and that, by such ways and means, he defeated and obstructed the plaintiff from bringing his action within the time limited, the effect of the statute may be avoided in actions at law as well as in suits in equity." This case is not applicable to case at bar, as the transaction complained of was not of such a character, and the circumstances such as to make silence itself a fraud. Nor was it "of such a character as to conceal itself," as said in *Wear v. Skinner*, 46 Md. 257, 24 Am. Rep. 517. See also *Bailey v. Glover*, 21 Wall. 346, 22 L. ed. 638. The circumstances show that the defendant could at any time have inquired of Scudder, the purchaser of his interests in the company, as to the amount paid for the same, and thus detected the fraud, if any, committed by the plaintiff by retaining more of the purchase money than he had a right to withhold. The cause of action arose when the money was received from Scudder by the plaintiff, or in a reasonable time thereafter when the defendant might have ascertained the facts from Scudder, with whom he was associated in the company. But why discuss this matter further when the plea shows that defendant himself sold to Scudder. The court did not err in instructing the jury that the matter of the special plea of offset was barred by the statute of limitations, as set out in defendant's bill of exceptions.

It is insisted that the court erred in admitting in evidence the two notes sued upon in this case, being described therein as "his certain promissory notes in writing," when the notes showed upon their face that they were negotiable and payable "at the Broad Street National Bank, Trenton, N. J.," claiming that there was a variance between the allegations in the declaration and the proof offered; citing in support of the objection to their introduction *Damarin v. Young Bros.* 27 W. Va. 436, where a distinction is drawn between a negotiable note and a mere promissory note. In that case the declaration described the note as a promissory note, but failed to aver the place of payment, the note stating in plain terms that it was "payable at the Kanawha Valley Bank, Charleston." It is there said; "The note declared on is not described as a negotiable instrument, but is simply described as 'a certain promissory note,' and no place of payment is mentioned. The note admitted in evidence is a negotiable

instrument 'payable at the Kanawha Valley Bank, Charleston.' A negotiable note payable at a particular office or bank is a very different instrument from a mere promissory note payable generally, even when between the same parties and for the same amount." And, for the reasons there given, it was held to be essential that the place of payment fixed by the note should be set out in the declaration, and, without such averment, the note should not be admitted in evidence. The objection cannot apply in the present case, as the declaration sets out a full description of the notes, including the place of payment.

It is claimed that the court erred in refusing a continuance. The matter of granting a continuance is within the sound discretion of the trial court, and, unless it is plainly apparent that such discretion has been abused, this court will not interfere therewith. *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821; *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Buster v. Holland*, 27 W. Va. 511; *Logie v. Black*, 24 W. Va. 1; *Riddle v. McGinnis*, 22 W. Va. 253. This action was begun on June 2, 1906, and the writ served on defendant the same day, and when the case was called for trial on the 7th day of November, 1906, the defendant moved for a continuance. Defendant's examination in open court upon said motion does not disclose a good cause for a continuance of the case, and the court did not err in overruling the motion.

No error appearing, the judgment of the Circuit Court is affirmed.

Petition for rehearing denied May 1, 1908.

VERMONT SUPREME COURT.

GOODYEAR METALLIC RUBBER SHOE COMPANY,

v.

H. O. CARPENTER, Admr., etc., of Joel C. Baker, Deceased.

(— Vt. —, 69 Atl. 160.)

Limitation of action — claim against attorney.

1. In the absence of fraudulent concealment, the statute of limitations begins to run against a claim upon an attorney for money collected by him, from the time the money should have been paid over, which is within a reasonable time after the collection, under the circumstances of the case.

Attorney — collection — payment — reasonable time.

2. Whether or not two months is a reasonable L.R.A. (N.S.)

able time to allow an attorney to pay over money collected by him for his client is a question for the court.

Same — two months.

3. The mere lapse of two months after the collection of money by an attorney for his client is not sufficient to establish the passing of a reasonable time for its payment over, so as to set in motion the statute of limitations, without anything to show his state of health, business, absence from home, or other facts bearing upon the question.

(March 3, 1908.)

EXCEPTIONS by plaintiff to a judgment of the Rutland County Court in defendant's favor in an action brought to recover money collected by defendant's intestate for plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. J. A. Merrill and Butler & Moloney, for plaintiff:

The claim was not barred by the statute of limitations.

Wilder v. Secor, 72 Iowa, 161, 2 Am. St. Rep. 236, 33 N. W. 448; *Bloomer v. French*, 40 Iowa, 601; *Goodell v. Brandon Nat. Bank*, 63 Vt. 303, 25 Am. St. Rep. 766, 21 Atl. 956; *Smith v. Franklin*, 61 Vt. 385, 17 Atl. 838; *Douglas v. Corry*, 46 Ohio St. 349, 15

Case Note. — *When does statute of limitations commence to run against action to recover money collected by attorney.*

This note includes only those cases in which the question has arisen as to when the statute of limitations commences to run against a client for money collected for him by an attorney at law, and is a companion to *Boyd v. Beebe*, ante, 660, where the same question is discussed in regard to actions to recover money collected by an agent not an attorney at law. This note, of course, presupposes that the relation of attorney and client is not such a trust relation as will prevent the statute of limitations from applying at all, and it does not concern itself with that phase of the question.

Although it seems to be generally conceded that, for a client to hold an attorney liable for money collected for him, he must make proper demand, it has been held in only a few cases that, in consequence thereof, the statute of limitations does not begin to run against the client for money collected for him by an attorney until that time.

Among these cases are *Roberts v. Armstrong*, 1 Bush, 263, 89 Am. Dec. 624; *Cord v. Taylor*, 5 Ky. L. Rep. 852; and *Sneed v. Hanly*, Hempst. 659, Fed. Cas. No. 13,136. And see cases cited in the latter part of the note to *Boyd v. Beebe*, ante, 660, to the same effect with reference to agents other than attorneys.

In *Birckhead v. De Forest*, 57 C. C. A. 107, 120 Fed. 645, an attorney wrote to his

Am. St. Rep. 604, 21 N. E. 440; *Krause v. Dorrance*, 10 Pa. 462, 51 *Am. Dec.* 496; *Weeks, Attorneys at Law*, § 263; *Wood, Limitation of Actions*, § 18, p. 54; *McDowell v. Potter*, 8 Pa. 189, 49 *Am. Dec.* 503; *Roberts v. Armstrong*, 1 Bush, 263, 89 *Am. Dec.* 624; *Houston & T. C. R. Co. v. Adams*, 49 *Tex.* 748, 30 *Am. Rep.* 116; *Morrill v. Palmer*, 68 Vt. 1, 33 *L.R.A.* 411, 33 *Atl.* 829; *Bailey v. Glover*, 21 *Wall.* 342, 22 *L. ed.* 636; 25 *Cyc. Law & Proc.* p. 1084, notes; *Wood v. Young*, 141 N. Y. 211, 36 N. E. 193; *Bronson v. Munson*, 29 *Hun.* 54.

The appellate court has jurisdiction.

Brown v. Brown, 66 Vt. 76, 28 *Atl.* 666; *Cutting v. Ellis*, 67 Vt. 70, 30 *Atl.* 688.

The burden of proof is on the defendant to establish his plea of the statute.

client that he was about to foreclose a certain mortgage for her, and in return she expressed the hope that he would be able to reinvest the proceeds. He subsequently did foreclose, bidding in the property himself, and so informed her, and expressed the intention to sell it again at private sale, and, by doing so, to have her mortgage continued. Money purporting to be interest payments upon the mortgage was sent at regular intervals. It does not appear in this case whether the attorney ever sold or conveyed the property or not; seven years after the foreclosure proceedings, this action was brought to recover the money alleged to have been received by the attorney. It was insisted for the attorney that the cause of action arose at the time of the foreclosure sale, while, for the client, it was insisted that, because of the attorney's conduct in leading his client to suppose that her money had been reinvested, a cause of action did not arise until she had knowledge of the facts. In regard to this latter proposition, the court, in following the New York decisions, said: "By the settled decisions of the courts of this state, the cause of action for the breach of a contract arises at the time when an action could have been maintained for the breach, and the running of the statute is not intercepted by proof of a fraudulent concealment by the defendant of the cause of action, and the failure of the plaintiff to discover the breach by reason of the fraud." It was held, however, that, under the condition of this case, a demand by the client was prerequisite to a right of action against the attorney, and the statute of limitations would not begin to run until a demand had been made, subject to the qualification that the demand must be made within a reasonable time. This demand having been made within a reasonable time, and the action having been brought within six years thereof, the statute of limitations was not a defense. It was also urged by the client that § 410 of the Code of Civil Procedure of New York had the effect to postpone the running of the statute. This section is to the effect that, where a right exists, but a demand

Green v. Dodge, 79 Vt. 73, 64 *Atl.* 499; *Burnham v. Courser*, 69 Vt. 183, 37 *Atl.* 288; *Batchelder v. Barber*, 67 Vt. 254, 31 *Atl.* 293.

Mr. Charles L. Howe, for defendant:

Upon appeal, no recovery can be had except upon matters presented to and passed upon by the probate court.

Adams v. Adams, 21 Vt. 162; *Maughan v. Burns*, 64 Vt. 316, 23 *Atl.* 583.

The relation between attorney and client, in respect to moneys collected, creates at most an implied trust; and to such a trust the statute of limitation applies.

Cone v. Dunham, 8 *L.R.A.* 647, and note, 59 *Conn.* 145, 20 *Atl.* 311; *Wood, Limitation of Actions*, 3d ed. §§ 18, 19; *Cook v. Rives*, 13 *Smedes & M.* 328, 53 *Am. Dec.* 88.

is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make a demand is complete, except, where the right grows out of the receipt or detention of money or property by an attorney, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends. It was said, however: "The courts of New York seem to have considered this section as meaning, among other things, to shield clients from the operation of the six-years statute of limitations in actions growing out of the receipt and detention of money by attorneys, when the client does not have knowledge of the facts which entitle him to dispense with the demand before bringing the action, and to set the statute in operation only from the time when he acquires knowledge. . . . While we might hesitate to attribute this meaning to the section in the absence of these decisions, we do not feel at liberty to disregard them."

A more logical rule is the one followed in a number of cases, where, although it is recognized that an attorney cannot be held liable for money collected for a client until the latter makes proper demand, yet it is held that such rule is designed for the protection of the attorney, and does not prevent the client from bringing suit immediately after collection. And the statute of limitations in these cases, instead of running from the time of demand, runs from the time the money was collected, or at least within a reasonable time thereafter.

Thus, in *Douglas v. Corry*, 46 *Ohio St.* 349, 15 *Am. St. Rep.* 604, 21 N. E. 440, although the court recognized that it is a general rule that an action cannot be commenced against an attorney for money collected until a demand has been made by the client, it held that, where an attorney collects money for his client, and uses no fraud or falsehood to him in regard to its receipt, the statute of limitations begins to run from the time of its collection; the court taking occasion to say: "It does not

Mere silence is not such a fraud as will bar the statute.

Smith v. Bishop, 9 Vt. 110, 31 Am. Dec. 607; *Miller v. Powers*, 119 Ind. 79, 4 L.R.A. 483, 21 N. E. 456; *Bates v. Preble*, 151 U. S. 149, 38 L. ed. 106, 14 Sup. Ct. Rep. 277; *Price v. Mutual Reserve L. Ins. Co.* 102 Md. 683, 4 L.R.A. (N.S.) 870, 62 Atl. 1040.

Active fraud on the part of the deceased would not bar the statute in favor of this defendant as administrator of an insolvent estate.

Yniestra v. Tarleton, 67 Ala. 126.

Rowell, Ch. J., delivered the opinion of the court:

The intestate, an attorney, brought suit for the plaintiff against the New England

follow, nor do the cases generally hold, that, where there has been no fraudulent concealment of the receipt of the money by the attorney, the statute does not begin to run until a demand has been made for its payment. The rule is general that, in the absence of such concealment, the statute begins to run from the time the money was collected and should have been paid over. The rule as to demand is designed for the protection of the attorney against the annoyance of unnecessary litigation and costs.

The client has it in his power, by making the demand, to commence the action at any time after the attorney has received the money and refused on demand to pay it over; and, by delaying the demand, he cannot prevent the running of the statute."

So, in *Kimbro v. Waller*, 21 Ala. 376, where a person brought an action of assumpsit against an attorney for money which the latter had collected over fourteen years prior thereto, the court, after recognizing that the client must make his demand against the attorney for money collected, within a reasonable time after the money is collected and converted, held that, notwithstanding the necessity of a demand, the client should have brought his suit within the six years from the time of the alleged conversion.

In *Campbell v. Wilson*, 2 Mackey, 497, demand was made upon an attorney for money collected for his client, but he refused to pay; and it was held that the statute commenced to run against the client from that time, and this action not having been brought within the statutory period, the action was barred. A similar case, and holding to the same effect, is *Egerton v. Logan*, 81 N. C. 172.

Cases which take the view that demand is not necessary to hold an attorney liable for money collected naturally hold that the statute of limitations begins to run from the time of the collection of the money.

Thus, in *Coffin v. Coffin*, 7 Me. 298, where it was also contended that the statute of limitations would run only from demand, it was expressly held that, demand not being necessary to hold an attorney liable 17 L.R.A. (N.S.)

Insurance Company, and therein recovered and collected a judgment, but never notified the plaintiff of the collection, nor did the New England Company notify it until after the intestate's death. Both fraud and fraudulent intent on the part of the intestate are expressly negatived by the findings. This is assumpsit for the money thus collected. The statute of limitations is pleaded. Fraudulent concealment of the collection by silence is replied. There is no rejoinder. It was stipulated below that, if the plaintiff is entitled to recover on the facts found, it should have judgment for so much, with interest thereon for such a time.

The cases differ as to when a client can sue his attorney for money collected and not paid over. All agree, however, that the

to his client for money collected, the statute of limitations commenced to run from the time of collection; and therefore in this case, the statutory period having elapsed, the action could not be maintained.

In *Douglass v. Murray*, 28 N. Y. Week. Dig. 339, 7 N. Y. S. R. 837, although no discussion appears as to whether or not a demand was or was not necessary, it was held that, in an action against an attorney for money collected by him for a client, the statute of limitations begins to run from the time of the receipt of the money.

A class of cases closely related to the above are those in which it is recognized that it is incumbent upon the attorney to notify his client of the collection, and thereafter the duty of the client to make proper demand; and it is held in these cases that if, after such notice or other means of knowledge, the client fails within a reasonable time to make proper demand, he starts the statute of limitations.

A leading case of this nature is *Stafford v. Richardson*, 15 Wend. 302, where, notwithstanding the client had knowledge that the debt would be collected in the near future, and the fact that part of it had already been collected and paid over, he made no inquiry in regard to it for sixteen years; and it was held that the statute of limitations commenced to run from the time the money was received, and not from the time the client saw fit to demand it.

So, in *Whitehead v. Wells*, 29 Ark. 99, the court, after recognizing that a client, in order to maintain an action for money collected by his attorney, must make demand within a reasonable time after notice has been given him of such collection, held that, if the client could ordinarily discover, and know of, the collection, the statute of limitations would begin to run after a reasonable time for demand.

In *Leigh v. Williams*, 64 Ark. 165, 62 Am. St. Rep. 183, 41 S. W. 323, it was held that an action brought by a client to recover from his attorney an amount collected by the latter for him, but not brought within three years after knowledge of the collection, was barred by the statute of limita-

collected for a client, held that, where the conduct of the attorney was calculated to mislead the client, the statute of limitations would not begin to run against his client until he discovered the fraud.

In *Wilder v. Secor*, 72 Iowa, 181, 2 Am. St. Rep. 236, 33 N. W. 448, where an attorney who had been intrusted to collect a certain draft from an estate secured its allowance, but set off the amount so allowed against his own indebtedness, it was held that, since the client had been led to believe that the claim had been allowed in his name and would be paid on the settlement of the estate, the statute of limitations did not commence to run against him until he discovered his cause of action. The court took occasion to say: "As plaintiff had the right to rely upon the defendants to communicate the facts to him, and as they were under obligation to communicate them, they cannot be permitted to say that he might have discovered the existence of the cause of action at an earlier date than he did by an examination of the records of the proceeding in which the claim was allowed against the estate, and settled by the administrator."

In *McCoon v. Galbraith*, 29 Pa. 293, where a firm of attorneys, among other things, collected a sum of money for their client, and one of them, in writing a couple of letters, said nothing about the money, but, instead, wrote that he was without information; but promised to ascertain and inform them of the facts,—it was held, in an action of assumpsit to recover the money collected, that the statute of limitations could begin to run only from notice of the collection. But see, *contra*, *Birkhead v. De Forest*, 57 C. C. A. 107, 120 Fed. 645, *supra*.

In *Fleming v. Culbert*, 46 Pa. 498, after recognizing that, in case of fraudulent concealment by an attorney that he had collected money for his client, the statute of limitations would begin to run against the client only from the discovery of the fraud, and, in the case of the absence of such fraud or concealment, from the time the agent had a reasonable opportunity to pay it,—the court held that the investment of moneys in bonds and mortgages by an attorney in fact, instead of remitting them to his principal as directed, was not a fraudulent concealment that will prevent the running of the statute of limitations from the time the money collected was demandable.

In *Hudson v. Kimbrough*, 74 Miss. 341, 20 So. 885, under a statute so providing, the court, after recognizing that ordinarily in the case of fraudulent concealment by an attorney that he had collected money for his client the statute of limitations would not commence to run against the latter until the discovery of the cause of action, held that, since the client could, by the use of reasonable diligence, have discovered, long prior to the bringing of this action, that the money had been collected, the bar of the statute would apply.

So, in *Porter v. Smith*, 65 Ala. 189, an attorney who had collected a sum of money

for his client by false representations prevented the latter from gaining knowledge of the collection, and thus from bringing suit within six years after such the collection. This suit was brought within six years after the discovery of the fraud, but the court held that it was governed by a statute to the effect that, in actions seeking relief on the ground of fraud, where the statute has created a bar, a cause of action must not be considered as accruing until the discovery, by the aggrieved party, of the facts constituting the fraud, after which he must have one year within which to prosecute the suit; and, this suit not having been commenced within the space of one year from the discovery of the fact that the attorney had collected and converted the money in question to his own use, the action was barred by the statute of limitations.

For cases as to when the statute of limitations begins to run against an action for negligence or misconduct of an attorney in performance of professional duties, see case note to *Fortune v. English*, 12 L.R.A. (N.S.) 1005.

COLORADO SUPREME COURT.

CHARLES H. HOWE, Appt.,
v.

HILLIAN FRITH.

(— Colo. —, 95 Pac. 603.)

Judgment — lump sum — incompetent evidence — reversal.

1. A judgment based on a verdict for a lump sum must be reversed where the complaint seeks damages for a lump sum on different grounds, and incompetent evidence is admitted over objection in support of any one of them.

Landlord — shutting off heat — liability.

2. A landlord is not liable for injuries to his tenant by shutting off the heat from the tenement after the tenant is in arrears for rent, where the lease provides for for-

Case Note. — Right of landlord to render tenement uninhabitable under provision of lease reserving right of re-entry for condition broken.

Since conduct of a lessor directed toward the rendering of a tenement uninhabitable is in effect but a particular form of retaking possession by force, it would be well, in order to obtain a proper perspective, to consider the cases collected in the notes to *Allen v. Keily*, 16 L.R.A. 798, and *Whitney v. Brown*, 11 L.R.A. (N.S.) 468, which treat in a more general way of a landlord's liability for forcibly dispossessing his tenant.

In *Spencer v. Commercial Co.* 30 Wash. 520, 71 Pac. 53, which was an action for damages by a lessee against his lessor for a wrongful eviction consisting in the landlord's cutting the water pipes of the prem-

feiture in case of nonpayment of rent, and for re-entry by the use of such force as is necessary, in which event no action shall be brought by the tenant.

Same — injunction — scope.

3. A landlord is not prevented from shutting off the heat of the leased apartment because of breach of covenant to pay rent, by an injunction against the prosecution of proceedings in forcible entry and detainer; nor is the tenant released from his covenant not to sue for injuries caused by re-entry in case of such breach.

(April 6, 1908.)

APPEAL by defendant from a judgment of the District Court for the City and County of Denver in plaintiff's favor in an action brought to recover damages for plaintiff's alleged wrongful deprivation of heat to which she was entitled under a lease. Reversed.

The facts are stated in the opinion.

Messrs. Kingsley & McKnight, for appellant:

The tenant cannot recover for any act or omission of the landlord after failing to comply with the notice either to pay rent or surrender possession.

Taylor, Land. & T. 7th ed. p. 620; Peterson v. Kreuger, 67 Minn. 449, 70 N. W. 567; Patterson v. Graham, 140 Ill. 531, 30 N. E. 460; Burnham v. Martin, 90 Ill. 438; Boreel v. Lawton, 90 N. Y. 293, 43 Am. Rep. 170; Lounsbery v. Snyder, 31 N. Y. 514; DeWitt v. Pierson, 112 Mass. 8, 17 Am. Rep. 58; Eisenhart v. Ordean, 3 Colo.

App. 162, 32 Pac. 495; Lay v. Bennett, 4 Colo. App. 252, 35 Pac. 748.

Upon failure of the tenant to pay rent in compliance with the notice, the landlord was entitled to the possession of the premises with or without process of law.

Goshen v. People, 22 Colo. 270, 44 Pac. 503; Meader v. Stone, 7 Met. 147; Mugford v. Richardson, 6 Allen, 76, 83 Am. Dec. 617; Allen v. Keily, 17 R. I. 731, 16 L.R.A. 798, 33 Am. St. Rep. 905, 24 Atl. 776; Todd v. Jackson, 26 N. J. L. 525; Simmons v. Thompson, 1 Handy (Ohio) 521.

If our position on this branch of the case is sound, the judgment must be reversed, because it is not known and cannot be determined how much of the verdict was arrived at as damages resulting from shutting off the heat.

Crymble v. Mulvaney, 21 Colo. 211, 40 Pac. 499; Cook v. Hopkins, 66 Ind. 208; Pennsylvania Co. v. Holderman, 69 Ind. 18; Rowe v. Peabody, 102 Ind. 198, 1 N. E. 353; Garr v. Gomez, 9 Wend. 656; Rhoads v. Metropolis, 36 Ill. App. 123; Glines v. Smith, 48 N. H. 259; Johnson v. Dicken, 25 Mo. 580; Gay v. Lemle, 32 Miss. 309.

Mr. C. C. Brown, for appellee:

Neither the landlord, nor other tenants, had any right to obstruct the hallway or stairway so as to impede access to the rooms leased to appellee.

Miller v. Fitzgerald Dry Goods Co. 26 Neb. 270, 86 N. W. 1078.

The payment of rent under the lease in question is a condition subsequent, and not precedent.

ises and in his demanding and collecting rent due the lessee from sublessees, it was held, even assuming the lessor had a right to terminate the lease under a re-entry clause for breach of a covenant, such right did not justify an eviction by force or strategy. The decision being that the statutes of the state securing a "speedy, adequate, and orderly method for a landlord to obtain possession" precluded him from resorting to force. Such statutes, it was said, provide an "exclusive remedy notwithstanding an agreement permitting possession to be taken by force."

And in Chapman v. Kirby, 49 Ill. 211, a clause in a lease providing for re-entry with force and without legal process upon the rent's not being paid on the day due was held to be no defense to the lessor, who, after notifying the lessee on the 7th of the month of his intention to terminate the lease within ten days for failure to pay the rent due on the first, on the first of the succeeding month disconnected the shaft transmitting certain power appurtenant to the lessee's planing mill. The case, however, proceeded upon the theory that, since the agent, in serving the notice on the 7th, had, under instructions refused the rent then

tendered him, there had been no sufficient demand made for the same, and that therefore there was no valid forfeiture; and, as a necessary consequence, the landlord's interference with the tenant's possession was unjustifiable. The gist of the decision, therefore, is not that the particular means of eviction resorted to by the lessor was wrongful, but that he had no right to enter at all.

A case which has by implication some bearing on the point under annotation is Fischer-Leaf Co. v. Caldwell, 15 Ky. L. Rep. 542, holding that, where the defendant, being indemnified by the lessor against liability, removed, against the consent of the lessee, a wall dividing her tenement from his own, the lessee could recover the damages sustained, notwithstanding that at the time of the acts in question she was in arrears for rent, and subject, in consequence, to ejectment upon five days' notice, the lessor, however, not having exercised his right to declare the lease forfeited.

For cases of forcible dispossession involving the statutes of forcible entry and detainer, see case note to Wilson v. Campbell, 8 L.R.A. (N.S.) 426.

Counsel for appellee meet this state of facts by contending that appellant did not avail himself of the license to re-enter, granted by the lease, but permitted the tenant to occupy the premises until the end of the term, and thereby waived the notice of forfeiture served October 31st. In the light of the facts disclosed by this record, such contention is utterly untenable. The complaint shows that, November 20th, appellant commenced suit in a justice court in forcible entry and unlawful detainer against appellee to recover possession of the premises, the prosecution of which suit was stayed by an *ex parte* injunction issued by the court below in this action; and that the court, upon motion of appellant, refused to dissolve such injunction. The fact that a court, through its injunctive writ, prevented the re-entry of the landlord under the license granted by the lease does not relieve the tenant from the rule of law above stated; nor does it release the tenant from the covenant of the lease, whereby she waived her right of action against the landlord on account of the acts she now complains of. The court erred in admitting evidence over the objection of appellant as to any damages suffered by appellee after the service of the notice of forfeiture of the lease October 31st, in instructing the jury as above indicated, and in refusing instructions requested by appellant on this point. We must presume that the evidence introduced upon this branch of the case was considered by the jury and entered into the amount of the verdict. To what extent we are unable to determine. The jury might have rested their entire verdict upon this objectionable evidence.

This conclusion renders it unnecessary to consider the other errors assigned and argued that question the correctness of rulings upon the admission of evidence, and other instructions of the court. *Marr v. Wetzel*, 3 Colo. 2, 8; *Crymble v. Mulvaney*, 21 Colo. 203, 211, 40 Pac. 499.

For the reason stated, the judgment is reversed, and the cause remanded.

Steele, Ch. J., and Helm, J., concur.

IDAHO SUPREME COURT.

BANK OF COMMERCE, LIMITED, Appt.,
v.
SARAH A. BOWERS, Impleaded, etc.,
Resp't.

(14 Idaho, 75, 93 Pac. 504.)

Married woman — separate estate —
power to bind.

1. Under the provisions of § 2 of the

Headnotes by AILSHIE, Ch. J.
17 L.R.A. (N.S.)

act of the legislature approved March 9, 1903 (Sess. Laws 1903, p. 346), construed in connection with the other provisions of the Code, a married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use or benefit, or for the use or benefit of her separate estate, or in connection with the control and management thereof, or in carrying on or conducting business therewith, unless the contract and obligation is made so as to create a lien or encumbrance on her separate estate, or some portion thereof, as security for the payment of the debt.

Same — power to become surety.

2. Under the provisions of § 2, act March 9, 1903, p. 346, which transfers to the wife the management, control, and absolute right of disposition of her separate property, and confers upon her all the privileges of contracting in relation thereto, and all the rights or privileges necessary to the complete enjoyment and power of disposition thereof, a married woman has no authority to become surety or guarantor for the debts of others; such right and the concurrent obligations thereof not being necessary or essential to the complete enjoyment of her separate estate.

Same — power to contract.

3. The power to contract with reference to her separate property is not an absolute and unlimited right of contract on all matters, but, on the contrary, confines that right to those contracts that "have reference to her separate estate."

(January 13, 1908.)

Case Note. — Power of married woman, under statute giving her sole control of her separate estate, to become surety for one other than her husband.

The right of married women to enter into contracts of guaranty or suretyship is generally denied under statutes which simply permit them to make contracts relating to their separate estates, unless such contracts relate thereto; while their power so to do is upheld under statutes permitting them generally to contract as though unmarried. Still another class of cases place their decision upon the ground that a married woman may bind her separate estate by such a contract if it expressly discloses an intention on her part to bind her separate estate.

Cases involving the right to charge a married woman's equitable estate with a contract of guaranty or suretyship are excluded from this note, as well as those in which, as part of the purchase price of property, she assumes the payment of an existing mortgage thereon. As the right of a married woman to enter into such contracts is expressly denied by statute in Georgia, Indiana, Kentucky, New Jersey, Pennsylvania, and perhaps other states,

APPPEAL by plaintiff from a judgment of the District Court for Ada County in favor of defendant, Sarah A. Bowers, in an action upon a promissory note which she had signed as surety for George E. Baldwin. Affirmed.

The facts are stated in the opinion.

Messrs. Edwin Snow and Carl A. Davis for appellant.

Mr. N. M. Ruick, for respondent:

Where a special or limited power of making contracts is given to a married woman, she is still considered as *prima facie* unable to contract at all; and the burden is on the person relying on the validity of her contract to bring it within the statutory rule.

15 Am. & Eng. Enc. Law, 2d ed. p. 792.

Allshie, Ch. J., delivered the opinion of the court:

This is an appeal from the judgment and an order striking a proposed statement from

cases arising thereunder are also excluded from this note.

Contracts not purporting to bind her separate estate.

It has been held that a married woman cannot become surety for one other than her husband under statutory authority to enter into contracts in relation to her separate property. *Heburn v. Warner*, 112 Mass. 271, 17 Am. Rep. 86; *Nourse v. Henshaw*, 123 Mass. 96; *Bartlett v. Bartlett*, 4 Allen, 440; *Willard v. Eastham*, 15 Gray, 328, 77 Am. Dec. 366.

Nor under authority to contract for her personal benefit, or that of her separate property. *Richardson v. Matthews*, 58 Ark. 484, 25 S. W. 502.

Nor under statutory power to hold property in her own right to her separate use, and to make contracts, and to sue and be sued, as if sole and unmarried. *Bailey v. Pearson*, 29 N. H. 77.

Nor under statutory power to contract and be contracted with, as to her separate property, in the same manner as though unmarried. *Habenicht v. Rawls*, 24 S. C. 461, 58 Am. Rep. 268.

Nor under a statute providing that the separate property of a married woman should be under her sole control, and that she could contract to the same extent and in the same manner as though unmarried. *Drake v. E. M. Birdsall & Co.* 10 Ohio Dec. Reprint, 56.

A married woman is not liable in equity upon an accommodation note which she indorses for one other than her husband, under a statute clothing a married woman with her real and personal property free from her husband, and permitting her to convey and devise the same. *Flanders v. Abbey*, 6 Biss. 16, Fed. Cas. No. 4,851.

A married woman, although possessing a separate estate, is not made liable to an action at law upon her contract of surety-
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the files and refusing to settle the same. The trial court had made an order extending the time for preparing the statement to June 7, 1906. Thereafter a further order was made, but the second order was not made until after the expiration of the time allowed by the first order. When the statement was presented for settlement, on motion of the adverse party the same was stricken from the files, and the court refused to settle it on the ground that it had not been presented in time, and that the court had lost jurisdiction to settle or allow it. The action of the court was clearly correct, and in conformity with the repeated decisions of this court. *Lydon v. Piper*, 5 Idaho, 541, 51 Pac. 101; *Hoehnan v. New York Dry Goods Co.* 8 Idaho, 66, 67 Pac. 796; *Swartz v. Davis*, 9 Idaho, 238, 74 Pac. 800; *Sandstrom v. Smith*, 11 Idaho, 779, 84 Pac. 1060.

On the appeal from the judgment, the

ship for one other than her husband by a statute providing that, where a married woman transacts any business, or purchases any property, and debts and claims thereby remain unsatisfied, an action at law may be maintained against the husband and wife or the survivor of them. *Vankirk v. Skillman*, 34 N. J. L. 109. The court observed that the right of a married woman to contract under such statute related only to contracts in which she was beneficially interested, and would not permit a contract of suretyship.

A married woman cannot bind herself as surety on a recognizance for one other than her husband. *People v. Williams*, 8 Daly, 264. The court observed that, if capable, under the enabling acts, to enter into a recognizance as surety she can bind only her separate estate; and that she does so must be expressed in the instrument.

It was said in *Shipman v. Lord*, 58 N. J. Eq. 380, 44 Atl. 215, affirmed without opinion in 60 N. J. Eq. 484, 46 Atl. 1101, that a married woman, although incapable of becoming surety for one other than her husband, may be bound by her executed contracts of suretyship, although not enforceable against her while they remain executory.

And a married woman's contract of suretyship, under a statute empowering her to enter into contracts in relation to her separate property, is not validated by the fact that the payment thereof is secured by a mortgage upon her land. *Heburn v. Warner*, supra.

But, on the other hand, the following cases sustain the right of a married woman to bind her separate estate by a contract of guaranty or suretyship for one other than her husband under the statutory authority mentioned:

Under a statute empowering her to make contracts and be sued the same as though

enter into necessarily have reference to "her separate property," and that she may therefore enter into any contract that could be entered into by a *feme sole*. It is further argued that no contract can be entered into but what has reference to property, and that, therefore, a contract by a married woman which has reference to "her separate property" will comprehend any and all contracts she might enter into. That position appears to be supported by the supreme court of Kansas in *Deering v. Boyle*, 8 Kan. 525, 12 Am. Rep. 480, wherein the supreme court, in considering the liability of a married woman on a promissory note executed for the debt of her husband, and in construing a statute identical with ours, said: "It must be equally clear that such a contract as the note sued on has reference, more or less remote, to the general property of the person signing the contract. If it has not such reference, then it has no reference to anything whatever, but is totally and absolutely void."

In both North and South Dakota the statute provides that "either husband or wife may enter into any engagement or transac-

tion with the other, or with any other person, respecting property, which either might if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." The supreme court of North Dakota, in *Colonial & U. S. Mortg. Co. v. Stevens*, 3 N. D. 265, 55 N. W. 578, in considering their statute and the liability of a married woman as surety on a promissory note for her husband, said: "This statute is very broad in its language. It is true that the contract must be one respecting property; but we cannot assent to the view that it must relate to the married woman's separate property. It would have been easy to have said so in express terms had such been the purpose of the lawmaking power. When the legislature has established the single and simple test that the contract must be one respecting property generally, we have no right to amend the law, and thereby inject into the act a further limitation which will exclude many contracts respecting property." It will be seen from the forego-

porate estate is in no sense a contract for the benefit of the estate of one of its copartners.

Contracts purporting to bind separate estate.

The cases generally hold that such a contract of suretyship is binding if it purports to bind the wife's separate estate.

Thus, it has been said that, when a married woman's contract of suretyship for another than her husband is made an express charge upon her separate estate; or when the consideration goes to the benefit of her estate,—equity will decree it a charge thereon, under a statute permitting her to contract and sue and be sued in relation to her separate property, and on contracts made by her respecting it, the same as though she were unmarried. *Willard v. Eastham*, 15 Gray, 328, 77 Am. Dec. 366.

Under New York act of 1860, permitting a married woman to enter into contracts in reference to her separate real estate as though unmarried (*Kelly, Contracts of Married Women*, 458), it has been held that a married woman may charge her separate estate by a contract of suretyship for one other than her husband, when the intention so to do is expressed in the instrument creating the liability.

A married woman is liable upon her accommodation indorsement of a promissory note, where, at the time the plaintiff advanced money upon it, she gave a separate written statement as to her pecuniary responsibility, and to the effect that, if the note was not paid, she considered it incumbent upon herself to pay it, and that her private estate was bound therefor. 17 L.R.A. (N.S.)

Knowles v. Toone, 96 N. Y. 534. The court said that in order to charge the payment of an obligation of a married woman upon her separate estate, which is not made for the benefit thereof, there must be a contract in writing expressing an intention to create a liability thereon; and that in this case the two papers would be considered as one, and her agreement therein was an assurance that her separate estate would be bound thereby.

So, a married woman is bound as a surety upon an appeal bond from a judgment recovered against her son, where, in the bond, she expressly stated that she thereby undertook and intended and agreed that such bond should be a charge upon her separate estate, describing it. *Woolsey v. Brown*, 11 Hun, 52, affirmed in 74 N. Y. 82.

A married woman may deposit money belonging to her separate estate in lieu of bail for her son, under a statute declaring the earnings of a married woman to be free from the control of her husband, and empowering her to contract and receipt for the same, and to contract in relation thereto, and dispose of the same as though unmarried. *Bullock v. Com.* 96 Ky. 537, 29 S. W. 341.

A married woman may become liable as a surety for the debt of one other than her husband, by executing a mortgage upon her separate estate to secure the payment thereof, notwithstanding that she has no power to become personally bound upon a note given for such purpose. *Damon v. Deeves*, 57 Mich. 247, 23 N. W. 798. The court said that a mortgage to secure another person's debt is valid beyond question, and the right to enforce the note personally is not necessary to make the mortgage good;

ing quotation that the North Dakota court practically conceded that, if the statute read "with reference to her separate property" as does our statute, the action could not have been maintained. A like statute was under consideration later by the supreme court of South Dakota in *Colonial & U. S. Mortg. Co. v. Bradley*, 4 S. D. 158, 55 N. W. 1108, and the court cited *Colonial & U. S. Mortg. Co. v. Stevens*, supra, with approval, and, in commenting on this statute, said: "The learned counsel for the respondents contends that, the authority of a married woman to enter into contracts being limited to contracts 'respecting property,' this limitation should be construed to mean her separate property; but to so construe the limitation would require us to interpolate into the section terms that are not found in the section, which this court would not be authorized to do. It must be presumed that, if the legislature intended to so limit the authority of married women to contract, it would have inserted such qualifying words into the section." The statute of California has been for many years the same as that quoted from North and South

Dakota, and the California court has held that it authorized a contract of the character of the one under consideration here. *Marlow v. Barlew*, 53 Cal. 456; *Goad v. Moulton*, 67 Cal. 536, 8 Pac. 63; *Farmers' & M. Bank v. DeShorb*, 137 Cal. 685, 70 Pac. 771. The same is true in Nevada. See *Cartan v. David*, 18 Nev. 310, 4 Pac. 61. In view of the material essential in which our statute differs from the statutes in California, Nevada, and the Dakotas, we feel that the decisions from those courts are not in point in this consideration further than the general reasoning of the cases might appeal to the court as throwing light upon the legislative intent. The two Dakota cases, however, admit that, if their statutes read the same as ours, their decisions would probably have been different.

It is insisted by counsel that our amendatory statute must have been taken from the statute of Kansas, and that with it we necessarily adopted the Kansas construction as embodied in *Deering v. Boyle*, supra; *Shoshone County v. Proffitt*, 11 Idaho, 772, 84 Pac. 712; *Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246. If it were conceded that the

such a lien must be express, and there is no reason for holding that such a note will vitiate a security which refers to it as descriptive of the debt secured; and, as the intention of the mortgage is lawful, and the lien on the property is clearly defined, nothing more is needed to bind the land.

A married woman's mortgage upon her separate estate, to secure the payment of her contract of suretyship for her son, is void, and cannot be foreclosed by an action at law, as such mortgage is not authorized by a statute permitting her to contract in relation to her separate estate. *Heburn v. Warner*, 112 Mass. 271, 17 Am. Rep. 86.

However, such mortgage may be enforced in equity against her separate estate, as it created an express charge thereon. *Ibid*.

But a married woman cannot mortgage her property to secure the note of one other than her husband, under statutory power to purchase property, and make contracts and be contracted with as to her separate estate. *Aultman & T. Co. v. Gilbert*, 28 S. C. 303, 5 S. E. 806; *Sibley v. Parks*, 28 S. C. 607, 5 S. E. 809.

So, a married woman cannot, by a trust deed, charge her separate estate for the purpose of indemnifying the surety on the recognizance of her son, under a statute permitting her to contract in relation to her separate estate. *Chandler v. Morgan*, 60 Miss. 471.

In an action against a married woman upon a contract of suretyship, there can be no recovery unless it appears that it related to her separate estate or business, or that she signed it intending to bind her individual property for its payment; and such intent is not established by the fact that, after the execution of the note, she

informed the payee that the loan was made on her responsibility as surety. *Smith v. Bond*, 56 Neb. 529, 76 N. W. 1062.

A married woman is not bound as a surety upon a guardian's bond, under a statute binding her by contracts made in her separate business or relating to her separate estate, by the fact that she made and annexed an affidavit to the bond to the effect that she possessed enough estate to make her a sufficient surety, as that is not a sufficient expression of an intention to bind her separate estate. *Gosman v. Cruger*, 69 N. Y. 87, 25 Am. Rep. 141, affirmed in 7 Hun, 60.

As the form of the undertaking upon an appeal is prescribed by Code, and cannot be altered, a married woman does not become liable as a surety thereon, although she adds words thereto disclosing an intent to charge her separate estate. *Field v. Leavitt*, 5 Jones & S. 537.

A married woman does not charge her separate estate upon her contract of suretyship, by a provision therein in which she waived her dower and homestead rights, in any real estate appearing of record in her own name, as such provision does not refer to property belonging to her. *Kohn v. Russell*, 91 Ill. 138.

And a married woman cannot charge her separate estate by an accommodation indorsement for the benefit of one other than her husband, under a statute clothing her with her real and personal property, free from her husband's control, by an indorsement stating that she "charges her own, individual, and separate estate for the payment thereof." *Flanders v. Abbey*, 6 Biss. 16, Fed. Cas. No. 4,851.

amended statute (§ 2, p. 346, act March 9, 1903) had been taken from the Kansas Code, still there would be this objection to the adoption of the Kansas construction thereof: The supreme court of this state has, through a continuous line of decisions for nearly twelve years, held that, "in order to charge the separate property of the wife, and render it liable to levy and sale, it must be alleged in the complaint, and proven, that the debt was incurred for the use and benefit of her separate property, or for her own use or benefit." Section 2504, Rev. Stat. 1887, has lent a great deal of force to that conclusion, and that section stands to this day without amendment. Notwithstanding this interpretation of the statute as it has existed in this state, the legislature, although meeting biennially, never attempted in any way to change the rule, or announced a different legislative intent, until the act of March 9, 1903. When it did make a change, it simply abrogated the statute providing for a married woman becoming a sole trader, and transferred the management and control and right of disposing of her separate property from her husband to her; and that transfer of management, control, and right of disposition granted a concurrent and commensurate power and authority to dispose of the same and contract in reference thereto. It is evident to us that, had the legislature desired to change the rule as previously announced by this court, and grant the wife the right to become surety and guarantor, and to sign accommodation paper and go bail, it would have done so in clear and unmistakable terms. In other words, the legislature would not have limited her right to contract to those instances merely which have "reference to her separate property." As it is, they have said, in substance, that, "with reference to the wife's separate property, she may enter into contracts in like manner and to the same effect as a married man may in relation to his property." When the legislature said that the contracts the wife can enter into are those "with reference to her separate property," it evidently intended to grant her all the rights and privileges of contracting that are necessary or essential to the full and complete enjoyment of her separate property, and the right of management and control and disposition of the same. On the other hand, it clearly appears that, by the use of this modifying phrase, they did not mean to extend her liability on contracts beyond that which would be for her own use or benefit, or in reference to her separate estate.

It is argued, however, that the execution of a promissory note for a third party is a contract with reference to the wife's sep-

arate property for the reason that, if she should have to pay it, she could not do so except out of her separate estate. This, as a highly attenuated theory, may have some logic in it; but, on the contrary, it contains much fallacy. A promissory note does not become property until it is executed and delivered. When delivered, it is the property of the payee. It is to be paid by the makers out of whatever property they may have at the time of its maturity, or, in case action is instituted for its collection, out of such property as may be reached by execution. But at the time of the execution of the note the married woman might not have a single dollar's worth of property in existence, nor the expectation of anything but her daily earnings. Still the person taking the note might rely upon her honesty and earning capacity for its payment, and yet, contrary to expectations, she might not have a dollar when it becomes due, and might not thereafter have anything subject to execution. Now to say that this note was executed with reference to her separate property is too far fetched to have much application to the consideration of this statute. Again, a married woman, who has not a dollar's worth of property, might execute a note in payment of her own debt, or for goods and wares furnished directly to her, or for the necessities of life, and where the property was parted with on the faith of her promise to pay, the contract would be a binding and valid contract against her; but it would not be binding merely because it was a contract "with reference to property," but because it is a contract to pay her own debt for her own use and benefit, and, if she failed to pay it, the creditor could collect it by execution, if she ever had property subject to execution that he could reach before the bar of the statute of limitations cut him off. Where, however, the debt is not hers, and she has received none of the consideration either for her own use or benefit or that of her separate estate, in order for the contract to be one "with reference to her separate property," within the purview of our statute, the obligation as to her must become one *in rem* whereby she creates a lien or encumbrance on her separate property for the payment of the debt. In such case the contract clearly becomes one with reference to her separate estate in so far as it obligates that estate, or any part thereof, for the payment of this specific obligation.

The case of *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, has perhaps been more generally criticized than any other American case in reference to its holding on this specific point, and yet to us its reasoning seems more logical and sound than that

contained in any of the opinions that have assumed to criticize it. Among other things, the court there says: "Can, then, the principle on which the liability depends be extended to cases of mere suretyship for the husband or a stranger? It seems to me it cannot. The obligation of a surety in all other cases is held to be *stricti juris*, and, if his contract is void at law, there is no liability in equity founded on the consideration between the principal parties. . . . Why should a married woman be made an exception to this rule? We are to remember that her contract is absolutely void at law; and, when she is a mere surety, there is no equity springing out of the consideration. If the promise is on her own account, if she or her separate estate receive a benefit, equity will lay hold of those circumstances, and compel her property to respond to the engagement. Where these grounds of liability do not exist, there is no principle on which her estate can be made answerable. If we hold that the signing of a note as surety brings a charge upon her estate, we must go further and hold, also, that her guaranty, her indorsement, her accommodation acceptance, her bail bond, indeed every conceivable instrument which she may be persuaded to sign, for her husband or others, although absolutely void at law, are so far binding in equity as to charge her property with its payment. This would be a doctrine sustained by no analogies, and opposed to the soundest policy. It would go far to withdraw those checks which are intended to preserve a wife from marital influences, which may be, and often are, unduly exerted, and yet baffle all detection. The doctrine that equity regards her as a *feme sole* in respect to her separate estate only admits that she may dispose of such estate with or without [a written] consent of her husband, and without the solemnities which the law in other cases requires. But her mere promise to pay money, as we have seen, is not of itself such a disposition. Courts of equity, proceeding *in rem*, will take hold of her estate, and appropriate it to the payment of her debts. But, when her obligation is one of suretyship merely, she owes no debt at law or in equity. If not at law, which is very clear, then quite as clearly not in equity."

It has been urged that a wife, at common law, would be liable for a debt like the one sued on here, and that, since the statute does not specifically prohibit such a contract, she should be held liable. We would be reluctant to concede such a doctrine. Originally at common law the wife had no separate estate, and could not contract. Later the English courts of chancery, through the medium of trusts, began to recognize and allow separate estates to be set-

tled upon married women. Following the allowance of such estates, the courts of chancery, irrespective of the *feme covert's* incapacity to contract, held that, where the promise was made with reference to her separate estate, and she had signified an intention or desire to obligate her estate for a debt where the benefit or consideration moved to her or her estate, the courts of chancery would decree the payment of the same out of the separate estate. Controversies, however, arose not infrequently as to whether such obligation should be paid out of the separate estate that the *feme covert* had at the time the debt was contracted and of the promise to pay, or whether it could be made out of estate coming to her after the obligation was incurred. *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454, 6 English Ruling Cases, 56. An examination of the English cases on this subject discloses that, with a very few exceptions, they were cases where the debt was contracted by the wife for her separate use and benefit, or her separate estate, or in reference thereto. It will also be seen, on a perusal of those cases, that there was no unanimity of opinion as to the true principle to be applied, and that such eminent English chancellors and jurists as Lords Hardwicke, Thurlow, Bathurst, Alvanley, Rosslyn, and Eldon frequently disagreed as to the true principle upon which such decrees rested, and as to the facts under which that principle, whatever it was, should be applied. As late as 1873 in *London Chartered Bank v. Lempriere*, 42 L. J. P. C. N. S. 49, 21 English Ruling Cases, 553, on an appeal from the supreme court of the colony of Victoria, the court had under consideration the character of the "engagement" for which a wife's separate property would be held in equity. The diversity of opinion as to the extent of such liability is disclosed by a quotation in the latter case from *Johnson v. Gallagher*, 30 L. J. Ch. N. S. 298, wherein the lord justice said: "I am not prepared, however, to go to the length of saying that the separate estate will, in all cases, be affected by a mere general engagement. The cases of *Jones v. Harris*, 9 Ves. Jr. 493, and *Aguilar v. Aguilar*, 5 Madd. Ch. 414, show that the engagement which, if the married woman was a *feme sole*, the law would create for repayment of the consideration of a void annuity, would not affect the separate estate. It seems to follow that, to affect the separate estate, there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married

woman living separate from her husband might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate, if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given." The London Chartered Bank Case was cited and distinguished in *Pike v. Fitzgibbon*, supra, wherein it was expressly admitted that there could be no liability against a married woman at common law, and the relief there was granted upon the theory of a "promise" rather than that of a "contract." It will also be noticed that the principle which has been kept uppermost was that the wife received the consideration for the "promise," or that it inured to the use and benefit of her separate estate. In practically every instance where a decree has been allowed against her estate it has been upon the theory—if not express, then implied—that the obligation was one incurred "with reference to her separate estate or property." For interesting American reviews of the English authorities on this subject, see *Ewing v. Smith*, 3 Desauss. Eq. 417, 5 Am. Dec. 557; *Jaques v. Methodist Episcopal Church*, 17 Johns. 548. 8 Am. Dec. 447; *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503; *Yale v. Dederer*, 22 N. Y. 450, 78 Am. Dec. 216; *Cartan v. David*, 18 Nev. 310, 4 Pac. 61.

We conclude that the action of the trial court in entering judgment in favor of the defendant Bowers, and in denying the motion, was correct, and the same is hereby affirmed, costs awarded in favor of respondent.

Stewart, J., concurs.

Sullivan, J., concurring:

I concur in the conclusion reached, for, as I view this case, the former opinion rendered by a divided court is the law of the case on the questions decided by my associates on this appeal. For that reason, it is not necessary for me to express my views of the questions decided on this appeal.

ILLINOIS SUPREME COURT.

CITY OF CHICAGO

v.

BOWMAN DAIRY COMPANY, Plff. in Err.

(234 Ill. 294, 84 N. E. 913.)

Police power — capacity of marked cans.

1. Imposing a penalty on a milk dealer for having in possession, with intent to use them, any bottle or jar of less capacity 17 L.R.A. (N.S.)

than is marked on it, is a valid exercise of the police power, and does not unconstitutionally deprive him of his property rights.

Class legislation — regulation of milk jars.

2. An ordinance imposing a penalty on all who sell milk or cream in glass jars, for having in possession, with intent to use them, jars of less capacity than they purport to contain, is not special legislation, although it does not apply to all milk dealers, or to all persons who vend substances in liquid form.

Property rights — requiring special milk jars.

3. Requiring milk dealers indelibly to indicate their capacity upon glass jars which contain the milk sold does not unconstitutionally deprive them of their property in the old jars.

Prohibited measures — intent — liability.

4. One having in possession for use glass jars for the sale of milk of less capacity than is indicated upon them cannot escape the penalty imposed by ordinance therefor, by showing that he had not informed himself as to their capacity.

(April 23, 1908.)

ERROR to the Municipal Court of Chicago to review a judgment convicting defendant of having in possession milk bottles of less than their purported capacity, in violation of a municipal ordinance. Affirmed.

Statement by Hand, Ch. J.:

This was an action of debt commenced in the municipal court of the city of Chicago against the Bowman Dairy Company to recover the penalty imposed by § 2479, Rev. Mun. Code Chicago 1905, as amended June 11, 1906, and September 3, 1907, for having in its possession bottles for the purpose of containing milk or cream to be sold, or offered for sale, of less capacity than said bottles purported to contain; which section of said ordinance provides: (1) No person or corporation shall, after October 1, 1907, sell or offer for sale within the city of Chicago any milk or cream in bottles or in

Note. — The question of the validity of police regulations requiring the labeling of articles of commerce is discussed in the case note to *Ex parte Hayden*, 1 L.R.A. (N.S.) 184. Since the date of that note it has been held in *Ex parte Dietrich*, 149 Cal. 104, 5 L.R.A. (N.S.) 873, 84 Pac. 770, that a statute requiring the marking of small packages of butter intended for sale, with their weight in figures not less than one quarter of an inch high, was an unconstitutional interference with liberty and property rights, and not a legitimate exercise of the police power.

glass jars unless each of said bottles or glass jars in which said milk or cream is sold or offered for sale shall have blown into it, or otherwise indelibly and permanently indicated thereon, in a legible and conspicuous manner, the capacity thereof; (2) the inspector of weights and measures of the city of Chicago shall have the right, at any time, to examine any bottle or glass jar in which milk or cream is sold or offered for sale in the city of Chicago, or which is used by any person or corporation for the purpose of containing milk or cream to be sold or offered for sale, in order to ascertain whether such bottle or jar is of a capacity less than that which it purports to be; (3) and, if any such bottle or jar is of a less capacity than that which it purports to be, or if any such bottle or jar shall not have blown into it, or otherwise indelibly and permanently indicated thereon, in a legible and conspicuous manner, its capacity, as aforesaid, the person or corporation selling or offering for sale milk or cream in any such bottle or jar, or having in his or its possession any such bottle or jar to be used, or which has been used, for the purpose of containing milk or cream to be sold or offered for sale in said city of Chicago, shall be fined not less than \$5 nor more than \$100 for each offense; (4) each and every bottle or glass jar found in the possession of any person or corporation used, or to be used, or which has been used, by such person or corporation for the purpose of containing milk or cream to be sold or offered for sale in the city of Chicago, which shall be found to be of a less capacity than that blown into the same, or otherwise so indelibly and permanently indicated thereon, or which shall not have blown into it, or otherwise indelibly and permanently indicated thereon, in a legible and conspicuous manner, the capacity, as aforesaid, shall constitute a separate and distinct offense on the part of such person or corporation.

The defendant was charged with having in its possession, in the city of Chicago, on the 25th day of November, 1907, one glass bottle which purported to contain 1 quart, but the capacity of which was less than 1 quart, and at the same time and place with having in its possession two glass bottles which purported to contain 1 pint each, but the capacity of each of which bottles was less than 1 pint; and that the defendant, at said time and place, was using each of said bottles, and intended to use each of said bottles, for the purpose of holding or containing milk or cream which defendant had sold, or was offering for sale, or intending to sell, in the city of Chicago. The 17 L.R.A. (N.S.)

defendant, on being served with process, appeared and pleaded not guilty.

It appeared from the evidence that the defendant was engaged in the business of handling milk and cream in the city of Chicago; that two deputy city inspectors of weights and measures, on the 25th day of November, 1907, called at the business place of the defendant in the city of Chicago and stated to its manager that they were from the city sealer's office and that they wanted to test some of the bottles that were in use by the defendant; that the manager sent an assistant for bottles, who returned with a number of pint and quart bottles; that the inspectors tested said bottles in the presence of the manager and found several of them to hold less in amount than was indicated upon the outside of the bottles.

The defendant, at the close of all the evidence, moved the court to find the defendant not guilty, and to dismiss the case, which motion the court overruled, and, without the intervention of a jury, rendered a judgment against the defendant on the three charges for \$150 and costs of suit, and the defendant has sued out this writ of error.

Messrs. Ritscher, Montgomery, Hart, & Abbott, for plaintiff in error:

Under the ordinance, a special burden is placed upon such dealers in milk and cream as elect to retail their wares in bottles or glass jars.

Hibbard v. Chicago, 173 Ill. 98, 40 L.R.A. 621, 50 N. E. 256; People v. Steele, 231 Ill. 340, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; Pierce v. Dillingham, 203 Ill. 164, 62 L.R.A. 888, 67 N. E. 846; Bailey v. People, 190 Ill. 35, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; Gillespie v. People, 188 Ill. 185, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Eden v. People, 161 Ill. 308, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; Pierce v. Aurora, 81 Ill. App. 670; Starne v. People, 222 Ill. 194, 113 Am. St. Rep. 389, 78 N. E. 61.

The ordinance is void because it permits the inspector of weights and measures to examine any bottle or jar in which milk or cream is sold or offered for sale in the city of Chicago.

Cooley, Const. Lim. p. 365; Sullivan v. Oneida, 61 Ill. 242.

The ordinance deprived the defendant of property, without due process of law.

Wynehamer v. People, 13 N. Y. 378; Baldwin v. Smith, 82 Ill. 165.

The ordinance is unreasonable.

Tugman v. Chicago, 78 Ill. 407; Chicago v. Netcher, 183 Ill. 111, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707.

Mr. Henry M. Selligman, with Mr. George H. White, for defendant in error: The ordinance properly comes within the police power of the city.

1 Starr & C. Anno. Stat. 1896, § 1, art. 5, Cities & Villages Act, ¶¶ 50, 53-56, 66, 96; Brannon, 14th Amerd. pp. 167-170; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Tiedeman, Pol. Power, § 89, p. 208; Dill. Mun. Corp. § 233; McQuillin, Mun. Ord. §§ 484, 485; People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; Savanna v. Robinson, 81 Ill. App. 471; Freund. Pol. Power, § 274; Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610; Thompson v. District of Columbia, 21 App. D. C. 395; Guillotte v. New Orleans, 12 La. Ann. 432; State v. Tyson, 111 N. C. 687, 16 S. E. 238; Turner v. State, 55 Md. 240; 22 Am. & Eng. Enc. Law, 2d ed. p. 919; 30 Am. & Eng. Enc. Law, 2d ed. p. 454; Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; Sylvester Coal Co. v. St. Louis, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649; Stokes v. New York, 14 Wend. 87; McPherson v. Chebanse, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454; Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035; Gundling v. Chicago, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44; Booth v. People, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798; Price v. People, 193 Ill. 114, 55 L.R.A. 588, 86 Am. St. Rep. 306, 61 N. E. 844; Boston Beer Co. v. Massachusetts, 97 U. S. 33, 24 L. ed. 992; Leisy v. Hardin, 135 U. S. 128, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; State v. Dupaquier, 46 La. Ann. 577, 26 L.R.A. 162, 49 Am. St. Rep. 334, 15 So. 502.

An ordinance which operates alike on all persons similarly situated is not class legislation, and is not unreasonable.

Hawthorn v. People, supra; Kettles v. People, 221 Ill. 232, 77 N. E. 472; Erford v. Peoria, 229 Ill. 553, 82 N. E. 374; Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 91, 11 L.R.A. 787, 26 N. E. 493; St. Charles v. Elsner, 155 Mo. 671, 56 S. W. 291; McQuillin, Mun. Ord. § 193; State v. Bishop, 128 Mo. 373, 29 L.R.A. 200, 49 Am. St. Rep. 569, 31 S. W. 9; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Des Moines v. Keller, 116 Iowa, 648, 57 L.R.A. 243, 93 Am. St. Rep. 268, 88 N. W. 827; O'Maley v. Freeport, 96 Pa. 24, 42 Am. Rep. 527.

Where express authority to legislate is given, the question of reasonableness of the ordinance does not apply.
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McQuillin, Mun. Ord. § 181; Shea v. Muncie, 148 Ind. 14, 46 N. E. 138; People v. Armstrong, 73 Mich. 288, 2 L.R.A. 721, 16 Am. St. Rep. 578, 41 N. W. 275; A Coal-Float v. Jeffersonville, 112 Ind. 15, 13 N. E. 115; People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609.

The evidence as to intention was properly excluded.

Thompson v. District of Columbia, 21 App. D. C. 404; New York v. Hewitt, 91 App. Div. 445, 86 N. Y. Supp. 332; Petersburg v. Whitnack, 48 Ill. App. 663.

Hand, Ch. J., delivered the opinion of the court:

It is contended by the defendant that the ordinance for a violation of which it was convicted is unconstitutional in this: That it deprives it of its property without due process of law, and is special legislation.

We think the ordinance can be sustained as an exercise of the police power of the city of Chicago. The police power is said to be an attribute of sovereignty, and to exist without any reservation in the Constitution, and to be founded upon the duty of the state to protect its citizens and to provide for the safety and good order of society. 22 Am. & Eng. Enc. Law, 2d ed. p. 918. In Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610, it was held that the statute requiring the operators of butter and cheese factories on the co-operative plan to give bonds to protect their patrons was valid, as a proper exercise of the police power of the state; and, in McPherson v. Chebanse, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454, that an ordinance prohibiting persons from keeping open their places of business in a city or village for the purpose of vending goods, wares, and merchandise on Sunday was a proper exercise of the police power of such city or village; and, in Booth v. People, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798, that § 130, chap. 38, Crim. Code, which declares grain-option contracts to be gambling contracts, was a valid police regulation and sustainable as such; and in Chicago v. Gunning System, 214 Ill. 628, on page 635, 70 L.R.A. 230, 73 N. E. 1035, it was said: "The police power of the state is that inherent or plenary power which enables the state to prohibit all things hurtful to the comfort, safety, and welfare of society, and may be termed 'the law of overruling necessity.' Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; Wabash, St. L. & P. R. Co. v. People, 105 Ill. 236. Anything which is hurtful to the public interest is subject to the police power, and may

be restrained or prohibited in the exercise of that power. *Dunne v. People*, 94 Ill. 120, 34 Am. Rep. 213; *Cole v. Hall*, 103 Ill. 30; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698. All rights, whether tenable or untenable, are held subject to this police power. *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634." In *People v. Wagner*, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609, an ordinance providing that all bread manufactured by the bakers of the city of Detroit for sale should be made into loaves of 1, 2, and 4 pounds' weight was held to be a valid exercise of the police power. The court, on page 600 of 86 Mich., said: "The police power of a state is not confined to regulations looking to the preservation of life, health, good order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection. *Tiedeman, Pol. Power*, § 89, p. 208." And in *Hawthorn v. People*, 109 Ill. on page 311, 50 Am. Rep. 610, the court, in discussing the question whether the statute then under consideration fell within the exercise of the police power of the state, said: "It is said that this is not a police regulation. That may be true if the term were confined merely to the protection of the health and morals of the people. The term has a much more comprehensive meaning. It has been defined to be, 'the regulation and government of a country or city, so far as it regards its inhabitants;' also, 'the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form.' It is true there are other and more limited meanings of the word, and, when it is said that there are other limits to its exercise than the Constitution, it has reference to the more restricted meaning of the term. When exercised by the legislature in its more comprehensive sense, in the passage of laws for the protection of life, liberty, and property, or laws for the general welfare, the only limitations to restrain its action must be found in the Constitution. This, in the larger sense, is an exercise of the police power by the general assembly, and falls fully within legislative power, and sustains the enactment under consideration." And, under the police power of the state, it is held "weights and measures are established." *Cooley, Const. Lim.* 2d ed. p. 596; *State v. Wilson*, 61 Kan. 32, 47 L.R.A. 71, 58 Pac. 981. It is said the police power of the state may, in the absence of any constitutional restrictions upon the subject, be delegated to the various municipalities throughout the state, to be exercised by them within 17 L.R.A. (N.S.)

the corporate limits. 22 Am. & Eng. Enc. Law, 2d ed. p. 919.

Milk and cream are articles of general consumption. They are usually sold by the pint or quart, and, while each transaction involves but a few cents, the number of such transactions in a large city like Chicago daily reaches a large sum. The opportunities for fraud in their sale are great, and the ordinary legal remedy afforded the individual consumer to protect himself against fraud or deceit is wholly inadequate. Clearly, therefore, an ordinance like the one under consideration is valid, and is not obnoxious to any of the provisions of the state or national Constitution.

Neither does the fact, we think, that the ordinance does not apply to all persons who vend substances in liquid form, or to all persons who engage in the business of selling milk or cream in the city of Chicago, make the ordinance void as special legislation. The ordinance, as framed, applies to all persons who sell milk or cream in bottles or glass jars in the city of Chicago, and in the fullest sense is general in its terms. In *Hawthorn v. People*, 109 Ill., on page 311 50 Am. Rep. 610, it was said: "It [the statute] embraces all persons in the state similarly engaged. If all laws were held unconstitutional because they did not embrace all persons, few would stand the test. . . . A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced." And in *Gundling v. Chicago*, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44, it was held that the city council of Chicago might pass an ordinance regulating the sale of cigarettes under the exercise of its police power, and that the ordinance was not void as special legislation by reason of the fact that it did not require a license to sell tobacco in all its forms in said city, but subjected only tobacco to regulation put up in the form of cigarettes.

It is also urged that the defendant is deprived of its property in the bottles which it had on hand at the time the ordinance went into effect on October 1, 1907. The exercise of the police power differs from the exercise of the right of eminent domain. Under the right of eminent domain, property cannot be taken or damaged without compensation; but, under the police power, it may be destroyed, and the owner left remediless. 22 Am. & Eng. Enc. Law, 2d ed. p. 916. In the *Booth Case*, on page 48 of 186 Ill., it was said: "In the exercise of this power the general assembly may, by valid enactments, i. e., 'due process of law,' prohibit all things hurtful to the comfort, safe-

ty, and welfare of society, even though the prohibition invade the right of liberty or property of an individual. 18 Am. & Eng. Enc. Law, pp. 739, 740; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71. . . . It is not without the power of the general assembly, in the proper exercise of the police power, by an enactment otherwise valid, to declare that unlawful which was theretofore lawful, even if the act so condemned be an attribute of the right of liberty or property guaranteed to the citizen by the constitutional provisions under consideration."

It is also said that the evidence does not show that the defendant knowingly had bottles in its possession which had less capacity than the amount indicated on their outside. The evidence showed the defendant had bottles for use in its business in its possession which held less than the markings on the outside showed they would hold. This proof was sufficient to show a violation of the ordinance, and the defendant could not excuse itself by saying that it had neglected to inform itself of the size of the bottles which it had in its possession.

The defendant has urged other reasons for a reversal, but we think them without force.

The judgment of the Municipal Court of Chicago will be affirmed.

Petition for rehearing denied June 4, 1908.

KENTUCKY COURT OF APPEALS.

WOLFE COUNTY et al., Appts.,

v.

T. M. BECKETT et al.

(— Ky. —, 105 S. W. 447.)

Tax — oil and gas wells.

1. The property held under an oil and gas lease which vests in the lessee all the property rights to the oil and gas that may be found in paying quantities on the premises is taxable to the lessee under statutes taxing all real and personal property within the state, and making it the duty of persons owning any oil or gas privileges by lease or otherwise to list them for taxation. Same — resident owners.

2. A statute making it the duty, under penalty, of all persons owning any oil or gas privileges other than in the county in which the owners reside, to list the property for taxation in the county where situated at the same time and in the same manner as is now required by law of resident owners, applies alike to owners of such property whether resident or nonresident. 17 L.R.A. (N.S.)

Same — landowners — interest — deduction.

3. The owner of an oil and gas lease which requires him to deliver one eighth of the product of the wells to the owner of the land may deduct the value of such portion from that of the whole privilege, in listing his interest for taxation.

(November 20, 1907.)

APPEAL by defendants from a judgment of the Circuit Court for Wolfe County in favor of petitioners in a proceeding to set aside the proceedings of the Board of Supervisors and establish those of assessors upon an appeal from the action of those officials fixing the value of certain oil and gas leases for purposes of taxation. Reversed.

The facts are stated in the opinion.

Messrs. G. B. Stamper and S. G. Sample for appellants.

Messrs. Fulks & Hovermale and Gourley, Redwine, & Gourley for appellees.

Olney, C., delivered the opinion of the court:

Appellee T. M. Beckett listed for taxation in Wolfe county for the year 1907, along with other property, property of the value of \$1,000 under the item, "Steam

Case Note. — Interest of one other than the owner of the soil in mineral in situ as independent subject of taxation.

Cases like *Bakersfield & F. Oil Co. v. Kern County*, 144 Cal. 148, 77 Pac. 802, involving the question whether the possessory right to a mining claim on public lands is subject to taxation, are not within the scope of this note. In many of the cases cited in the note the ultimate question as to the separate liability of the interest in the mineral to taxation apart from the soil depended upon the question whether the particular instrument by which such right was created was to be regarded as a conveyance of mineral *in situ*, operating to dis sever the fee in the mineral from the fee in the soil, or a mere lease or executory contract creating at most only a chattel real, and not a new estate in realty. The character and terms of the instruments construed in some of these cases are shown in the case note to *Coolbaugh v. Lehigh & W. B. Coal Co.* 4 L.R.A. (N.S.) 207 (which deals with the general question whether an agreement or instrument conferring the right to mine or remove coal is to be regarded as an absolute sale of coal in place, as distinguished from a lease or a conditional sale); and, when that is the case, they will not be repeated in connection with the citation of the cases in this note.

It is well settled that, by an instrument in proper form, the fee in the mineral may be severed from the fee in the surface; and

engines and boilers." This the board of supervisors for the county raised to \$3,000. Under the items, "Coal mines, oil, gas, and salt wells," he listed property of the value of \$14,000. This the board of supervisors raised to \$55,825. Appellee Milton Garver listed for taxation in the same county for the year 1907 under the items, "Coal mines, oil, gas, and salt wells," property of the value of \$2,500. This valuation the board of supervisors raised to \$5,000. Appellee Morehead Oil & Gas Company had listed to it by the board of supervisors for the year 1907, under the items, "Coal mines, oil, gas, and salt wells," property of the value of \$15,000. From the final action of the board of supervisors, appellees herein appealed to the Wolfe county court. That court sus-

tained the action of the board of supervisors. Appellees then appealed to the Wolfe circuit court. There they filed a petition alleging that they held the oil and gas wells by leases, but they had no title to the realty covered by their respective leases; that the leases simply gave them a license or privilege to go upon the lands, and drill and explore for oil, and pump the same; and that the oil under the lands covered by the leases was realty until severed from the soil, and was not properly taxable to appellees. They then asked that the action of the board of supervisors in listing the oil and gas wells to them be declared to be invalid, and that the valuation as fixed by the assessor be adjudged to be the proper valuation of the personal property to be listed by each of the ap-

that, when that has been done, each fee or interest is separately assessable and taxable to the owner thereof as real estate. *Re Major*, 134 Ill. 19, 24 N. E. 973; *Consolidated Coal Co. v. Baker*, 135 Ill. 545, 12 L.R.A. 247, 26 N. E. 651; *Sholl Bros. v. People*, 194 Ill. 24, 61 N. E. 1122; *Stuart v. Com.* 94 Ky. 595, 23 S. W. 307; *Smith v. New York*, 68 N. Y. 552; *Logan v. Washington County*, 29 Pa. 373; *Sanderson v. Scranton*, 105 Pa. 469; *Delaware, L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394; *Miles v. Delaware & H. Canal Co.* 140 Pa. 623, 21 Atl. 427; *Powell v. Lantzy*, 173 Pa. 543, 34 Atl. 450; *Waterman v. Davis*, 66 Vt. 83, 28 Atl. 664; *Low v. County Court*, 27 W. Va. 785; *United States Coal, Iron & Mfg. Co. v. Randolph County Court*, 38 W. Va. 201, 18 S. E. 566.

In *Consolidated Coal Co. v. Baker*, supra, the court, in reply to an objection to the taxation of the right to the coal, based upon a provision of the revenue act, that, in valuing any real property on which there is coal or other mine, the same shall be valued at such a price as the property, including the mine or quarry, would sell at a fair, voluntary sale for cash, said that it is true that the total assessment must equal the value of the land, augmented by the value of the coal or mine; but that the assessment of each should be made separately according to the several holdings.

In *Ridgway Light & Heat Co. v. Elk County*, 191 Pa. 465, 43 Atl. 323, also, it was held that gas rights conveyed by deeds and conveyances apart from the soil were in their nature separately assessable as land to the owners thereof; though the rights in question were held in this case, and in the companion case of *St. Mary's Gas Co. v. Elk County*, 191 Pa. 458, 43 Atl. 321, to be exempt from local taxation because they were owned by a public corporation, and were indispensably necessary to carry out the purpose for which it was chartered.

In *Re Maplewood Coal Co.'s Appeal*, 213 Ill. 283, 72 N. E. 786, it was held that coal-mining rights separated from the ownership of the soil were assessable to the owner of 17 L.R.A. (N.S.)

such rights, even if such severance occurred after the last quadrennial assessment of the lands. The court said that, if the assessment to the original proprietor includes the mining rights as well as the land, he has his remedy, but the owner of the mining rights cannot complain. To the same effect is *People ex rel. Mooneyham v. O'Gara Coal Co.* 231 Ill. 172, 83 N. E. 140.

If the instrument by which the right in the mineral is conveyed is, when properly construed, a mere lease or license, and does not dis sever the fee in the mineral from the fee in the soil or surface, while it may, by virtue of local statute, be taxable as personal property, it is not separately taxable as real property.

Thus, an instrument purporting to lease for the term of forty years a described tract of land "for the purpose of mining garnets thereon, with all the privileges pertaining thereto," the lessee to pay a semiannual rent and a royalty, and the lease being terminable by him upon a specified payment, or by the lessor in case of the non-payment, having been construed to create merely a chattel interest in the grantee, and not to sever the fee in the mineral from the fee in the soil,—it was held that the lessee's interest was not taxable as an interest in real estate, under Conn. Rev. Stat. 1902, § 2322, which, in describing real estate liable to taxation, provides that quarries, mines, and ore beds, whether owned in fee or leased, shall be set in the lists separately at their present true and actual valuation.

So, in *Jones v. Wood*, 9 Ohio C. C. 560 (affirmed without opinion in 54 Ohio St. 627, 47 N. E. 1119), an instrument having been construed to be a license or a lease at will of the right to mine minerals, and not a conveyance of the mineral *in situ*, it was held that such rights could not be taxed as real property.

Where coal, oil, or other mineral underlying a tract of land is conveyed by deed or lease, the grantee takes an estate in land assessable and taxable to him; but, if the instrument is but a lease for a definite term, with the probability or possibility of

pelles. A demurrer was interposed by appellants, Wolfe county and the commonwealth of Kentucky, which was overruled by the court, and, the appellants having declined to plead further, the court entered judgment to the effect that the oil in place and in oil wells, except as oil is produced by same, is a part of the realty and belongs to the owner of the surface until it is taken from the ground, or until the owner makes absolute deed to the oil under the surface, thus separating it from the realty, and that a lease for a term of years, or any time less than a life estate, is not such an interest in real estate as requires the tenant or lessee to pay the taxes on the leased premises. From that judgment the county of Wolfe and the commonwealth of Kentucky are here on appeal.

It will be observed that this appeal involves the following questions: (1) Are oil and gas wells held under lease taxable? (2) If they are taxable, who should pay the tax, the lessor or lessee?

Before passing upon these questions, it may be well to advert to the general principles of law regulating the subject of taxation. It is well settled that the power to impose taxes is one so unlimited in force, so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except

such as rest in the discretion of the authority which exercises it. *McCulloch v. Maryland*, 4 Wheat. 431, 4 L. ed. 583. It may touch property in every shape,—in its natural condition, in its manufactured form, and in its varied transmutation. It may touch business in the almost infinite forms in which it is conducted,—in professions, in commerce, in manufacture, in transportation. *State Tax on Foreign-held Bonds*, 15 Wall. 309, 21 L. ed. 179. Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, franchise or privilege, occupation or right. Nothing but special constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature, in its discretion, shall select it for revenue purposes. *Cooley*, *Taxn.* page 9. This extends to property, whether it be tangible or intangible, and it matters not in what the intangible property consists, whether privilege, corporate franchises, contracts, or obligations. It is enough that it is property, which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a

its reversion of the grantor, the estate is not assessable as land, to the grantee. *Moore's Appeal*, 4 Pa. Dist. R. 703. In this case it was held that the assessment of the land to the owner properly included its enhanced value from its oil-producing capacity.

An instrument executed with the formalities of a deed, giving one the right to enter upon land and open and test slate rocks or quarries, and, if suitable material is found, to manufacture roofing slate therefrom until the rock is exhausted, he agreeing to pay a certain royalty as "rent," and the owner of the land reserving the use of all the property not needed for working the quarry, is a lease; and creates no interest in land which is taxable to the lessee as such. *Hughes v. Vail*, 57 Vt. 41.

The interest of a lessee under an oil and gas lease conferring the right to "enter upon, operate for, and procure oil and gas" is not subject to separate taxation under a statute providing that, where the fee to the surface is in one person, and the right or title to minerals therein in another, such right shall be valued and listed separately from the fee, as that statute applies only when the right or title to minerals in place has been severed from the right or title to the surface. *Kansas Natural Gas Co. v. Neosho County*, 75 Kan. 335, 89 Pac. 750.

So, the word "held," in a statute providing that, when mineral, mineral water, oil, gas, or coal privileges or interests are held

by a party or parties, or any company or association, exclusive of the surface, the same shall be assessed separately to such party or parties, company or association, does not contemplate the holding of a lessee who agrees to pay a royalty for the coal mined and removed, the title remaining in the lessor; but contemplates a case in which another party has become the owner of the mineral or coal, and holds it as such owner. *United States Coal, Iron & Mfg. Co. v. Randolph County Court*, *supra*.

To the same effect is *State v. South Penn Oil Co.* 42 W. Va. 80, 24 S. E. 688.

A conveyance of a fractional undivided interest of oil, gas, and other minerals under a tract does not sever the ownership of the minerals *in situ* from the title to the soil, and is therefore not subject to separate assessment as real estate, under a statute providing that, where one person becomes the owner of the surface and the other of the minerals, the assessor shall divide the value at which the whole had before been assessed among the different owners. *Barnes v. Bee*, 138 Fed. 476.

It will be observed that the question thus far considered was not the general one whether the interest in mineral *in situ* is subject to separate taxation, but whether it is subject to separate taxation as real estate. It will be noted that in *WOLFE COUNTY v. BECKETT* the question arose under a statute declaring all real and per-

large proportion of the wealth of the country. People ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705.

Bearing these principles in mind, what has the legislature declared to be taxable? Section 4020, Ky. Stat. 1903, provides as follows: "All real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale." Under this section, all property not exempted by the Constitution is made subject to taxation. It is contended, however, that property held under lease is not subject to taxation in the hands of the lessee. As a general proposition this is true, but there is a wide difference between an ordinary lease of lands and an oil or gas lease. Under the former, the lessee has only the right to occupy and cultivate the land, and take therefrom the growing crops. At the expiration of his lease, the property is in-

tact. Its condition is substantially the same as it was when he entered upon the land. The property owned by the lessor is not diminished. Its value is practically the same. This is not true, however, of an oil or gas lease. The latter carries with it not only the privilege of going upon the lands for that purpose, but the right to take therefrom during the continuance of the lease such oil or gas as may be found. The title to the oil or gas is vested by the lease in the lessee. It is his property of recognized value. He controls it and disposes of it as his own. Not only is the oil or gas property, but the lease under which it is taken from the ground is property which has substantial value and is the subject of frequent sale. If, at the expiration of the lease, the property be returned to the lessor, its value has been diminished to the extent that oil and gas have been taken therefrom, and the value of the property to that extent has been enjoyed by the lessee.

It is contended, however, that the oil *in situ*, being a part of the realty, cannot be severed therefrom except by deed. It is admitted that the leases held by appellees are of the usual kind. They give to appellees the right to drill and operate for oil and gas for a definite term of years, and, in case oil or gas is found in paying quantities, to continue said operations so long as same is

sonal estate subject to taxation, and the court, while holding that the interest of the lessee was subject to taxation, does not specifically decide whether it was subject as personal or real property. Treating the subject of taxation as personal property, the decision in that case has some support from Harvey Coal & Coke Co. v. Dillon, 6 L.R.A.(N.S.) 628, which, after construing an instrument granting the right of mining, shipping, and selling coal from premises to be not a conveyance disavowing the fee in the coal from the fee in the surface, but a lease creating merely a chattel real, held that it was taxable under a statute which provides for the taxation of all personal property, "including chattels real." The case of Carter v. Tyler County Court, 45 W. Va. 806, 43 L.R.A. 725, 32 S. E. 216, holding that the prospective production of oil under a lease for oil and gas purposes upon the usual terms and conditions, including the payment of one eighth of the oil produced as royalty, cannot properly be charged to the lessee on the personal-property books of the county, since the oil while it remains *in situ* must be regarded as realty and as the property of the lessor,—was distinguished in the Dillon Case upon the ground that the assessment in the Carter Case was on the future production of oil (the court regarding it as a tax upon oil in its place), whereas the as-

essment in the Dillon Case was on the intangible chattel real, the leasehold.

The same distinction applies to the statement in Peterson v. Hall, 57 W. Va. 535, 50 S. E. 603, that a lessee under an ordinary oil lease for years has no vested taxable interest in the oil still in the ground, either before or after he has found paying wells.

The right to one sixteenth of the oil to be produced, reserved by the owner of an oil leasehold in an assignment of the same, whether it be called personal property, a chattel real, incorporeal hereditament, or privilege, is property, and as such subject to taxation under a statute declaring it to be the duty of all persons owning any real or personal property, mineral rights, or any coal, oil, or gas privileges, by lease or otherwise, or any interests therein, to list the same for taxation. Mt. Sterling Oil & Gas Co. v. Ratliff, 31 Ky. L. Rep. 1229, 104 S. W. 993.

The constitutionality of a statute taxing the lessee's right as a chattel real was expressly upheld in Harvey Coal & Coke Co. v. Dillon, *supra*; and the constitutionality of a statute requiring the separate taxation of the fee in the minerals when severed from the fee in the surface was upheld in Low v. County Court and United States Coal, Iron & Mfg. Co. v. Randolph County Court, *supra*.

found in quantities that pay. Appellees agree, on their part, to deliver one eighth of all oil found by reason of such operations in suitable pipe lines to the owner of the fee, the lessor, and to pay a fixed sum per year for each well the product of which is carried and marketed from the premises. The remainder of the oil or gas is the property of the lessees. Why, then, say that a deed is necessary to sever the oil from the realty, when the lease accomplishes the same result? During the continuance of the lease, the ownership of the oil or gas is vested in the lessee; and, as the lease continues so long as oil or gas may be found in paying quantities, does not the lessor part with his title to the oil *in situ* for all practical purposes, for the reason that it has no value if it cannot be produced in quantities that pay? We therefore conclude that the form of contract is immaterial, and that it makes no difference whether the oil or gas privileges be conveyed by deed or lease, just so the effect of the instrument is to vest in the lessee all property rights to the oil or gas that may be found in paying quantities on the leased premises. In this view we are confirmed by the supreme court of West Virginia in *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 6 L.R.A. (N.S.) 628, 53 S. E. 941, where in the court said: "There can be several estates or interests, each property in a tract of land. Especially can there be a chattel real, savoring of it, issuing out of it. 'Several persons may have in one tract of land distinct interests which are the subject of taxation, such as land and mineral rights, or land and growing trees, or land and structures thereon.' 27 Am. & Eng. Enc. Law, 2d ed. p. 640. The chattel is a separate property from the land, taking neither its title nor its soil in itself, vested in a different person, carved out of the fee, a particular estate distinct as a life estate. Always has the common law regarded it as distinct property, and of value as property. Is not the lease in this case a highly valuable asset of the corporation? Has it not a distinct property in it alone? Who can say that a conveyance of coal in fee does not create a separate property, taxable as such? Why is not a long lease vesting the lessee with right to take coal not a valuable separate property? The surface owner has lost dominion over the coal; the lessee has complete dominion. Still each has a property, taxable distinctly, if the state elects to do so, because they are different properties, and each one ought to pay taxes on his own property." However, if there were any doubt of the purpose of the legislature to tax oil or gas leases under § 4120, that doubt was removed by the enactment of § 4039, which was re-enacted in Acts 1906, chap. 22, § 20, p. 93, and is 17 L.R.A. (N.S.)

in part as follows: "That it shall be the duty of all persons owning any real or personal property, mineral rights, or standing (branded) trees of any kind whatever, on the lands of another, or any coal, oil, or gas privileges, by lease or otherwise, or any interest therein, in this state, other than in the county in which the said owners reside, or if they should reside out of the state, to list the property for taxation personally or by authorized agent, in the county where situated, at the same time and in the same manner as is now required by law of resident owners," etc. It is the contention of appellees that the above statute is a penal, and not a taxing, statute, and applies only to nonresidents of the county or state. Such contention is manifestly unsound. If that were the case, the statute itself would be unconstitutional upon the ground of unjust discrimination and lack of uniformity. The statute distinctly recognizes that the different kinds of property therein enumerated are taxable. Doubtless nonresidents of the county and state were claiming that their coal, oil, and gas privileges held under lease were personal property, and were taxable at their domicils, and in this manner were virtually escaping taxation thereon. The purpose of the legislature was to fix the situs for taxation of such property in the counties where the lands covered by such leases were situated. In doing this it provided that nonresident owners (speaking of both the county and state) should list the property for taxation personally or by authorized agent, in the county where situated, at the same time and in the same manner as is now required by law of resident owners. For failure to do this a penalty is provided. Manifestly, therefore, if the listing of such property were not required of resident owners, no penalty could be inflicted upon nonresidents. That being the case, we think the statute applies to all owners of such property, whether resident or nonresident.

Having held that oil or gas privileges held by lease or otherwise, or any interest therein, are taxable, it remains to be determined how the tax on such property shall be apportioned between the lessor and lessee. This court, in *Mt. Sterling Coal & Gas Co. v. Ratliff*, 31 Ky. L. Rep. 1229, 104 S. W. 993, recently laid down the rule that the lessor or owner who, by the terms of the lease, receives one sixteenth of the oil produced from the leased premises, should pay taxes to that extent; and that it was immaterial by what name such property was called,—whether personal property, a chattel real, incorporeal hereditament, or privilege,—it was nevertheless property and as such was taxable under § 4039, Ky. Stat. That being the

case, it necessarily follows that appellees are not taxable upon the whole value of their oil or gas privileges. From that value there should be deducted that portion thereof represented by the amount of oil reserved to the lessor. The remainder is taxable against the appellees.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

MISSISSIPPI SUPREME COURT.

BOARD OF SUPERVISORS OF HANCOCK COUNTY, Appt.,
v.

IMPERIAL NAVAL STORES COMPANY.

(— Miss.—, 47 So. 177.)

Tax — turpentine lease.

A grant of the right to take turpentine from standing trees for a specified time is not subject to taxation as a separate or special interest in land.

(June 22, 1908.)

APPEAL by the supervisors of Hancock County from a decree of the Circuit Court for Hancock County setting aside its

assessment for taxation of a certain turpentine right belonging to the Imperial Naval Stores Company. Affirmed.

The facts are stated in the opinion.

Messrs. B. P. Harrison and R. V. Fletcher, Attorney General, for appellant: The grant of a turpentine license or lease is an alienation of an interest in land.

Millikin v. Carmichael, 134 Ala. 623, 92 Am. St. Rep. 45, 33 So. 9.

Mr. W. J. Gex, for appellee:

A turpentine license, right, or lease is not an interest in lands or assessable as such.

27 Am. & Eng. Enc. Law, 2d ed. p. 642; Ashe Carson Co. v. State, 138 Ala. 108, 35 So. 38; Orrell v. Bay Mfg. Co. 83 Miss. 824, 70 L.R.A. 881, 36 So. 561; Bryant v. United States, 45 C. C. A. 145, 105 Fed. 943; 18 Am. & Eng. Enc. Law, p. 1127; Callen v. Hilty, 14 Pa. 286; Rathbone v. McConnell, 21 N. Y. 469; Hetfield v. Central R. Co. 29 N. J. L. 571; Declouet v. Borel, 15 La. Ann. 606.

Mr. R. W. Stoutz also for appellee.

Whitfield, Ch. J., delivered the opinion of the court:

This case was tried by agreement between the parties before the judge, a jury being

Case Note. — *Interest of one other than the owner of the soil in growing trees or timber, or their products, as separate subject of taxation.*

The analogous question with reference to mineral rights is discussed in the note to Wolfe County v. Beckett, ante, 688.

The statute under which the decision in Ashe Carson Co. v. State, 138 Ala. 108, 35 So. 38, otherwise sufficiently set forth in the above opinion, was rendered, provides that "every separate or special interest in any land such as mineral, timber, or other interest, when such interest is owned by a person other than the owner of the surface or soil, is subject to taxation." It was held in the previous case of Freeman v. State, 115 Ala. 208, 22 So. 560, that a separate timber interest separately taxable under this statute was created by an instrument purporting to "lease" certain land for the period of eight years "for the purpose of cutting pine saw logs therefrom," and containing provisions looking to the protection of the lessor, among which was one that, if the lessee should fail to comply with any provisions of the contract, the lease should be voidable at the option of the lessor, and another for extra compensation if the lessee obtained logs from the land in excess of the estimated quantity. This case is not mentioned in the opinion in the Ashe Carson Co. Case, and it is not clear whether it can be reconciled with the decision in that case, or is to be regarded as impliedly 17 L.R.A. (N.S.)

overruled thereby. If there is any distinction, it would seem that it must be found in the fact that in the Ashe Carson Co. Case the subject of the lease was turpentine, whereas in the Freeman Case the subject of the lease was the standing timber. The terms of the instrument in the Freeman Case seem no more appropriate to the severance of a fee in the timber from a fee in the soil than in the other case; nor does the decision seem to have been rendered upon the assumption that such was the effect of the instrument.

In Fox v. Pearl River Lumber Co. 80 Miss. 1, 31 So. 583, it was held that the interest of one person in standing timber on the soil of another was separately assessable, as an interest in real estate, to the former. The terms of the instrument by which the interest in respect of the trees was granted do not appear.

The right to standing timber, created by an instrument purporting to grant, bargain, sell, transfer, and convey all the pine and oak timber 10 inches and over in diameter at the stump, growing on certain land, with the privilege for fifteen years to enter upon the land and remove the timber, is property assessable for taxation apart from the land itself, under a statute levying taxes on the assessed valuation of "all property" situated within the state, except that expressly exempted. Globe Lumber Co. v. Lockett, 106 La. 414, 30 So. 902.

But an instrument which purports to sell and transfer the right to deaden, cut, and

waived, upon an agreed statement of facts. The agreed statement of facts is, in substance, as follows:

That the plaintiff possessed a turpentine license or right, evidenced, in the only parts necessary for our consideration, by the following instrument:

John Smith to Imperial Naval Stores Co.
State of Mississippi, Hancock County.

This agreement, made and entered into on this the 23d day of May, A. D. 1902, by and between the Imperial Naval Stores Company, of Hancock county, Mississippi, and the said John Smith, of said county and state, witnesseth as follows, to wit: The said John Smith hereby bargains and leases to the Imperial Naval Stores Company all the pine timber on the following described land, to wit: . . . —in Hancock county, Mississippi, to be used for turpentine purposes for the term of three years from date of cutting boxes; said lease not to exceed ten years from date. The said Imperial Naval Stores Company agrees to pay \$12.50 per thousand boxes for said lease; the sum of \$500 being paid, and said Imperial Naval Stores Company to pay the balance when trees are boxed and counted.

Given under my hand and seal, this the 23d day of May, A. D. 1902.

John Smith.

Witnesses: Thos. Haitheoke.

Joseph Davis.

State of Mississippi, Hancock County.

Personally appeared before me, J. P. Mauffray, a member of the board of supervisors of the county of Hancock, and said state, the within named Jno. J. Smith, who acknowledged that he signed and delivered

the foregoing instrument on the day and year therein mentioned.

Given under my hand this the 11th day of September, A. D. 1902. J. P. Mauffray.

That said lease, license, or grant, by whatever words it may be called by the court, was duly assessed at the sum of 50 cents per acre on said turpentine right, for every acre of land embraced in said lease, by the assessor of Hancock county, on the land roll of said county, as an interest in the said lands, and that the assessment roll was duly approved by the board of supervisors at a regular meeting thereof, all of which assessment, equalization, and approval of said assessment concerning said turpentine rights were had over the objection of said plaintiff. That the said plaintiff is a foreign corporation of the state of Louisiana, with its principal place of business in New Orleans. That the said lands described in said lease were duly and regularly assessed at their true and full value, the said turpentine right thereon not having been taken into consideration as affecting the actual assessable value of the said lands, which lands were assessed at the same valuation they would have been assessed at had the said turpentine right not existed. That the purpose of presenting this cause is to have the court decide two questions: First, Is a turpentine license, right, or lease an interest in lands, and so assessable? and, second, If not, is such license or right assessable at all, and, if so, is a nonresident corporation assessable with said right or lease under the laws of this state?

It is conceded that this last proposition

remove all cypress trees then standing on certain described property, all trees remaining on the land after the expiration of ten years to revert to the owners of the land, does not transfer a present title to the trees as such, so as to render them taxable to the purchaser as tangible movables. *Williams v. Eliche*, 107 La. 92, 31 So. 926. The court repudiated the contention of the taxing officers that the trees, though immovable in fact, were "mobilized by anticipation," so as to render them subject to taxation as tangible movables. It was also assumed that the instrument did not operate to sever a fee in the trees from the fee in the soil, so as to render them separately subject to taxation as immovables; the court distinguishing the case in this respect from *Globe Lumber Co. v. Lockett*, by reason of the difference in the terms of the instruments by which the rights were created in the respective cases. The court further said that the question whether the right in respect of the trees was subject to separate taxation could not be affected by the agreement between the parties in respect of taxa-

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tion, but must be determined by reference to the legal situation resulting from the instrument.

The right to enter upon land and cut and remove timber therefrom at any time within twelve years, the timber not cut within that period to revert to and become the property of the grantor, is not separately taxable as real estate. *Clove Spring Iron Works v. Cone*, 56 Vt. 603.

Standing timber reserved upon the sale and conveyance of the land is not assessable as personal property or as "forest products." *Fletcher v. Alcona Twp.* 72 Mich. 18, 40 N. W. 36. While it is stated in the opinion that the ownership of timber standing and growing on land is an interest in the land itself, and, under the statute, assessable as realty, other parts of the opinion seem to imply that the value of the timber should be included in the assessment on the land.

Cases like *Wilson v. Cass County*, 69 Iowa, 147, 28 N. W. 483, where the right or interest in the timber or trees belongs to the owner of the land are not within the scope of this note.

is not necessarily involved in this record. The court below held that the instrument passed no interest in the land as land, and that it was not assessable. It is conceded in the case that the land embraced in the instrument was assessed at its full value *qua* land, and that the pine trees were in that assessment treated as part of the land, both belonging to the plaintiff. In treating of a precisely similar lease, the supreme court of Alabama, in the case of *Ashe Carson Co. v. State*, 138 Ala. 108, 35 So. 38, said: "The statute above quoted, under which it is claimed the state has the right to tax the interest the lessees acquired under their lease as an interest in land, is one which must be strictly construed against the state. The purposes of the statute was to tax the ownership of the land, and when the title to some substantial part of the land is vested in one person, and the general title is vested in another, the interests are taxable separately. It does not extend to a person who has a mere right to go upon land of another to derive some profit therefrom. Construing the statute most strictly against the state (*Cooley on Taxation*, 266), it would seem that the right which was given to the lessees by the lessors under their contract to take crude turpentine from standing trees was not a special possessory interest in the land itself, within the meaning of the statute. *Kennedy Stave & Cooperage Co. v. Sloss Sheffield Steel & Iron Co.* 137 Ala. 401, 34 So. 372. The turpentine was the only thing to be acquired by the lessees from the timber and land. Under the lease, the land and timber remained the property of the lessors. The sole object of the lessees in entering into the contract was to extract from the trees the crude turpentine as a product from the land, leaving the trees and the soil to the lessors, the owners of the land, after the expiration of the lease." The statute referred to by the supreme court of Alabama is § 3911, subdiv. 1, of the Code of 1896, which provides as follows: "Every separate or special interest in any land, such as mineral, timber, or other interest, when such interest is owned by a person other than the owner of the surface or soil," is subject to taxation.

The instrument in this Alabama case is substantially identical with the instrument in this case, and the decision of the Alabama supreme court is squarely in point here. No interest in the land passed by this instrument, and, by whatever name it may be called, it was nothing but the grant of a right to take the crude turpentine from the trees during the period stipulated for, at the consideration named. The crude resin or product of the tree might itself be taxed 17 L.R.A. (N.S.)

as personal property when severed from the tree, or the turpentine made from such crude product itself be taxed as personal property; but the instrument conveys no interest in the land as land. Now, the precise point presented for our determination is whether the right granted by this instrument was taxable as an interest in the land itself at 50 cents per acre. It was so assessed on the land roll, it was dealt with by the court below in that view alone, and consequently the point made by the learned attorney general, that, if we should hold that the crude products are taxable as personal property, then this judgment should be reversed under the principle announced in *Tunica County v. Tate*, 78 Miss. 294, 29 So. 74, is not tenable on the point presented by this record. It is true, as held in that case, "that the law taxes the property, and is not to be defeated by its being put on one assessment roll rather than another;" but dealing, as we must on the face of this record, with an assessment on this right on the land assessment roll as an interest in the land, the only question for decision here is whether that particular judgment is correct. All the crude products obtained from these pine trees, or all the turpentine made from them, certainly should be assessed to the appellee, and taxes paid on them by the appellee, just as they would be paid on any similar personal property; "but that is another story."

In 27 Am. & Eng. Enc. Law, 2d ed. at page 642, it is said that "a license to go on land and sever and remove the products thereof has been held to be not such an interest in the land as is taxable as real property," and in the note thereto certain authorities are cited, including *Ashe Carson Co. v. State*, *supra*. We think this is the correct announcement of the law on this point. In the case of *Millikin v. Carmichael*, 139 Ala. 226, 101 Am. St. Rep. 29, 35 So. 706, the Alabama supreme court held that a turpentine lease was valid without the wife's having joined in the acknowledgment of the lease, though the subject-matter, the land, was a homestead. In other words, the effect of that decision was squarely to hold that all such an instrument as this grant is, is merely the right of user of the homestead for a particular turpentine purpose, as distinguished from an alienation of any interest therein as a homestead. There were two such alleged leases in that case, one with such acknowledgment and one without it, and the instrument first executed was the one without the acknowledgment, and the one which the court upheld in a contest between the two. The case of *Gex v. Dill*, 86 Miss. 10, 38 So. 193, in no way conflicts with this view. It held nothing except that

an instrument like this was not revocable by the death of the grantor when it was based upon a valuable consideration. In the case of *Orrell v. Bay Mfg. Co.* 83 Miss. 824, 70 L.R.A. 881, 36 So. 561, we held that an instrument like this does not pass or alien any interest in the land as land; but that case considered § 2291, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 1390, which declared that "no part of such land has been alienated," etc., and our holding, perfectly sound, and which we now reaffirm, was that such an instrument as this is no alienation of any part of the land as land. That case was thoroughly well considered, and the opinion in that case by Judge Truly is full and careful and thoroughly sound, and is, we think, decisive of the controversy in this case.

In the Alabama case referred to and criticized in *Orrell v. Bay Mfg. Co.* supra, to wit, *Millikin v. Carmichael*, 134 Ala. 623, 92 Am. St. Rep. 45, 33 So. 9, it seems to have been conceded in argument, curiously, that the separate homestead acknowledgment was necessary, and, secondly, that the instrument was violative of the policy of the Federal statutes in respect to homesteads. We refused in the *Orrell* Case to follow the Alabama supreme court on the second proposition that such an instrument as this is in violation of the policy of the Federal statutes in respect to homesteads; and the Alabama supreme court in the late case of *Millikin v. Carmichael*, 139 Ala. 226, 101 Am. St. Rep. 29, 35 So. 706, squarely held that the homestead acknowledgment was not necessary to such an instrument as this. These two cases, *Orrell v. Bay Mfg. Co.* 83 Miss. 800, 70 L.R.A. 881, 36 So. 561, and *Millikin v. Carmichael*, 139 Ala. 226, 101 Am. St. Rep. 29, 35 So. 706, in effect decide, also, as a necessary corollary, that such an instrument as this conveys nothing which in any wise diminishes or impairs the value of the land as land, or of the trees as trees. Mr. Justice Truly, in the *Orrell* Case, supra, quotes approvingly from *Bryant v. United States*, 45 C. C. A. 148, 105 Fed. 943, this passage: "We think it is not a matter of common knowledge that such cutting and boxing of pine trees destroy the value of the trees as timber, or that it has a tendency to retard the growth of the trees. It is, however, we think, a matter of common knowledge, of which we may take notice, that, on March 2, 1831, and long before that date, the 'turpentine business' was an industry most prevalent in all the parts of the country where there were pine-growing public lands, and, if it had been the intention to protect these public lands from the ravages of that business, it would have been easy to make that intention clear by the use

of appropriate words." We thoroughly agree with this statement that it cannot be said to be a matter of common knowledge that the cutting and boxing of pine trees destroy the value of the trees as timber; and we further agree that everywhere in the country where pine trees were growing on public lands this turpentine business had been in vogue since before 1831. It is said in the course of argument, and with great force, that, if such an instrument as this could be held to convey any interest in the land as land, then the value of the land for assessment purposes should be reduced by the value of this interest in land for assessment purposes; the one (the value of the land) being assessed to the grantor, and the other (this particular and special interest) being assessed to the grantee in this instrument, so as to avoid double taxation. But there is no interest, as we have held, in the land *qua* land granted, or which passes by this instrument. See, as throwing material light on this particular point, *Boston Mfg. Co. v. Newton*, 22 Pick. 23; *Fall River v. Bristol County*, 125 Mass. 567, and especially *Hughes v. Vail*, 57 Vt. 43, and *Clove Spring Iron Works v. Cone*, 56 Vt. 603. These cases, just referred to, indubitably establish the proposition that no title to this crude resin, or turpentine, passes under this instrument until there shall have been a severance of it from the trees; and it must follow, as a necessary corollary, that the grantee under this instrument never had any interest in the land, as land.

There has been a great deal of confusion in the books about what is and what is not a lease. Many cases are collected in the valuable note to *Heywood v. Fulmer*, 18 L.R.A. 491. That case approves, and we approve, the following definition taken from 12 Am. & Eng. Enc. Law, p. 977: "No particular form of expression or technical words are necessary to constitute a lease; but whatever expressions explain the intention of the parties to be that one shall divest himself of the possession of his property, and the other shall take it for a certain space of time, are sufficient and will amount to a lease for years as effectually as if the most proper and permanent form of words had been made use of for that purpose." In a number of cases cited in the note to this case, a clear distinction is drawn between a grant of the right for a term of years to take from certain premises ore or mineral, coupled with the right of ingress and egress, etc., to do so, and an outright sale of minerals or ore in place; in the last class of cases it being always held that the conveyance is an outright sale, and, of course, a conveyance of an interest in the land. Speaking of these two classes of cases, the author

of the note then says: "But the cases above [*i. e.*, those of the first class referred to] are to be clearly distinguished from those in which all the minerals within certain land are expressly conveyed. Such a conveyance grants an interest in the land, and excludes the grantor from the mine." This second class of cases is well illustrated by one of the cases cited by the learned counsel for the appellant, to wit, *Consolidated Coal Co. v. Baker*, 135 Ill. 550, 551, 12 L.R.A. 247, 26 N. E. 651. That case held that, where there was no division of ownership, as between the land and the minerals in it, the land should all properly be assessed, with the fee, to the owner, but, where the fee and the coal were owned by different persons, they should be separately assessed as real estate, meaning, of course, where the ore was still in place in the land; and that case further held that in such case the two assessments must equal the value of the land proper, augmented by the value of the coal, and that wherever coal underlying the land, in place in the land, is dealt with, it may be conveyed by a proper instrument, so as to pass the title to the same, with the right to mine it, and that that sort of an instrument is much more than a mere license to enter and mine the coal. It is a conveyance of the coal itself, as it lies in its natural state, and the subject of such grant is real property in the grantee, which is liable to taxation as such. But that case was, in construction of chapter 120 of the Revised Statutes of Illinois of 1874, set out at page 549, and the reasoning set out on page 551, of 135 Ill., is simply to the effect we have previously stated, with this further thought: That such coal or mineral is to be assessed as real estate while so in place in the ground, where there is an absolute conveyance of the coal, not where the instrument is like the one here, granting nothing but the mere right to enter and take away the property. This same principle is announced in *Sanderson v. Scranton*, 105 Pa. 474, which simply holds that, where there is a divided ownership, there must be a divided taxation in cases of this sort.

It is very aptly said—so aptly that we think it worthy of quotation as a part of this opinion—by one of the learned counsel for the appellee, as follows: "For illustration, if A sells to B the right to gather all of the pecans that shall be produced on his (A's) pecan orchard, or all the grapes which his vineyard shall yield, in three years, certain it is that such privilege would not be assessable, because A pays the taxes on his lands, in assessing which the pecan orchard or the vineyard are taken into consideration as a part thereof, and the fact that they bear fruit is considered as an element of 17 L.R.A. (N.S.)

value in assessing such lands, and then B is assessed with the personal property as such; that is to say, the fruits after they shall have been gathered. Any other mode of taxation would be inequitable as double taxation. If, again, A were to say to B, 'I give you the right and privilege, for a certain price, to gather all of the cabbages that shall grow to maturity upon a certain tract of land, which I have sown with cabbage seeds,' certain it is that all that B could be assessed with would be the cabbages, as personal property, when gathered. Now, what is the difference between the annual product of the pecan orchard, or the vineyard, or the cabbage field, and the annual product of the pine tree? All yield a yearly crop, and in the cases of the pecan orchard and the vineyard the fruit of the tree or vine is what is gathered, while in the case of the turpentine it is likewise the annual product of the tree for three consecutive years that is gathered by the grantee." This seems to us the very essence of the whole point involved in this case, and the common-sense view,—the view, too, supported, as we have shown, by the authorities. We conclude, therefore, that whatever this instrument may be called technically, whether a lease or a license, undoubtedly what it grants is not any interest in the land as land, but a mere irrevocable right, during the life of the contract, to enter upon the land and take from the pine trees the crude resin or turpentine. Confining ourselves strictly to the precise point presented for adjudication by this record, which is, merely and simply, whether this instrument passes any interest in the land as land, and therefore assessable as land, we say that it does not.

Wherefore the decree of the court below is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CHARLES DUNCAN

v.

FRANK R. CORDLEY et al.

(— Mass. —, 85 N. E. 160.)

Contract — performance — subsequent change — effect.

One employed to build a street to a certain level is entitled to his pay when he has constructed the street to that level according to specifications, although, because of the action of the elements or the nature of the soil, it subsequently settles below that level.

(June 17, 1908.)

EXCEPTIONS by defendants to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover the contract price for the construction of a street. Overruled.

The facts are stated in the opinion.

Mr. Hollis R. Bailey, for defendant Rollins:

If the bottom proved soft, plaintiff was bound to put in more filling, under the contract.

1 Hudson, Bldg. Contr. 2d ed. p. 219; Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762.

Messrs. Berenson & Berenson for plaintiff.

Case Note. — Effect of change of conditions from natural causes after completion of construction contract.

This note is confined to cases where no warranty existed.

A search has disclosed little authority upon the question annotated.

The cases disclosed, passing upon like questions with that in *DUNCAN v. CORDLEY*, seem to be in accord with that case in holding that, where the contract has been completed according to agreement, the contractor is not responsible for a defect arising from a natural cause after its completion.

Thus, in *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700, where a contractor built a stone wall according to plans and specifications furnished, and protected it in the manner designated, he was held not chargeable for damage caused to the wall by frost. The court said: "He agreed to perform it in accordance with certain plans and specifications. If he made the mortar as provided by the contract, and protected it as he agreed, and performed the work as he was directed or permitted to do by defendant's proper authorities, he is not responsible for the condition of the wall, caused by freezing. He did not guarantee that the wall should stand the weather."

As to the duty of building contractor to protect work from freezing, see *Brent v. Head, W. & Co.* 16 L.R.A.(N.S.) 801, and case note thereto.

And in *Filbert v. Philadelphia*, 181 Pa. 530, 37 Atl. 545, where one built a reservoir in accordance with specifications which his contract compelled him to follow, and it leaked solely because of the micaceous rock upon which it was built, he was held entitled to recover. The court said: "To hold the plaintiffs answerable for it would be to hold them as warranting that the reservoir should be a perfect reservoir, notwithstanding that its defects might be due entirely to its site or to the specifications. This is precisely the position taken by the city, and it cannot be sustained."

So, in *Powell v. Markham*, 18 La. Ann. 581, the plaintiff erected a brick house according to defendant's directions, in which the workmanship and materials were good. It appeared that the ground in that locality was unfit for brick buildings, and that most of those situated there were cracked. It was held that recovery might be had for its construction, although the walls had cracked in various places, since the plaintiff was not responsible for the unfitness of the soil, or for the owner's refusal to have excavations in the soil properly prepared for the building.

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In *Dermott v. Jones* (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762, where the plaintiff contracted to build a house to be "fit for use and occupation," and, after completion, it settled because of an inherent defect in the soil, it was held that the one for whom the house was built was entitled, in an action by the builder, to recovery for the cost of remedying the defect. In this case, however, it will be noticed that there was an express provision, as above stated, which distinguishes it from such cases as *DUNCAN v. CORDLEY*.

The case of *Boughton v. Smith*, 142 N. Y. 674, 37 N. E. 470, is similar. There one contracted to put parquet floorings throughout another's house, the work to be first class. It was shown that in first-class work the blocks had no spaces between them, and did not shrink. It was held that, although the party gave the best of material and work, he could not recover where it appeared that, after completion, spaces opened up between the blocks, and that they were repeatedly repaired, once to the expressed satisfaction of the owner, but afterwards again shrank and became uneven.

In *Standard Stamping Co. v. Hemminghaus*, 157 Mo. 23, 57 S. W. 746, a person undertook to construct a building, the flooring to be of white oak, well seasoned, level, and closely joined. The evidence showed that, after it was laid, it warped and was uneven. It was held that if, during the construction of the building, the architect objected to flooring which was proposed to be used, and the builder then furnished other stock, which was approved by the architect and president of the company for whom the building was being erected, the builder was not liable if the defects were such as could have been seen by the exercise of ordinary skill and experience; but, if they were latent, the builder would be liable for the warping, etc., though he acted innocently.

In *Wisconsin Red Pressed Brick Co. v. Hood*, 67 Minn. 329, 64 Am. St. Rep. 418, 69 N. W. 1091, where a contractor purchased brick for use in constructing a building without knowledge of a latent defect which existed in them, and, after the building had been completed and accepted, the defects were developed by exposure to the weather, the contractor was allowed to recover, it appearing that the defect could not have been discovered by the exercise of reasonable care and skill. Here the defect was inherent in the material used, which distinguishes the case from *DUNCAN v. CORDLEY*.

Morton, J., delivered the opinion of the court:

This is an action upon a written contract to recover the balance alleged to be due for building two streets on land of the Crescent Land Company in Boston. The streets were to be built up to the level of Commonwealth avenue, and, when finished, were to be 10 feet wide at the top. The material was to be taken from the company's land, and the work was to be completed on or before July 20, 1904. There was a verdict for the plaintiff, and the case is here on exceptions by the defendants to the refusal of the court to rule that, on all the evidence, the plaintiff was not entitled to recover. The case was submitted to the jury under the instructions not otherwise objected to.

The only question is whether the streets were completed according to the contract. The jury must have found that they were, and we do not see how it could have been ruled, as matter of law, that they were not. There was testimony tending to show that they were built up to the level of Commonwealth avenue and finished 10 feet wide at the top, as required by the contract; but that afterwards, owing to the nature of the land on which it was built and perhaps to the action of the elements, one of them settled so that it was below the stipulated level. The defendant contends, in effect, that the plaintiff was bound to fill it up again and to keep filling it up as often as it settled, until it remained permanently at the level contracted for; and that, because he did not do so, he did not perform his contract and is not entitled to recover. But all that the contract required the plaintiff to do was to build the streets to the level of Commonwealth avenue and finish them 10 feet wide at the top, and when he had done that he had performed all that the contract called for. If one of the streets afterwards settled, owing to the nature of the land on which it was built or the action of the elements, the plaintiff was not responsible therefor, and was not bound to fill the street up again. If the street had settled during the process of construction, the plaintiff would have had to keep filling it in till he brought it up to the required level. But, after it was once completed, as the jury have found that it was, his obligations under his contract were ended. Cases like *Dermott v. Jones* (*Ingle v. Jones*) 2 Wall. 1, 17 L. ed. 762, relied on by the defendant, and *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137, are not applicable.

Exceptions overruled.

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MASSACHUSETTS SUPREME JUDICIAL COURT.

MATTIE T. HOOK

v.

ELLEN A. BOLTON.

(— Mass. —, 85 N. E. 175.)

Fixtures — question for jury.

1. Whether or not gas fixtures, steam radiators, a kitchen range, and window and door screens, annexed by the owner to his dwelling house and used with it, are fixtures which will pass under a mortgage of the realty, is a question for the jury under proper instructions.

Same — gas stove — window shades.

2. A gas stove and window shades running on rollers, attached by the owner to his dwelling house designed for a single family, are not fixtures which will pass with a mortgage of the realty.

(June 15, 1908.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover the value of certain articles taken by defendant as fixtures upon foreclosing a real-estate mortgage. Sustained.

The facts are stated in the opinion.

Mr. Olcott O. Partridge, for plaintiff:

These were ordinary steam radiators, attached to the upright pipes or risers only by a screw coupling, easily removable without injury, of the kind usually kept in

Case Note. — Gas stoves as fixtures.

A search has disclosed but three cases where this question has been considered by the courts.

In the absence of an express agreement, it would seem to be the rule that such ranges do not become fixtures by being placed in position and connected with a supply pipe.

Thus, in *Cosgrove v. Troescher*, 62 App. Div. 123, 70 N. Y. Supp. 764, gas ranges resting on concrete hearths, and attached to a supply pipe in apartments, were held, as a matter of law, as against a purchaser of the real estate under foreclosure, to be movables. The court said: "They were not set in any place specially constructed for them. They stood out on the floor wholly disconnected from the walls, floor, or ceiling, except that they rested on feet which were not attached, and were connected with the flues as stoves are generally connected. Their connecting pipes were screwed onto the gas supply pipes, but this was similar to the connection between an ordinary stove and a permanent boiler, and in no material respect differs from the attachment of gas fixtures."

In *Vaughen v. Haldeman*, 33 Pa. 522, 75

stock by dealers, and could be used to equal advantage in any house or office. They are furniture, like gas fixtures.

National Bank v. North, 160 Pa. 303, 28 Atl. 694; *Vaughen v. Haldeman*, 33 Pa. 522, 75 Am. Dec. 622; *Wall v. Hinds*, 4 Gray, 256, 64 Am. Dec. 64; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Leonard v. Stickney*, 131 Mass. 541.

The kitchen ranges were removable.

Jennings v. Vahey, 183 Mass. 47, 97 Am. St. Rep. 409, 66 N. E. 598.

A gas fixture such as these is not a fixture, in the sense of being legally annexed to the realty, even if it is screwed to the gas pipes and cemented on.

Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353; *Guthrie v. Jones*, 108 Mass. 191; *Condit v. Goodwin*, 44 Misc. 312, 89 N. Y. Supp. 827; *Raymond v. Strickland*, 124 Ga. 504, 3 L.R.A.(N.S.) 69, 52 S. E. 619.

Gas stoves are at least as removable in their legal character as gas fixtures.

Vaughen v. Haldeman, supra.

Window shades are usually treated in Massachusetts as removable, and have been held in other states to be removable as matter of law.

Cosgrove v. Troescher, 62 App. Div. 123, 70 N. Y. Supp. 764; *Towne v. Fiske*, supra; *Durkee v. Powell*, 75 App. Div. 176, 77 N. Y. Supp. 368.

Window screens have been held to be personal property.

Cosgrove v. Troescher and Durkee v. Powell, supra.

Mr. John F. Lynch, for defendant:

The question was properly submitted to the jury whether the furnace and radiators were part of the realty.

Jennings v. Vahey, 183 Mass. 47, 97 Am. St. Rep. 409, 66 N. E. 598; *Ridgeway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. 714; *Allen v. Mooney*, 130 Mass. 155; *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353;

Am. Dec. 622, in a case involving the right of one whose property had been sold at sheriff's sale to remove chandeliers and brackets, after stating that there was nothing to distinguish chandeliers, etc., from lamps, and like fittings, whose places they took, the court said: "Gas stoves are largely used for bath and other rooms, and are necessarily connected with the gas pipes in the same way; but no one would think of saying that they were fixtures which it would be waste to remove. It is therefore more simple to consider all these gas fixtures, whether stoves, chandeliers, hall and entry lamps, droplights, or table lamps, as governed by the same rule as the articles for which they are substituted."

But, by agreement, they may be considered as fixtures.

17 L.R.A.(N.S.)

Turner v. Wentworth, 119 Mass. 459; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 53 L.R.A. 603, 84 Am. St. Rep. 867, 85 N. W. 698; *Young v. Hatch*, 99 Me. 465, 59 Atl. 950; *Boston Furnace Co. v. Dimock*, 158 Mass. 552, 33 N. E. 647.

The ranges were used by the tenants during their occupancy, and were part of the realty as a matter of law.

Knickerbocker Trust Co. v. Penn Cordage Co. 66 N. J. Eq. 305, 105 Am. St. Rep. 640, 58 Atl. 409; *Allen v. Money*, 130 Mass. 155; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 6 L.R.A. 249, 15 Am. St. Rep. 235, 23 N. E. 327; *Turner v. Wentworth*, supra; *Goddard v. Chase*, 7 Mass. 432; *Monti v. Barnes* [1901] 1 K. B. 205; *Erdman v. Moore*, 58 N. J. L. 445, 33 Atl. 958.

The question whether the gas fixtures and gas range were fixtures was properly submitted to the jury.

Cunningham v. Seaboard Realty Co. 67 N. J. Eq. 210, 58 Atl. 819; *Knickerbocker Trust Co. v. Penn Cordage Co.* supra; *Lynde v. Rowe*, 12 Allen, 100; *McFarlane v. Foley*, 27 Ind. App. 484, 87 Am. St. Rep. 264, 60 N. E. 357.

The window screens were used by the plaintiff and her tenants. It does not appear that they were adjustable, or that an attempt was made to sell or remove them, or that the tenants had the right to use screens of their own, if they so wished; and the question whether they were realty or not was properly submitted to the jury.

E. M. Fish Co. v. Young, 127 Wis. 149, 106 N. W. 795; *Cunningham v. Seaboard Realty Co.* supra.

Knowlton, Ch. J., delivered the opinion of the court:

This is an action of tort to recover the value of certain articles annexed to a dwell-

Thus, in *Wynne v. Friedman*, 49 Misc. 616, 96 N. Y. Supp. 838, where defendant agreed to sell property by full covenants, expressly contracting that gas ranges were to be included, but made no mention of these in the deed, and the ranges were subsequently taken by a gas company which showed title, it was held that, while movable, the attached ranges were so of kin to fixtures that the parties might, by agreement, treat them as part of the realty so as to make it unnecessary to mention them in the conveyance in order that they should pass with the land; and in this case, they having been included in a covenant of sale and warranty which did not merge in the conveyance, the vendor was held liable upon their removal.

ing house and used with it. The defendant claimed title under the foreclosure of a mortgage of the real estate. The plaintiff requested the presiding judge to rule, as to several classes of these articles, that they were personal property, and not fixtures.

The principles of law applicable to cases of this kind have been stated many times in recent opinions of this court. In *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519-522, 6 L.R.A. 249, 15 Am. St. Rep. 235, 23 N. E. 327, is this language: A chattel "is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it and to be used with it to promote the object for which it was erected or to which it has been adapted and devoted, an article intended not to be taken out or used elsewhere, unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place." See also *Wentworth v. S. A. Woods Mach. Co.* 163 Mass. 28, 39 N. E. 414; *Ridgeway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. 714; *Southbridge Sav. Bank v. Mason*, 147 Mass. 500, 1 L.R.A. 350, 18 N. E. 406; *Southbridge Sav. Bank v. Stevens Tool Co.* 130 Mass. 547; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Leigh v. Taylor* [1902] A. C. 157-161. Of course the rule is the same as to articles attached to a dwelling house as it is as to machines put into a factory. As bearing upon the question, "the nature of the article and the object, the effect, and the mode of annexation are all to be considered." Generally, the question whether an article attached to a building belongs to the real estate is a mixed question of law and fact.

The application of these principles to the facts of the present case require us to sustain the rulings of the court as to all the articles except the gas stove and the curtains.

It is contended that the gas fixtures should have been held to be personal property as matter of law, on the authority of *Guthrie v. Jones*, 108 Mass. 191, and *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353. In the opinion in each of these cases there is language which goes beyond the decision, and tends to support the plaintiff's contention. The later case merely adopts the language of the earlier one. But in each of the cases the question before the court was whether the gas fixtures, upon the evidence, could be ruled, as matter of law, to be a part of the realty. The decision was simply that they could not.

We have not been referred to any case in 17 L.R.A. (N.S.)

which the court has decided that gas fixtures attached to a building and used with it are, as matter of law, personal property. They may or may not be, according to the facts and circumstances which tend to show that they do or do not belong to the building, and were or were not intended to remain with it as a part of it. As to the gas fixtures, the steam radiators, the kitchen range, and the window screens and door screens, the judge was right in submitting the questions to the jury, with proper instructions. *Allen v. Mooney*, 130 Mass. 155; *Ridgeway Stove Co. v. Way*, supra; *Jennings v. Vahey*, 183 Mass. 47, 97 Am. St. Rep. 409, 66 N. E. 598.

The gas stove and the window shades, running on rollers, stand differently. It may be that certain apartment houses, or other dwelling houses designed for occupation by tenants, are constructed in some of our cities and intended to be used in such a way that the introduction of such gas stoves and window shades by the owner, to go with the house as a part of it, for use by the tenants, may hereafter be proved at a trial. See *Jennings v. Vahey*, supra. It is entirely possible that the mode of construction and use of certain kinds of houses may be such that articles of this kind will be made a part of the house for permanent retention and use in the places where they are put. If it becomes a practice to build and use houses in such a way these articles may be put in as fixtures. As to the application of the law, we agree with Lord Halsbury in what he said in *Leigh v. Taylor*, supra, in regard to the decisions of the courts: "The facts have been regarded in different aspects, according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of attachment which, from time to time, became necessary or not, according to the nature of the structure which was being dealt with."

In the present case we discover no evidence to warrant the jury in finding that the gas stove and curtains were a part of the realty. So far as appears, the building in question was an ordinary dwelling house for a single family, and there is nothing to show that it was intended to be occupied or used differently from common dwelling houses. These were ordinary articles of merchandise, not peculiarly fitted for use in this house, were of a standard pattern, loosely affixed and easily removed, and were of the nature of personal property. They were put into the house by the mortgagor, and were of a kind of articles which usually are carried away by an outgoing occupant. There was nothing to show that the owner

intended to annex them as a permanent addition to the real estate. We think, upon the evidence, the judge was wrong in submitting to the jury the question whether they were a part of the realty.

Exceptions sustained.

VIRGINIA SUPREME COURT OF APPEALS.

TROUT, Plff. in Err.,
v.

NORFOLK & WESTERN RAILWAY COMPANY.

(107 Va. 576, 59 S. E. 394.)

Evidence — consideration of deed.

1. Upon the question of the consideration for land deeded to a railroad company for a right of way, letters written after execution of the deed, by persons not shown to have been the authorized agents of the railroad company or to have had anything

to do with the making of the contract, are inadmissible.

Same — immaterial.

2. Upon the question whether or not an agreement to construct a pass way was part of the consideration for a grant of land to a railroad company for a right of way, letters which throw no light upon the question are not admissible in evidence.

Deed — consideration.

3. In an action to recover the purchase price of land conveyed to a railroad company for a right of way, recovery cannot be had for breach of a contract to establish across it a pass way which is not mentioned in the deed.

Same — parol reservation.

4. Parol evidence is not admissible to show that the true consideration for a deed, which is recited to be a sum of money, was, in addition thereto, a contract to build a pass way across the property conveyed, since the effect would be to establish the reservation of an easement inconsistent with the terms of the deed.

(November 21, 1907.)

Case Note. — Parol agreement to construct private way across railroad.

The rule laid down in the above case, that the grantor in a deed for a railroad right of way, containing no reservation to that effect, will not be permitted to show that, at the time of the execution of the deed, the railroad company orally contracted, as a part of the consideration therefor, to construct him a pass way across the road, is supported by *Meade v. Norfolk & W. R. Co.* 89 Va. 296, 15 S. E. 497, which is sufficiently set forth in the above opinion. and by *Schrimper v. Chicago, M. & St. P. R. Co.* 115 Iowa, 35, 82 N. W. 916, in which it was held that, where a deed for a railroad right of way fully expressed the consideration, evidence of a parol agreement for an undercrossing, alleged to have been made at the time of the execution of the deed, as a part of the consideration, was inadmissible, as it would vary the effect of the deed.

So, in *Gulf, C. & S. F. R. Co. v. Richards*, 11 Tex. Civ. App. 95, 32 S. W. 96, it was held that, where the deed for a railroad right of way contained no stipulations as to the manner in which the railroad should be constructed, parol evidence was not admissible to show that the grantee, in procuring the deed, falsely and fraudulently represented to the grantor that, wherever the roadbed was required to be elevated, trestling would be used so that his access from one portion of his land to the other would not be cut off.

Attention may here be called to *Mills v. Hopkins*, 6 U. C. C. P. 138, in which it was held that, where a railroad company had agreed to construct a farm crossing for the grantor of a portion of its right of

way, the right of the grantor to a crossing could not pass by parol to a purchaser of another portion of his land.

On the other hand, in *Perkiomen R. Co. v. Bromer*, 217 Pa. 263, 66 Atl. 359, the court, though admitting that all negotiations and promises and oral agreements were merged in and extinguished by the written instrument which was the final result of negotiations between the parties to a contract or deed, nevertheless held that an oral promise made by one of the parties at the time and used to procure the execution of a deed might be given in evidence, although its effect was to change the writing. Accordingly, the grantor in a deed of a railroad right of way was permitted to show that he was induced to execute the deed by a contemporaneous agreement on the part of the president of the railroad company that the company would build a crossing over the railroad to connect the two portions of such grantor's land.

Some authority for the conclusion reached in the case last cited would seem to be found in the two cases following, in neither of which does it appear whether the contracts sued upon were verbal or written, though they were probably oral, since they were made in each case by an agent of the railroad company while negotiating with the owner of the land through which ran the company's right of way.

In *Goding v. Bangor & A. R. Co.* 94 Me. 542, 48 Atl. 114, the court refused to decree the specific performance of an alleged contract of a railroad company to build and maintain a grade crossing over its track, not because of the insufficiency of the agreement, but because in the opinion of the court there were no adequate reasons for the existence of such a crossing. The court

ERROR to the Circuit Court for the City of Roanoke to review a judgment in favor of defendant in an action brought to recover the value of lands conveyed to defendant for a right of way. Affirmed.

The facts are stated in the opinion.

Messrs. Hunt & Staples for plaintiff in error.

Messrs. Robertson & Wingfield and A. A. Phlegar for defendant in error.

Cardwell, J., delivered the opinion of the court:

This is an action of assumpsit, in which the plaintiff claims the right to recover the value of certain real estate which he had conveyed to the defendant company.

The declaration contains the common

said that it was the more ready to come to this conclusion because of the fact that, if the plaintiff's allegations were true, he could recover for all damage that he had sustained by reason of the failure of the company to perform the contract.

So, in *Owazarak v. Gulf, C. & S. F. R. Co.* 31 Tex. Civ. App. 229, 71 S. W. 793, recovery was refused to the owner of land through which a railroad ran, for the failure of the railroad company to construct and maintain a crossing over its road within the plaintiff's land, because there was no consideration shown for such an agreement. From which it may fairly be inferred that, had there been sufficient consideration, the plaintiff would have been entitled to recover.

In *Morris & E. R. Co. v. Green*, 15 N. J. Eq. 469, a railroad was enjoined from using a deed for its right of way as a defense to a suit at law under the following circumstances: The owner of a farm through which a railroad desired a right of way objected to signing a deed offered by the company, upon the ground that it did not reserve his right to a crossing, though he finally executed it upon the assurance by the company's agents, one of whom was a lawyer, that his right to a crossing would not be affected by such deed. The company having failed to construct a crossing after being legally notified, the owner made it himself, and, by virtue of the provision of the company's charter, sued it at law for the money expended, and the company set up the deed as a bar to recovery. It was held that the company was estopped from such use of the deed by the representations made by its agents at the time of its execution.

It would seem, however, that, where a stipulation as to a private crossing is inadvertently omitted from a deed of a railroad right of way, the deed will be reformed on the ground of mistake so as to express the true agreement entered into at the time the conveyance was made. Such, at least, was the conclusion reached in *Stafford v. Big Sandy R. Co.* 32 Ky. L. Rep. 154, 105 S. W. 389. And such seems also to be the

counts in assumpsit and two special counts. The first special count alleges that the plaintiff agreed to convey to the defendant certain parts of a tract of land, provided the defendant would pay him the sum of \$2,999 in cash, and would also construct, open, and maintain across the land to be conveyed and under the defendant's railway tracks a roadway 30 feet wide, of which 24 feet was to be dedicated to the public use, and 6 feet to the plaintiff as a means of access for his live stock from one side of his place to the other; that he did convey the land, by a deed which he makes a part of the count, and received the \$2,999; but that the defendant refused to provide the 6-foot pass way for his use, whereby he is deprived of access to water for his stock, and has suffered dam-

view taken by the court in *Jewett v. Chicago, M. & St. P. R. Co.* 45 Mo. App. 58, though relief was denied because the agent by whom the parol agreement as to the crossing was made was not authorized, to the knowledge of the owner of the land, to bind the company by any such agreement.

In *Swan v. Burlington, C. R. & N. R. Co.* 72 Iowa, 650, 34 N. W. 457, in which it appeared that a railroad company, at the time of obtaining from the plaintiff a deed for the right of way over his land, made an oral agreement to construct and maintain a crossing for him, and had done so, and the same had been used by the plaintiff for nearly twenty years, it was held that the purchaser of such road at a judicial sale, with constructive notice of such agreement, could not claim and occupy the right of way upon any other conditions than those fixed by such agreement.

On the other hand, in *Hunter v. Burlington, C. R. & N. R. Co.* 76 Iowa, 490, 41 N. W. 305, the court refused to give efficacy, as against a purchaser of a railroad at a foreclosure sale, to a parol agreement for the construction of a private crossing over the railroad, where such agreement was made, not at the time of the execution of a deed for the right of way, but afterwards, in settlement of certain claims of the plaintiff against the railroad company. The court distinguished this case from the *Swan Case*, just cited, by the fact that in the latter case the plaintiff had acquired a valid right to the passageway when the road was built, and, having been in the possession and enjoyment of it when the defendant purchased, did not lose his right thereto; while in the case at bar the consideration for the agreement consisted solely of claims for damages which were not liens on the right of way, but were in the nature of personal demands upon the company which built the road, and the easement of a permanent crossing, sought to be secured by the plaintiff in payment of such claims, was not required for the proper construction and operation of the road.

ages in the sum of \$2,000. The second special count is practically the same as the first, except that it omits the statement that part of the roadway was to be dedicated to the public; and both counts claim that, in addition to the consideration agreed to be paid in money, there was the further consideration for the said deed, of the promise and agreement on the part of the defendant that it would construct and maintain the 6-foot passageway across the land conveyed and under the defendant's railway tracks, for the use of the plaintiff as a means of access for his live stock from one side of his place to the other; and both allege the breach of the contract or agreement of the defendant to construct said passageway.

The defendant pleaded nonassumpsit; and at the trial the plaintiff was introduced as a witness on his own behalf, described the location of his tract of land, testified that he entered into a contract with the defendant for the sale of a portion of that tract; then introduced the deed made a part of the declaration, and proposed to testify that the contract between him and the defendant was that, if he would convey 11 and a fraction acres of land more than he had formerly agreed to convey, defendant would, for the additional land, provide him a cattle pass as stated in the declaration. To the introduction of this parol evidence the defendant objected, which objection was sustained by the court, and the plaintiff excepted to the ruling and tendered his first bill of exceptions, which was duly signed and made a part of the record. The plaintiff was then permitted to state, with the understanding that the defendant could move to exclude the statement, that the defendant was, in addition to the \$2,999 mentioned in the deed, to give him a pass way along the culvert to be built over the county road, for a cattle pass from one side to the other of his land, and that such pass way was to be through the land conveyed by the deed. On the motion of the defendant this evidence was excluded, and to this ruling the plaintiff also excepted and took his second bill of exceptions. Thereupon the plaintiff offered a letter written by his attorneys to the chief engineer of the defendant, his reply thereto, and a letter from Theo. Low, who signs himself "Real Estate Agent," to said chief engineer, which on defendant's objection were excluded, and the plaintiff took his third bill of exceptions.

The verdict was then rendered for the defendant, motion to set it aside was overruled, and the plaintiff filed his fourth bill of exceptions. Whereupon judgment was rendered for the defendant, to which judgment this writ of error was awarded.

The four bills of exceptions may be con-

sidered together, and the underlying question in the case is whether or not the court erred in excluding the evidence offered by the plaintiff above mentioned.

The deed mentioned in the declaration and exhibited by the plaintiff while on the witness stand states a consideration in money paid in cash; and he was attempting to prove what was the real consideration for the deed. A plat, designated as "No. 7,087, Revised," referred to in and made a part of the deed, shows the 22.22 acres of land conveyed as lying along the main railway track of the defendant, and embracing the proposed center line of a proposed new east-bound track, all the space between the two tracks, and two certain triangular parcels of land between the defendant's two lines of railway and the county road, and also shows a proposed new county road, from an old county road on the one side, across the lands conveyed and the defendant's two lines of railway, to a county road on the opposite side. The statement as to the location of his land, made by the plaintiff, shows that he owned about 124 acres, of which about 100 acres lay on the south side of the old railway right of way, and 24 acres on the north side thereof, upon which there was water for cattle, while there was none on the 100 acres south of the railway. The purpose of the parol evidence and the letters which the court below excluded was to show that, as claimed in plaintiff's declaration, while the deed stated upon its face a consideration of \$2,999 "cash in hand paid, the receipt whereof is hereby acknowledged," the real consideration for the conveyance was not only this sum of money, but an agreement of the defendant to provide for the plaintiff a pass way along the culvert to be built on the side of the proposed new county road shown upon the map, for a cattle pass from the south side of plaintiff's land to the north side thereof; that the agreement between the plaintiff and the defendant originally was that the former would convey to the latter only the land necessary for its proposed new line of railway, which would require only about 11 acres, at the price of \$3,000, of which \$1 was paid when the agreement was made, and the \$2,999 to be paid subsequently; that afterwards plaintiff had another agreement with the defendant that, if he would embrace in his deed all of his land occupied by the proposed new line of railway and lying between the two railway tracks of the defendant, and also the two triangular pieces of land before mentioned, which together contained an aggregate of 22.22 acres, the defendant would construct the pass way for his cattle to pass from the land on the south side of the tracks to that lying on the north,

as above mentioned; that the deed from the plaintiff to the defendant was executed in accordance with this last-mentioned agreement, but, while the defendant paid to the plaintiff the money consideration for the conveyance, when it began to construct the culvert for the passage of the county road under its tracks, it proposed to lay out the same to a width of 24 feet instead of 30 feet, as shown upon the map, providing no pass way whatever for plaintiff's cattle according to what he contends was the agreement and a part of the consideration for the land conveyed other than the mere right of way for the defendant's proposed new line of railway; and that, upon plaintiff's demand that the pass way for his cattle be constructed in accordance with the agreement, the defendant refused to construct it.

The objection of the defendant to the introduction of the parol evidence offered on behalf of the plaintiff, and excluded, was on the ground that it tended to alter and contradict the legal import of the deed, and that the plaintiff was seeking to prove that there were two contracts between him and the defendant, while his declaration alleged and his deed showed but one.

We are of opinion that the letters of Churchill, chief engineer, and Low, the real-estate agent, offered by plaintiff in error, were inadmissible. They were not only written after the deed exhibited with the declaration was executed and delivered, but there had been no proof that the writers of the letters were the authorized agents of defendant in error, or that they had anything to do with the making of the contract between the parties. The only point made by the letter to which Churchill's is a reply is that the county road should be located at a particular place, and it would seem that Low's letter was merely intended to express the view that plaintiff in error's claim that the county road shown on the map made a part of the deed was to be an undergrade crossing was well founded; that it was his (plaintiff in error's) intention to use the county road as a pass way for his cattle; and that this plat, showing the road as it did, influenced plaintiff in error in selling the land conveyed by the deed, instead of the $11\frac{1}{2}$ acres, for \$3,000.

Nor was the letter of Robertson, Hall, & Woods at all relevant, and therefore it was also properly rejected. Neither the map with the deed, nor either of these letters, intimated any claim for a private pass way, or of two contracts, while Robertson, Hall, & Woods's letter says: "An option for this land was obtained from Mr. Trout by Mr. C. C. Taliaferro, representing the railway company, on November 6, 1905. . . . The property in question embraces 22.57 acres, 17 L.R.A. (N.S.)

as shown by 'Plan 7,087, Revised,' which was attached to and made part of the option," etc. The "revised" plan referred to was shown to be the map exhibited with the deed as a part thereof.

The trouble with plaintiff in error's case is that, in his declaration, under the guise of enforcing payment of the purchase money for the land conveyed in the deed, he sets up a claim for an easement over the land conveyed, an encumbrance on the land of which no mention is made in the deed, and the parol evidence offered by him was for the purpose of showing that he was entitled to recover of defendant in error damages for the nonperformance of its contract to establish for the plaintiff in error the easement, when, in point of fact, the last expression of the parties as to the contract is to be found in the deed itself.

No fraud or misconduct is alleged in the declaration, in the execution or procurement of the deed in question, and therefore this parol evidence was for the purpose of setting up a prior contract between the parties different from that contained in the deed.

It is true it is settled law that the consideration actually paid or promised can be shown to have been other than that recited in the instrument, or the fact of payment of the consideration agreed upon may be contradicted in an action for its recovery; but it is equally as well settled that parol evidence is inadmissible to alter or contradict the legal import of a deed. Its legal import may no more be contradicted by parol evidence than its actual expressions. *Colhoun v. Wilson*, 27 Gratt. 649; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232; *Watkins v. Robertson*, 105 Va. 269, 5 L.R.A. (N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33.

"It is true that the deed need not contain all the stipulations of the parties. For example, the agreements as to consideration and mode of payment need not be embraced in the deed, for the instrument purports to be the deed of but one of the parties; but it does purport to contain the covenants of the grantor in respect to the property conveyed. To add a new covenant by parol proof would be a palpable violation of the familiar rule that written contracts are not to be varied by oral testimony. Such a parol stipulation, it has been held, could not be proof in respect to an ordinary bill of sale of personal property." And the same will, of course, apply to a conveyance of land. *Browne*, Parol Ev. § 104; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313.

As well stated by the author of *Browne on Parol Evidence*, supra: "Parol evidence is incompetent to add any covenant to a

deed, or to enlarge or contradict any covenant, or create a reservation."

The deed between these parties professes to convey from the grantor a fee-simple, unencumbered title to the land. It contains express covenants "that the grantor has done no act to encumber it, and that the grantee shall have quiet possession thereof free from all encumbrances;" while the proposed parol evidence offered was to show that the grantor reserved a pass way 6 feet wide over the land conveyed, which the grantee promised so to construct and maintain that the grantor's stock might pass over it at will, although the map attached to the deed and made a part thereof, while it shows the change of location of the county road, and places it across the land conveyed, contains nothing whatever to indicate that there was to be any such pass way for cattle as plaintiff in error contends for. In effect, plaintiff in error is contending that, by a contract not proven or attempted to be proven to have been entered into prior to the deed, he reserved to himself a right which is wholly inconsistent with the terms of his deed.

In the case of *Melton v. Watkins*, 24 Ala. 433, 60 Am. Dec. 481, very similar to the case under consideration, the lower court had allowed proof of contemporaneous parol agreement that the grantor in a deed to land could remain in possession for a time; but the supreme court of that state held that this was error, the opinion saying: "It [the parol evidence] varied by parol the legal effect of the deed, and took from the grantee an interest which the deed conveyed to him. The rule is too well settled to require the citation of authority, that all previous or contemporaneous parol agreements or understandings between the parties, materially altering or varying, by adding to or subtracting from, the written agreement, must be considered as merged in that agreement, and the writing must be regarded as the evidence and sole expositor of the contract of the parties, when it is clear and unambiguous."

The agreement for a pass way over the land conveyed by plaintiff in error is not collateral, and does not relate to a subject distinct from the land, but is really a part and parcel of the subject conveyed. We can see no difference between reserving a right of way and reserving the right to possession of the land after the conveyance, which it was held, in the case of *Melton v. Watkins*, *supra*, could not be done.

In *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664, the action was trespass *quare clausum fregit* against Edgell, who justified on the ground, among others, that he had conveyed the land to one Hall, under whom plaintiff claimed, with the agreement that

he was to have a right of way over it, and that the trespass alleged was the use of the right of way. It was held that parol evidence to prove this agreement was not admissible; the opinion saying: "I think the court did not err in this. To admit such evidence would be dangerous in the extreme. The estate of man in land would be very precarious if such were the rule. His deed says he has absolute ownership, unencumbered by the great burden of the right of way; but slippery memory or perjury comes up to contradict the deed, and place a heavy encumbrance upon the owner's estate, largely detractive from the value of that estate. . . . Here Edgell, granting all his right in land, seeks afterwards to detract from the legal effect of his conveyance by loading the land with heavy encumbrance of a private right of way for all time."

It is not to be questioned that "a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if, under the circumstances of the particular case, it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself, upon its face, is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing." *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46.

The map exhibited with the deed in this case is as much the declaration of the plaintiff in error as the other written portions of the deed, and, as we have remarked, there appears nothing on the map which indicates the pass way for cattle as contended for by him.

In *Meade v. Norfolk & W. R. Co.* 80 Va. 206, 15 S. E. 497, the bill was filed to reform or cancel a deed granting the railroad company a right of way, because the parties had verbally agreed that a trestle with a pass way under it should be erected across a ravine on the grantor's land, which agreement was not inserted because the parties deemed it unnecessary; but the relief was denied on the ground that parol evidence was inadmissible to show the agreement for the pass way, such an agreement being inconsistent

with the terms of the deed which was asked to be reformed or canceled.

In that case *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239, is cited as conclusive that the relief sought could not be granted. In the case cited it is said: "The authorities all agree that equity has jurisdiction to reform written instruments in two well-defined classes of cases only, *viz.*: (1) Where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake; and (2) where there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties. But so great and obvious is the danger of permitting the solemn engagements of parties, when reduced to writing, to be varied by parol evidence, that in no case will relief be granted except where there is a plain mistake, clearly made out by satisfactory and unquestionable proofs."

This rule applies with more force in a court of law than in one of equity, and, in referring to the rule, *Harrison, J.*, in *Slaughter v. Smither*, 97 Va. 206, 33 S. E. 545, says: "This court has manifested no disposition to fritter away the rule of evidence in question by nice distinctions to meet the hardships, real or supposed, of particular cases." It was there further said that it cannot be assumed that the written contract between the parties was designed as an imperfect expression of their agreement from the mere fact that it contains nothing on the subject to which the parol evidence offered is directed. "On that assumption, the rule which excludes parol proof as a means of adding to the written contract would be entirely abrogated. . . . Where parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance; and consequently all parol testimony of conversations held between them, or declarations made by either of them, whether before, after, or at the time of the completion of the contract, will be rejected. If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied, parol evidence to vary or add to its terms is not admissible."

In *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380, the action was trespass on the case to recover damages for a breach of an alleged parol agreement between the parties, entered into at the time, or prior to the execution of a lease of a certain brick factory: and the court held that parol evi-

dence to establish this collateral agreement was inadmissible, for the reason that the written contract purported on its face to be complete and to contain the entire agreement of the parties, and that the parol evidence offered tended to add another term to the agreement, the agreement containing nothing on the subject to which the parol evidence was directed. The opinion in that case reviews a great number of decided cases, and declares, as this court did in *Slaughter v. Smither*, *supra*, that to admit parol proof to add to a written contract in such a case would be entirely to abrogate the rule of the common law that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument.

We find nothing in the case here which takes it from under the control of that rule of the common law, and therefore the judgment complained of is affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

LUCY A. SMITH, Admr., etc., of John B. Smith, Deceased,

v.

CONNECTICUT RAILWAY & LIGHTING COMPANY, Appt.

(80 Conn. 268, 67 Atl. 888.)

Negligence — proximate cause — last clear chance.

1. Although one driving along a street ahead of a street car which is running so slow that he has time to cross the track without being struck is negligent in making the attempt, his act is not the proximate cause of his resulting injury, if, upon seeing his design, the motorman, because of his inexperience, becomes confused, releases the break, and causes the car to increase its speed so that it strikes the wagon, which it would not do if he used ordinary care.

Street railway — speed — reasonableness.

2. The speed of a street car going 3 or 4 miles an hour may be found to be unreasonable if by maintaining it the car will collide with a vehicle in the act of crossing the track.

(October 22, 1907.)

Note. — The above case presented an almost ideal state of facts for the application of the doctrine of last clear chance, as there was a positive act of misfeasance on the part of the motorman in increasing the speed of the car after the negligence of plaintiff had intervened and his perilous position had been discovered; and the plaintiff apparently could not, even by the exercise of the highest degree of care, have escaped the peril.

APPEAL by defendant from a judgment of the Superior Court for Hartford County assessing the damages after its default in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Mr. William B. Boardman for appellant.

Messrs. James E. Cooper, John H. Kirkham, and Arthur W. Upson for appellee.

Baldwin, Ch. J., delivered the opinion of the court:

The plaintiff's intestate was driving an active, long-gaited farm horse in a light wagon on a city street. There was a trolley track on it, so laid that, at a point some little distance ahead of him, it crossed from the middle to the right-hand side of the street. It was necessary that he should cross the track, in order to keep on the proper side of the road, which for him was the right-hand side. A trolley car operated by the defendant was behind him, on a down grade. The gong was sounding loud and clear. The power was shut off, and the motorman had the car under control by the hand brake. It was running at a speed of from 3 to 5 miles an hour. The decedent, when 200 or 300 feet from the place where he lost his life, looked back and saw the car approaching, and it was apparent to him that, at the speed at which it was going, there was plenty of time for him to cross the track in front of it, in safety. It must have then been apparent to anyone on board the car, who was on the lookout, that the decedent was likely to cross the track at any time. The horse was trotting. Shortly after this, without looking again for the car, the intestate turned across the track in a slanting direction; the horse still trotting, but more slowly. When it became apparent from the car that he was about to cross, it was proceeding at the rate of speed before mentioned, and was from 20 to 25 feet behind the rear end of his wagon. By the use

of ordinary care the motorman could have brought it to a stop before it had gone 15 feet farther, and before reaching the wagon. He was inexperienced, became confused, and negligently and unskillfully released the brake, which had been partly set, so that the car moved forward more rapidly than before, striking the hind wheel of the wagon, and throwing the intestate out, in a manner which resulted in his death.

The trial court found that, when the intestate started to cross the track, knowing that a car was coming a short distance behind, and without then looking to see how far away the car might be, he ran into a position of danger, and was not exercising ordinary care; and that the motorman did not exercise ordinary care in attempting to stop the car after the danger to the intestate became apparent; whereas, had such care been exercised, or had the speed of the car not been increased, the accident would not have happened. These conclusions are supported by the facts specially set forth, as above recited, and justified the award of substantial damages.

Negligence is only deemed contributory when it is a proximate cause of the injury. That only is a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation separated from its effect by no other act of causation. If, after an act of omission constituting negligence on the part of one injured at a railroad crossing, the railroad car or cars might have been so controlled, by the exercise of reasonable care and prudence on the part of those in charge of them, as to avoid the injury, then a failure to exercise such care and prudence would be an intervening cause, and so the plaintiff's negligence no longer a proximate cause, and therefore not a bar to his recovery. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 429, 36 L. ed. 485, 492, 12 Sup. Ct. Rep. 679; *Parkinson v. Concord Street R. Co.* 71 N. H. 28, 51 Atl.

ous position in which he had placed himself by his own negligence. The case, therefore, clearly fulfilled both of the conditions essential to the application of the doctrine of last clear chance in favor of plaintiff; namely, the continuance of a precedent negligence, or the intervention of original negligence, on the part of the defendant after the intervention of plaintiff's negligence, and the continuance of the defendant's negligence after the termination or cessation of plaintiff's negligence, that is, after it had become impossible for the plaintiff by the exercise of due care to escape from his perilous position. For various aspects of the 17 L.R.A. (N.S.)

doctrine of last clear chance, see subject note to *Bogan v. Carolina C. R. Co.* 55 L.R.A. 418; case note to *Dyerson v. Union P. R. Co.* 7 L.R.A. (N.S.) 137; and editorial comments in connection with *Indianapolis Traction & Terminal R. Co. v. Kidd*, 7 L.R.A. (N.S.) 143; *Black v. New York, N. H. & H. R. Co.* 7 L.R.A. (N.S.) 148; *Louisville City R. Co. v. Hudgins*, 7 L.R.A. (N.S.) 152; *State v. Cumberland & W. E. R. Co.* 16 L.R.A. (N.S.) 297; and *Atchison, T. & S. F. R. Co. v. Baker*, 16 L.R.A. (N.S.) 825. See also Digest for other cases reported in this series on the subject.

268; *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 404-413, 71 Am. Dec. 78. The act of the intestate was a careless one, but had the speed of the car not been subsequently increased, there would have been no collision between the two vehicles. This increase was not intentional, but it was equally deadly. At a moment when it was apparent that the intestate was about to cross the tracks, and when the car could have readily been stopped, it was allowed by an unskilful act of the motorman to shoot ahead with accelerated velocity. This act was the proximate cause of the intestate's death. The negligence of the latter was not; because, after he was guilty of that negligence, there arose a new and intervening cause for the collision, without which the accident would not have occurred.

The complaint alleges that the defendant negligently ran the car on a steep down grade at an unreasonably high rate of speed, and not under proper control. It is contended that the rate of speed proved was so small that it could not be deemed unreasonably high. The reasonableness of the speed at which a car is run is to be measured by the relation of that speed to the particular circumstances under which it is maintained. A speed of 20 miles an hour might not be unreasonable in the open country, where the view is unobstructed, and there are no travelers in sight. A speed of 3 or 4 miles an hour might be unreasonable in a crowded street, when other vehicles or pedestrians were on the tracks in front, or obviously on the point of crossing them. The proprietor of a street car, who runs it over a highway under a franchise from the state, has no greater rights, as to the manner of the use of that part of the highway on which the car is run, than the proprietor of any other vehicle, except that, since it can move only on fixed tracks, it is incumbent on those also traveling upon them to make reasonable efforts to keep out of the way of an approaching car. *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 489, 37 L.R.A. 533, 37 Atl. 379. The immediate cause of the injury to the intestate was the sudden increase of the speed of the car, due to the release of the brake. This was a change of conditions which he had no reason to anticipate, and it proceeded from a careless act of a servant of the defendant, while engaged in the duties of his service.

There is no error.

The other Judges concur.
17 L.R.A. (N.S.).

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
EX REL. LOUISE JENKINS, Appt.,
v.

BOARD OF EDUCATION OF THE CITY
OF CHICAGO et al.

(234 Ill. 422, 84 N. E. 1046.)

Municipal corporation — vaccination — power to require.

1. Charter authority to appoint a board of health and make all regulations which may be necessary for the promotion of health or the suppression of disease does not empower a municipal corporation to make vaccination a condition precedent to attendance of the public schools, where the Constitution provides for a system of free schools where all children may receive a good common-school education.

Same — health rules — emergency.

2. The occasional recurrence of smallpox in a city does not present an emergency for which the health commissioner may make and enforce rules not prescribed or approved by the legislative authority of the city.

(April 23, 1908.)

Case Note. — Power to require vaccination.

No American case can be found which holds that compulsory vaccination may be required in the sense of compelling one to submit his person thereto, although the power to impose a fine or imprisonment, or both, for a failure to comply with a regulation requiring vaccination, is sustained.

Compulsory vaccination is practised in England. See cases in note to *Duffield v. Williamsport School Dist.* 25 L.R.A. 152; also *Bramble v. Lowe* [1897] 1 Q. B. 283; *Queen v. Brocklehurst* [1892] 1 Q. B. 566; *Queen v. Portsmouth* [1892] 1 Q. B. 491; *Reg. v. Burrows*, 77 L. T. N. S. 338. Of course, there can be no question as to the power of Parliament.

In general.

It is a valid exercise of police power to delegate to local boards of health authority to require, under penalty, the vaccination of all citizens when it may be deemed necessary to the public health and safety; and such necessity arises when smallpox is present in a community, or its appearance may be reasonably apprehended. *Com. v. Jacobson*, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719 (affirmed in 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358); *Morris v. Columbus*, 102 Ga. 792, 42 L.R.A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *State v. Hay*, 126 N. C. 999, 49 L.R.A. 588, 78 Am. St. Rep. 691, 35 S. E. 459.

And an adult is not deprived of his liberty by the enforcement of a rule of a local board of health requiring the vaccination of

APP^{EAL} by relator from a judgment of the Circuit Court for Cook County dismissing a petition for a writ of mandamus to compel relator's reinstatement in a public school. Reversed.

The facts are stated in the opinion.

Messrs. **Walter J. Watts and Stedman & Soelke**, for appellant:

The ordinance is null and void.

Potts v. Breen, 167 Ill. 67, 39 L.R.A. 152, 59 Am. St. Rep. 262, 47 N. E. 81; **Lawbaugh v. Board of Education**, 177 Ill. 572, 52 N. E. 850.

The commissioner of health is purely a ministerial officer.

State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; **Osborn v. Russell**, 64 Kan. 510, 68 Pac. 60.

Mr. Edward J. Brundage, with Messrs. **Emil C. Wetten, George W. Miller, and Frank Hamlin**, for appellees:

Vaccination may be made a condition pre-

cedent to attendance at the public schools by exercise of the city's general police power.

Duffield v. Williamsport School Dist. 162 Pa. 476, 25 L.R.A. 152, 29 Atl. 742; **Bissell v. Davison**, 65 Conn. 183, 29 L.R.A. 251, 32 Atl. 348; **Blue v. Beach**, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; **State ex rel. Freeman v. Zimmerman**, 96 Minn. 353, 58 L.R.A. 78, 91 Am. St. Rep. 351, 90 N. W. 783; **Re Viemeister**, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97; **Morris v. Columbus**, 102 Ga. 792, 42 L.R.A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; **Jacobson v. Massachusetts**, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358.

Cartwright, J., delivered the opinion of the court:

Louise Jenkins, by her next friend, filed her petition in the name of the people, in the circuit court of Cook county, against the board of education of the city of Chi-

all citizens,—at least in the absence of satisfactory evidence that he is not a fit subject of vaccination, or that, by reason of his condition, it will seriously impair his health, or possibly cause his death. **Com. v. Jacobson**, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358.

And such regulation is not rendered void, as a denial of equal protection of the laws, by reason of lack of an exception in favor of adults who may be certified by a physician as unfit subjects for vaccination, although such an exception is made in favor of children. *Ibid.*

And an ordinance adopted under delegated authority is not rendered invalid by a failure to except from its operation a person whose health is such as to render it unsafe to submit to vaccination. **State v. Hay**, *supra*.

A failure to comply with such ordinance is not justified because of one's own opinion or that of his physician that it would be dangerous for him to submit to vaccination, or he that he is sufficiently protected by a former vaccination. *Ibid.*

And the fact that one has decided opinions against vaccination does not exempt him from the operation of such a regulation. **Com. v. Jacobson**, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719.

But a local board of health is without authority to quarantine persons not affected with smallpox, nor shown to have been exposed thereto, until they submit to vaccination, by a statute authorizing the isolation of persons infected with, or exposed to, contagious diseases, and to provide thorough and safe vaccination for those in need thereof. **Ke Smith**, 146 N. Y. 68, 28 L.R.A. 820, 48 Am. St. Rep. 769, 40 N. E. 497.

Although a city has power to require vaccination, it cannot adopt a by-law imposing penalties upon the manager or head of a

business establishment for permitting unvaccinated employees to frequent the same. **Montreal v. Garon**, *Rap. Jud. Quebec*, 23 C. S. 363.

It has been held that it is an unconstitutional invasion of personal rights for a local board of health, in the absence of bubonic plague, to require all Chinese inhabitants of a city to submit to inoculation with a supposed preventive thereof, and to confine all who refuse within the limits of the Chinese section of the city. **Wong Wai v. Williamson**, 103 Fed. 1.

As a condition of admission to public schools.

There appears to be no doubt of the power of the legislature to require vaccination as a condition of the admission to public schools, and this, so far as a direct exercise of power by the legislature is concerned, appears to be true even in the absence of a smallpox epidemic in the community, or apprehension of an outbreak thereof; but, unless such power is clearly conferred, local bodies may not require vaccination in the absence of smallpox, or an apprehension of an immediate outbreak thereof. No case has been found, however, which denies the power of the local bodies, during an epidemic of smallpox, or an apprehended outbreak thereof, to refuse admission of unvaccinated children to the public schools.

In **Lawton v. Steele**, 152 U. S. 136, 38 L. ed. 338, 14 Sup. Ct. Rep. 499, in enumerating the legislative powers that might be exercised under the police powers, the court said it included everything essential to the public safety, health, and morals, and thereunder the compulsory vaccination of children may be required; this, however, is *obiter*.

So, a statute excluding from the public schools any unvaccinated child or person, or

cago, and therein alleged that she was a resident of the city, six years of age, a daughter of D. F. D. Jenkins, a resident and taxpayer of said city, and that, on October 29, 1907, she applied for admission as a pupil to the John Fiske school, which she was entitled to attend, and was denied admission to the said school by the board of education because she refused to be vaccinated and she prayed for a writ of mandamus commanding the board to admit her to the public schools. The board of education answered, making no denial of the averments of fact contained in the petition, which were therefore admitted to be true, but setting up in justification of the exclusion of the relator an ordinance of the city of Chicago and instructions by the health department to enforce such ordinance. The relator demurred to the answer, and the court overruled the demurrer. The relator elected to stand by the demurrer, and judgment was entered against her, dismissing the petition and for costs. An appeal to this

court was prayed for, and the trial judge certified that the validity of the city ordinance was involved, and in his opinion public interest required that an appeal should be taken direct to this court, in pursuance of § 118 of the practice act. Laws 1907, p. 467. The appeal was allowed and perfected, and the record has been filed in this court.

The Constitution requires the general assembly to provide a thorough and efficient system of free schools, whereby all children in this state may receive a good common-school education; and the statute provides for establishing and keeping in operation such schools for the accommodation of all children over the age of six and under the age of twenty-one years. The right to attend the public school in the district where the relator resides is therefore given to her by the law, and the duty to admit her and to maintain the school rests upon the board of education. The legislature have never made it a condition precedent to the

one who fails to produce a physician's certificate showing him to be immune therefrom, is within the police power of the state. *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *French v. Davidson*, 143 Cal. 658, 77 Pac. 603; *Re Viemeister*, 179 N. Y. 236, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, affirming 88 App. Div. 44, 84 N. Y. Supp. 712; *Re Walters*, 84 Hun. 457, 32 N. Y. Supp. 322; *Field v. Robinson*, 198 Pa. 638, 48 Atl. 873; *Stull v. Reber*, 215 Pa. 156, 64 Atl. 419; *Nissley v. Hummelstown*, 18 Pa. Co. Ct. 481; *Sprague v. Baldwin*, 18 Pac. Co. Ct. 568; *Gerhard v. Packer Twp. School Dist.* 24 Pa. Co. Ct. 339; *Beveridge v. Winner*, 31 Pittsb. L. J. N. S. 40.

And such a statute may be enforced although smallpox is not prevalent. *Re Viemeister*; *Field v. Robinson*; and *Stull v. Reber*,—*supra*.

And, under such a statute, a board of education may suspend a teacher for a refusal to comply with a regulation requiring teachers to be vaccinated. *Lyndall v. High School Committee*, 19 Pa. Super. Ct. 232.

Although a statute permits the admission of an unvaccinated child to the public schools upon presentation of a certificate from a practising physician showing that the child is unfit for vaccination, a board of education may, during an epidemic of smallpox, refuse admission to a child presenting such certificate. *Hammond v. Hyde Park*, 195 Mass. 29, 80 N. E. 650.

A complete defense is shown to a prosecution of a parent for the failure to send a child to school, where it appears that admission was refused because the latter was unvaccinated, as, in order to sustain a conviction under such circumstances, it would be necessary to compel the child to be vaccinated, which the statute does not attempt

to require. *Com. v. Smith*, 8 Del. Co. Rep. 61.

So, the legislature may authorize municipal corporations, or boards of education, to exclude unvaccinated children from public schools, even in the absence of smallpox. *Bissell v. Davidson*, 65 Conn. 183, 29 L.R.A. 251, 32 Atl. 348.

So, unvaccinated children may be excluded from the public schools, in the absence of smallpox, under authority to make and enforce such necessary rules and regulations to secure the vaccination of, and to prevent the spread of smallpox among, the school pupils, as, in the opinion of the board of education, the safety and interests of the public require. *State ex rel. Milhoof v. Board of Education*, 76 Ohio St. 297, 81 N. E. 568.

And such a regulation may be adopted under authority to make all rules proper for the government and management of the public schools, consistent with the laws of the land. *Re Rebenack*, 62 Mo. App. 8.

The power of local boards of health or education to refuse admission of unvaccinated children to public schools during an existing or apprehended epidemic of smallpox has been sustained under power to adopt and enforce rules and regulations necessary to preserve public health, and to prevent the spread of contagious or infectious diseases. *Blue v. Beach*, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *State ex rel. Horne v. Beil*, 157 Ind. 25, 60 N. E. 672.

Or under authority to exclude from the public schools those suffering from contagious diseases, or liable to convey the same. *State ex rel. Cox v. Board of Education*, 21 Utah, 401, 60 Pac. 1013.

Or under authority to do all acts, and make all regulations, deemed necessary and expedient for the preservation of the public health. *State ex rel. Freeman v. Zimmer-*

exercise of the legal right to attend the public schools that children shall be vaccinated, and the question whether power to do that exists is not involved in this case. The petition alleges, and the answer does not deny, that the defendants denied to the relator admission to the John Fiske school, but the answer sets up as justification for the exclusion an ordinance of the city of Chicago. Not only have the legislature never prescribed vaccination as a condition to the enjoyment of the legal right to attend public schools, but they have never conferred upon cities the power to do so. If the city of Chicago has power to pass any ordinance on the subject, the power is derived from the authority conferred upon the city council to appoint a board of health and prescribe its powers and duties, to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease, and to pass all ordinances and rules, and to make all regulations, proper or necessary to carry into effect such authority. The ordinance set out in the answer was passed on March 20, 1905, and the only section relating to exclusion from schools is § 1255, which is as

follows: "No principal or person in charge or control of any school shall admit to such school any child who shall not have been vaccinated within seven years next preceding the admission or application for admission to any such school of such child; nor shall any such principal or person retain in, or permit to attend, any such school, any child who shall not have been vaccinated as provided in this article."

The general police powers above enumerated to pass ordinances and make regulations for the promotion of health or the suppression of disease do not include the passage of such an ordinance as this, which makes vaccination a condition precedent to the right to an education. An ordinance passed by reason of such authority must be reasonable in its character, and rest upon the ground that it is a necessary means of preserving the public health. In the case of *Potts v. Breen*, 167 Ill. 67, 39 L.R.A. 152, 59 Am. St. Rep. 262, 47 N. E. 81, it was held that the exclusion of a child from a public school because of a refusal to be vaccinated can only be justified where such course is necessary, or reasonably appears to be necessary, in case of an existing or threatened

man, 86 Minn. 353, 58 L.R.A. 78, 91 Am. St. Rep. 351, 90 N. W. 783.

Or when clothed with the exclusive control of the public schools. *Hutchins v. Durham*, 137 N. C. 68, 49 S. E. 46.

So, when smallpox is prevalent in a community, a board of education may, as a necessary health regulation, require the presentation of a physician's certificate showing vaccination as a condition of admission of a child to the public schools. *Auten v. School Board*, 83 Ark. 431, 104 S. W. 130; *Glover v. Board of Education*, 14 S. D. 139, 84 N. W. 761; *Duffield v. Williamsport School Dist.* 162 Pa. 476, 25 L.R.A. 152, 29 Atl. 742.

Or a certificate showing that, by repeated trials, the child has proved immune to vaccination. *Auten v. School Board*, supra.

And the fact that a child's physical condition is such as to render it dangerous to submit to vaccination creates no exception from a regulation excluding unvaccinated children from the public schools during an epidemic of smallpox. *Hutchins v. Durham*, supra.

In *State ex rel. Cox v. Board of Education*, supra, the court expressly says that its decision must be understood to recognize such power only during an epidemic; and that the board of education could not compel vaccination.

But the power of local authorities, or a board of education, in the absence of an epidemic of smallpox or the apprehended outbreak of one, to make vaccination a condition of admission to the public schools, unless expressly empowered so to do, is denied in *Potts v. Breen*, 167 Ill. 67, 39 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347.

152, 59 Am. St. Rep. 262, 47 N. E. 81, affirming 60 Ill. App. 201; *Lawbaugh v. Board of Education*, 177 Ill. 572, 52 N. E. 850, reversing 66 Ill. App. 159; *Osborn v. Russell*, 64 Kan. 507, 68 Pac. 60; *Glover v. Board of Education*, supra.

And, in the absence of smallpox in a community, although there are a few cases in different parts of the state, a school board cannot require vaccination as a condition of admission to the public schools, such power not being conferred by statutory authority to determine the qualifications for admission thereto, to do all things desirable for their prosperity and success, and to make and enforce suitable rules and regulations for their government and management. *Mathews v. Kalamazoo Bd. of Edu.* 127 Mich. 530, 54 L.R.A. 736, 86 N. W. 1036. The court said that a parent was subject to both fine and imprisonment for the neglect to send his children to school, and the effect of such rule would be to compel the vaccination of his children, or subject him to the penalty of the law; and, if such rule should be sustained, the result would be to give the board of education the right to require compulsory vaccination.

A state board of health cannot, under power to make regulations for the prevention of the introduction of smallpox into, and the suppression thereof in, the state, when smallpox is not prevalent in the community, require vaccination of children as a condition to their admission to the public schools; although the power of the legislature so to do is conceded. *State ex rel. Adams v. Burdige*, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347.

epidemic of smallpox, and to prevent the spread of the disease. In the case of *Lawbaugh v. Board of Education*, 177 Ill. 572, 52 N. E. 850, the court adhered to those principles, and declined to further discuss them, although earnestly urged to reconsider the former decision. Section 1255 is null and void and affords no justification for denying relator admission to the John Fiske school, whether the denial of her legal right was at the instance of the health commissioner, the health department, or any other authority.

The only other section of the ordinance which has any relation to schools, or which purports to give any authority respecting them to the health commissioner or health department, is § 1253; and it does not purport to give any authority to exclude children from schools. It provides that the commissioner of health, or any officer of the health department designated and authorized to act by such commissioner, shall have power to enter any of certain enumerated buildings and places, among which are schoolhouses, under certain circumstances; and that such commissioner or officer shall have power to vaccinate any person found in such building or place whom he shall deem it necessary or advisable to vaccinate. It further purports to authorize the commissioner, at any time when smallpox is prevalent, or an epidemic of smallpox is or appears to be imminent, to vaccinate any person in the city whom he shall deem it necessary or advisable to vaccinate, provided that such person may be vaccinated by his own physician in a manner satisfactory to the commissioner. Although this section is set out at length in the answer, it is not alleged that the commissioner was attempting to vaccinate the relator, and no justification under its provisions is attempted.

Section 1035 of the ordinance purports to give to the commissioner of health power to make such rules and regulations in relation to the sanitary condition of the city and for the prevention and suppression of disease, not inconsistent with the Municipal Code, as he may deem necessary or advisable; but it provides that such rules and regulations shall not take effect and be in force until approved by the city council, except in cases of emergency. The answer does not allege that the commissioner of health made any rules or regulations, or that any were approved by the city council. The section further provides that the commissioner may make rules and regulations for the preservation of the public health in case of an emergency from contagious or epidemic disease, or danger from anticipated or impending contagious or epidemic disease; but such emergency rules and regulations shall, as 17 L.R.A. (N.S.)

soon as may be after the promulgating of the same, be reported to the city council for approval. Here, again, it does not appear that the commissioner acted under any provision of that section, or made any rule or regulation, or reported any to the city council after promulgation.

These provisions of the ordinance are the only ones that could in any event have any relation to attendance upon the public schools, and the only one that was enforced against the relator was § 1255, which is null and void. The answer alleged, as a matter of fact, that, on October 29, 1907, the disease of smallpox was prevalent in the district in which the John Fiske school was located, within such a radius as to make it dangerous for all persons therein residing who had not been vaccinated; that the commissioner of health declared smallpox to be epidemic in said district, and instructions were given by the health department to exclude all children who had not been vaccinated in accordance with the terms of the ordinance. The terms of the ordinance are that no child shall attend the public schools who has not been vaccinated within seven years, and do not constitute a lawful exercise of any power conferred upon the city. The health commissioner is a purely ministerial officer and has no legislative powers whatever. The ordinance does not purport to give him authority to exercise such powers or to make any rules or regulations, except in cases of emergency, until they can be reported to the city council for approval or rejection. He can only be authorized to perform administrative duties in pursuance of some ordinance of the city, and there was no valid ordinance authorizing the exclusion of relator from the public school which she had a legal right to attend. There is nothing in the nature of an emergency in the occasional recurrence of the well-known disease of smallpox in a city like Chicago which may not be provided for by general rules and regulations prescribed by the legislative authority of the city. The board of education, which has charge of the public schools, has made no rule or regulation on the subject of such epidemics, and neither has the city council. The answer does not make known any ordinance, rule, or regulation for the exclusion from the schools of children not vaccinated in the event that an epidemic of smallpox exists in the vicinity of a school or is reasonably apprehended, and in our opinion the court erred in overruling the demurrer.

The judgment is reversed, and the cause is remanded to the Circuit Court, with directions to sustain the demurrer.

Petition for rehearing denied June 9, 1908.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CHARLES E. LEWIS, Admr., etc., of Fred E. Lewis, Deceased,
v.

BROTHERHOOD ACCIDENT COMPANY.

(194 Mass. 1, 79 N. E. 802.)

Arbitration — validity — attempt to oust courts.

1. A provision near the end of an accident-insurance policy which has prescribed certain benefits on certain conditions, to the effect that, in case of disagreement between the parties as to the liability of the insurer, such liability shall be determined by arbitration, is an attempt to oust the courts of their jurisdiction, and is void.

Insurance — drowning.

2. Drowning, although not accompanied by external marks, is covered by a policy insuring against personal injury leaving upon the body external marks, where drowning appears in the list of accidents insured against, and a separate provision limits the liability, in case of drowning, to a certain percentage of the face of the policy in the absence of an eyewitness.

Same — unauthorized beneficiaries — trust.

3. Making the proceeds of an accident-insurance policy, in case of the death of the insured, payable to his estate, does not violate the statutes authorizing such insurance solely for the benefit of heirs, where the policy expressly provides that the estate shall receive the fund in trust for, and pay it forthwith to, the heirs.

Same — drowning — eyewitness.

4. The facts and circumstances of a drowning accident are sufficiently established, within the meaning of an accident-insurance policy limiting the amount of recovery in case they are not so established, where witnesses testify to having seen deceased in a cranky canoe, with a companion, within three or four minutes of the time of accident, and to having seen the overturned canoe and evidence of its having recently capsized, within a few minutes

after it, although they did not actually see the craft overturn.

(January 4, 1907.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover the amount alleged to be due on an accident-insurance policy which resulted in a verdict in plaintiff's favor. Overruled.

The facts are stated in the opinion.

Messrs. Whipple, Sears, & Ogden and J. B. Crawford, for defendant:

The action was prematurely brought, the plaintiff not having asked arbitration.

Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Hutchinson v. Liverpool & L. & G. Ins. Co. 153 Mass. 143, 10 L.R.A. 558, 26 N. E. 439; Kyte v. Commercial Union Assur. Co. 144 Mass. 43, 10 N. E. 518; Putnam Tool Co. v. Fitchburg Mut. F. Ins. Co. 145 Mass. 265, 13 N. E. 902; Cook v. North British & Mercantile Ins. Co. 181 Mass. 101, 62 N. E. 1049; Paul v. Fidelity & C. Co. 186 Mass. 413, 104 Am. St. Rep. 594, 71 N. E. 801; 2 Bacon, Ben. Soc. 3d ed. § 421.

There being no external marks of violence, the plaintiff could not recover the maximum sum.

Aldrich v. Bay State Constr. Co. 186 Mass. 489, 72 N. E. 53; Greenl. Ev. 13a; Nolan v. New York, N. H. & H. R. Co. 70 Conn. 159, 43 L.R.A. 305, 39 Atl. 115.

Messrs. Noble & Davis and Herbert R. Morse, for plaintiff:

The plaintiff is entitled to recover notwithstanding the absence of external marks on the body.

Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; McGlinchey v. Fidelity & C. Co. 90 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13; Pennington v. Pacific Mut. L. Ins. Co. 85 Iowa, 468, 39 Am. St. Rep. 306, 52 N. W. 482; Wehle v. United States Mut. Acci. Asso. 11 Misc. 36, 31 N. Y. Supp. 865; Paul v.

Note. — The question, in an action upon an accident policy for death by drowning, of the effect of provisions in the policy limiting the insurer's liability, or denying it altogether, where there is no external or visible mark or sign on the body, does not seem to have been presented before for adjudication, as an extensive search has revealed no other case in which such question arose. But in Wehle v. United States Mut. Acci. Asso. 11 Misc. 36, 31 N. Y. Supp. 865, affirmed without reference to this point in 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35, the court uses language which tends to support the conclusion arrived at in LEWIS v. BROTHERHOOD ACCL. Co., though 17 L.R.A. (N.S.)

no contention seems to have been made by the insurer in this regard, and it does not appear from the opinion that the policy contained any provision as to marks on the body. The language referred to, which is all the court had to say upon the question, is as follows: "The body of the testator, when taken from the water, exhibited visible, external signs of the cause of death. Water came from the mouth, and the body seemed to be filled with water. So that every condition precedent to a right of recovery, within the terms 'external, violent, and accidental means,' as defined in Tucker v. Mutual Ben. Life Co. 50 Hun, 50, 4 N. Y. Supp. 505, was established."

Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347.

Questions of legal liability cannot be left to arbitration.

Miles v. Schmidt, 168 Mass. 339, 47 N. E. 115; Badenfeld v. Massachusetts Mut. Acci. Asso. 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769; Jones v. Brown, 171 Mass. 318, 50 N. E. 648; Mittenthal v. Mascagni, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; Westfield Cigar Co. v. Insurance Co. of N. A. 169 Mass. 384, 47 N. E. 1026.

The provision as to proof by eyewitnesses is illegal.

Nute v. Hamilton Mut. Ins. Co. 6 Gray, 174; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Reynolds v. Equitable Acci. Asso. 59 Hun, 13, 1 N. Y. Supp. 738.

The administrator is entitled to maintain such a suit as this for the benefit of the heirs.

Shea v. Massachusetts Ben. Asso. 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; Rindge v. New England Mut. Aid Soc. 146 Mass. 286, 15 N. E. 628; Burns v. Grand Lodge, A. O. U. W. 153 Mass. 173, 26 N. E. 443; Boyden v. Massachusetts Masonic Life Asso. 167 Mass. 242, 45 N. E. 735; Sargent v. Sargent, 168 Mass. 420, 47 N. E. 121.

Hammond, J., delivered the opinion of the court:

This is an action upon a policy of insurance against accident. The case is before us upon the exceptions taken by the defendant at the trial, in which a verdict for the plaintiff was returned for the full amount claimed.

1. One of the grounds of defense was that there had been no compliance with the arbitration clause. The judge ruled that the clause was valid, but submitted to the jury the question whether there had been a waiver; and the jury found a waiver. The question upon this branch of the case is whether this action of the judge was prejudicial to the defendant. We have not found it necessary to consider whether there was any evidence of waiver because we are of opinion that the arbitration clause is invalid.

The clause is as follows: "10. In the event that this company and the certificate holder or beneficiary disagree as to the liability of this company under this certificate, it is agreed, and this certificate is issued upon the express condition, that such liability and the amount thereof shall be determined by arbitration; the board of arbitrators to consist of three members of the order of the Odd Fellows, one to be ap-

pointed by the company, one by the claimant, and the third shall be the Noble Grand of the lodge of which the assured is a member; and that no legal proceedings for recovery under this certificate shall be brought until the expiration of three months after receipt by the company of acceptable proofs of loss, and of a request in writing, in case of disagreement, to arbitrate, and a refusal by the company to arbitrate; and the company shall not be liable in any legal proceeding unless said proceeding is commenced within six months from the time when the right of action accrues; and no suit shall be brought in any case, except to enforce payment of the award of said arbitrators, unless" the company refuses to arbitrate.

It is to be noted that the subject of reference is not merely the question of damages, or, as put by Colt, J., in *Wood v. Humphrey*, 114 Mass. 185, 186, such a matter as does "not go to the root of the action but . . . [is] only preliminary thereto or in aid thereof,—such as respect[s] the mode of settling the amount of damage, or the time of paying it, or the like;" but it includes also the question of the "liability of this company on this certificate." To what extent and under what circumstances an agreement to refer a question of liability to arbitration is valid has been the subject of considerable discussion in the courts of England and this country. In England, as stated by W. Allen, J., in *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572, 576, "the question . . . has been one of the construction of contracts,—whether the agreement to refer in the particular contract under consideration is a condition precedent to a right of action upon the contract, or an agreement to refer a right arising under other provisions of the contract." See *Scott v. Avery*, 8 Exch. 487, 497, 5 H. L. Cas. 811; *Edwards v. Aberayron Mut. Ship Ins. Soc.* L. R. 1 Q. B. Div. 563; *Spurrier v. La Cloche* [1902] A. C. 446. Perhaps the statement of Maule, J., in *Avery v. Scott*, 8 Exch. 497, 499, quoted with approval by Lord Lindley in *Spurrier v. La Cloche*, ubi supra, contains the principle of the distinction in its most concise form: "There is no decision which prevents two persons from agreeing that a sum of money shall be paid upon a contingency; but they cannot legally agree that, when it is payable, no action shall be maintained for it." How far this court would follow the English courts in the first class of cases described by W. Allen, J., as quoted above, namely, those in which the agreement to refer is a condition precedent to the right of action, or, in other words, where the agreement to refer is one of the essential elements of the cause of action, it is certain that in this state, and quite gen-

erally in many other jurisdictions, in the second class of cases described, namely, those in which the agreement is to refer a right of action arising under other provisions of the contract, the agreement, whether contained in the same or a separate paper, is void as an attempt to oust the courts of jurisdiction. *Wood v. Humphrey*, ubi supra; *White v. Middlesex R. Co.* 135 Mass. 216. For an extensive collection of the cases see 9 Cyc. Law & Proc. p. 512, note 77.

Upon an inspection of the policy in this case we are of opinion that the clause in question comes under the second class of cases above named, and that it is in substance an agreement to refer a cause of action arising under the other provisions of the contract, and therefore is void as an attempt to oust the courts of their jurisdiction. The first page of the policy contains an express promise to pay a certain sum to the estate of the insured in case of his death from one of the causes named. It also contains an express promise to pay certain sums, varying with the extent of the injury, to the insured. These promises are made subject to the by-laws of the company and the conditions thereto annexed. Neither in the by-laws, nor in the conditions annexed, is there any provision for arbitration. We have then an express promise to pay a certain definite sum of money upon compliance with certain expressed conditions. So far the minds of the parties have met. But the conditions are numerous, and it was manifest that a disagreement might arise between the insurer and the beneficiary as to whether a particular condition had been complied with; and the liability of the insurer might turn on that question. There also might arise other disagreements as to the extent of the injuries, for instance, whether the injury was such as to bring the case under one promise where a certain sum would be due, or under another promise where only a much smaller sum would be due. With the possibility of the various disputes before them, the clause in question is framed by the parties. It comes at the end of a definite contract. It being placed immediately before the attesting clause provides that, in the case of a disagreement between the company and the beneficiary "as to the liability of this company under this certificate," the question of "liability and the amount thereof" shall be referred, etc. It is plain that this clause is speaking of a liability on any of the promises thereinbefore set forth. It assumes the existence of a dispute as to whether the conditions under which the express promise to pay is made have been met so that the money is due, or, in other words, whether the money is due under that express promise. In this very 17 L.R.A. (N.S.)

case one of the questions raised—and, indeed, the principal question—is whether the condition with reference to the testimony of an eyewitness as to the facts and circumstances of the accident has been complied with, or, in other words, whether the money is due under the terms of one of the promises. In view of the definite promises contained in the contract, of the express reference to the conditions to which they are subject, and of the situation of the clause in question, and of the language of its opening sentence, we are of opinion that the clause cannot be regarded as qualifying the nature of any of the preceding promises, or as an essential element of liability thereon, but that it must stand as an agreement to refer questions of liability arising upon either of the promises. As thus construed, the agreement to refer is invalid as an attempt to oust the court of its jurisdiction. The agreement to refer being invalid, the whole of the clause is inoperative. See *Badenfeld v. Massachusetts Mut. Acci. Asso.* 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769. Since the clause is invalid the question of waiver is immaterial; and the defendant has suffered no injury from the action of the judge in submitting that question to the jury.

2. It is also contended by the defendant that the policy does not cover accident by drowning, unless, as a result of the accident, there are upon the body external marks of contusion or wounds. In considering this ground of defense it is to be observed that the provisions of the policy are very voluminous, elaborate, and intricate. Many of them are printed in very fine type. It is the general rule in the construction of an insurance contract that any doubt arising upon its face as to its meaning is to be resolved in favor of the insured. This rule is founded in sound sense, and is particularly applicable to a contract so complicated in detail as the one before us. Bearing in mind this rule of construction, we proceed to look into this policy. Upon the first page it is said that the insurance is "against personal bodily injury leaving upon the body external marks of contusion or wounds." Upon the second page, under the head of "What is insured against," it is said that "this certificate of insurance provides against bodily injuries, such as dislocations, fractures, broken bones, bruises, cuts, accidental gun-shot wounds, crushing or mangleing, burns and scalds, bites of dogs, stroke of lightning, drowning, or injuries produced by falls, effected through external, violent, and accidental means, within the intent and meaning of this contract and its conditions as hereto annexed." Then follows a statement of the conditions. The conditions are very complicated and nu-

merous, and are printed in very fine type. It is unnecessary to insert them here. It is sufficient to say that they provide, in substance, that, "in the event of any accidental bodily injury, fatal or nonfatal, contributed to or caused by" any one of a long list of events, accidental or otherwise, which are detailed at great length, the limit of liability in case of death shall be only "one twentieth of the . . . death benefit provided for in this policy." The part as to drowning is in these words: "Drowning or shooting when the facts and circumstances of the accident and injury are not established by the testimony of an actual eyewitness; and also when in an alleged drowning (shipwrecks at sea excepted) the body is not recovered and identified." Then follows a semicolon, followed by these words: "And in case of injuries, whether fatal or disabling, of which there is no visible mark on the exterior of the body visible to the eye (the body itself in case of death not to be deemed such mark)."

In cases of drowning death is caused by the filling of the lungs with water so that the air cannot get to them, and there is no reason why there should be any external mark of contusion or wound. In the ordinary case, therefore, none is to be expected. And if, while drowning, the body is bruised, there is usually no natural or necessary connection between such bruise and death. Suppose two persons, each having a policy like this, are accidentally swept overboard from a ship by the same wave. One goes clear and receives no mark, while the other is bruised and scratched by a spike in no way disabling him as he goes over the rail. Both are drowned and both bodies are recovered. Upon the body of the first is found no external mark of contusion or wound, while upon the body of the other appears the work of the spike. Is it to be said that the first case is covered by the policy and the second is not? To hold that drowning is not covered by the policy unless, in addition to the flooding of the respiratory organs, there is some external mark of contusion or wound, is to base a distinction upon a circumstance which generally has nothing whatever to do with the cause of the death, and, moreover, is to eliminate practically the ordinary and usual case of drowning. An interpretation founded upon such a basis of distinction, and leading to results so unreasonable, is not to be adopted unless clearly required by unmistakable language.

In view of these and other obvious considerations the provisions of the policy relating to external marks of contusion and wounds must be held applicable to the more

violent causes of injury, and not to the case of death by drowning.

3. The policy provides that in case of loss the company shall pay to the estate of the insured, "in trust, however, for and to be paid over forthwith to his legal heirs;" and the defendant contends that the policy could not be made payable to the estate, because, if so made, the sum received would be assets for the payment of debts and expenses of administration, and would be subject to an unrestricted disposition by will, which would be inconsistent with the statutes. But this is not a case where the estate is the beneficiary, as was *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166, upon which and other similar cases the defendant relies. By the express provision of the policy the administrator receives the money solely in trust for the heirs at law, and is answerable for it to no one else. In substance, then, the real beneficiaries are the heirs at law. The money, when recovered, goes to them, and there is no violation of the statutes. See *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628; *Shea v. Massachusetts Ben. Asso.* 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; *Sargent v. Sargent*, 168 Mass. 420, 47 N. E. 121, and cases cited.

4. The difficult question in the case is one of damages. Shall the plaintiff recover the full sum of \$5,000, or only one-twentieth of that sum, to wit, \$250? The answer turns upon the meaning of the clause in the policy respecting eyewitnesses. This clause is found among the large amount of fine print upon the second page of the policy under the head of "Conditions," and, so far as material to the question before us, is as follows: "In the event of any accidental bodily injury, fatal or nonfatal, contributed to or caused by . . . drowning or shooting, when the facts and circumstances of the accident and injury are not established by the testimony of an actual eyewitness, . . . then and in every such case the limit of the liability of this company hereunder shall be one-twentieth of the accidental death benefit provided for in this policy not to exceed \$250 for accidental death, and for nonfatal injuries causing total or partial disability, one-fifth of the weekly indemnity provided for in this policy." This whole paragraph of which the above is a part described more than two dozen cases in either one of which the same reduction to one-twentieth is to be made. Although the case before us is one of drowning, still upon the question of interpretation the fact that the clause includes also injury or death by shooting may be properly considered.

The clause seems to be of somewhat recent origin in policies of insurance, and our attention has not been called by counsel to any

case, nor are we aware of any except *National Acci. Soc. v. Ralstin*, 101 Ill. App. 192, in which it has received judicial attention. That case was one of shooting and the injury was not fatal. It was held that the plaintiff, who was the injured person, was an eyewitness to his own injury. It was further said that an eyewitness to a shooting does not necessarily mean one who saw the load leave the gun. Before the insertion of this clause, the insurance companies labored under some difficulty in their defense. Especially was this felt in cases of death by drowning or shooting. If the defense was that the death was suicidal, inasmuch as suicide was not to be presumed, the burden of showing suicide was upon the defendant; and, where the facts and circumstances of the accident were shown only by circumstantial evidence, there frequently would be great difficulty in sustaining this burden even if death actually was suicidal. Moreover, in the case of disappearance of the person whose life was insured, and the subsequent finding of the dead body in water, the question whether death was caused by drowning, or by some disease or cause not insured against, was frequently embarrassing to the defense. A good illustration of such a case is *Trew v. Railway Pass. Assur. Co.* 6 Hurlst. & N. 838. In that case it appeared that the assured left his lodgings for the purpose of bathing, and was not afterwards seen alive. Subsequently his clothes were found by the water side. A body was found in the water at a distance from the place where he went to bathe, but not at such a distance that it might not have been carried there by the waves, and there was some evidence that this was the body of the assured. It was held that, assuming that the body was that of the assured, it was a question for the jury whether the death was by drowning, or by suicide or natural causes, such as apoplexy or heart disease or the like. In an attempt to meet such cases doubtless a clause has been inserted in policies providing in substance that there shall be no recovery in certain cases unless the claimant proves by direct and positive proof that the death or injury was caused by accident and was not the result of design, or, in other words, was from a cause covered by the policy. But it was held that such a clause did not make it necessary that the facts and circumstances of the injury should be shown by persons who were actually present when the insured received the injuries, but that it was sufficient if they were shown by circumstantial evidence. *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; 17 L.R.A. (N.S.)

Utter v. Travelers' Ins. Co. 65 Mich. 545. 8 Am. St. Rep. 913, 32 N. W. 812.

It would seem as if the clause under consideration was inserted in view of these and other similar decisions. It is not to be disposed of by the remark that it is in fine print, or is in the nature of a trap or catch, and hence is to be wholly disregarded. It forms a part of the contract and must be fairly construed. What does the clause mean? An eyewitness is a person who testifies to what he has seen. By the terms of this policy the facts and circumstances of the accident and injury are to be established by those who saw them. Not only are the facts and circumstances of the injury to be established by an eyewitness, but also of the accident; that is, the operating cause of the injury. Enough must be testified to by eyewitnesses to show the operating cause of the injury, or at least to show that at the time of the injury there was an operating cause to which the accident may fairly be attributed, and to indicate in a general way the nature of that cause and the manner of its working. To illustrate. Suppose a person standing upon the shore sees not far out a boat sailing peacefully along in a mild breeze, with a competent and careful man at the helm. The boat is so large and steady that it is not likely to be capsized by any movement the man would make, nor by the wind as then blowing. In no sense can the boat be said to be in then present peril from any cause. Suppose the observer leaves the shore and returns in an hour, and then sees the upturned boat near where he first saw it. During his absence an accident has happened resulting in the upsetting of the boat. Can it be said that he has seen the circumstances of the accident within any fair interpretation of the language? He has seen no cause in operation to which the accident may be fairly attributed. But suppose that, when he first sees the boat, or while he is looking at it, a squall suddenly looms up in the distance and rapidly approaches the boat. He sees it strike the boat, putting her in evident peril. Wanting to get a better look, he runs to a house for a spy-glass, is gone only a few minutes, and when he returns sees only a capsized boat. Such a man is an eyewitness of the accident, although he did not actually see the boat capsize. He saw the boat in peril from a then impending cause. He saw the cause at work, and he saw what was the natural effect of such a cause. That is far enough; and in such a case the cause of the accident must be held to have been established by an eyewitness within the meaning of the policy.

In the light of this interpretation of the clause, we proceed to examine the evidence

in this case to see to what extent the facts and circumstances of the accident and the injury are shown. One Black testified that, about five minutes before 4 o'clock in the afternoon of June 25, 1902, he, being out on the river in a skiff with one Reissman, saw Lewis in a red canoe with a lady, going "in the opposite direction from the way the witness was going. Lewis was paddling the canoe sitting in the stern, and Miss Hurley was sitting in the center of the canoe on the bottom, leaning back against the cushions. The pair were talking, and Lewis smiled and bowed to witness." The witness had known Lewis very well for two years. "Lewis looked bright and happy; . . . the pair were chatting together; . . . Miss Hurley appeared the same as any young woman on the river; and . . . there was nothing unusual in the appearance of either; . . . they were going quite swift, and . . . Lewis was a good hand on the river." He "had his coat and vest off." Reissman, who was with Black, testified substantially to the same facts. He further said that, about three or four minutes after they had passed the couple, and after a point of land had shut the canoe out of sight, he heard a scream, but could not swear whether it was the scream of a man or a woman; that it did not seem to him at the time to be a cry of agony; that it seemed like a cry of despair, but that he did not go back, and never thought any more of it until the next day, when he heard of the accident. So far as appears, this was the last time that either Lewis or Miss Hurley was seen alive.

One Chellman testified that he was out on the river that afternoon, but did not know Lewis; that, shortly before 4 o'clock, the witness and a man named Esselen "were coming up the river and found the overturned canoe; that they were paddling and had been picking pond lilies; that, as they came around the bend, he discovered the cushions and the lady's coat, gentleman's coat, and lady's hat, and a red canoe, bottom up; that the carpet was with the canoe with one end thrown over the bottom, and after paddling around they found a gentleman's vest 5 feet under water; that he fished it out, that it was not on the bottom; that he looked at the watch and that it was stopped at 4 o'clock; that the vest was soaked through, but that the other things had not sunk below the surface; that these things were found not later than quarter past 4; that they picked up the things," and towed the boat to the Hiatt boathouse. On cross-examination, he appeared a little uncertain as to the precise time, but placed the time as near 4 o'clock. He also said that the canoe was about 20 feet from the shore. He was corroborated by Esselen, who fixed 17 L.R.A. (N.S.)

the time of picking up the things as "within ten or fifteen minutes past 4."

The next day the bodies of Lewis and Miss Hurley were taken from the river near the place of the accident, and there was no question about identification. There were no external marks upon the body of Lewis, and the medical examiner testified that death was caused by drowning, and that in his opinion it was a case of accidental drowning. Hiatt, the owner of the canoe, testified that Lewis hired the canoe about 2 o'clock; that he "seemed natural," and that "he was a very good boatman and had been coming constantly to his boathouse for two seasons." As to the canoe, he testified that it was a "16-foot canoe of 34 or 35 inch beam, made of cedar with a canvas skin painted red;" that it "was what he should call a medium safe canoe; that a person would have to be more careful with it than with a larger one." On cross-examination he testified that there "was no reason for his [Lewis's] upsetting in a medium safe canoe; . . . that he was a perfectly competent man and had a perfectly safe canoe."

It is unnecessary to recite the evidence further in detail. The jury might have found on the evidence of actual eyewitnesses that, shortly before the time when the accident happened, Lewis and Miss Hurley were upon the river in what might be called a "cranky" canoe, liable to overturn at any moment unless unusual care was exercised both by Lewis and his companion; that, within five (perhaps fewer) minutes of the time at which they were last seen alive, the canoe was overturned and the bodies were under water. Here, then, is shown upon the testimony of eyewitnesses an operating cause,—namely, the imminent liability of the capsizing of the canoe by reason of its cranky nature, taken in connection with the fact that it had two occupants of whom one was a young woman not shown to have been experienced in aiding to keep the canoe in balance. It is not the case of a boat which is of such size and construction as to be not liable to be upset by the movements of persons in it; but it is the case of a cranky canoe having two persons in it where a not unusual movement, even of one of them, may result in the capsizing of it. An operating cause for disaster is ever present under such circumstances, and that cause is disclosed by the testimony of eyewitnesses. Moreover, upon the evidence the jury might have found that the movements of the canoe and its occupants were shown by eyewitnesses up to a time within three or four minutes of the accident, and that every operating cause of the accident except the one above shown to have been present was fairly excluded by the testimony of these

same eyewitnesses. It must be held that in the case before us the facts and circumstances of the accident and injury were established by eyewitnesses within the meaning of the policy. We see no substantial error in the manner in which the trial judge dealt with this branch of the case.

In view of our decision upon this point, it becomes unnecessary to consider the contention of the plaintiff that such a provision is void upon the ground that it is an attempt to dictate to a court as to rules of evidence.

5. Under the circumstances disclosed in this case, we do not see how it was material whether the defendant is a fraternal beneficiary association, or not. The action is upon the policy. The exceptions to the admission of the evidence are also overruled. Even if the evidence excepted to was immaterial, as contended by the defendant, we do not see how the defendant could have been harmed by its admission.

Exceptions overruled.

Petition for rehearing overruled.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

THOMAS, Plff. in Err.,
v.

UNITED STATES.

TAGGART, Plff. in Err.,
v.
SAME.

(84 C. C. A. 477, 156 Fed. 897.)

Statute — revision — change in meaning.

1. The change, by the statutory revision commission having no authority to alter the meaning of a statute, of the words "conspire to commit an offense against the laws of the United States," to "conspire to com-

mit an offense against the United States," in a statute providing for the punishment thereof, does not limit the punishment to cases of conspiracy against the United States as such, but it extends to conspiracy to violate the simple penal provisions of its statutes.

Same — inconsistent statutes.

2. A general statute punishing by imprisonment any conspiracy to violate a statute of the United States is not inapplicable to a conspiracy to commit an offense under a subsequent statute providing for the punishment of that offense by fine only, on the theory that its application would indirectly operate to subject the offender to punishment not warranted by law, or that the former statute was superseded by the latter.

Conspiracy — consummation of offense — effect.

3. The consummation of the offense of receiving a rebate contrary to law does not absolve from punishment for conspiracy strangers who conspired to induce the guilty party to commit the offense.

Indictment — conspiracy — sufficiency.

4. An indictment of a transportation agent for conspiring to induce a shipper to receive rebates in violation of the act of Congress known as the "Elkins act" is not insufficient because it fails to set out the name of the proposed giver,—at least where the givers are described as the railroads and their connecting lines engaged in carrying on interstate commerce between the points of shipment and destination of the shipper's traffic.

Same — source of rebate.

5. A charge in an indictment for conspiracy to induce a shipper to violate the "Elkins law" by receiving rebates, that the money was to be received from the railroads in the way or guise of pretended claims, commissions, and allowances, and, when so received, was to be turned over to the shipper, is sufficient to show how the rebate was to be effected.

Same — duplicity.

6. An indictment for conspiracy to in-

Case Note. — May offense of conspiracy be predicated of an attempt to procure violations of the Elkins act?

A conclusion at variance with that in *THOMAS v. UNITED STATES* was reached by Holt, J., in the circuit court for the southern district of New York, in the case of *United States v. New York C. & H. R. R. Co.* 146 Fed. 298, where it was held that, since the Elkins act expressly abolished imprisonment as a penalty for any offense committed under the acts to regulate commerce, an indictment would not lie against the traffic managers of a railroad company and the recipients of rebates for a conspiracy to commit such an offense, which is an offense punishable by imprisonment, the offense of conspiracy being essentially the same offense as that of giving or receiving

rebates. The court said: "It is impossible to deny that Congress intended in the Elkins act to abolish the penalty of imprisonment for the offense of giving or taking rebates, and to substitute for the previous punishment a much heavier fine than that which could be inflicted under the interstate commerce act. If, therefore, the offense charged in this indictment is essentially the same offense as that created and punished in the interstate commerce act and the Elkins act, this indictment, in my opinion, cannot be maintained. If Congress has made a certain action an offense, and prescribed its punishment, the courts cannot, by giving it some other name, increase the punishment. The question in this case, therefore, is whether the offense charged in the indictment as constituting the crime of

duce a shipper to violate the "Elkins law" by receiving rebates is not bad for duplicity in charging that the conspiracy was to induce him to "accept and receive" rebates.

Evidence — private memoranda.

7. Upon trial of a charge of conspiracy to induce a shipper to receive rebates in violation of the "Elkins act," after it has been shown that he received money from some source in some way related to his shipments, and that the account was not carried on the books of his business, evidence of the contents of a private memorandum book with reference to them is admissible.

Conspiracy — rebates — liability.

8. One who, in the guise of a transportation agent, induces a shipper to permit him to route his freight for a compensation to be secured from the railroad company to which the transportation is confided, in the guise of exaggerated claims for loss, damage, and overcharge or commissions, is

punishable for conspiracy to induce violation of the "Elkins law."

Evidence — similar transactions.

9. Upon trial of an indictment for conspiracy to induce a shipper to receive rebates in violation of the "Elkins law," evidence is admissible of similar dealings with other merchants.

Jurisdiction — offense.

10. The court within whose jurisdiction a fraudulent scheme is first devised has jurisdiction of the offense regardless of where the formal contract was executed.

Conspiracy — joining — liability.

11. One who comes into a conspiracy after it is concocted, with full knowledge of its existence and character, and with the purpose of furthering its design, is punishable as a conspirator.

Judgment — acquittal — bar.

12. Acquittal of a conspiracy to induce a railroad company to give rebates is not a bar to a prosecution for inducing shippers to receive them.

conspiracy differs from the offense described in the interstate commerce acts and the Elkins act as the giving and receiving of rebates punishable by a fine. In most cases, undoubtedly, a conspiracy to commit a crime is a distinct offense from the commission of the crime itself. This is true, of course, of all crimes committed by one person, for two persons, at least, are necessary for a conspiracy. Even if more than one person commits the crime, there may be others engaged in a conspiracy to have it committed, who do not take part otherwise in the commission of the crime. But there are certain crimes which require for their commission the concurrent action and co-operation of more than one person. Such crimes as rioting, or dueling, or bigamy, for instance, cannot be perpetrated by one person, and persons who do not perpetrate them might take part in a conspiracy to cause them to be done. But, when the concurrent action of two persons is necessary to perpetrate a certain crime, and all that they do is to agree to do it, and do do it, it seems difficult to claim that their agreement to act is in law a conspiracy, and their act a distinct crime, and that the agreement to act can be punished more severely or differently from the act itself. I think that the offense of giving or receiving rebates is such an act. It requires the concurrence of two persons. A rebate cannot be given unless there is someone who agrees to receive it and who does receive it, and cannot be received unless there is someone who agrees to give it and who does give it. The claim that the agreement to give it is a conspiracy punishable by imprisonment, while the actual giving it is an offense only punishable by a fine, seems to me too subtle a distinction to be drawn in the administration of criminal law. . . . The facts alleged in the indictment in the case at bar as steps taken to effect the object of the conspiracy are the same facts which it 17 L.R.A. (N.S.)

would be necessary to prove to sustain an indictment for giving and receiving rebates. On the trial of such an indictment, the government would not make out a cause by simply proving the payment of the check. It would have to prove that the check was given in payment of a rebate. To establish that proposition, it would be necessary to prove the agreement to give a rebate, the shipment of sugars, the payment of the full scheduled rates of freight, the filing of the claims for rebate, and the payment of such claims as rebate. Without proof of these facts, these defendants could not be convicted of the crime of giving or taking rebates; with such proof, they could. They would thereupon be liable to be punished by the fines prescribed by the Elkins act. . . . In my opinion, it is not in the power of the government, by calling the same acts a conspiracy, to indict these defendants for a different crime, and to thereby subject them to the liability of imprisonment for acts for which such punishment was expressly abolished by the Elkins act."

The view that one may be prosecuted for conspiracy to violate the interstate commerce law, as well as for its actual violation, derives some support from the decisions cited in the THOMAS CASE, in which persons conspiring to defeat the provisions of such law have been held amenable to the conspiracy statute; although in none of these cases does the question appear to have been expressly passed upon.

One source of doubt in regard to this question has, however, been removed by the act of June 29, 1906, which amends § 1 of the Elkins act by striking out the provisions abolishing punishment by imprisonment for offenses under the acts to regulate commerce, and making in lieu thereof, a provision, as an alternative or additional penalty, for imprisonment for a term of not exceeding two years,—the same term fixed by the conspiracy statute.

Trial — instruction — effect.

13. An instruction that defendant must be found guilty beyond a reasonable doubt before he can be convicted is not the equivalent of a requested instruction that he is presumed innocent of the crime, and that this presumption remains until it is overcome by the proof, so that it will correct an error in refusing a request for the latter instruction.

(October 21, 1907.)

WRITS OF ERROR to the District Court of the United States for the Western District of Missouri to review judgments convicting defendants of conspiracy. Reversed.

The facts are stated in the opinions.

Argued before Sanborn, Hook, and Adams, Circuit Judges.

Messrs. O. M. Spencer, O. H. Dean, and W. D. McLeod, with Messrs. Hale Holden, H. C. Timmonds, and John N. Baldwin, for plaintiffs in error.

Mr. A. S. Van Valkenburgh for defendant in error.

Adams, Circuit Judge, delivered the opinion of the court:

An indictment was found in the court below charging defendants Thomas and Taggart with conspiring with one George A. Barton, a member of the firm of Barton Brothers, of Kansas City, Missouri, and others to the grand jurors unknown, to commit an offense against the United States by getting that firm, which was engaged in the business of making large shipments of merchandise from New York and New Jersey to Kansas City, Missouri, to accept and receive rebates and concessions from divers railroads engaged in transportation of interstate commerce between those places, in violation of the interstate commerce acts, and particularly act February 19, 1903, chap. 708, 32 Stat. at L. 847, U. S. Comp. Stat. Supp. 1907, p. 880, known as the "Elkins act." Another indictment was found in the same court and at the same time against Thomas and Taggart and one Crosby, charging them with conspiring to commit an offense against the United States by getting the Chicago, Burlington, & Quincy Railroad Company, a corporation operating a railroad engaged in the transportation of interstate commerce, to offer, grant, and give rebates, concessions, and discriminations to divers favored persons and corporations engaged in interstate commerce, and particularly to such persons or corporations in Kansas City as were engaged in shipping goods from New York or New Jersey to Kansas City. The two indictments were consolidated for the pur-

pose of a trial. The defendants were found guilty and sentenced to pay a fine and be imprisoned on the first, and with Crosby were found not guilty and discharged on the second, indictment. Thomas and Taggart prosecuted separate writs of error, which were treated together in argument and brief of their respective counsel, and will be treated together in this opinion.

A large number of errors were originally assigned, but, in conforming to the requirements of rule 24 of this court (150 Fed. xxxiii.), requiring counsel to specify in their briefs the errors intended to be relied upon by them, they are greatly reduced, and will be specifically referred to as the opinion proceeds. Many of the errors claimed to have been committed by the trial court arise under the general specification that the court erred in not sustaining a demurrer to the indictment. Section 5440 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3676), under which the indictments were found, originated as § 30 of an act entitled "An Act to Amend Existing Laws Relating to Internal Revenue, and for Other Purposes," approved March 2, 1867 (14 Stat. at L. 471, 484, chap. 169), which is as follows: "That, if two or more persons conspire either to commit any offense against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be liable to a penalty of not less than \$1,000, and not more than \$10,000, and to imprisonment not exceeding two years. . . ."

Under authority of an act approved June 27, 1866 (14 Stat. at L. 74, chap. 140), a commission was appointed to revise and consolidate the statute laws of the United States, and empowered to "make such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." That commission was not authorized to make any changes in the law as it stood, but only to alter the existing text so far as necessary to make clear the intention of Congress whenever that intention was found obscured by contradictions, imperfections, or omissions. The commission reported in 1873, taking the conspiracy provision out of the special class of revenue legislation, and placing it under a heading, "Crimes against the Operations of the Government," as an independent section (5440) of the Revision. It changed the text so that, instead of reading, "if two or more persons conspire either to commit any offense against the laws of

the United States or to defraud the United States in any manner whatsoever," etc., it read: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than \$1,000, and not more than \$10,000, and to imprisonment not more than two years."

By an act approved May 17, 1879 (21 Stat. at L. 4, chap. 8, U. S. Comp. Stat. 1901, p. 3676), § 5440 was amended so as to provide for a fine of not more than \$10,000 or imprisonment for not more than two years, or both, in the discretion of the court, in lieu of the cumulative punishment provided for in the original section. Except for these modifications of the punishment, § 5440 remains as when first incorporated into the Revision as a separate section.

1. It was formerly contended that the statute, by reason of its enactment in and as a part of the revenue act, contemplated only conspiracies against the enforcement of the revenue laws of the United States (*United States v. Fehrenback*, 2 Woods, 175, Fed. Cas. No. 15,083), but since the decision of the Supreme Court in *United States v. Hirsch*, 100 U. S. 33, 36, 25 L. ed. 539, 540, no such contention can longer be made. Counsel for defendants practically so concede, but place reliance upon the proposition that the only conspiracies contemplated by the statute are those against the United States as such, which affect the operations of the government, or tend to overthrow or impair its authority; and that it does not contemplate a conspiracy to violate simple penal provisions like those of the Elkins act against giving or receiving rebates. The case of *Curley v. United States*, 64 C. C. A. 369, 130 Fed. 1, is cited and relied upon by them as authority for their contention. That case mainly involves the consideration of a conspiracy to defraud the United States, and many of the expressions quoted and relied upon by counsel must be referred to the conspiracy under actual consideration by the court, namely, a conspiracy to defraud, for an accurate understanding of their meaning. As indicative that the learned court which decided that case did not intend the language to be construed as limiting conspiracies to commit an offense as claimed by the defendants, attention may be called to the following expression found on page 8 of the opinion: "Manifestly § 5440 in its general terms contemplates wrongs other and beyond conspir-

acies to commit distinct statutory offenses against the United States. . . ."

If we are wrong in our interpretation of that case, and if it is, when properly understood, authority for defendants' contention now being considered, we find ourselves quite unable to adopt its conclusion. The original conspiracy act of 1867 (14 Stat. at L. 471, chap. 169) made no such limitation. It denounced a conspiracy to commit an offense "against the laws of the United States" as a crime. We cannot presume that the commissioners, under the act of 1866, undertook to change the meaning of the original act. They were authorized to make clear the intention of Congress, and they did it in the particular under consideration by expressing the thought that the offense denounced by the original act was one against the organized body capable of being offended, a body authorized to make rules of conduct, rather than against the rules themselves. The word "offense" implies a violation of a law by which alone it can be denounced. Actuated, doubtless, by considerations like these, the commissioners eliminated the words "the laws of," and made the crime denounced to consist of a conspiracy to commit an offense against the United States, the maker of the laws and the body interested in and responsible for their enforcement; and in so doing they expressed more philosophically and exactly the necessary and essential meaning of the original act. In cases of doubt and uncertainty about the meaning of a compiled or revised statute, resort may properly be had to the original enactments to ascertain their true meaning. *United States v. Bowen*, 100 U. S. 508, 513, 25 L. ed. 631, 632; *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; *Logan v. United States*, 144 U. S. 263, 302, 36 L. ed. 429, 442, 12 Sup. Ct. Rep. 617; *The Conqueror*, 166 U. S. 110, 122, 41 L. ed. 937, 943, 17 Sup. Ct. Rep. 510; *Barrett v. United States*, 169 U. S. 218, 227, 42 L. ed. 723, 726, 18 Sup. Ct. Rep. 327.

A brief reference to other provisions of the statutes shows that Congress frequently employed the formula "offense against the United States," as the equivalent of "offense against the laws of the United States." Rev Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716), providing for the arrest, imprisonment, and letting to bail of accused persons reads as follows: "For any crime or offense against the United States, the offender may," etc.

Section 731 (U. S. Comp. Stat. 1901, p. 585), relating to the venue in criminal cases, reads: "When any offense against the United States is begun in one judicial circuit

and completed in another, it shall be deemed," etc.

Section 5541 (U. S. Comp. Stat. 1901, p. 3721), relating to the place of imprisonment of convicts, reads: "In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed," etc.

Section 5542, relating to the same subject, reads: "In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor it shall be lawful," etc.

Section 5543, relating to the same subject, reads: "All prisoners who have been or may be convicted of any offense against the laws of the United States . . . shall be entitled," etc.

Many other statutes might be referred to, but the foregoing are sufficient to show that Congress is in the habit of using the formula "offense against the United States" interchangeably and indiscriminately with "offense against the laws of the United States," and that both mean the same thing. It is inconceivable, and, so far as we know, has never been claimed, that Congress intended by § 1014 to make provision for the arrest, imprisonment, and bailing of persons charged with offenses affecting the operations of the government only, or that by § 731 Congress did not intend to make all offenses, whatever their grade, begun in one circuit and completed in another, triable in either; or that Congress did not intend by §§ 5541, 5542, and 5543 to make general provisions for the place of imprisonment and credit for good behavior applicable to all convicts whatever be the character of their offenses.

In the light of the foregoing considerations, we think § 5440 was intended as a broad and comprehensive provision denouncing conspiracies to commit offenses created by any of the statutes of the United States as a crime.

2. Before the passage of the Elkins act, in 1903, the interstate commerce law dealt mainly with the carrier, its officers, and agents. The act of 1903 first made it an offense for a shipper to solicit, accept, or receive a rebate, concession, or discrimination. It abolished imprisonment for offenses under the old acts, and did not impose it as punishment for offenses under the new act. In view of this state of the law, it is contended by defendants' counsel that, as the crime of conspiracy under § 5440 is punishable by imprisonment, no such crime can be imputed to one who conspires to violate the interstate commerce act for which no

punishment by imprisonment is provided, because that would indirectly operate to subject him to punishment not warranted by law. In other words, that § 5440, in so far as it formerly permitted an indictment for a conspiracy to violate any of the provisions of the interstate commerce act, was to that extent superseded by the Elkins act. This contention might be tenable if the two statutes created or punished the same offense; but the conspiracy statute denounces a crime of different elements and of different gravity than those denounced by either the original or amended interstate commerce acts. In the former, two or more persons must necessarily be implicated, a conspiracy between them must be shown, an overt act in the accomplishment of the object of the conspiracy must be committed, and the offense, by reason of the danger that is enhanced by combination and secrecy, is peculiarly grave and serious. In the latter acts the mere conscious, intelligent giving or receiving a rebate, concession, or discrimination, and nothing more, constitutes a separate offense by the persons so giving or receiving the same. Congress undoubtedly had the power to denounce only the completed act as an offense, and to withdraw it from the class of offenses subject to the general conspiracy act; but it would seem, considering the radical difference between a substantive offense denounced by law and a conspiracy to commit such an offense, that, if Congress had intended that offenses against the interstate commerce act should not continue to be the basis of a conspiracy charge, it would have said so in some clear and unambiguous way, and would not have left a matter so important to the offender and to the government to the uncertain test of repeal by implication. By repeated adjudications of the Supreme Court and other courts, a conspiracy to commit a criminal offense has been held to be an entirely different thing from the substantive offense itself; and prosecutions for conspiracies to defeat the provisions of the interstate commerce act have been frequently upheld.

In *Clune v. United States*, 159 U. S. 590, 595, 40 L. ed. 269, 271, 16 Sup. Ct. Rep. 125, Mr. Justice Brewer, speaking for the Supreme Court in expounding the meaning of § 5440 in connection with § 3995 (U. S. Comp. Stat. 1901, p. 2716), said: "[It is] contended that a conspiracy to commit an offense cannot be punished more severely than the offense itself, and also that, when the principal offense is, in fact, committed, the mere conspiracy is merged in it. The language of the sections is plain, and not open to doubt. A conspiracy to commit an offense is denounced as itself a separate of-

fense and the punishment therefor fixed by the statute; and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Callan v. Wilson*, 127 U. S. 540, 555, 32 L. ed. 223, 228, 8 Sup. Ct. Rep. 1301. The power exists to separate the conspiracy from the act itself, and to affix distinct and independent penalties to each."

See also *United States v. Hirsch*, 100 U. S. 33, 36, 25 L. ed. 539, 540; *United States v. Britton*, 108 U. S. 199, 27 L. ed. 70, 698; 2 Sup. Ct. Rep. 531.

In the following cases persons conspiring to defeat the provisions of the interstate commerce law have been held amenable to the conspiracy statute: *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (C. C.) 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *Waterhouse v. Comer* (C. C.) 19 L.R.A. 403, 5 Inters. Com. Rep. 564, 55 Fed. 149; *United States v. Howell* (D. C.) 4 Inters. Com. Rep. 818, 56 Fed. 21; *United States v. Cassidy* (D. C.) 67 Fed. 698; *Wabash R. Co. v. Hannahan* (C. C.) 121 Fed. 563. In the light of these authoritative decisions denouncing a conspiracy to commit an offense as peculiarly dangerous and in itself totally separate from those involved in the mere violations of the law, and of the other decisions referred to, recognizing violations of the interstate commerce law as bases of charges of conspiracy, it would be highly unreasonable to impute to Congress a purpose not to recognize the doctrine of these cases, and by silence, merely, to deny the applicability of § 5440 to violations of an important act like the interstate commerce law; and we unhesitatingly conclude that, notwithstanding the offense of violating provisions of the interstate commerce law is punishable with less severity than the conspiracy to commit that offense, § 5440 is in no way repealed or superseded by the provisions of the interstate commerce law in question. The two may well and harmoniously stand together, and in such circumstances repeal by implication or supersession of either cannot be presumed. *Great Northern R. Co. v. United States*, 155 Fed. 945.

3. Again, it is argued that an indictment will not lie in this case for a conspiracy because a concert and plurality of agents are necessary elements of the substantive offense for the commission of which a conspiracy is charged to have been formed; and because it required the intelligent co-operation of two or more persons to commit the

offense of receiving a rebate,—the giver or givers, on the one hand, and the receiver or receivers, on the other,—that every element of the offense of conspiracy is involved in the completed offense of receiving a rebate from the one who gave it, and is merged in it. Attention is directed to 2 Wharton, *Crim. Law*, § 1339, *United States v. Dietrich* (C. C.) 126 Fed. 664, and *United States v. New York C. & H. R. R. Co.* (C. C.) 146 Fed. 298, as authority for the contention. The rule broadly laid down by Wharton, if applied as written, justifies the contention made. He says: "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained," etc.

It is to be noted that the learned author fails to state or make it clearly appear whether he limits immunity from the charge of conspiracy to those who are the sole and necessary actors in the commission of the substantive offense, or whether he includes in his rule of immunity against conspiracies persons who may have conspired to induce others to commit the offense. If he limits the applicability of his doctrine to the former, he would be clearly right. It cannot be if (using one of his illustrations) the crime of bigamy be punishable in a certain way that the two parties who alone could commit it can be subjected to a charge of conspiracy for committing the same crime, and thereby made to suffer twice for exactly the same offense, or be subjected to a severer punishment on a conviction for the conspiracy than is imposed upon the substantive offense itself. But, if persons combine to induce others to commit bigamy, they, according to the same learned author, may be punished as for a conspiracy. We think counsel for defendants have erroneously interpreted Wharton's meaning as manifest from the context. As we understand the *Dietrich* and the *New York Central Railroad Cases*, they each involve facts of the kind just referred to in the illustration. In the former case *Dietrich* alone was to receive a bribe and *Fisher* alone was to give it to him. The conspiracy charged consisted of the unlawful combination between the two to that effect. The indictment, being against those two persons alone, was held bad. To show that Judge Van Devanter understood the Wharton rule to be limited to cases in which the necessary parties to the substantive offense only were charged with conspiring, a brief quotation from his opinion will suffice. He said (page 666 of 126 Fed.): "As the transaction is stated in the indictment, it was *Dietrich* who

agreed to receive the bribe, not Dietrich and Fisher; and it was Fisher who agreed to give the bribe, not Fisher and Dietrich. The charge is not that two or more persons agreed among themselves to corruptly obtain the aid of another, a member of Congress, in securing the appointment of some aspirant to a Federal office, nor is it that two or more members of Congress agreed among themselves to obtain from another person a reward or compensation for their services or aid in securing such an appointment. Such an agreement would constitute a conspiracy to commit an offense against the United States, and, if followed by the doing of any act by one of the conspirators to effect its object, would be punishable under § 5440."

In the New York Central Railroad Case, the court was dealing with facts like those in the Dietrich Case. The crime charged was a conspiracy to commit the offense of receiving a rebate, and the only persons indicted for the conspiracy were those representing, on the one hand, the giver, and, on the other hand, the receiver, of the rebate; and those were the sole persons whose concert and coercion constituted the substantive offense denounced by the interstate commerce law. That Judge Holt, who sat in the case, so regarded it, a brief extract from his opinion will show. He said (page 304 of 146 Fed.): "The counsel for the government assert that the Dietrich Case is to be distinguished from this case because in the Dietrich Case but two persons—the giver and taker of the bribe—were charged with the conspiracy in the indictment, while in the case at bar the indictment charges that seven persons named, and others to the jurors unknown, were parties to the conspiracy. But only four of the seven persons named are indicted, and of those four Guilford and Pomeroy represent simply the giver, and Edgar and Earle simply the receiver, of the rebate."

The case now before us differs radically from either of the foregoing. Thomas and Taggart, who are the sole defendants, and who alone are indicted, were neither givers nor receivers of the unlawful rebates in question. Neither did they stand for them as representatives. They occupied the position of irresponsible intermediaries. They are neither charged, nor shown in proof, to have given or received the rebate in question, nor are they charged with conspiring to give or receive a rebate. They are charged with conspiring to bring about the commission of the offense of receiving rebates by others, namely, by Barton Brothers. If, when the coercion of two or more persons is necessary to constitute the commission of a crime, no outside persons, how-

ever effectually and wickedly they may have conspired with them or either of them to bring about the violation of the law, can be held for a conspiracy, immunity from a most salutary criminal provision is found for many of the worst violators of the law. It is the schemers who set afoot the infractions of the law that are most dangerous to the public weal; and we cannot believe that Congress ever intended, except in cases of a clear doubling of punishment of the same persons for the same offense, to relieve them from amenability to the conspiracy statute.

4. The indictment is also assailed (1) for insufficiency in averment of facts constituting the conspiracy; (2) for want of such certainty in describing the offense which the conspiracy was formed to commit as makes it appear that it was an offense against the United States; (3) for want of such certainty in describing the offense as fairly informs the defendants of its nature and of what they were called upon to meet; (4) for duplicity. The indictment charges in clear and unequivocal language that defendants conspired together and with George A. Barton, one of the members of the firm of Barton Brothers, of Kansas City, to commit an offense specifically denounced by the interstate commerce law of getting the firm of Barton Brothers, who were large shippers of interstate commerce from New York to Kansas City, to accept and receive rebates as defined in that law from railroads over which their freight might be routed from New York to Kansas City. The indictment charges with great particularity the different steps taken in the formation of the conspiracy, and that its object was to bring about the commission of that offense. It is averred that Thomas, who was then operating a transportation bureau in New York city routing shipments and procuring freight rates for those who might employ him (defendant Taggart being in his employ), should first enter into a contract with Barton Brothers securing the right to place or route all their west-bound freight from New York or New Jersey to Kansas City over such railroads as he might select, and should make an arrangement with divers railroad companies engaged in transportation of interstate-commerce freight between New York and Kansas City and other railroad companies to the grand jurors unknown for the carriage of their freight from New York to Kansas City, and should secure from such companies, "in the way of pretended claims, commissions, and allowances," large sums of money to be used in part in making payments of rebates to Barton Brothers, thereby lessening their freight rate below that established and fixed

for the time being according to law, and from time to time to pay the same to Barton Brothers as such rebates and concessions. Little, if any, claim is or can be made that the charge of conspiracy is not well and sufficiently laid; but it is urged that the indictment is bad because it does not set out with sufficient clearness the facts constituting the offense to commit which the conspiracy was formed, and particularly that there is no allegation as to what railroad company, if any, was a party to the conspiracy, or that any railroad company had agreed or promised to give Barton Brothers any rebates, or that it knew, or understood, it had done so. To properly weigh this argument it should be borne in mind that the particular conspiracy charged to have been formed by defendants was to get Barton Brothers to accept and receive rebates, and thereby to violate a criminal statute. The acceptance of secret rebates by one shipper gives him an undue advantage in business, and stands in the way of fair, open, and equal competition, which it is the beneficent design of the interstate commerce act to promote. The conspiracy under consideration was to defeat that design by getting Barton Brothers to receive rebates, and not by getting carriers to give them. But it is said that the receipt of a rebate necessarily implies a giver, and that to properly advise the defendants of the crime charged against them the name of the proposed giver should have been stated, and the fact made to appear that they were to act knowingly and intentionally in doing so. In other words, the contention is that facts should be averred with such accuracy as would show, not only an intention to commit the substantive crime, but all facts necessary to constitute that crime. We think that is not the law. All facts necessary to constitute the conspiracy, including the overt act, must be averred with all the particularity required in criminal pleadings because the conspiracy is the crime with which the defendants stand charged, and with the nature and character of which they, under constitutional safeguard, are entitled to be advised. But, when the conspiracy charged is one to commit an offense, and that offense (as is the case in all offenses against the United States) is clearly defined by statute, no high degree of particularity is required in describing it. If enough is shown to make it appear that an offense against the United States has been committed, it is sufficient.

Wharton says (2 Wharton, *Crim. Law*, § 1343): "It is enough . . . to set out the offense aimed at by such apt words as will describe it as a conclusion of law."

In *State v. Ripley*, 31 Me. 386, it is 17 L.R.A. (N.S.)

said: "In an indictment for a conspiracy at common law, if the conspiracy charged is an unlawful combination and agreement of two or more persons to commit a deed which, if done, would be an offense well known and acknowledged, the nature of which is perfectly understood by the name by which it is designated, no further description of the crime is required."

In *State v. Noyes*, 25 Vt. 415, it is held: "As the object of the conspiracy was to commit an offense punishable by law, it was not necessary to set out the means to be used to effect it; and it is not necessary that there should be the same certainty in setting out the object of the conspiracy as there must be in an indictment for the offense which the respondents conspired to commit."

In *State v. Grant*, 86 Iowa, 216, 53 N. W. 120, the supreme court of Iowa uses the following language: "It is said that the indictment is defective in that it fails to fully disclose the means by which the crime was to be accomplished. It is well settled in this state, and is the law in many states, that, where the indictment charges a conspiracy to do an act which is a crime, it is sufficient if it be described by the proper name or terms by which it is generally known in law. It is only where the charge is that an act in itself not criminal is sought to be accomplished in an illegal manner, or by illegal means, that the means used for its accomplishment must be averred."

In *Ching v. United States*, 55 C. C. A. 304, 118 Fed. 538, 540, the circuit court of appeals for the fourth circuit, in discussing this subject, said: "As to the sufficiency of the indictment, it must be first noted that the gist of the offense charged is that of conspiracy, which we think is properly pleaded. In such cases the offense which is intended to be committed as the result of the conspiracy need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime."

See also *United States v. Stevens* (D. C.) 44 Fed. 132, 141.

Measured by these rules of pleading, the indictment abundantly shows that the conspiracy had for its object the commission of a well-known criminal offense against the United States; that, in the absence of definite knowledge, a sufficient description of the railroads which were to be involved in the execution of the conspiracy is given, and that the defendants were sufficiently informed of the nature and character of the offense with which they were charged. The offense was one clearly denounced in the Elkins act, and sufficiently

described in the indictment. The railroads involved were not known to the grand jury, but were described as those which, with their connecting lines, were engaged in carrying interstate commerce from New York to Kansas City, and were the ones which defendants were to designate and determine by exercising the power given them by Barton Brothers to route their freight. Besides definitely averring that the conspiracy was to bring about the commission of a well-known criminal offense, the indictment adds, by way of showing more particularly the nature and character of the offense, and the means to be resorted to for its commission, that the money was to be demanded, solicited, and received from the railroads so to be determined by the defendants "in the way or guise of pretended claims, commissions, and allowances," and, when so received, was to be paid over to Barton Brothers as rebates. The words just quoted, found in the indictment, are general; but, if they "make clear to common understanding" the matter to which they refer, it is sufficient. *Evans v. United States*, 153 U. S. 584, 592, 38 L. ed. 830, 833, 14 Sup. Ct. Rep. 934. To get money from the railroads "in the way or in the guise of pretended claims, commissions, and allowances" plainly suggests to the "common understanding" that some subterfuge was to be practised, not to get the money, but to make the money apparently appropriated for one purpose intentionally serve another.

In the recent case of *Armour Packing Co. v. United States*, 14 L.R.A.(N.S.) 400, 82 C. C. A. 135, 153 Fed. 1, we held, that "the substance of the crime of receiving a rebate or concession under the Elkins act is the solicitation, acceptance, or receipt thereof whereby property in interstate or foreign commerce is transported at less than the regular rate. The device whereby the receipt and transportation are obtained is not an essential element of the crime, and it is unnecessary to plead it in the indictment."

Much more is it true that in a charge of conspiracy to bring about the receipt of a rebate or concession the particular device or method by which it is to be accomplished need not be pleaded with all the particularity which would be required in pleading the commission of the substantive offense.

The contention that the indictment is bad for duplicity because it contains the charge that defendants conspired to commit the offense of getting Barton Brothers "to accept and receive" rebates, etc., is without merit. The words underscored are obviously used to express one and the same act, 17 L.R.A.(N.S.)

and the fact that the pleader employed them conjointly is not objectionable. It results that the various objections to the indictment for insufficiency are not well taken.

5. Was there error in the introduction of evidence? Without intending to deal with the facts in detail, or to make a demonstration from the record of what we have concluded, we content ourselves by stating the result of a patient and careful examination of all the proof. It is the theory of the government, and there is ample evidence tending to show, that, some time before November 14, 1903, Thomas, who resided in New York, went to Kansas City and there made arrangements orally with Kimber L. Barton, senior member of the firm of Barton Brothers, for the purpose, which subsequent evidence tended to show, of securing rebates from the fixed and lawful tariff rates from New York to Kansas City for Barton Brothers, and, after securing them, to pay the same over to Barton Brothers as unlawful concessions in their favor.

The other members of the firm, William and George A. Barton, if not shown to have been actually cognizant of the arrangement made by Kimber L. at the time it was made, afterwards knowingly participated in the fruits of that arrangement, and fully ratified all that was done by the senior member. On November 14th a contract was executed between Thomas and Barton Brothers. This was fair and lawful on its face. It purported to obligate Barton Brothers to give Thomas the exclusive right to route all of their west-bound freight from New York, and to give him a certain minimum amount for his services in so doing, and obligated Thomas, among other things, to collect from the carrier any claims for loss and damage to merchandise and overcharges which Barton Brothers might have. The term of this contract was to expire in January, 1905, and on January 10th of that year another formal contract purporting to obligate the parties to the performance of the same obligations for another year was executed between them. There is evidence tending to show that these contracts did not express the real purpose of the parties, but were subterfuges intended by them to conceal and mystify their real purpose, and to make evidence against the time of possible need. The then recent enactment of the Elkins law, approved February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), had for the first time made the receiving of rebates by a shipper a criminal act, and had rendered any direct contract between the carrier and shipper providing for the giving or receiving of an unlawful rebate exceedingly hazardous.

Hence the occasion and supposed prudence of operating, if at all, through the medium of an intermediary who should be neither carrier nor shipper, nor subject to the penalties for the misdeeds of either under the interstate commerce law.

With the foregoing scheme claimed by the government to have existed between Thomas and Barton Brothers in mind, we proceed to a consideration of the errors assigned in the introduction of evidence. During the two years in question the firm of Barton Brothers received from the carriers at the hands of Thomas about \$3,900 on legitimate claims for loss, damage, and overcharge, and, in addition, the individual members received each one third of \$10,300 from some source and on some account. These facts are undisputed. With a view of getting at the source of and reason for these individual receipts, George A. Barton, one of the partners, who was called as a witness by the government, was asked whether any of this money came from Thomas. He answered "No." He was then asked if it was received from anybody else acting for Thomas.

After objections and rulings by the court, the witness answered and the testimony proceeded as follows:

A. Our firm has received money from sources. Shall I state from whom?

Q. Certainly.

A. I think we received remittances from Mr. Kelby. [Kelby was clerk for Thomas.]

Q. Do you mean by his hand or through him?

A. We received remittances by express and through the mail, and I think Mr. Kelby was here once and left a draft. . . .

Q. Now, what were those remittances? In what form and in what amount and on what dates?

A. Well, I have a record book made up by K. L. Barton of our firm, memoranda that he handed to me. They are not on our regular books. . . .

Q. Have you that record with you?

A. Yes, sir.

Q. You may state what that book shows with reference to these payments.

To this question the defendants objected, and, upon the objection being overruled, duly excepted. The contents of the book read in evidence showed that from time to time during the year 1904 amounts were received under a notation of "freight commissions" aggregating about \$8,000 and in the year 1905 aggregating about \$2,300. The proof showed that the money so entered in the private book by the senior member of the firm was equally divided between the three members, Kimber, George, and William, and that the amounts so received and

divided did not include the legitimate amounts received by the firm for loss, damage, and overcharge which were regularly entered on the books of the firm. We think the court committed no error in receiving in evidence the contents of this private book. Sufficient evidence had already been introduced, to say nothing of evidence afterwards offered, to make a prima facie case of the conspiracy charged,—evidence sufficient, when considered with all the inferences naturally deducible from it, to justify a finding by the jury that the conspiracy as charged had been entered into. Kimber L. Barton was its moving spirit. He made the preliminary arrangements and collected the unlawful proceeds. Although he was not expressly charged in the indictment as one of the conspirators, he falls well within the class of those "to the grand jurors unknown" who are so charged. He was engaged with Thomas and his copartners in the unlawful purpose, and his acts in furtherance of it, including the fact that he received the moneys, entered the same in a private book, and not in the regular books of the firm, and afterwards distributed them between the members of his firm, were clearly admissible against the defendants, his co-conspirators. We are not unmindful of the contention of defendants' counsel that there was no direct evidence of any unlawful undertaking with Thomas, and no direct evidence that Thomas paid Barton Brothers any money as rebates or concessions on freight charges. For argument's sake, this might be conceded. Conspirators do not act that way. Fraud is not often proven by direct testimony. A preconceived plan to do an unlawful act must, from the nature of the case, be usually established by inferences drawn from the relation of the parties, from the acts done, and from the results achieved.

"It is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme. . . . It is sufficient if two or more persons in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design." *United States v. Babcock*, 3 Dill. 581. 585, Fed. Cas. No. 14,487.

"If the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable

doubt." *Davis v. United States*, 46 C. C. A. 619, 107 Fed. 753, 755.

"It is often that the intention of a wrongdoer are ascertained entirely by acts done which are the natural effects of unlawful designs. The acts and circumstances which accompany them, showing the connection between the acts and the motives which produced them, are generally the most convincing evidence which can be adduced." *State v. Ripley*, 31 Me. 386, 388.

Looking at the proof in the light of the foregoing well-understood rules, we entertain no doubt that the money which Kimber L. Barton received, entered in his book, and subsequently divided equally between his other partners and himself, came from Thomas; that Thomas got the same from the railroad which carried Barton Brothers' freight through the colorable pretense of collecting exaggerated claims for loss, damage, and overcharge or commissions, and that all these things are clearly referable to a prearrangement to that end, entered into between Thomas and the members of the firm and others. If there were any doubt about the unlawful intent of the defendants in their business relations with Barton Brothers, that doubt is dispelled by the evidence of contemporaneous contracts and transactions made by Thomas with other merchants doing business in St. Louis, Kansas City, and Omaha. Those contracts were all equally fair and innocent on their face, calling for actual service by Thomas in the way of routing the shippers' freight, prosecuting and collecting claims for loss, damages, and overcharges, but the merchants, by their evidence, disclose the unreality or comparative unimportance of any such service. One admitted that, as a result of his firm's contracts with Thomas, they expected to get a cheaper rate than the usual shipper. Another said it was "inferred without discussion that his house was to get certain money, . . . that Thomas understood very well that I understood," and, again, that "the results were beneficial to us . . . in the sense of refunds which we were to receive." Another testified that Thomas "was to look after all the claims we had for freight, and we were to receive a certain rebate on freights from west of the Mississippi river." Notwithstanding the explicit provision in the contracts that Thomas should attend to claims for loss, damage, and overcharge, some of the shippers testified that they took care of them and handled them for themselves without the intervention of Thomas. The evidence of all of them shows that the feature requiring Thomas to attend to their claims for loss, damage, and overcharge was treated with much indifference. Their testimony 17 L.R.A. (N.S.)

discloses, when read with discrimination and fair regard to the circumstances, that the real purpose of all of them in making contracts with Thomas was to secure rebates or refunds from the railroads on freight charges. In fact, they did receive money as a result of their arrangement. It came mysteriously to them, generally from unknown sources, sometimes by special messenger, sometimes by express, sometimes by deposit in bank to the credit of a fictitious name agreed upon, and always in currency. When received it was charged to some individual account out of the regular course of bookkeeping. It was obviously intended that the money received by them should not be traceable to any source. Tracks were covered as well as they could be, but the humiliating confession had to be made, and was made by some, that their real purpose was to secure unlawful rebates, and others are left by the proof in the uncomfortable attitude of receiving large sums of money in currency without knowing or inquiring whence it came or on what account it was paid to them. The conduct of the latter is consistent alone with the fact that they thought they were receiving money unlawfully, and all the circumstances point with much certainty to the conclusion that they actually received unlawful rebates or concessions on freight shipments as an intentional result of the contracts made between them and Thomas.

Objection was made to the introduction of evidence showing dealings between Thomas and the merchants other than Barton Brothers; and the action of the court in admitting that evidence is assigned for error. There is no merit in that assignment. Nothing is better settled in the law of evidence in any case involving fraudulent intent than that other acts and dealings of the accused, of a kindred character to those charged in the case in hand, and performed at or about the same time, are admissible to illustrate and establish the intent or motive in the particular act directly in judgment. *Wood v. United States*, 16 Pet. 342. 10 L. ed. 987; *Chitwood v. United States*, 92 C. C. A. 505, 153 Fed. 551; *Exchange Bank v. Moss*, 79 C. C. A. 278, 149 Fed. 340. The present case fitly illustrates the value of the rule in question. The same ostensible contracts, the same mystery, the same results appear in all the collateral transactions. They tell the same story of an attempted evasion of the law under the thin disguise of a formally executed contract, and afford very persuasive evidence of the real intent and purpose of the accused in similar dealings with Barton Brothers in this case.

6. The contention is made that the evidence fails to disclose the formation of a

conspiracy within the jurisdiction of the court below. This position under the proof to which attention has already been sufficiently called cannot be sustained. The fraudulent scheme seems to have been first devised and agreed upon in Kansas City, and it makes little difference where the misleading and deceptive formal contracts were executed. They were merely a step taken in carrying out the scheme, and designed, doubtless, to make it more effectual.

7. It is earnestly contended that there was not sufficient evidence to connect defendant Taggart with the particular conspiracy charged in the indictment. While the proof does not connect him with the incipency of that conspiracy, it is claimed by the government that facts appear from which it may be reasonably inferred that he came into it after it was concocted with full knowledge of its existence and character, and with a purpose of furthering its design. If such are the facts, he was as much a conspirator as if he participated in its original formation. *United States v. Newton* (D. C.) 52 Fed. 289; *United States v. Barrett* (C. C.) 65 Fed. 62; *United States v. Cassidy* (D. C.) 67 Fed. 698. This contention presents a doubtful question of fact, and as the case, for reasons hereafter stated, must be remanded for another trial, when new evidence may be presented on the issue, it is not deemed necessary or wise to further consider it at the present time.

8. Because of the verdict of not guilty and the judgment discharging the defendants Thomas, Taggart, and Crosby on the indictment against them which was consolidated with the present indictment against Thomas and Taggart for trial, the last-named defendants interposed a plea of former jeopardy as a bar to their conviction in the present case. This plea was disallowed, and defendants assigned that action of the court as error. A brief reference to the facts will dispose of the question. The indictment against defendants and Crosby was for a conspiracy to get the Chicago, Burlington, & Quincy Railway Company to give rebates to divers shippers in Kansas City. The indictment against the defendants in this case (not including Crosby) was for a conspiracy to get Barton Brothers to receive rebates from divers railroads. Notwithstanding the similarity of evidence introduced in support and defense of the two prosecutions, the offenses charged in the two indictments were totally different as a matter of law. They were grounded on different provisions of the interstate commerce act of 1903, and the acquittal in one affords no ground for discharge in the other. There had been no jeopardy on the charge contained in the present indictment. 17 L.R.A. (N.S.)

"A plea of *autrefois acquit*" must be upon a prosecution for the same identical offense. 4 Bl. Com. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in point of fact. *Burton v. United States*, 202 U. S. 344, 378, 50 L. ed. 1057, 1070, 26 Sup. Ct. Rep. 688.

Other criticisms are made of the proceedings below, and error is claimed to have been committed in the charge to the jury and in refusing to give certain declarations of law requested by defendants; but, in view of the conclusions already reached and expressed on fundamental and important questions, it is not deemed necessary for the guidance of the trial court at the next trial to express our opinion on the several incidental and less important questions presented by the assignment of errors. Most of them are answered by the proper application of the principles already laid down.

As we have already indicated, the judgment must be reversed, and we will now proceed to a consideration of one error which renders that result inevitable. The court was duly and properly asked to instruct the jury that the defendants were presumed to be innocent of the crime charged against them, and that such presumption remained with them until it was overcome by the proof. This instruction the court refused to give and exception was duly saved. It is not claimed that the request was improper, or that it should not have been given, but it is claimed that its equivalent was given to the jury in the general charge. We have critically examined the charge with a view of extracting from it, if possible, some equivalent for the instruction asked and refused, but we fail to find it. All that counsel for the government point out and claim to be such equivalent is the repeated declaration found in the general charge that the jury must find the defendant guilty beyond a reasonable doubt before a verdict of guilty can be rendered. It is earnestly contended that such instruction is the full equivalent of the one asked and refused. However interesting an original discussion of this question might be, it is not open to us. The Supreme Court has conclusively settled it. In the two cases of *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394, and *Cochran v. United States*, 157 U. S. 286, 299, 39 L. ed. 704, 708, 15 Sup. Ct. Rep. 628, that court has unequivocally held that a proper instruction concerning the subject of reasonable doubt was not the equivalent of

an instruction concerning the presumption of innocence, and judgments of conviction in both of those cases were reversed because of refusal to give a requested instruction upon defendant's presumption of innocence like that asked in this case, notwithstanding the fact that in each the trial court properly instructed on the subject of reasonable doubt.

On the authority of those cases, we have no alternative but to reverse the judgments, and remand the causes to the court below for a new trial; and it is so ordered.

Sanborn, Circuit Judge, concurring:

I concur in the reversal of the judgments in these cases for the reason stated in the foregoing opinion, and also because it seems to me that the testimony of George A. Barton to the contents of the record book, or of the memoranda, which he swore that Kimber L. Barton kept of the moneys received for Barton Brothers, was hearsay evidence, and its reception fatal error. Conceding that Kimber L. Barton was a co-conspirator with the defendants below, and that his overt acts in the execution of the conspiracy were admissible against them, the proof of those overt acts was still subject to the established rules of evidence. Whether or not he or his firm received the sums of money which George A. Barton read from that book from the defendants, or either of them; whether or not he correctly entered in that book what he or his firm received,—were questions of fact which were decisive in the trial of this action. If George A. Barton had testified that Kimber L. Barton had told him that Kimber, or his firm, had received the moneys entered in that book, that testimony would have been hearsay. The mere fact that those amounts were written in the book by a person other than the witness does not change their character. Written hearsay is not more competent than oral hearsay. Before the contents of that book could become admissible evidence against the defendants, competent proof that the moneys there entered were received from the defendants, or one of them, and that Kimber L. Barton correctly wrote down in that book the amounts which he, or his firm, so received, was indispensable. Even if the concession were made, and it is not, that Kimber's statements were admissions of all the conspirators, and hence of the defendants, still the book was incompetent because there was no evidence in the case that Kimber ever said or admitted that he had correctly entered in the book, or in the memoranda, the amount of moneys which he, or his firm, had received, and George A. Barton did not testify that those moneys were correctly en-

tered. The fact is, however, that those entries were not acts in execution of the conspiracy. The making of those entries did nothing toward the accomplishment of the purpose of the conspiracy. This purpose either had or had not been accomplished before the entries were made; hence these entries were not admissible, either as overt acts, or admissions of a conspirator, nor as independent testimony of verified writings. They were nothing but the unverified, and hence incompetent, evidence of that which Kimber L. Barton happened to write.

The chief reason for the rule which excludes hearsay testimony is that its obedience subjects, while its disregard relieves, the parties whose statements are offered, from the cross-examination of opposing parties. The right of cross-examination is the great safeguard against fraud, false statements, and half truths resulting from statements of parts and omissions of other parts of conversations and transactions, which are frequently more misleading and dangerous than direct falsehoods. It furnishes the cardinal and most effective means to discover and disclose the whole truth in all judicial investigations, and, under the English and American systems of jurisprudence, the opportunity to exercise the right of cross-examination is a condition precedent to the reception of the direct evidence of the witness. *Heath v. Waters*, 40 Mich. 457, 471; *Sperry v. Moore*, 42 Mich. 353, 361, 4 N. W. 13. If the unsworn written statements of witnesses may be received in evidence upon the testimony of a third party that the witnesses told him they were true, then the witnesses who know the facts may make their written statements thereof, and tell one who knows them not that those statements are true, and the accused may be deprived of the privilege of being confronted by, and of all opportunity to cross-examine, the real witnesses against them, for, as in the case at bar, they may be conveniently absent and the witness who produces their written statements may know nothing, but that they told him they were true.

No rule of law is more salutary, or more indispensable to the security of the life, liberty, and property of the citizen, than that which prohibits the repetition of the written or oral statements of absent persons to determine issues between litigants, and commands that only after due notice, after opportunity for cross-examination of the very parties whose statements are offered, and then only under the solemnity of an oath or affirmation, shall their stories be evidence. Disregard this rule, and the most sacred rights of persons and property are at the mercy of the whimsical and per-

icious gossip of the reckless, the irresponsible, and the vicious. *Queen v. Hepburn*, 7 Cranch, 290, 295, 3 L. ed. 348, 349; *Lake County v. Keene Five-Cents Sav. Bank*, 47 C. C. A. 464, 470, 108 Fed. 505, 510; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* 64 C. C. A. 180, 186, 188, 129 Fed. 668, 674, 676; *National Masonic Accl. Asso. v. Shryock*, 20 C. C. A. 3, 7, 36 U. S. App. 658, 73 Fed. 774, 777. In the case in hand one of the most important, if not the most important, fact in issue, was permitted to be proved to the jury by the unverified written statement of one who was either a stranger or a criminal, and who was permitted to be absent from the trial, so that the defendants were deprived of all opportunity to cross-examine him on this crucial question, and of the right to be confronted with one of the principal witnesses against them. A conviction in this case ought never to be permitted to stand upon such evidence.

The other questions discussed in the opinion of the majority are not determinative of the case as it is now presented to this court, and I do not desire to be deemed to have expressed any opinion upon them.

NEW HAMPSHIRE SUPREME COURT.

SOLAN A. CARTER, State Treasurer,
v.

MAE E. WHITCOMB et al., Exrs., etc., of
Susan E. Reed, Deceased.

(74 N. H. 482, 69 Atl. 779.)

Statute — tax exemption — amendment — construction.

1. An amendment of a statute exempting from the succession tax religious societies the property of which is by law exempt from taxation, by providing that the exemption shall apply only when the society is bound to devote the property solely to such uses that it will be, by law, exempt from taxation, cannot be construed as merely declaratory of the meaning of the original statute.

Tax — exemption — construction.

2. A statute exempting religious societies from the operation of the succession tax is not repealed by its re-enactment with a proviso that such societies shall be so exempt only when they are bound to devote the property received solely to such uses that the property would, by law, be exempt from taxation.

Same — prospective effect.

3. An amendment to a statute imposing a succession tax, which relates to property which "shall pass by law," does not apply to estates in process of settlement at the time of its passage.
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Succession tax — exemption — scope.

4. That some of the property held by a religious society is not exempt from taxation, or that the property received by will may be invested in taxable property, does not deprive it of the benefit of a statute providing that the succession-tax law shall not apply to religious societies the property of which is, by law, exempt from taxation.

Same — specific exemptions.

5. A church and its societies, the Young Women's Christian Association, the Women's Auxiliary to the Young Men's Christian Association, a home for aged women, although its beneficiaries are required to pay a sum for admission and turn over to it the property which they possess, the Women's Relief Corps of the Grand Army of the Republic, are charitable organizations, within the meaning of a statute exempting such organizations from succession tax.

Same — missionary societies.

6. A local auxiliary of a foreign missionary society whose funds are devoted to enterprises in foreign countries, or only a very small portion of which are expended within the state, from which no substantial local benefit of a public nature results, is not within the meaning of a statute exempting from taxation the property of charitable associations devoted exclusively to the uses and purposes of public charity, since the legislature will not be presumed to have exempted institutions having no relation to the welfare of the inhabitants of the state.

(April 7, 1908.)

Case Note. — Right of charitable, educational, or religious institution to exemption from taxon as affected by the geographical field of operation.

Reason and authority would seem to support the proposition enunciated in *CARTER v. WHITCOMB*, that such institutions are not entitled to exemption from taxation when their benefits are chiefly bestowed beyond the limits of the state. Such was the principle governing the decision of *Alfred University v. Hancock*, 69 N. J. Eq. 470, 46 Atl. 178, in which it was held that a succession-tax statute exempting gifts and bequests to religious, benevolent, and charitable institutions and organizations did not exempt from such tax gifts and bequests to charitable institutions located outside the state.

The authority chiefly relied upon by the court in the case just cited was *Re Prime*, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091, in which it was held that the exemption of "any religious, educational, . . . or charitable corporation, or corporation organized for . . . other than business purposes," from the collateral-inheritance tax extended only to domestic corporations. The court said that "a statute of a state granting powers and privileges to corporations must, in the absence of plain indica-

TRANSFER by the Superior Court for Hillsborough County, for the opinion of the Supreme Court, of a proceeding by the State Treasurer to subject legacies under the will of Susan Reed to the succession tax. Exemption sustained in part.

The beneficiaries claiming exemption from the succession tax were certain local churches and the societies connected with them, such as the Ladies' Social Circle, Sunday School, the choir, the Epworth League, the Auxiliaries of the Woman's Home and Foreign Missionary Societies, the Young

Women's Christian Association, the Auxiliary of the Young Men's Christian Association, the Protestant Home for Aged Women, the Day Nursery, and the Women's Relief Corps of the Grand Army of the Republic.

Further facts are stated in the opinion. Messrs. Edwin G. Eastman, Attorney General, and Joseph S. Matthews, for plaintiff:

Statutes exempting persons or property from taxation are to be strictly construed against the exemption.

tions to the contrary, be held to apply only to corporations created by the state and over which it has the power of visitation and control. . . . It is the policy of society to encourage benevolence and charity; but it is not the proper function of a state to go outside of its own limits, and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large."

The foregoing language was quoted with approval in *Re Balleis*, 144 N. Y. 131, 38 N. E. 1007, and in *Re Smith*, 77 Hun, 134, 28 N. Y. Supp. 476, in both of which it was held that the exemption provision, in favor of religious corporations, of an act providing for transfer taxes, did not apply to foreign religious corporations.

And in *Humphreys v. State*, 70 Ohio St. 67, 65 L.R.A. 776, 101 Am. St. Rep. 888, 70 N. E. 957, it was held that missionary boards, and other benevolent religious societies and the auxiliaries thereto, incorporated and organized under the laws of other states, for "purposes of purely public charity or other exclusively public purposes," were not exempt from succession taxes, though some of the charitable work of such institutions was carried on within the state. *Re Prime*, supra, was the principal authority relied upon for this decision, and the language of that opinion was quoted with approval.

So, in *Re Speed*, 216 Ill. 23, 108 Am. St. Rep. 189, 74 N. E. 809, in which it was held that exemptions in favor of religious, educational, or charitable organizations provided by the inheritance-tax statute did not apply to foreign corporations, the fact that the benefits of such corporations were bestowed beyond the state seems to have influenced to some extent the decision, since the court reverted to the fact that the corporation in question had never engaged in the state in the educational or religious work it was chartered to promote and advance, and that it had no power to devote funds which it might receive to educational or religious purposes beyond the limits of the state where it was incorporated.

In the following cases, in which it was held that the exemptions under tax laws in favor of charitable, educational, or religious institutions did not apply to corporations chartered in other states, the principles enunciated in the cases just reviewed very likely actuated the courts in arriving at such conclusion, though no other ground

was offered therefor than that the institutions in question were foreign corporations: *People ex rel. Huck v. Western Seaman's Friend Soc.* 87 Ill. 246; *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; *Rice v. Bradford*, 180 Mass. 545, 63 N. E. 7; *Port Huron v. Wright*, 150 Mich. 279, 114 N. W. 76; *Re Rothschild* (N. J.) 63 Atl. 615, affirmed upon the opinion of the prerogative court in 65 Atl. 1118; *Catlin v. Trinity College*, 113 N. Y. 133, 3 L.R.A. 206, 20 N. E. 864; *Re Hickok*, 78 Vt. 259, 62 Atl. 724.

Upon these principles, it would seem to follow that, if an institution incorporated in one state has property devoted to charitable, religious, or educational purposes within another state, such property will be entitled to the exemptions bestowed by the tax laws of the latter state upon domestic corporations of such character, unless the terms of the exemption provisions are inconsistent with such a view. Such, in fact, was the result reached in *Litz v. Johnston*, 65 N. J. L. 169, 46 Atl. 776, and in *St. Vincent de Paul v. Brakeley*, 67 N. J. L. 176, 50 Atl. 589.

The location of the field of operation of such institutions does not seem to affect the exemptions from taxes provided in English statutes, since in *Comrs. of Income Tax v. Pemsel* [1891] A. C. 531, it was held that a trust for missions among the heathens was a trust for charitable purposes so as to entitle the trustees thereof to the allowances granted by the income-tax law on the rents and profits of lands, etc., vested in trustees for charitable purposes, so far as the same should be applied to such purposes.

In *Re Jones* (N. J.) 67 Atl. 1035, it was held that institutions of another state, whose object was to furnish instruction to young men destined for the ministry in a certain religious denomination, and a society (of what state does not appear) whose only purpose was the extension of gospel preaching, were entitled to the exemptions provided by the collateral inheritance-tax statute in favor of religious institutions "not confined in their operations and benefactions to local or state purposes, but for the general good of the people interested therein,—whether . . . organized under the laws of this state, or . . . under the laws of some other state."

State v. Manchester Sav. Bank, 71 N. H. 535, 53 Atl. 739; *Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589; *Re Walker*, 200 Ill. 566, 66 N. E. 144; *Re Hickok*, 78 Vt. 259, 62 Atl. 724; 12 Am. & Eng. Enc. Law. 2d ed. p. 302; *Bangor v. Rising Virtue Lodge*, No. 10, F. & A. M. 73 Me. 434, 40 Am. Rep. 369; *Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 Pac. 252; *Young Men's Christian Asso. v. Paterson*, 61 N. J. L. 420, 39 Atl. 655; *Chicago use of Schools v. Chicago*, 207 Ill. 37, 69 N. E. 580; 1 Cooley, Taxn. 3d ed. p. 357; *Morris v. Lone Star Chapter No. 6, R. A. M.* 68 Tex. 698, 5 S. W. 519.

If the legacy is left in such a way that the institution is at liberty to invest the money in tenement property, or otherwise to invest it for purposes of income, thus hoarding the principal and using only the income for the purposes of charity, the legacy is taxable, because such investments in the hands of the institution are taxable.

Young Men's Christian Asso. v. Keene, 70 N. H. 223, 46 Atl. 186; *Phillips Exeter Academy v. Exeter*, supra; *Alton Bay Campmeeting Asso. v. Alton*, 69 N. H. 311, 45 Atl. 95; *New London v. Colby Academy*, 69 N. H. 443, 46 Atl. 743; *Third Cong. Soc. v. Springfield*, 147 Mass. 396, 18 N. E. 68; *Academy of Richmond County v. Bohler*, 80 Ga. 159, 7 S. E. 633; *Pennsylvania Hospital v. Delaware County*, 169 Pa. 305, 32 Atl. 456; *Sisters of Peace v. Westervelt*, 64 N. J. L. 510, 45 Atl. 788; *American Sunday School Union v. Philadelphia* (*American Sunday School Union v. Taylor*) 161 Pa. 307, 23 L.R.A. 695, 29 Atl. 26; *Hibernian Benev. Soc. v. Kelly*, 28 Or. 173, 30 L.R.A. 167, 52 Am. St. Rep. 769, 42 Pac. 3; *First M. E. Church v. Chicago*, 26 Ill. 482; *Brodie v. Fitzgerald*, 57 Ark. 445, 22 S. W. 29; *Ridgeley Lodge, No. 23, I. O. F. v. Redus*, 78 Miss. 352, 29 So. 163; 1 Cooley, Taxn. 3d ed. 350, 353; 1 Desty, Taxn. 111.

The words "in this state" were intended to require not only that the institution itself should be here, but that its activities should be devoted to charities within this state.

Humphreys v. State, 70 Ohio St. 67, 65 L.R.A. 776, 101 Am. St. Rep. 888, 70 N. E. 957; *Re Prime*, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091; *Minot v. Winthrop*, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; *Rice v. Bradford*, 180 Mass. 545, 63 N. E. 7; *Re Hickok*, supra; *Catlin v. Trinity College*, 113 N. Y. 133, 3 L.R.A. 206, 20 N. E. 864; *Re Rothschild* (N. J.) 63 Atl. 615; *Alfred University v. Hancock*, 69 N. J. Eq. 470, 46 Atl. 178; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073.

If the charity is confined altogether or 17 L.R.A. (N.S.)

mainly to the assistance of the members of any particular organization or society, it is not a public charity.

1 Desty, Taxn. p. 113; *Donohugh's Appeal*, 86 Pa. 314; *Philadelphia v. Masonic Home*, 160 Pa. 572, 23 L.R.A. 545, 40 Am. St. Rep. 736, 28 Atl. 954; *Jackson v. Phillips*, 14 Allen, 539; *Young Men's Protestant Temperance & Benev. Soc. v. Fall River*, 160 Mass. 409, 36 N. E. 57; *Newport v. Masonic Temple Asso.* 108 Ky. 333, 49 L.R.A. 252, 56 S. W. 405; *Ridgeley Lodge, No. 23, I. O. O. F. v. Redus*, and *Bangor v. Rising Virtue Lodge, No. 10, F. & A. M. supra*; *Mullen v. Juenet*, 6 Pa. Super. Ct. 1.

The exemption does not extend to those institutions whose charities are only quasi public.

Donohugh's Appeal and *Young Men's Christian Asso. v. Paterson*, supra.

Public charity must be the essential object of the institution. If the society is at liberty to devote its funds to other purposes, the exemption does not attach.

Re Vineland Historical & Antiquarian Soc. 66 N. J. Eq. 291, 56 Atl. 1039; *Philadelphia v. Women's Christian Asso.* 125 Pa. 572, 17 Atl. 475; *Mullen v. Juenet*, supra.

Mr. George B. French, for defendants:

The charities here represented are public charities within the meaning of the statute.

Jackson v. Phillips, 14 Allen, 556; *Webster v. Sugrow*, 69 N. H. 381, 48 L.R.A. 100, 45 Atl. 139; *Garrison v. Little*, 75 Ill. App. 402; *Perry, Tr.* §§ 699-705; 2 Kent, Com. p. 276; *Pom. Eq. Jur.* §§ 154, 1018-1024; *Sears v. Atty. Gen.* 193 Mass. 551, 79 N. E. 772; *Farrigan v. Pevar*, 193 Mass. 147, 7 L.R.A. (N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855; *Minns v. Billings*, 183 Mass. 126, 5 L.R.A. (N. S.) 686, 97 Am. St. Rep. 420, 66 N. E. 593; *Franklin Square House v. Boston*, 188 Mass. 409, 74 N. E. 675; *Osgood v. Rogers*, 186 Mass. 238, 71 N. E. 306; *Drury v. Natick*, 10 Allen, 178; *Re Bartlett*, 163 Mass. 514, 40 N. E. 899; *McAlister v. Burgess*, 161 Mass. 269, 24 L.R.A. 158, 37 N. E. 173; *Sherman v. Congregational Home Missionary Soc.* 176 Mass. 349, 57 N. E. 702; *Darcy v. Kelley*, 153 Mass. 433, 26 N. E. 1110; *Lovell v. Charlestown*, 66 N. H. 584, 32 Atl. 160; *Warde v. Manchester*, 56 N. H. 508, 22 Am. Rep. 504; *Rolfe & R. Asylum v. Lefebvre*, 69 N. H. 238, 45 Atl. 1087; *Oxford Union Cong. Soc. v. West Cong. Soc.* 55 N. H. 467; *Union P. R. Co. v. Artist*, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Conklin v. Davis*, 63 Conn. 377, 28 Atl. 537; *Philadelphia v. Women's Christian Asso.* 125 Pa. 572, 17 Atl. 475; *Mack's Appeal*, 71 Conn. 122, 41 Atl. 242; *Smith v. Havens Relief Fund Soc.* 44 Misc. 594, 90 N. Y.

Supp. 168; Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 40 L.R.A. 119, 36 S. W. 921; Re Buck [1896] 2 Ch. 727; State, Sisters of Charity, Prosecutor, v. Chatham Twp. 52 N. J. L. 373, 9 L.R.A. 198, 20 Atl. 292; People ex rel. Society of New York Hospital v. Purdy, 58 Hun, 386, 12 N. Y. Supp. 307.

The means or methods by which a public charity is sustained are not to be confused with its purposes.

Philadelphia v. Women's Christian Asso. supra; Com. v. Young Men's Christian Asso. 116 Ky. 711, 105 Am. St. Rep. 234, 76 S. W. 522; Daly's Estate, 208 Pa. 58, 57 Atl. 180; Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434; Mercantile Library Co. v. Philadelphia, 14 Pa. Co. Ct. 204; Philadelphia v. Pennsylvania Hospital, 154 Pa. 9, 25 Atl. 1076; Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 40 L.R.A. 119, 36 S. W. 921; Woman's Home Missionary Soc. v. Taylor, 173 Pa. 456, 34 Atl. 42; Re Vassar, 127 N. Y. 1, 27 N. E. 394; Episcopal Academy v. Philadelphia, 150 Pa. 565, 25 Atl. 55; Price v. Maxwell, 28 Pa. 23; Philadelphia v. Keystone Battery A. 169 Pa. 526, 32 Atl. 428; Burd Orphan Asylum v. School Dist. 90 Pa. 21; Gooch v. Association for Relief, 109 Mass. 558; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; People ex rel. Society of New York Hospital v. Purdy, supra; Sherman v. Congregational Home Missionary Soc. 176 Mass. 349, 57 N. E. 702.

Special tax laws, however, are to be construed most strictly against the government, and most favorably to the taxpayer; and a citizen cannot be subjected to such special burdens without clear warrant of law.

Dos Passos, Collateral Inheritance Tax Law, p. 75, § 32; Dwarria, Stat. 742, 749; Re Enston (People v. Sherwood) 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87; Re Fayerweather, 143 N. Y. 114, 38 N. E. 278; Re Harbeck, 161 N. Y. 211, 55 N. E. 850; Re Kimberly, 27 App. Div. 470, 50 N. Y. Supp. 586; Re Beach, 19 App. Div. 630, 46 N. Y. Supp. 354; Green v. Holway, 101 Mass. 248, 3 Am. Rep. 339; Hartranft v. Wiegmann, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; Commercial Bank v. Sandford, 103 Fed. 98; Cache County ex rel. Matthews v. Jensen, 21 Utah, 207, 61 Pac. 303; Brown v. Com. 98 Va. 366, 36 S. E. 485.

Sunday schools are public charities.

Conklin v. Davis, 63 Conn. 377, 28 Atl. 537; Fairbanks v. Lamson, 99 Mass. 533; Re Bartlett, 163 Mass. 509, 40 N. E. 899; Eutaw Place Baptist Church v. Shively, 67 Md. 493, 1 Am. St. Rep. 412, 10 Atl. 244; Morville v. Fowle, 144 Mass. 109, 10 N. E. 766.

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Subsequent legislation, even if plainly intended to be declaratory of prior statutes, cannot be more than evidence in no respect controlling the court, whose peculiar duty it is to construe the meaning of statutes.

Smith v. Syracuse, 17 App. Div. 63, 44 N. Y. Supp. 852; Re Harbeck, 43 App. Div. 188, 59 N. Y. Supp. 362; Virginia Coupon Cases, 25 Fed. 647; Dequindre v. Williams, 31 Ind. 444; State v. Ohio Soldiers' & Sailors' Orphans' Home, 37 Ohio St. 275; People ex rel. Thorne v. Hays, 4 Cal. 127.

Walker, J., delivered the opinion of the court:

By the statute in force on the date of the death of the testatrix, "all property within the jurisdiction of the state, . . . which shall pass by will, or by the laws regulating intestate succession, . . . except . . . to or for the use of charitable, educational, or religious societies or institutions in this state the property of which is by law exempt from taxation, . . . shall be subject to a tax of 5 per cent of its value, for the use of the state." Laws 1905, chap. 40, p. 432, § 1. Before the decree of the probate court in this proceeding, this statute had been amended by the legislature of 1907 by apparently making the exemption of legacies to such institutions from the tax or impost to apply only "when such society or institution is bound by the terms of the will, . . . or by the limitation of its powers, to devote such property solely to such uses and purposes that the property in its hands will be, by law, exempt from taxation." Laws 1907, chap. 68, p. 66, § 1. Under the former law, no inheritance tax was chargeable upon a legacy to a charitable, educational, or religious society which enjoyed, under the law, immunity from taxation upon its property. The use to be made of the fund bequeathed to such a society was not deemed to be important; at least, it was not regarded by the legislature as so essential as to be declared to be the test of the exemption. Under the latter statute, it would seem the exemption attaches in such a case only when it appears that the money or property donated must be devoted to such uses by the society that it will be exempt from the general, yearly tax burden. That the legislature intended by this amendment to introduce into the law a material change is too plain for argument. Its purpose was to restrict the exemption within narrower bounds than those set by the former statute. The claim made by the plaintiff, that the amendment is merely declaratory of the meaning of the original statute, cannot be sustained upon any reasonable construction of legislative action; and, if sustained, it might not be of

controlling importance in a judicial finding of the legislative intention evidenced by the act of 1905. It is plain that the two acts do not mean the same thing. Nor was it the intention of the legislature of 1907 to repeal the statute of 1905. While it re-enacted the latter statute, with the material change above suggested, it did not in terms attempt to repeal it; and no reason is apparent why it should. It was seeking to perfect legislation upon a comparatively new subject; and it accomplished its purpose by enacting an amendment to the old statute in a single particular, "so that said section shall read as follows." To hold that this amounted to a repeal of the former statute would be to give no force to the evident intention of the legislature. *Re Prime*, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091.

Equally untenable is it to urge that the amendment of 1907 was intended to have a retroactive effect, and to apply to estates then in course of settlement. The language used is prospective. It relates to property "which shall pass by will." The testatrix's will became effective to pass property upon her death. The necessary delays incident to the settlement of the estate and final decree of distribution did not postpone the passing of the estate within the meaning of the statute. The legatees derive their title from the testatrix. Their rights became fixed at her death. They then became the owners of the property bequeathed to them, though the possession and actual enjoyment thereof were delayed by operation of law, and at the same time the right of the public to the tax accrued. As the legatees' interests vested at the death of the testatrix or upon the probate of the will (*Brown v. Brown*, 44 N. H. 281; *Ordway v. Dow*, 55 N. H. 11; *Sanborn v. Clough*, 64 N. H. 315, 10 Atl. 678), there is little ground for holding, in the absence of express language to that effect, that the legislature intended the amendment of 1907 to have a retroactive effect, and to defeat or limit rights so vested under testamentary provisions. The construction and effect of a will are ordinarily governed and determined by the law in force when it became effective. *Loveren v. Lamprey*, 22 N. H. 434; *Wakefield v. Phelps*, 37 N. H. 295, 306; *Perkins v. George*, 45 N. H. 453, 455; *Morgan v. Perry*, 51 N. H. 559, 567. The rights, therefore, of the parties to the suit under the will in question, must be determined in accordance with the statute of 1905, which was in force when the testatrix died and when the interests of the parties under her will vested.

In this view of the case, the question arises whether the bequests to the defendant associations and societies are exempt 17 L.R.A. (N.S.)

from the tax imposed by the statute of 1905. In the language of the statute, if they are "charitable, educational, or religious societies or institutions in this state," and if their property "is, by law, exempt from taxation," the bequests to them are not subject to the tax; otherwise they are. If the meaning of the statute is that the exemption only applies when the association, falling within the terms of the statute in other respects, holds all its property free from yearly taxation, practically the exemption, which was intended to foster and encourage such institutions, would be found to apply to a rather peculiar and limited class. *Re Vassar*, 127 N. Y. 1, 10, 27 N. E. 394. Most charitable institutions whose property "is devoted exclusively to the uses and purposes of public charity," and which is "exempted from taxation" (*Laws 1895*, chap. 66, p. 426.), may own property, not exclusively devoted to charity, which is subject to the general tax burden. The use that is made of the property determines the question of its taxability under the statute quoted. Some of it may be exempt from taxation, while the rest of it is not. Such a society may own real estate which is not directly used in carrying on its charitable work, as, for instance, it may rent real estate for business purposes (*Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589; *New London v. Colby Academy*, 69 N. H. 443, 446, 46 Atl. 743; *Young Men's Christian Assn. v. Keene*, 70 N. H. 223, 46 Atl. 186) and be subject to taxation therefor. It may invest money in savings banks, which thereupon becomes taxable. But the fact that it may own taxable property, or that it in fact does own such property, does not prove that the legislature did not intend to include such an institution of a charitable character within the favored class. In consideration of public benefits conferred by such establishments, and in view of the fact that their property is substantially used directly in the promotion of public charity, is unproductive of profit or gain, and is not when so used taxable, it was the policy of the legislature to exempt them from the burden of the inheritance tax. If their general property is exempt from taxation under existing statutes, general or special, bequests to them are not taxable merely because it appears that they own incidentally property that is taxable. Nor does it appear that the legislature intended that a legacy to a charitable association should be subject to the succession tax if, when received, it might be invested in taxable property. The sole test suggested by the language of the statute in its application to the subject-matter is to ascertain whether the legatee is a charitable, educational, or

within the class which the legislature intended to favor and encourage.

When, however, an auxiliary body, like the Auxiliary of the Woman's Foreign Missionary Society, though connected with a local church and existing within the jurisdiction as an association, seeks as its principal object "the evangelization of heathen women" and the raising of funds for that purpose alone, it is difficult to discover how the public represented by the people of this state is benefited by the supposed benevolence. Even if there are "heathen women" in our midst, this society can do nothing for their enlightenment and civilization; for, as found in the case, none of its funds "are or can be devoted to charitable objects within the state of New Hampshire." Its money may be sent, and presumably the principal part of it is sent, to assist in the conversion of people living in remote parts of the earth from their native religion to that of Christianity. The expenditure of large sums of money for the enlightenment upon religious subjects of the natives of the antipodes evidently was not one of the objects the legislature intended to encourage, when, in 1895, the property of charitable associations "devoted exclusively to the uses and purposes of public charity" was exempted from taxation, or when, in 1905, legacies to such associations "in this state" were exempted from the inheritance tax. The benefit to the public of this state of such a trust is so visionary, problematical, and uncertain that it cannot be deemed for the purposes of this case a public charity, without imputing to the legislature motives which it is reasonably certain they did not entertain. The state is not itself a charitable institution, and does not authorize its representatives to expend the public money, by exemptions from taxation or otherwise, for purposes having little or no relation to the welfare of the inhabitants of the state. The purpose of such laws is the acquisition of some supposed public advantage. Opinion of Justices, 58 N. H. 623; *Perry v. Keene*, 56 N. H. 514. If it is impossible to see how the public good of the state is promoted by a claimed exemption from the tax burden, it cannot be inferred that the legislature intended such a result from language which does not necessarily require such a construction. "If a statute is capable of two meanings, and one is more reasonable and therefore more probable than the other, this fact is necessarily considered, with all other competent evidence, on the question of intent. The evidence of intention may include various inherent probabilities and the probative force of many circumstances, as well as the literal sense of the words used. When the meaning is found by giving due weight to

everything that legally tends to prove it, it is not a matter of discretion whether it shall be adopted or rejected. If the evidence establishes the fact that the literal sense is not the true sense, a literal construction would be an alteration of the law." Opinion of Justices, 66 N. H. 629, 651, 33 Atl. 1076, 1088. In holding that general tax exemption laws apply to domestic, and not to foreign, corporations, the court, in *Re Prime*, 136 N. Y. 347, 362, 18 L.R.A. 713, 32 N. E. 1091, 1095, says: "It is the policy of society to encourage benevolence and charity; but it is not the proper function of a state to go outside of its own limits and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large." And it is not to be inferred that the legislature undertook to encourage the accumulation of property in this state by foreign or domestic corporations or societies, whose only charitable purpose is to devote it exclusively to the use of religious missionaries for the conversion of the heathen in foreign lands. The Home Missionary Society is also an auxiliary to a corporation organized in another state, and its object is, in subordination to the principal body, to assist "in the elevation and evangelization of needy and destitute women and children in our own land, and in raising funds for this work." While it seeks to accomplish religious, moral, and educational results, its field of operation is not confined to, though it may include, this state; and the question whether its charity is a public one which the legislature intended to promote may not be entirely free from doubt. As a matter of fact, a very small part of the funds of this local society is expended in this state; and it does not appear from the case whether it has the right, as between it and the parent society, to use its money for local purposes. As a matter of practice, it has devoted substantially all its funds to the support of charities outside of New Hampshire, and presumably it will continue that practice. If its object was to maintain an orphans' home or a hospital for poor people on the Pacific coast, and all its resources were devoted to that purpose, the public benefit of such a charity in New Hampshire would not be apparent. Perhaps it would be no more evident than the maintenance of missions in China. Its relation to the public interests of this state, which alone the legislature is ordinarily presumed to have in view, would be so slight, arising merely from a general community of interstate interests, that it is not probable such a charity would be the object of legislative bounty and encouragement. Nor should we expect to find the lawmakers exempting from the common burden of taxa-

tion a society whose purpose is, as established by long practice, to use its funds exclusively in the promotion of charities in other states. If some substantial local benefit accrues of a public nature by the actual use of some of its funds for charitable purposes in this state, it might be found that it was included within the exemption, though it used the balance of its funds in other jurisdictions. *Balch v. Shaw*, 174 Mass. 144, 54 N. E. 490. The question would be whether its charity was of such a character and so administered as to be of any substantial benefit or advantage to the public of this state; and this would be principally a question of fact, to be determined upon competent evidence. But, in the absence of such evidence, as in the case of this missionary society, the fact cannot be assumed, and it cannot be found, upon the facts reported, that the society is exempt from taxation.

Case discharged.

Peaslee, J., did not sit. The others concur.

NEW YORK COURT OF APPEALS.

WILLIAM A. WILCOX, Resp't.,
v.

CITY OF ROCHESTER, Appt.

(190 N. Y. 137, 82 N. E. 1119.)

Elevator — negligence — question for jury.

1. The question of the contributory negligence of one injured by falling into an elevator well when attempting to enter the car for transportation is for the jury on conflicting evidence as to whether or not the conductor, who had just come from the car, left the door open or closed.

Same — police station — governmental power.

2. The operation by a municipal corporation of an elevator in a police station is

Case Note. — Liability of municipality for acts which are not essentially police functions, but which are connected therewith.

This note does not include cases which discuss the liability of municipal corporations for the acts of police officers in the discharge of the usual duties imposed upon such officers, or for acts of policemen outside the scope of their employment; but is confined to cases in which the negligent act complained of was not such as generally pertains to the functions of a police department.

The principle upon which Judge Haight bases his dissenting opinion seems also to have governed the decision reached in *Woodhull v. New York*, 150 N. Y. 450, 44 N. E. 17 L.R.A. (N.S.)

part of its governmental duty, for negligence in which it is not liable to an individual injured thereby.

Pleading — legal objection.

3. That the act causing the injury to one suing a municipal corporation for personal injuries alleged to have been caused by its negligence was part of its governmental function is merely a legal objection to the right to recover, which it is not necessary to plead.

(Haight, J., dissents from proposition 2.)

(December 10, 1907.)

APPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. William A. Sutherland, for appellant:

The defendant was engaged solely in the discharge of governmental functions.

Moest v. Buffalo, 116 App. Div. 657, 101 N. Y. Supp. 996; *Snider v. St. Paul*, 61 Minn. 466, 18 L.R.A. 151, 53 N. W. 763; *Hughes v. Monroe County*, 147 N. Y. 49, 39 L.R.A. 33, 41 N. E. 407; *McKay v. Buffalo*, 9 Hun, 401, affirmed in 74 N. Y. 619; *Eddy v. Ellicottville*, 35 App. Div. 256, 54 N. Y. Supp. 800; *Smith v. Rochester*, 76 N. Y. 506; *Reynolds v. Board of Education*, 33 App. Div. 88, 53 N. Y. Supp. 75; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Davidson v. New York*, 24 Misc. 560, 54 N. Y. Supp. 51; *Brown v. New York*, 32 Misc. 571, 66 N. Y. Supp. 382; *Bank v. Brainerd School Dist.* 49 Minn. 106, 51 N. W. 814; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Eastman v.*

1038, which is set forth in full in his opinion. In that case the court used the following language: "The liability of a municipal corporation for the acts of servants or agents depends upon the character of the service. If the corporation appoints or elects them, and controls them in the discharge of their duties; if it can continue or remove them, or hold them responsible for the manner in which they discharge their duties; and if their duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interests,—they may be regarded as its agents or servants, and the maxim *respondeat superior* applies."

Such, too, seems to have been the controlling principle of the decision in *Twist*

a city hall was a public and governmental use, and therefore the city was not responsible for the negligence of its officers, agents, or servants in the management of such building.

The broad general doctrine of the *Maximilian Case*, which is certainly not now open to question in the courts of this state, is that "two kinds of duties are imposed on municipal corporations,—the one governmental and a branch of the general administration of the government of the state; the other quasi private or corporate;" and "that, in the exercise of the latter duties, the municipality is liable for the acts of its officers or agents, while in the former it is not." Cullen, J., in *Lefrois v. Monroe County*, 162 N. Y. 563, 567, 50 L.R.A. 206, 57 N. E. 185, 186. The question which confronts us on the branch of this appeal now under consideration is whether the duty exercised by the city of Rochester, under the general statutes relating to cities of the second class, of maintaining and caring for a police station, is a governmental duty appertaining to the general administration of the state, or a duty imposed and undertaken for the benefit of the municipality as a corporate body. If it falls within the first of these categories, the present action cannot be maintained.

To my mind, it seems perfectly clear that, if there is any logical validity in the distinction laid down in the *Maximilian Case*, and so firmly established by the subsequent decisions of this court, it must be applied in favor of the defendant and appellant here. What powers and duties are there which can be conferred and imposed upon a municipality that more clearly constitute a function of general government than the power and duty to maintain a police force, and provide suitable buildings for its occupation and use? The agency which caused the accident out of which the *Maximilian Case* arose was the driving of an ambulance wagon through the streets of New York by an employee of the commissioners of public charities and corrections. The statutory duties of the department of which the commissioners were the head were to care for paupers, destitute children, lunatics, and certain classes of offenders. This court held that these functions were "acts to be done by them in their capacity as public officers in the discharge of duties imposed upon them by the legislature for the public benefit;" and that they were not acts done for the city of New York "in what may be called its private character, in the management of property or rights voluntarily held by it for its own immediate profit or advantage as a corporation, though inuring ultimately to the benefit of the public."

The general governmental character of the 17 L.R.A. (N.S.)

functions of the police in our cities strikes me as much more apparent than was such character on the part of the commissioners of public charities and corrections in *Maximilian v. New York*, supra. For one thing, their powers were strictly local, while, in some respects, the powers of municipal police officers extend throughout the entire state. On this point it is necessary to refer only to § 181 of the act for the government of cities of the second class, familiarly known to lawyers as the "White Charter" (*Laws 1898*, chap. 182, p. 398), which provides, among other things, as follows: "The members of the police force, excepting the surgeons, in criminal matters, have all the powers of constables under the general laws of the state; and they also have power and it is their duty to arrest any person by them found violating any of the penal ordinances of the city or laws of the state, and to take such person before the proper city magistrate, to be dealt with in the same manner as if such person had been arrested upon a warrant theretofore duly issued by such magistrate. . . . They shall also have, in every part of the state, in criminal matters, all the powers of constables; and any warrant for search or arrest issued by any magistrate of the state may be executed by them in any part of the state, according to the tenor thereof, without indorsement," etc. Indeed, I think it can hardly be disputed that, so far as relates to the appointment and maintenance of the police force, the city of Rochester exercises a public governmental function, so that it is not responsible for the unlawful or negligent acts of policemen in the discharge of their duties. 2 Dill. Mun. Corp. 3d ed. § 975. The suggestion is made, however, that inasmuch as the alleged negligence in the present action was not the omission of a police officer or member of the police force assuming to act as such, but was done by an employee of the city, engaged in the maintenance of a police station, the rule which denies the application of the doctrine of *respondet superior* to the torts or negligent acts of police officers does not apply. This proposition simply brings us back to the question whether the safe and proper maintenance of a police station building is not an appropriate, not to say necessary, element in the maintenance of a police force; and, if it is, whether it is not the exercise of a public governmental function. I have already indicated that I think these questions must be answered in the affirmative. The evidence leaves no doubt as to the character of this building. The city engineer, who had been in office several years, and was its custodian, testified: "Since I have had charge of it, it has been occupied as

headquarters for the police department and by the police court,—nothing else. There are four stories in the building. The police telephone system is on the top story,—police patrol and fire alarm. There is a portion of the fire alarm there and the police patrol calls. The third is the women's cells and matron's room. The second floor is the men's cells and the court room. The first floor is the assembly hall and the office of the captain and some other officers. The assembly hall is where the policemen assemble and are given their instructions. That is the use to which the building has been put during all the time I have been city engineer, and to no other purpose."

It thus appears that the structure was used in part as a jail for prisoners, as well as in part for the accommodation of the police force of the city of Rochester. The weight of judicial authority in this country is in favor of the doctrine that the maintenance of a jail is a governmental function (*Lahner v. Williams*, 112 Iowa, 428, 84 N. W. 507; *Gray v. Griffin*, 111 Ga. 361, 51 L.R.A. 131, 36 S. E. 792; *La Clef v. Concordia*, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272; *New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426; *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *Brown v. Guyandotte*, 34 W. Va. 299, 11 L.R.A. 121, 12 S. E. 707), although a contrary view has been entertained in North Carolina (*Shields v. Durham*, 118 N. C. 450, 36 L.R.A. 293, 24 S. E. 794), and by a Federal judge in the fourth circuit (*Edwards v. Pocahontas* [C. C.] 47 Fed. 268). I think that the prevailing view is based on sound reason, and that it is equally applicable to a police station, such as this was in Rochester. It was actually applied to a police station in the case of *Kelley v. Cook*, 21 R. I. 29, 41 Atl. 571, where the defendant, city treasurer, was sued, as the representative of the city of Woonsocket, to recover damages for the negligence of the city in caring for a person who had been unlawfully arrested by a police officer, and incarcerated in a police station, and, by reason of the city's neglect to provide for him therein, was rendered so ill that he died. The court said: "In the temporary care of persons under arrest, the city, by its police department, is aiding in the enforcement of the laws, and thus discharging a public duty for which it receives no pecuniary benefit, and, for the manner in which it discharges this duty, it is legally responsible to no one. The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the people." I cannot see that any distinction can logically be drawn which will take this case out of the rule which defeated the plaintiff in *Max-*

milian v. New York, 62 N. Y. 160, 20 Am. Rep. 468, growing out of the fact that the person or persons whose alleged negligence caused the accident here were not at the time actually endeavoring to exercise any authority over the plaintiff, or with reference to the plaintiff, as officers or members of the police force. If their acts were in aid of the maintenance of the police station, and such maintenance by the municipality was as much the exercise of a public governmental function as was the organization or the regulation or the discipline of the police force itself, then the nonliability of the city depends on the character of the duties thus imposed and assumed, and not at all on the relation to the municipality of those affected by the manner in which such duties may be discharged.

The point is made by the learned counsel for the respondent that the principal question which I have discussed was not raised by the answer. It is a purely legal objection to the plaintiff's right to recover, which it was not necessary to plead. The evidence as to the character of the building came in without objection, and was uncontroverted. The point was distinctly raised on the defendant's motion to dismiss, and the ground on which Mr. Justice Nash based his dissent in the court below shows that it must have been considered by the appellate division.

I think that the judgment should be reversed, and a new trial granted; costs to abide the event.

Edward T. Bartlett and Hiscock, JJ., concur.

Gray, J., concurs on second ground stated in opinion.

Cullen, Ch. J., and Werner, J., concur in result on the ground only of contributory negligence of plaintiff.

Haight, J., dissenting:

This action was brought to recover damages which the plaintiff is alleged to have sustained by reason of his falling down the elevator shaft in the police building in the city of Rochester. It appears that one Smith was in the employ of the city, operating the elevator; that he ran it down to the ground floor, then stepped out, and went to the front door of the building to notify the engineer that the elevator squeaked and needed oiling. He there met the plaintiff and one Murrell, who were engaged in repairing the roof of the building, and walked back with them; the plaintiff, being in the lead, stepped inside of the elevator shaft and fell to the cellar floor, receiving the injuries for which this action was brought. It appears that, during the absence of Smith, one

Karnes, another employee, a telegraph operator, arrived, entered the elevator, and, as he states, nearly closed the door, leaving a space of about 2 inches, and then ran the elevator up to one of the floors above. The controversy in this case is as to whether the door of the elevator shaft was open or closed. The testimony of the plaintiff and his companion, Murrell, is to the effect that the door was wide open. All the witnesses on the part of the defendant testify to the effect that it was partially or nearly closed. The trial court charged, as a matter of law, that, if the jury found that the door was substantially closed, and that the plaintiff pushed it open and stepped into the well without looking to see whether the car was there, he was negligent and could not recover. But, if the door was open, then it was a question for the jury to determine, from the evidence, as to whether he used such care and caution as a reasonably prudent and cautious person would have used, under the same circumstances, in entering or attempting to enter the elevator well, without looking to determine whether the car was there or not. The jury having found a verdict in favor of the plaintiff, we must assume that it found that the door of the elevator shaft was open, and that that issue is disposed of in favor of the plaintiff. The negligence of the defendant's employee thus being established, the only other question that remains is as to whether the plaintiff was guilty of contributory negligence. That question was also submitted to the jury, and the finding was in his favor. I am of the opinion that, under the circumstances disclosed by his testimony and that of his associate, we cannot say, as a matter of law, that he was guilty of contributory negligence, or that there was no evidence to sustain the verdict. *Tousey v. Roberts*, 114 N. Y. 312, 316, 11 Am. St. Rep. 665, 21 N. E. 399.

It is now contended that the city of Rochester, in maintaining and operating an elevator in the police building, was engaged solely in the discharge of a public governmental function, distinguishable from a municipal function, and that therefore it is not liable for the negligence of its servants. The duties of policemen, as prescribed by statute, pertain to the executive branch of the government; and the fact that the statute has provided for their appointment by municipal officers does not change the character of their duties, or operate to make the municipality liable for their negligence while engaged in the discharge of such governmental function. It consequently follows that, when a policeman, in an endeavor to shoot a mad dog, negligently injures an individual, 17 L.R.A. (N.S.)

the municipality is not liable. *McKay v. Buffalo*, 9 Hun, 401, affirmed in 74 N. Y. 619. The same rule obtains with reference to the board of health. The preservation of the health of the people of the state, and their protection from infectious and contagious diseases, is a governmental function; and, although the legislature has provided for the establishing of local boards through appointment of municipal authorities, when the servants or employees are actually engaged in the discharge of a duty pertaining to the preservation of such health the municipality is not liable for their negligence or want of skill in the performance of that duty. Consequently, when an employee engaged in the driving of an ambulance wagon negligently struck and caused the death of a person, the city was held not liable. *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468. It will thus be seen that the liability of the municipality depends upon the character of the service in which the servant is engaged. This question was considered in the case of *Woodhull v. New York*, 76 Hun, 390, 28 N. Y. Supp. 120. In that case an action had been brought against the city of New York and the city of Brooklyn, and it was conceded that the defendants owned and were operating a railway across the New York and Brooklyn bridge, and were engaged in carrying passengers for hire. It was the contention of the plaintiff that he had paid his fare to be carried across the bridge, and, while in the act of entering one of the cars, a policeman, who was there, engaged in performing the ordinary duties of a guard, closed the door against his leg; and that he remonstrated against such treatment. Thereupon the policeman entered the car, prevented the plaintiff from leaving it until it arrived at the other end of the bridge, and then arrested him, charged him with assault and battery, and took him before a magistrate, before whom he was tried upon the charge and acquitted. An action for false imprisonment was then brought, and a recovery had, which was sustained in the general term upon the ground that the policeman was stationed at the door as a train man or guard, assisting passengers in or out of the cars; that such a service pertained to the municipality, and was not governmental. An appeal was taken to this court, and the judgment reversed, but upon the ground that the action was for false imprisonment, and not for injuries received by reason of the shutting of the door against the plaintiff's leg. It appeared that the policeman had been a patrolman upon the bridge ten years, charged with the duty of

preserving order, and that in making the arrest he was acting in his capacity as such policeman, discharging a governmental function, for which the municipality was not liable for his negligence or misconduct; that his act in shutting the door was a separate and distinct act from that of subsequently arresting the plaintiff without proper cause. *Id.*, 150 N. Y. 450, 44 N. E. 1038.

Bearing in mind the distinction, to which attention has been called, we come to the consideration of the circumstances of this case. No claim is made that the elevator was out of repair, or that there was any defect which caused the injury to the plaintiff. The negligence, if any, was the negligence of the employee in leaving the door open when he removed the elevator to an upper floor. Was this employee discharging a governmental function? I think not. Undoubtedly the elevator was a convenience. It enabled the policemen to ride up and down. So were the cars running upon the New York and Brooklyn bridge a convenience. Policemen could avail themselves of them in going from one place to the other, as well as other street railroads, by which they could ride from their homes to the station house or to the territory which they were required to patrol and guard. But it never before has been suggested that the servants of a municipality or of a corporation, in aiding a policeman in his travels, are exercising a governmental function which would shield it from liability for the negligence of its employees. To carry the rule thus far might, as was suggested in the *Woodhull Case*, permit cities to escape all liability for injuries by reason of the negligence of their servants by appointing them all policemen. We then answered that contention to the effect that such could not be the case, "for it is very easy to distinguish between the duties of a servant and those of a policeman." It does not appear that the operator was a policeman, nor that he had any other duty to perform which pertained to a governmental function. He was employed and paid by the city, and, to my mind, he was rendering purely a municipal service, and was not discharging the functions of a governmental officer.

It is also suggested that a room for the detention of prisoners was maintained in the police building, and that the maintaining of a jail or prison is a governmental function. It may be that the keeper of the room of detention is discharging a governmental function, but that question is not involved in this case, and should not, therefore, now be decided.

The judgment should be affirmed, with costs.

17 L.R.A. (N.S.)

OREGON SUPREME COURT.

W. F. MATLOCK, Respt.,
v.
JACOB SCHEUERMAN, Appt.

(— Or. —, 93 Pac. 823.)

Check — infirmity — notice.

1. Notice of infirmity in the contract is not given to the purchaser of a check by a statement of the indorser that the maker had requested him to wait two or three days before presenting it for payment.

Same — notice of dishonor.

2. A check negotiated at noon on the day following its date is not overdue so as to carry notice of its illegality or previous dishonor, although made and negotiated in the town in which the drawee is located.

Same — suspicious circumstances — jury.

3. The purchase of a check by the vice president of the bank on which it is drawn, from his relative, in the near vicinity of the bank, without inquiry at the bank as to its validity, procuring the blank check with which to make payment from a hotel, and delivering it to a stranger for delivery to the payee of the check, is not sufficient, as matter of law, to show notice of facts sufficient to arouse suspicions as to the validity of the paper; but the question of good faith is for the jury.

Same — value — check.

4. Giving his own check in exchange for that of a third person constitutes one a holder of it for value; and such position is not lost by the fact that payment of the stranger's check is refused before his own has been negotiated or presented for payment.

Same — stopping payment.

5. One who, without notice of the invalidity of the check of a third person, has given his own check to the payee in exchange for it, is not bound to stop payment of his own check in case payment of the stranger's check is refused because of such invalidity.

Same — gambling debt — right of holder.

6. A bona fide holder for value of a check given for a gambling debt, which is dishonored upon presentation for payment, is not bound to pursue the indorser for the protection of the maker, because of the original invalidity of the check.

(February 4, 1908.)

Case Note. — *Effect of exchange of commercial paper to constitute one a holder in due course for value.*

MATLOCK v. SCHEUERMAN is, so far as its result is concerned, undoubtedly supported by the authorities; but there seems to be little reason for insisting that there was "nothing more than an exchange of checks;" nor is it apparent just how the rule that the giving of a check is but a conditional

APPEAL by defendant from a judgment of the Circuit Court for Umatilla County in plaintiff's favor in an action brought to recover the amount alleged to be due on a bank check. Affirmed.

Statement by Slater, C.:

Defendant appeals from a judgment entered against him for the amount of a check issued by him under date of December 12, 1906, on the First National Bank of Pendleton, for the sum of \$400, in favor of Lester Swaggart, his order or bearer, who, about noon of the following day, indorsed and delivered it to plaintiff, receiving in exchange therefor plaintiff's check for the same amount, on the same bank, payable to his order. It is averred in the

complaint that plaintiff paid Swaggart value for the check, and on the 14th presented it to the bank for payment, which was refused on the order and direction of defendant, given to the bank without plaintiff's knowledge, and after he became the owner of it. The answer admits the issuance of the check, but denies the other averments of the complaint, and affirmatively alleges that the only consideration for the check was a gambling debt which Swaggart claimed from defendant; that Swaggart, on the morning of the 13th, before he indorsed it to plaintiff, had presented the check for payment, which was refused; that plaintiff had knowledge of its illegality when he received the check, and of its previous dishonor; that plaintiff paid

payment could affect the question to be there decided. The court held such rule not to apply because, there being but an "exchange of checks," there was no debt; and a debt, either "precedent or contemporaneous," is, it held, a necessary condition to the applicability of the rule of conditional payment. Such rule, it would seem more logical to argue, is made in the interest of the one receiving the check, and, therefore, until objection comes from him,—and objection can so come only in the event of the checks being dishonored,—the giving of a check is, so far as the maker is concerned, an absolute payment. And herein lies the true distinction between *Heartt v. Rhodes*, 66 Ill. 351, and *MATLOCK v. SCHEUERMAN*. In the latter case the former is distinguished: "Because of the pre-existing debt [said to be present in *Heartt v. Rhodes*, and absent in *MATLOCK v. SCHEUERMAN*] the rule of conditional payment was applicable." Aside from the fact that there was no question of holding for value in *Heartt v. Rhodes*, where the plaintiff had surrendered a note to the accommodation payee, receiving the latter's check in exchange, what was decided was that the plaintiff could not be deemed to have taken the check in absolute payment of the note, and, therefore, upon the check's being dishonored, his right of action upon the note was restored. What was conditional, then, was not the giving of the check, but the taking of it. In *MATLOCK v. SCHEUERMAN*, however, the contention was that the giving was conditional. To answer such contention and to distinguish the cases, when thus stated, it is not necessary to resort to the explanation that in the one there is present, and in the other there is absent, the element of a pre-existing indebtedness, which explanation, when given, is as much in need itself of an explanation as that which it purports to explain.

The court does, however, state what is undoubtedly the true rule when it says: "Where there is an exchange of commercial paper . . . each instrument is a sufficient consideration for the other." The cases make no distinction, so far as is relevant here, between the consideration 17 L.R.A. (N.S.)

that will constitute one a holder in due course of a negotiable instrument and the consideration that will support an action thereon by one not contending for the privileges of a holder in due course.

Harrington v. Johnson, 7 Colo. App. 483, 44 Pac. 368, referred to in *MATLOCK v. SCHEUERMAN*, is a case, it is true, not dissimilar to the latter in reasoning. Here one who purchased a note against which there was a defense for fraud, giving therefor his check, was held, in the absence of evidence showing that the check was taken in absolute payment or that it was paid, to take the note subject to pre-existing equities. The court argues that, since the giving of a check is presumptively but a conditional payment, and as, in this case, there was no evidence to show an absolute payment, the check being neither produced nor its payment proved, the giving of it did not constitute the giving of value. It may not be amiss to observe that the court considered it necessary to the ends of justice to subject this particular note to the equities contended for, and that it intended so to subject it if it could be "accomplished without doing violence to any legal proposition." Nor are the questions of purchasing in good faith and purchasing for value very distinctly differentiated.

Teutonia Ins. Co. v. Bussell (Tenn. Ch. App.) 48 S. W. 703, affirmed orally by the supreme court, is in its facts similar to the foregoing case; there is, however, nothing said of "conditional payment." It was here held that one was not to be considered an innocent purchaser for value of a draft against which the acceptor had a defense, upon the simple statement that he gave his check for the same, he giving no evidence of the returned check other than that he could not find it, nor calling any of the bank officials to testify in reference to the check, and giving no evidence of his having funds to meet the same. The case really involves the point of a purchase in good faith, and not of a purchase for value.

In *Mickles v. Colvin*, 4 Barb. 304, it was held that one purchasing a third party's note with his own is a purchaser for value,

no consideration or value for the transfer; and that at the time of the transfer the check was past due. By the reply all of the new matter of the answer is denied excepting that the check was given for a gambling debt. Error is assigned on account of the overruling of defendant's motion for a nonsuit, the admission of testimony over his objection, and the giving and refusing of instructions by the court.

Mr. Douglas W. Bailey for appellant.
Mr. J. H. Raley for respondent.

Slater, C., delivered the opinion of the court:

All the errors assigned are included in two principal propositions, which alone are necessary to be considered, viz.: (1) Is

the plaintiff a holder in course? and (2) was he under any legal duty to stop payment on his own check after having been denied payment of the check held by him? The statute declares that one is a holder in due course "who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Bellinger & C. Anno. Codes & Statutes, § 4454. But a check, the consideration for which is money

and takes free of defenses. And to the same effect is *Greenwood v. Lowe*, 7 La. Ann. 197, the instruments being drafts.

And in *Howlett v. Fitzgibbon*, 16 N. Y. S. R. 804, 1 N. Y. Supp. 321, it was held that one giving his note for a check for the same amount, the check being secured by a draft accepted by the defendants, is a purchaser for value of the draft to the amount of the check,—the check not being paid,—and to that extent takes the draft free of pre-existing equities; and the fact that his note is not paid at maturity does not alter the situation.

In *Bacon v. Holloway*, 2 E. D. Smith, 159, plaintiffs who gave their own note to the payee of the note in suit in exchange for the same, paying such note of theirs by an adjustment of a claim they had against the one to whom such payee indorsed, were bona fide purchasers of the note in suit for value.

And in *Adams v. Soule*, 33 Vt. 538, where one purchased a \$750 note to which the maker had a defense, giving therefor \$300 in cash and his note for \$400, it was held he took a good legal title to the \$750 note, and could enforce it to its full extent; and his position was the same in equity, although the payments made by him on his \$400 note to the payee thereof were not made until after he had been informed of the defense. It seems, however, the information given him was not of a very definite nature.

Where one, as in *Russell v. Hadduck*, 8 Ill. 233, 44 Am. Dec. 693, purchases of his bankers, with whom he has deposits, a draft by giving his check on them for the amount of the draft, he is a purchaser for value and takes free of defenses.

And likewise, *Mayer v. Heidelberg*, 123 N. Y. 332, 9 L.R.A. 850, 25 N. E. 416, holds that, where a depositor in a bank, having sufficient funds standing to his credit, tenders to it his check in payment for a draft purchased by it for him, and the bank accepts the check, charges it against the deposit, files it as a voucher, 17 L.R.A. (N.S.)

and delivers over the paper purchased, the purchaser is a holder for value and protected as such.

And in *Wilson v. Denton*, 82 Tex. 531, 27 Am. St. Rep. 908, 18 S. W. 620, where two notes for \$1,000 each, payable to bearer in one and two years, respectively, were sold six months after date for the vendee's two notes, each for \$900, and for four and sixteen months, respectively, at increased interest, and \$36 in a store account, it was held the vendee was a purchaser for value and took a protected title.

It was held in *Lally v. Colgate*, 10 Jones & S. 544, that the payee of a "gold check" intrusted by the maker to a third person to effect a "settlement" between such payee and another, such third person promising to procure for the maker of the "gold check" payee's currency check, purchases such "gold check" for value by giving his own check therefor, payable to such third person, and takes free of equities, he being ignorant of the terms on which the "gold check" was so intrusted.

Bird v. Harville, 33 Ga. 459, holding the maker of a note could interpose any defense in a suit on it by the transferee thereof that he had against the payee, the transferee having taken the note upon giving to the payee a duebill payable when the note was collected, turns upon a point of evidence, the trial court having excluded certain evidence tending to show plaintiff was put forward by the payee only to defeat the maker's defense.

This note is limited to checks, promissory notes, drafts, and bills of exchange. Nor does the note include cases where one note, etc., is given in renewal of another; nor cases wherein there is a surrendering of one note, etc., by the holder thereof, and the taking by him in the place thereof and in substitution therefor another note, etc.,—these cases involving the application of the principle that the surrendering of securities or of evidences of indebtedness is a parting with value.

won by playing at a game of cards, is void and of no effect as between the parties to the same and all other persons, except holders in good faith, without notice of the illegality of such contract. *Bellinger & C. Anno. Codes & Statutes, § 1945.*

It having been admitted by the pleadings that the check was given in consideration of a gambling debt, the burden of proof is with the plaintiff to establish all of the elements necessary to constitute him a holder in good faith for value. *Owens v. Snell, 29 Or. 483, 44 Pac. 827; Kenny v. Walker, 29 Or. 41, 44 Pac. 501; Brown v. Feldwert, 46 Or. 363, 80 Pac. 414.* The check sued on was offered in evidence, and is in the following form:

Pendleton, Oregon, Dec. 12, 1906. No. —
The First National Bank \$400.

Pay to L. Swaggart or { order four hun-
dred dollars. } bearer J. Scheuerman.

Plaintiff testified that he had lived in Pendleton for thirty years and had been acquainted with Scheuerman for twenty years; that he was a man who did a great deal of business about town, of which plaintiff had more or less knowledge; that he had frequently seen defendant's checks in circulation in the community, and now held one of them; and that he, plaintiff, was the present owner and holder of the check sued on; that he bought the check from Swaggart, who, at the time, indorsed the same to him; that no part of the check had been paid, and that he, plaintiff, gave his check for \$400 for it, and that his check, so given to Swaggart, was cashed at the First National Bank, and the amount charged to his account by the bank; that within two or three days after he got Scheuerman's check he demanded payment thereof of the First National Bank, but was told by the cashier that Scheuerman had stopped its payment; that, at the time he paid Swaggart for the check, he had no knowledge as to what the consideration of the Scheuerman check was, nor that it was given for a gambling debt, nor that the maker and payee thereof had been engaged in gambling. On cross-examination the witness also testified that he bought the check on December 13, 1906, about noon. In answer to the question, "Tell the jury the circumstances under which you bought it," plaintiff testified as follows: "That day, about 12 o'clock, I was going home to my lunch, and I met Mr. Swaggart on the corner of the Boston store, and he stopped me and said, 'I have a check of Scheuerman's which he asked me to wait two or three days for, and I may need the money,' and I said, 'All right. Give me the

check, and I will give you my check for it, and you can go to the bank and get the money.' And he signed the check, and I went to my lunch and came back from lunch, and went to the hotel and got a blank check and gave it to John Endicott." Knowing that Endicott was well acquainted with Swaggart, he asked him to hand the check to the latter, which he did. Endicott, it appears, had been interested with Swaggart in the results of the gambling game; but plaintiff swears he knew nothing of that. The plaintiff's evidence further shows that he is vice president of the First National Bank, and was in the bank on the morning of the 13th, but he did not then learn that Scheuerman had ordered payment of his check stopped; that he presented the check at the bank for payment on the morning of the 14th, which was refused; that he made no inquiry at the bank to ascertain whether the check he had issued to Swaggart in exchange therefor had been paid or not, nor did he notify Swaggart of the nonpayment of the Scheuerman check, but he immediately gave it to his attorney for collection; that on the 15th Swaggart cashed at the bank the check received by him from plaintiff. Upon this state of the record, has plaintiff made out a prima facie case of a holder in due course? We shall discuss in the order of their statement in § 4454, supra, the several elements of fact, the existence of which is necessary to constitute one a holder in due course.

1. It is necessary that the instrument be complete and regular on its face; and it is argued by the defendant that Swaggart's remark at the time of the negotiation, that Scheuerman had asked him to wait two or three days for presentation of the check, disclosed to plaintiff that the instrument did not represent on its face all of the contract between the parties, and rendered it indefinite as to time of payment. Such a request, however, was not binding on the payee. It did not vary the terms of the writing. It added nothing to it and took nothing from it that was essential to its character as a negotiable instrument. From such a request one would usually and rightly infer that the maker had not funds on deposit to meet the check when issued, but would deposit sufficient funds within the time, and, by the use of such language, notice of that fact might be given; but it is not calculated to carry notice of any infirmity in the contract.

2. It is urged that the check was overdue when negotiated. It is payable on demand, and when such paper is negotiated an unreasonable length of time after issue the holder is not deemed a holder in due course. *Bellinger & C. Anno. Codes & Statutes, 17 L.R.A. (N.S.)*

§ 4455. What is a reasonable time has been fixed by judicial decisions. As between the drawer and payee the rule is that, when the payee to whom the check is delivered receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on the next day. 2 Dan. Neg. Inst. 5th ed. § 1590. The presumption raised by the statute is that, if the instrument is presented within a reasonable time, it would be paid, if a valid instrument on its face; but, when such reasonable time has passed and the instrument is still in circulation, it carries with it the inference of dishonor, and is notice to anyone taking it of any latent inherent infirmity that may exist. The check having been issued on the 12th, and bearing that date, and negotiated at the noon hour on the 13th, was not overdue, so as to carry notice to plaintiff of its illegality or of its previous dishonor.

3. It is next urged that the check was not received in the usual course of business, but in a very unusual manner, not in the course of a business transaction, or a transaction free from suspicion. As to what transactions are included "in the usual course of business," it is not easy to determine. That depends largely upon the circumstances of each particular case. 7 Cyc. Law & Proc. p. 925. As applied to the indorsement of commercial paper, it may be said generally to include the concurrent indorsement and delivery for value under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it when offered for the purpose for which this was transferred; and it would not be in due course if such a person would at once suspect the integrity of the paper itself, or the credit and standing of the party offering it. 2 Randolph, Com. Paper, § 988; Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Kimbro v. Lytle, 10 Yerg. 417, 31 Am. Dec. 585. This necessarily involves the question of good faith. But a purchaser for a valuable consideration, before maturity, of negotiable paper, is not, as a matter of law, affected by notice of facts calculated to arouse suspicion as to the transaction in which the paper originated. The single question is whether he acted in good faith; and, to aid in determining that question, his knowledge of suspicious circumstances may be shown, and it is for the jury to determine the ultimate facts. Bowman v. Metzger, 27 Or. 23, 39 Pac. 3, 44 Pac. 1090. Since the decision of that case, the legislature has prescribed a rule upon what shall constitute notice in such cases: "To constitute notice of an infirmity 17 L.R.A. (N.S.)

in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Bellinger & C. Anno. Codes & Statutes, § 4458. The lack of good faith arises, it is asserted, from the facts shown: That the transfer took place in the near vicinity of the bank on which the check was drawn, and of which Matlock was vice president; that he and Swaggart were brothers-in-law; that no inquiry was made at the bank before purchase; that Matlock, after getting his lunch, went to the hotel, and there procured a blank check in which he wrote the amount of \$400, payable to Swaggart, and signed and delivered it to Endicott for delivery to Swaggart. But none of these facts amount to proof of actual knowledge. As to making the inquiry, "he does not owe to the party who puts such paper in circulation the duty of active inquiry to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by mere speculation as to his probable diligence or negligence." Belmont Branch of State Bank v. Hoge, 35 N. Y. 65-68; Bowman v. Metzger, supra. Plaintiff testified to his lack of knowledge of the infirmity of the paper and to his good faith in taking it; but, if an inference may be drawn from the surrounding circumstances that, on the one hand, tend to detract from the credibility of plaintiff's statements, and, on the other hand, tend to establish the lack of good faith, it is for the jury, and not the court, to determine the fact.

4. Did the plaintiff take the instrument for value? Value is any consideration sufficient to support a simple contract. Bellinger & C. Anno. Codes & Statutes, § 4427. It is a well-settled and universally recognized rule that, when a debtor has given his check for the amount of his indebtedness, the prima facie presumption arises that the check was taken merely as conditional, not absolute, payment (22 Am. & Eng. Enc. Law, 2d ed. p. 569), and "the acceptance of the instrument by the creditor is considered as accompanied by the condition of its payment. Thus it was said, in the time of Lord Holt. 'A bill shall never go in discharge of a precedent debt, except it be a part of the contract that it shall be so.'" 2 Dan. Neg. Inst. 5th ed. p. 283. And this rule has been applied to the liquidation of a contemporaneous debt. Id. p. 281.

There must, however, be a debt, either precedent or contemporaneous, to make the rule applicable. Where, however, there is an exchange of commercial paper, each instrument forms a sufficient consideration for the other

(2 Randolph, Com. Paper, §§ 479, 480; Rice v. Grange, 131 N. Y. 149, 30 N. E. 46; Rankin v. Knight, 13 Ohio Dec. Reprint, 693; Shannon v. Horley, 32 Misc. 623, 66 N. Y. Supp. 471), and each is an independent obligation, not conditional on the payment of the other (7 Cyc. Law & Proc. p. 710). In this case the language of the parties used at the time imports nothing more than an exchange of checks. They met upon the street, when Swaggart says to plaintiff: "I have a check of Scheuerman's which he asked me to wait two or three days for, and I may need the money." Plaintiff replies: "All right. Give me the check, and I will give you my check for it, and you can go to the bank and get the money." That is the contract between the parties. It appears from other evidence that the Scheuerman check, which was then indorsed and delivered to plaintiff, was for the sum of \$400, and that Matlock gave to Swaggart his check for a like amount. The transaction does not amount to an offer to pay \$400, and its acceptance, thereby creating a debt of that amount, which was afterwards liquidated by the delivery of another check. If, however, that construction should follow, the check would have the effect of conditional payment, and it is a part of the plaintiff's case that the check he gave was paid on the 15th. That not only established its value, but is a performance of the condition. The original obligation is paid and extinguished by relation as of the date of the giving of the check. Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Getchell v. Chase, 124 Mass. 366; Cushman v. Libbey, 15 Gray, 358. As sustaining the contention that the check was not payment, we are cited to the case of Heartt v. Rhodes, 66 Ill. 351-356. There one Dickinson gave his check to pay a precedent debt existing in the form of a note signed by Heartt for his accommodation, and on which the action was brought. At the time of giving the check, Dickinson had only \$23.40 in the bank, and the check was dishonored for want of funds. Because of the pre-existing debt, the rule of conditional payment was applicable, and the court very properly say: "Drawing the check without having funds to meet it, and having no right to expect payment of it, was a fraud and imposition upon the payee." For the same purpose, the case of Harrington v. Johnson, 7 Colo. App. 483, 44 Pac. 368, is cited. There one Hoblit, who was the cashier of a bank, purchased of the mortgagee a note and mortgage which had been fraudulently given, and gave a check on his bank for the price. A suit in equity was brought to set aside the conveyance for fraud, and the defense of bona fide purchaser for value was set up. Fraud was found; but the lower court held

that Hoblit purchased without notice, and that, by giving his check, he had paid value. On appeal the case was reversed upon the ground that Hoblit was entirely silent as to what became of the check; whether it was ultimately paid, or whether, in point of fact, Mrs. Johnson, the assignor, ever received the money which it represented. He neither produced the check nor proved its payment, and hence there was no evidence of value. Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94, is another case upon which defendant relied. It was there held that the crediting, upon the books of the bank, to a depositor, of the amount of a check fraudulently issued without consideration, and to whom it was assigned, does not make the bank a bona fide purchaser for value, and that if, after such credit, and before payment for value upon the faith of the check, the holder received notice of the invalidity of the check, he cannot become a bona fide holder by subsequent payment. This is undoubtedly correct, because, by such credit, only the relation of debtor and creditor is created, and it is the right of the apparent debtor at any time upon receipt of knowledge of the invalidity of the check to cancel the credit; but, if it pays, having such knowledge, it is a voluntary payment. We conclude, therefore, that there was no error in denying defendant's motion for a nonsuit.

The theory of the defense is that the giving of a check by Matlock to Swaggart was not payment, and did not amount to payment, until Matlock's check was paid at the bank on which it was drawn, or it had passed out of Swaggart's hands and into the hands of an innocent purchaser. An instruction to that effect was asked, but was denied; and the court instructed the jury: "That the plaintiff was not bound to make inquiry at the bank, or ascertain whether or not his check had been presented or paid at the time he presented the Scheuerman check for payment. Neither was it necessary for plaintiff to stop payment on his check if, at the time he presented the check to the bank for payment, he was a bona fide holder thereof. The fact that his own check had not yet been cashed would make no difference." And error is also assigned for the refusal to give and the giving of these instructions. If defendant's theory is correct as to what constitutes payment and when it took place, then Matlock received notice of an infirmity in the instrument before he paid value, and he would be bound, at his own peril, to stop payment of his own check. But we have already held that, where there is an exchange of commercial paper, as there was in this

case. each instrument is a sufficient consideration for the other, and such exchange is an independent obligation, not conditioned on the payment of the other, unless such condition is expressed in it. It necessarily follows that the nonpayment of the Scheuerman check would not be a defense to Matlock in an action against him on his own check, brought by Swaggart. "It is true," as stated in *Wooster v. Jenkins*, 3 Denio, 187, "that, so long as the securities are in the hands of the original parties, they will balance each other. But it will be by way of set-off, and not on the ground that they are invalid." Even the defense of set-off would be lost by assignment of the check. As between Matlock and the bank, he could doubtless have stopped payment of his own check when denied payment of the Scheuerman check, but that would not have relieved him of liability on his own check, either in the hands of Swaggart or of a third party as assignee. While Matlock may have had a cause of action against Swaggart, as indorser, upon due notice to him of nonpayment, he is also entitled to his action against Scheuerman, and he was not bound to pursue the former for the protection of the latter, to whom he was under no legal duty, on account of the original invalidity of the check. In *Duncan v. Gilbert*, 29 N. J. L. 521, action was brought on a note made for the accommodation of one Rowland, and which, it was alleged as a defense, had been fraudulently misappropriated by him, and a letter of credit on London obtained from plaintiffs in his favor as the consideration for its assignment. The suggestion was made to the court that plaintiffs might revoke the letter of credit and thus protect themselves, to which Brown, J., at page 540 of opinion, replies, in substance, that, if it be said that as Rowland has not drawn, the plaintiffs may protect themselves from future drafts by revoking the credit, the answer is, the plaintiffs cannot be called upon by defendant to adopt that remedy. There was no error in refusing the requested instruction, or in the one given.

The court permitted the jury to consider all of the surrounding circumstances given in evidence, which included plaintiff's failure to notify Swaggart of the nonpayment of the defendant's check, and his failure to demand and enforce payment against Swaggart, to ascertain plaintiff's good faith in taking the check. We think that is all that defendant was entitled to, and there was no error in refusing the other requested instructions, not specifically considered herein.

These considerations, we think, dispose of the errors assigned, and result in an affirmation of the judgment.

TENNESSEE SUPREME COURT.

MARY J. ENGLISH, Admr., etc., of C. B. English, Deceased, Appt.,
v.

THOMAS B. CRENSHAW, Clerk of Shelby County.

(— Tenn. —, 110 S. W. 210.)

Succession tax — compromise of will.

Property received by collateral heirs by deed from testator's widow upon compromise of a contest of his will which gave all his property to her is not within the provisions of a statute taxing estates passing by will or inheritance, or by grant or gift made in contemplation of death, to other than parents, husband, wife, or lineal descendants of decedent.

(May 11, 1908.)

A PPEAL by the administratrix with the will annexed of C. B. English, deceased, from a judgment of the Circuit Court for Shelby County imposing a succession tax upon a portion of decedent's property. Reversed.

The facts are stated in the opinion.

Messrs. W. B. Gilsson and T. K. Riddick for appellant.

Messrs. Charles T. Cates, Jr., Attorney General, G. P. Smith, and W. B. Eldridge for appellee.

McAllister, J., delivered the opinion of the court:

This suit was brought by the county court clerk of Shelby county against Mary J. English, administratrix *cum testamento annexo* of the estate of C. B. English, deceased, for the purpose of recovering an inheritance tax alleged to be due the state. The case was submitted to the Honorable J. P. Young, of the circuit court, on the following stipulation of agreed facts:

"C. B. English, a citizen of Shelby county, Tennessee, died January 26, 1904. He was childless, but left as his widow Mary J. English, the administratrix *cum testamento annexo*. His heirs at law were Annie E. Ricks, a sister, and the children of his deceased brother, T. C. English.

"C. B. English left a will by which all his property, real, personal, and mixed, was left to his widow (Mary J. English) to the exclusion of his heirs at law (Annie E. Ricks,

Note. — A search has disclosed no additional cases involving the liability to pay a succession tax in respect of property transferred by one belonging to an exempt or favored class to one not a member of such class, in compromise of a dispute over decedent's estate.

a sister, and the children of T. C. English, deceased).

"The heirs at law then instituted a contest of the will, and upon trial before a jury the will was set aside.

"An appeal was then taken to the supreme court by the proponent, and the case was reversed and remanded for a new trial.

"The case then came on for trial, and, after the jury was selected, impaneled, and sworn, but before the trial was proceeded with, the following compromise was offered by the administratrix, Mary J. English, and accepted by the heirs at law of C. B. English:

"Mrs. English proposed that, if defendants, Mrs. Ricks and the heirs of T. C. English, would withdraw their contest, that she (Mrs. English) would deed to Mrs. Ricks one fourth in value of all the lands belonging to C. B. English at his death, and to the heirs of T. C. English one fourth of the value of said land; the land to be divided by appraisers or commissioners. The land has not yet been divided; but it is agreed that the case may proceed as if it had been divided, and Mrs. Ricks and the heirs of T. C. English now had a deed to their respective one fourth. It is also agreed that all rents and profit accruing from the land of C. B. English since his death should be equally divided between Mrs. Mary J. English and Mrs. Ricks and the heirs of T. C. English as follows:

"One half to Mrs. Mary J. English, and one fourth to Mrs. Annie E. Ricks, and one fourth to the heirs of T. C. English.

"Thereupon the contest of the will was withdrawn and the jury found in favor of the will, upon which verdict the judgment of the circuit court was duly entered. The entry recites that, by consent of parties, it is further adjudged that proponent pay the costs, for which execution might issue.

"The value of the estate going to Mrs. Annie E. Ricks was fixed by appraisers at \$12,600. The value of the estate going to the heirs of T. C. English was fixed at the same figures, viz., \$12,600."

The question propounded to the circuit judge for decision was: Is the state entitled to collect a collateral inheritance tax, either from Annie Ricks, the sister, or from the heirs of T. C. English, the nephews and nieces of C. B. English, or from both? The circuit judge was of opinion that Mrs. Annie Ricks, the sister of C. B. English, deceased, and the children of T. C. English, not belonging to the exempted classes, were liable for the succession taxes on the sum of \$25,000, the value of the property deeded to them by Mrs. English, and that the state was entitled to recover thereon the sum of \$1,642.25, the amount of said tax, with interest and attorneys' fees, against the property in the hands of the administratrix. The defendants below appealed from the judgment of the circuit court, and insist that neither Mrs. English, as the widow of the devisor or administratrix *cum testamento annexo*, nor the grantees of Mrs. English, under the terms of the compromise, were liable for any inheritance or succession tax.

Chapter 174, p. 347, of the Acts of 1893, provides for a tax upon all estates, real, personal, and mixed, situated in the state, whether the person dying seised lived in the state or not, passing either by will or inheritance, or by any deed, grant, bargain, gift, or sale made in contemplation of death, or to take effect in possession or enjoyment after the death of the grantor, to any person or body corporate or politic in trust or otherwise, when the property thus passing goes to any other than the father, mother, husband, wife, children, and lineal descendants.

By another act passed at the same session of the general assembly, being § 7, chap. 89, p. 146, of the Acts of 1893, the exemption was extended to brothers, sisters, the wife or widow of a son, and husband of a daughter, and any legally adopted child. In construing these acts it was said by this court in *State v. Alston*, 94 Tenn. 681, 28 L.R.A. 178, 30 S. W. 751: "The legislature has constitutional power to impose a privilege tax upon the right of succession, whether by will, inheritance, or otherwise, to the estates of deceased persons." "It must be borne in mind that the tax is not upon the property, but the right or privilege of acquiring it by succession. It is a condition upon which the person may take the estate of a deceased relative by inheritance, or testator by his will. It is a retention by the state of a part of a deceased person's property which the state may take to meet its necessities, and which in certain cases it may take *in toto*, as in cases of escheated property. It is not a tax upon the right of alienation, but on the privilege of receiving by inheritance, or will, or otherwise, at the death of a former owner."

The reasoning of the circuit judge by which he reached his conclusion is thus stated in the following paragraph of his written opinion filed with the record: "The court therefore holds that, under the will of C. B. English, the whole estate, in the absence of contest, would have passed to the widow, who was exempt from the operation of the law. But, contest having been made by the heirs at law who were not so exempt, and a compromise and division of the property having been agreed upon, only one half of it passed to the exempted widow under the compromise, and the

other half passed to the heirs at law under the statute of descent and distribution; the will being null and void as to that half."

Again he stated: "The widow is exempt from this tax as to all the estate devised by will from the testator. The collateral heirs are not exempt, but liable on whatever property they receive under the laws of descent and distribution."

Again his Honor stated: "It is clear that the property received by the heirs at law under the compromise did not pass to the widow under the will."

We think the crucial inquiry in the case is presented in these excerpts from the opinion of the circuit court. Is the tax sought to be collected, under the circumstances presented on this record, within the contemplation of the legislature and the intentment of the act. It is axiomatic and fundamental that exemptions from taxation must positively appear, and that no implication will arise that any species of property or subject of taxation was intended to be excluded if it comes within the fair purview of the act. But, while this is true, statutes imposing taxes are not extended by a construction or intentment to subjects lying outside of the domain of the statute.

In *Memphis v. Bing*, 94 Tenn. 644, 30 S. W. 746, this court held: "It is . . . a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government and in favor of the citizen or subject, because burdens are not to be imposed beyond what the statutes expressly and clearly import."

In *Eidman v. Martinez*, 184 U. S. 583, 46 L. ed. 701, 22 Sup. Ct. Rep. 517, it is said: "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception confining the operation of duty, . . . though the rule regarding exemptions from general laws imposing taxes may be different. We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports

should be expressed in clear and unambiguous language."

In 27 Am. & Eng. Enc. Law, 2d ed. p. 340, it is said: "The succession tax is a special tax, and the rule is that special tax laws are to be construed strictly against the government and favorably to the taxpayer, so that the citizen cannot be subjected to special burdens without clear warrant of law."

In *Kerr's Estate*, 159 Pa. 512, 28 Atl. 354, the supreme court of that state, in dealing with the Pennsylvania succession-tax law, which is almost identical with the Tennessee statute on the same subject, said: "Collateral inheritance tax can only be imposed in the cases specified by the statute, viz., upon real or personal estate passing at the death of the owner, 'either by will or under the intestate laws of this state, or . . . transferred by deed, grant, bargain, or sale made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor,' to the persons, etc., made subject to such tax. No liberality of construction can extend the language of the statute so as to make it include either moneys paid to extinguish the title of persons claiming adversely to the decedent whose estate is liable to taxation, or property surrendered by way of compromise to the person so claiming, and thus never forming a part of the decedent's estate at all. Such persons are neither legatees nor devisees, heirs, or next of kin; nor are they grantees, etc., under assignments or transfers made or intended to take effect after the death of the bargainor. The allowance or compromise of their claims simply reduces the estate afterwards passing to volunteers with the same effect as if the reduction had been caused by the payment of debts, or as if the payment or surrender had been the result of a suit terminating in favor of the claimant."

It will be observed the Pennsylvania court distinctly decides that property surrendered by way of compromise is not subject to the succession tax. The facts of that case may be briefly outlined. Elizabeth S. Palmer died September 25, 1886, leaving a last will and testament in which she devised all of her property to Mary Jane Kerr, a friend of the testatrix. The heirs at law and next of kin of Mrs. Palmer instituted a contest of her will. Mrs. Kerr died in the meantime, and the contest was afterwards compromised by her heirs at law and next of kin entering into an agreement by which they withdrew all claims from Mrs. Palmer's personalty and one half of her realty. The court held that the heirs at law and next of kin, with whom the compromise was made, were neither legatees,

nor devisees, nor next of kin, nor grantees of the testatrix, and hence were not embraced within the terms of the succession statute. This question again arose in a later case, and was decided by the supreme court of Pennsylvania March 19, 1906, and is reported in *Hawley's Estate*, 214 Pa. 525, 63 Atl. 1021. The facts of that case are set out in the opinion as follows: "The claim of the commonwealth is for collateral inheritance tax on money paid by the heirs of the decedent to persons who were named as beneficiaries in a writing purporting to be a will which was not admitted to probate. The decedent died in 1903, leaving surviving him a widow and two daughters. Two writings purporting to be his wills were found. By the first of these, dated in 1899, he gave annuities to his sisters and the rest of his estate to his daughters, except a bequest of \$5,000 to his employees. By the second, dated in 1902, he provided annuities for his sisters, payable the first Monday of April, and gave to his employees who had been with him three years or upwards \$10,000, 'to be divided between them,' etc., 'payable the first Monday of April of each year.' . . . A caveat was filed with the register of wills, and negotiations were pending between the daughters and the employees, 87 in number, for several months. . . . These negotiations resulted in a written agreement by which it was provided that the employees should be recognized as creditors of the estate to the extent of a gross sum of \$55,000. The register entered a decree reciting that all the parties in interest had been notified and had appeared before him, and that, having considered the allegations and the evidence offered in the case, he sustained the objections of the caveators and refused probate of the writing. . . . No mere device intended to evade the payment of a tax due the commonwealth can be effective. Courts look beyond the form of any arrangement by which the commonwealth is deprived of a tax to its substance, to ascertain its real purpose. An agreement to set aside a will and to make distribution in accordance with its provisions will not relieve legacies passing to collaterals from tax. Such an agreement is evidently collusive; but money paid in good faith in compromise of threatened litigation is not subject to tax. *Pepper's Estate*, 159 Pa. 508, 28 Atl. 353; *Kerr's Estate*, supra. It is averred in the answer to the petition for a citation that the controversy as to the validity of the will was not collusive, but real; and that the compromise agreement was made in good faith to avoid a contest, and not for the purpose of evading the payment of collateral-inheritance tax. There is nothing in the testimony, nor in the con-

duct of the parties to the agreement, that raises a doubt of the truth of these averments. In the decision of the case they must be considered as established facts. That the annuities given to the employees of the decedent in the writing purporting to be his will were mere gratuities, and gave rise to no legal obligation that they could enforce as creditors of his estate, is of no importance. They claim that the writing was a valid will, and that the provision for their benefit was in discharge of an obligation of the decedent. The heirs denied the validity of the writing as a will because of the want of testamentary capacity. A settlement was made in which the employees were treated as creditors and allowed a part of their demands. This was clearly a compromise of a doubtful right to avoid litigation by which the heirs parted with a portion of the estate in the purchase of peace. The employees took nothing under the will, and the money paid them was not subject to tax, unless the whole arrangement was collusive."

The court held in that case that the payments made to the legatees in such settlement were not subject to the collateral tax. It will be observed in that case the court held that the employees took nothing under the will, the will having been set aside after the compromise between the legatees and the heirs of the testator, and that money paid in good faith in compromise of threatened litigation is not subject to tax.

We are unable to differentiate the two cases from Pennsylvania already quoted from the facts of the case now in judgment. In principle they are perfectly analogous, and, since a counterpart, almost, of the Tennessee statute, was under construction by the Pennsylvania court, its conclusions are strongly persuasive in the settlement of the present controversy. The circuit court, however, laid much store by the case of *Pepper's Estate*, 159 Pa. 508, 28 Atl. 353, decided about the same time, but shortly before the adjudications in the two cases already mentioned. The facts presented in that record were that Edward Pepper died March 1, 1892, intestate, unmarried, and leaving issue, one son, Dr. Edward Pepper. By his will, dated March 18, 1891, he disinherited his son, Dr. Edward Pepper, upon the ground that he had already been amply provided for by the trust estate left to him by his grandfather. The testator devised his estate to various relatives. The son, Dr. Edward Pepper, filed a caveat and commenced taking testimony to contest this will. Pending these proceedings, after taking a great deal of testimony, he entered into an agreement of compromise, dated February 27, 1893, by which Dr. Edward

Pepper withdrew all claim to the personal and real estate on the payment to him of \$25,000. The question presented was whether the executor of the estate of Edward Pepper was liable to the payment of a collateral-inheritance tax on the sum of \$25,000 paid to Dr. Edward Pepper, son of the testator, under the compromise agreed. Said the court: "The question now arises whether the legatees are liable not only to the collateral tax upon the balance of their legacies, but also to that upon the amount they agreed to pay the caveator in compromise and settlement. We have reached the conclusion that, under the most favorable construction of the act, so far as respects the contention on behalf of the commonwealth, they are not so liable, and for the reason that the amount paid the caveator was never received by them as legatees, and, under the act, it is only so much of the estate which actually passes to them by virtue of the will that is liable to the tax. It will readily be seen, if the contest instituted by the caveator had been successful, he would be entitled, under the intestate law, to the entire estate and freed from the tax; but, instead of further litigation, he accepted a portion of the estate, relinquished his claim to the balance, and thus, of course, reduced the amount passing to the legatees; and in fact, to the extent of the amount he received, the will is a nullity. So that all the legatees take is the amount of their bequests after deducting the sum paid the caveator, and this they concede is subject to the tax. This, we think, is the proper construction to be placed upon the act of assembly. A contrary view would not only be inequitable, but work a hardship upon legatees and distributees. . . . It was never contemplated thus to impose a double burden; and, it may be suggested, the compromise is infinitely more to the interest of the commonwealth than if the terms of settlement were reversed, *viz.*, the will set aside, the entire estate received by the caveator, and then he had paid the legatees as a gratuity the amount they now receive. No tax whatever would then be paid. And, as is shown in *Kerr's Estate*, 2 Pa. Dist. R. 535 [affirmed the next case], the payment to the caveator 'simply reduced the estate afterwards passing to volunteers with the same effect as if the reduction had been caused by the payment of debts, or if the payment or surrender had been the result of a suit terminating in favor of the claimant.'"

The court therefore adjudged that the legatees were not liable for a collateral inheritance tax on the sum of \$25,000 paid to Dr. Edward Pepper under the compromise.

The circuit judge was of opinion that, if 17 L.R.A. (N.S.)

it had appeared in the Pepper Case that the contestant, Dr. Edward Pepper, was a brother or nephew, instead of a son, of the testator, he would have been chargeable with the succession tax. We are unable to see how such a conclusion can be deduced from the language of the Pepper Case. The real controversy there presented was whether the legatees, who had given up a portion of the estate devised to them by way of compromise to the contestant, were liable to a payment of the succession tax on the amount paid; and that question was resolved in their favor. The whole estate had been devised to these legatees under the will, and, it not appearing that they belonged to the exempted class, they were liable to the payment of the tax, but only upon the amount actually received by them. It was held that the amount paid out by them in settlement of pending litigation was to be likened to the payment of a debt, thus reducing the amount of the estate received by them. It is true that Dr. Edward Pepper was not liable for the payment of the inheritance tax, for the reason that he belonged to the exempted class; nor would he have been liable, in our opinion, if he had been a nephew or any other member of the nonexempt class, for the reason that he did not inherit the property from the testator, but it came to him from the legatees under the will.

Herein lies the real principle governing the present case. The defendants do not derive their title from C. B. English, but from the deed of Mary J. English, the widow. In an action of ejectment to recover these lands, the defendants would deraign their title from the deed of Mary J. English, and not by descent cast, as heirs and distributees of C. B. English. The defendants do not take by inheritance, will, deed, grant, gift, or otherwise from C. B. English, and hence, under the provisions of the act imposing the tax, no inheritance or succession tax inheres or attaches to the property in controversy. Mrs. English derived her title from C. B. English under the will, while the defendants derived their title from Mrs. English by deed. The property was disencumbered of any inheritance tax in the hands of the widow as the sole beneficiary of her husband's will, nor was it taxable for such purpose in the hands of her vendees.

We entirely agree with counsel that "Mrs. English had a perfect right to make this proposition, and Mrs. Ricks and T. C. English's heirs had a perfect right to accept it. Mrs. English had a perfect right to buy her peace. The law encourages compromise, and no rule of law or sound reason could make the grantees from Mrs. English liable for an inheritance tax, when they did not

inherit, and where the property so conveyed had been given to Mrs. English by will of her husband, and when, by the very terms of the statute, she took it free from the inheritance tax."

An analogous line of cases has arisen when claims for taxes under the United States internal revenue laws have been sought to be imposed on money received as the result of a compromise of will contests. Mr. Dos Passos, in his work on Inheritance Tax Law (§ 65), says: "Where money is received by claimants under a deceased person's will by reason of a compromise contract between them and the executors, sanctioned by a court having jurisdiction, the money so received does not fall within the category of legacies and distributive shares in intestate estates which are subject to Federal revenue taxes,"—citing *Page v. Rives*, 1 Hughes, 297, Fed. Cas. No. 10,666; *Brune v. Smith*, 13 Int. Rev. Rec. 54, Fed. Cas. No. 2,053.

The contingency suggested by counsel for appellee, that, by fraud and collusion, the state might be entirely defeated of its tax, has not arisen in this case. There is no semblance of proof in the record that this compromise was not made in the utmost good faith, and not as a mere subterfuge to evade the payment of the tax. We are therefore of the opinion, for the reasons stated, that the judgment of the circuit court was erroneous and must be reversed, and a judgment pronounced here in favor of defendant, with costs.

TEXAS SUPREME COURT.

ELIZABETH S. KAMPMANN, Plff. in Err.,
v.

I. N. ROTHWELL et al.

(—Tex. —, 109 S. W. 1089.)

Unsafe sidewalk — liability of property owner — independent contractor.

1. The abutting property owner is liable for injury to a pedestrian in falling over a covering which constitutes an obstruction to footmen, placed by an independent contractor over a repaired sidewalk without signals or guard to protect the public from injury after dark.

Same — liability over.

2. One undertaking to repair a sidewalk for a property owner without supervision, or direction, from him, is liable to him for any sum he is required to pay because of injury to a pedestrian due to failure to place proper signals or barriers to protect the public from injury after dark, whether he is an independent contractor, or a mere employee.

17 L.R.A. (N.S.)

Pleading — sufficiency.

3. A plea meager in its statement of facts, to which no exception is made, may be sufficient to require the court to submit to the jury the issue sought to be raised by it.

(May 6, 1908.)

ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Bexar County in favor of plaintiff against defendant Kampmann and in favor of defendants Fitzgerald & Basille in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed in part.

The facts are stated in the opinion.

Messrs. Denman, Franklin, & McGown, for plaintiff in error:

The owner is not liable for obstructions on sidewalks, not caused by himself.

Amos v. Fond du Lac, 46 Wis. 695, 1 N. W. 346; *Dill. Mun. Corp.* § 1012; *Moore v. Gadsden*, 87 N. Y. 85, 41 Am. Rep. 352, 93 N. Y. 15; *Kirby v. Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682.

The alleged obstruction having been placed on the walk by contractors who had completed the work they had been employed to do, the owner is not liable for injuries resulting therefrom.

16 Am. & Eng. Enc. Law, p. 192; *Cunningham v. International R. Co.* 51 Tex. 503,

Case Note. — Liability for act of independent contractor, affecting safety of highway.

This note is intended to include only those cases decided since the preparation of the notes covering this subject, appended to *Salliotte v. King Bridge Co.* 65 L.R.A. 620; *Jacobs v. Fuller & H. Co.* 65 L.R.A. 833; *Anderson v. Fleming*, 66 L.R.A. 119. Cases involving the liability of an employer for the negligent handling on the highway of a team of an independent contractor are not included herein.

Ordinarily an independent contractor's casual tort, that is, his tort which is merely collateral to the prosecution of the work, is not one for which the employer can be held responsible.

Thus, an abutting owner for whom an independent contractor constructs a cement sidewalk is not responsible for the latter's negligence in leaving a hole in the planking that he placed over the newly constructed walk. *Massey v. Oates*, 143 Ala. 248, 39 So. 142.

So, a property owner is not liable for injuries to a traveler caused by obstructions placed in the street in front of the property without danger signals, by an independent contractor whom he has employed to construct a building on the property; and such

32 Am. Rep. 632; *Wallace v. Southern Cotton Oil Co.* 91 Tex. 18, 40 S. W. 399; *Richmond v. Sitterding*, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562.

The owner's right to a recovery against the contractors should have been submitted to the jury.

Lowell v. Boston & L. R. Corp. 23 Pick. 24, 34 Am. Dec. 33; *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 201, 40 Am. Rep. 435; *Westfield Gas & Mill Co. v. Noblesville & E. Gravel Road Co.* 13 Ind. App. 481, 55 Am. St. Rep. 244, 41 N. E. 955; *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355; *Gray v. Boston Gaslight Co.* 114 Mass. 149; *Campbell v. Somerville*, 114 Mass. 334; *Corsicana v. Tobin*, 23 Tex. Civ. App. 492, 57 S. W. 319.

nonliability is not affected by the fact that the property owner's agent assented to the act. *Hoff v. Shockley*, 122 Iowa, 720, 64 L.R.A. 538, 101 Am. St. Rep. 289, 98 N. W. 573.

And apparently a building contractor who makes a subcontract with another to do the plastering and furnish the materials therefor, which renders him an independent contractor as to the former, will not be held liable for the negligence of the latter in leaving materials in the street without barrier or light. *Green v. Soule*, 145 Cal. 96, 78 Pac. 337. In this case it appeared there was an ordinance providing that any person by whom, or under whose immediate authority as principal contractor or employer, any portion of the public street should be made dangerous, should provide barriers and lights therefor; but the court made no reference thereto, except to point out that it was pleaded by the plaintiff.

So, an independent subcontractor's act in leaving a deadman and hookchain in the highway after moving a building which his contract requires him to move does not render the principal contractor liable to one injured by having her carriage wheel caught by the hook. *Wilbur v. White*, 98 Me. 191, 56 Atl. 657.

And the owner of a building in the course of construction is not liable for the negligence of a servant of an independent contractor in leaving a stone in a dangerous position, so that it fell and injured one using the adjacent sidewalk. *Johnson v. Helbing* (Cal.) 92 Pac. 360. The matter of barricading the sidewalk, or taking other precautions, seems not to have been considered in this case.

A county for which an independent contractor repaired a road is not liable for the latter's act in blasting in a stone quarry 100 feet from the highway, thereby casting a stone upon and injuring one using the highway, where the contract, although providing that the stone for the repairs should be obtained from such a quarry, did not provide for blasting, and, such means not being necessary, the county did not know that they would be employed. *Symons v.* 17 L.R.A. (N.S.)

Messrs. Houston Brothers, R. J. Boyle, and N. B. Jones, for defendants in error:

The covering constituted an unsafe and dangerous obstruction.

1 *Shearm. & Redf. Neg.* § 367; *Higgins v. Glens Falls*, 33 N. Y. S. R. 111, 11 N. Y. Supp. 289; *Galveston v. Hemmis*, 72 Tex. 558, 13 Am. St. Rep. 828, 11 S. W. 29; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Houston City Street R. Co. v. Delesdernier*, 84 Tex. 82, 19 S. W. 366; *Roe v. New York*, 24 Jones & S. 298, 4 N. Y. Supp. 447; *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128.

The obstruction was placed over the repairs on behalf and by the authority of defendant.

Atlantic Transport Co. v. Coneys, 28 C.

Alleghany County, 105 Md. 254, 65 Atl. 1067.

See also *Symons v. Allegany County*; *La Groue v. New Orleans*; *Thompson v. West Bay City*; *Wright v. Muskegon*; and *Massey v. Oates*,—*infra*.

An exception to the rule of nonliability for the acts of an independent contractor exists when the work is necessarily dangerous unless certain precautions are taken. *Montgomery Street R. Co. v. Smith*, 146 Ala. 316, 39 So. 757.

Thus, letting work which involves a dangerous excavation in a public highway, to an independent contractor, will not absolve the principal from liability for injuries to a traveler caused by the contractor's negligent failure to maintain proper guards and lights. *Cameron Mill & Elevator Co. v. Anderson*, 98 Tex. 156, 1 L.R.A. (N.S.) 198, 81 S. W. 282.

And damages for the death of one using a public alley, through having been struck by a piece of iron hurled by a heavy charge of high explosives from a point on adjacent property about 150 feet from the alley, may be recovered from the person for whom the explosives were being used, whether the person using them was a servant, or an independent contractor. *Falender v. Blackwell*, 39 Ind. App. 121, 79 N. E. 393.

And a railroad company building a bridge over a city street in such a manner as to render the use of the street dangerous cannot escape liability for injury to a pedestrian by the fall of a hammer, in consequence of the failure to observe the necessary precautions, upon the plea that the work was being performed by an independent contractor. *Philadelphia, B. & W. R. Co. v. Mitchell* (Md.) 69 Atl. 422.

So, a public-utility company cannot escape liability for an injury sustained by a pedestrian who fell into an unguarded excavation in the sidewalk, on the plea that the excavation, which was made under authority conferred upon the company by the city and for the former's account and benefit, was made by an independent contractor. *Rock v. American Constr. Co.* 120 La. 831, 14 L.R.A. (N.S.) 653, 45 So. 741.

A building contractor's liability for an

Brown, J., delivered the opinion of the court:

Mrs. Kampmann owned a home in San Antonio situated at the southeast corner of Fourth street and Avenue E. Some time anterior to the date of Rothwell's injury Mrs. Kampmann employed Fitzgerald & Basille upon terms which made them independent contractors, to build a sidewalk in front of her property, and they did construct it in accordance with and under the said contract. Sometime thereafter, a break appeared in the sidewalk, and Mrs. Kampmann called upon the contractors, Fitzgerald & Basille, to repair it, claiming that they should do so under the contract for its construction, and refused to pay them anything for it, and did not pay them anything for the repair. Fitzgerald & Basille denied their obligation to repair the work, and claimed that the break had occurred by reason of Mrs. Kampmann turning water upon it; but they finally did, without any further contract, proceed to make the repairs of the walk at the place pointed out. Mrs. Kampmann gave no directions as to how the work should be done, or anything connected with it, except to point out the place where it was to be done. The contractors took out a section of the sidewalk, about 6 feet long, and replaced it with fresh cement and concrete, and, in order to protect it from injury by persons walking over it, laid planks lengthwise upon it. The walk was on the side of a public street running in front of Mrs. Kampmann's property, which was a public highway in the city of San Antonio. There was no guard rail or other protection placed around the said sidewalk to prevent persons from walking upon it, nor was there

any light or signal placed there to notify pedestrians of the existence of the planks on the sidewalk. Rothwell was passing along the sidewalk at night, and, not observing the obstruction upon the sidewalk, fell over the ends of the planks, inflicting upon himself serious injury, which, for the purposes of this opinion, are not necessary to describe. Rothwell brought suit against Mrs. Kampmann for damages on account of the said injuries, and she pleaded over against Fitzgerald & Basille to make them responsible for any damage that she might have to pay. The case was tried before a jury, and the court instructed the jury to return a verdict in favor of Fitzgerald & Basille, and submitted the case upon the charge against Mrs. Kampmann, whereupon the jury returned a verdict as directed in favor of Fitzgerald & Basille, and also a verdict against Mrs. Kampmann in favor of the plaintiff.

Setting aside the issue presented by the parties as to whether the ordinance of the city of San Antonio applied to Mrs. Kampmann with regard to this work, and also assuming that Fitzgerald & Basille were independent contractors, we must hold that Mrs. Kampmann was liable to Rothwell for the injury caused by the negligence of the contractors in failing to place a signal or guard at a place where Mrs. Kampmann's sidewalk was repaired, whereby Rothwell, in passing upon the sidewalk, a public highway, received his injury. The rule of law applicable to this case is aptly stated by the Supreme Court of the United States in the case of *Robbins v. Chicago*, 4 Wall. 678, 18 L. ed. 432. That court said: "The party contracting for the work was liable

third of the cost, did not render the city responsible for the negligence of a contractor employed by the owner, in so placing a barrier around the newly constructed walk that a pedestrian fell over it, upon the ground that the act was a breach of the city's duty to keep the streets reasonably safe. The court said that, if a city is liable in a case of this character, its liability must rest on the ground that it has been guilty of negligence in failing to put the sidewalk in proper condition after it has had the statutory knowledge or notice of its unsafe condition.

Under the rule of the foregoing case, the failure of one who built a sidewalk under a contract with a county, to place and maintain proper barriers and lights above the unfinished walk, was not negligence for which the city is responsible, where it exercised no supervision over the work. *Wright v. Muskegon*, 140 Mich. 215, 103 N. W. 558.

In harmony with this rule is a *dictum* in *Massey v. Oates*, 143 Ala. 248, 39 So. 142, 17 L.R.A. (N.S.)

And no liability rests upon the city by reason of an excavation in the street that caused injury to one using the street, where the excavation was made by one under an independent contract with the abutting owner and in pursuance of a city permit. *Levenite v. Lancaster*, 215 Pa. 576, 64 Atl. 782.

Still, where the injuries were caused by refuse left piled in the street upon the completion of the work of resetting a curb, the municipal corporation cannot escape liability upon the theory that the work which was done by an abutting owner at its direction was actually performed by an independent contractor for whose acts it was not responsible. *Meyers v. Philadelphia*, 217 Pa. 159, 10 L.R.A. (N.S.) 678, 66 Atl. 251.

On the question of the liability of the employer after he has resumed control of the subject-matter of work executed by a contractor, see the subject note appended to *Choctaw, O. & W. R. Co. v. Wilker*, 3 L.R.A. (N.S.) 595.

. . . where the work to be done necessarily constituted an obstruction or defect in the street or highway which rendered it dangerous as a way for travel and transportation, unless properly guarded or shut out from public use; that in such cases the principal for whom the work was done could not defeat the just claim . . . of the injured party by proving that the work which constituted the obstruction or defect was done by an independent contractor.

. . . Where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party." *Chicago v. Robbins*, 2 Black, 426, 17 L. ed. 303; *Penny v. Wimbledon Urban Dist.* [1899] 2 Q. B. 72; *Chesapeake & O. Canal Co. v. Allegany County*, 57 Md. 201, 40 Am. Rep. 430; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618. *Fitzgerald & Basille*, being independent contractors,—that is, doing the work without supervision on the part of Mrs. Kampmann,—were required to do whatever the law required Mrs. Kampmann to do in repairing that part of the sidewalk, and, according to the testimony, their work was not complete until they had put the protection of the planks over the new cement to protect it from impressions which would be made by those who might walk over it. To state the facts shows that the planks as they are described, nailed to a crosspiece at each end, and extending for 6 feet along the sidewalk, necessarily obstructed the travel of footmen upon that sidewalk; and thus it is brought within the rule laid down as quoted above. It is a matter of such common knowledge as to require the contractors to take notice of it, that the sidewalk would be used by pedestrians at night, and that one who had no notice of the existence of such an obstruction would be liable to stumble upon it just as Rothwell did, and thereby sustain an injury. It becomes the duty, therefore, of the contractors, to guard against such an event by placing guards around the work so as to prevent persons passing over the sidewalk from coming in contact with the obstruction, or by placing lights near by so as to notify persons who might be passing of the existence of such obstruction. Nothing of this kind was done in this instance, therefore the liability of Mrs. Kampmann and of the contractors is beyond question.

Whether Fitzgerald & Basille were independent contractors, or were servants of Mrs. Kampmann in doing the work, they are liable for any sum that Mrs. Kampmann may 17 L.R.A. (N.S.)

be compelled to pay on account of injuries to the plaintiff occasioned by the negligence of Fitzgerald & Basille in performing the work which they had engaged to do. When they undertook to repair the sidewalk without any supervision or direction on the part of Mrs. Kampmann it was their duty to use ordinary care to guard all persons who might be using the sidewalk from injury. As we have already stated, if, in the performance of their duty, they placed an obstruction in the street, and that obstruction was of such a character as to be dangerous to persons passing by unless guarded from their use by proper railing or other protection, or that they should have proper notice of its existence, their contract to repair placed upon them the duty to observe the rights of the public in the sidewalk just the same as it rested upon Mrs. Kampmann. *Robbins v. Chicago*, supra; 20 Am. & Eng. Enc. Law, p. 51; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Zulkee v. Wing*, 20 Wis. 408, 91 Am. Dec. 425.

It is objected by counsel for Fitzgerald & Basille that there is neither pleading nor evidence to show any liability on their part to Mrs. Kampmann for what she may be compelled to pay. The plea of Mrs. Kampmann against Fitzgerald & Basille is somewhat meager in its allegation of fact, but there was no exception to the plea presented to the court, nor was there any objection to the evidence when offered. The pleading is sufficient to require the court to submit the issue to the jury.

It is ordered that the judgment in favor of I. N. Rothwell against Elizabeth Kampmann be affirmed, and that Rothwell recover all costs of all the courts against Elizabeth S. Kampmann. It is further ordered that the judgments of the District Court and Court of Civil Appeals in favor of Fitzgerald & Basille against Elizabeth Kampmann be reversed, and that Elizabeth S. Kampmann recover from Fitzgerald & Basille the same sum that Rothwell recovered against her, with all costs.

WASHINGTON SUPREME COURT.

MATT BLOMSNESS, Appt.,

v.

PUGET SOUND ELECTRIC RAILWAY,
Resp't.

(47 Wash. 620, 92 Pac. 414.)

Carrier — passenger — termination of relation.

A passenger on a street car, who, being entitled to a transfer to another line, which is not given him before the transfer point

is reached, continues to demand it after he has reached the ground at the transfer point in obedience to the conductor's command to get off the car and out of the way, has not lost his rights as a passenger, so as to absolve the company from liability for an assault upon him by the conductor, growing out of the altercation.

(November 21, 1907.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover damages for an assault upon plaintiff by defendant's employee. Reversed.

The facts are stated in the opinion.

Mr. Jackson Silbaugh for appellant.

Messrs. James B. Howe and Hugh A. Tait for respondent.

Dunbar, J., delivered the opinion of the court:

This is an action for personal injuries alleged to have been sustained by the appellant by being struck in the face and on the

Case Note. — Liability of railway or street railway for assault by employee on passenger outside of car or train.

Cases involving injuries due to the negligence or carelessness of railway servants are not included in this note.

Since one of the duties resting upon a railway company is to protect its passengers from assaults by its servants (see subject note to *Daniel v. Petersburg R. Co.* 4 L.R.A. (N.S.) 485), the question of the railroad company's liability for a breach of this duty does not depend upon whether the servant, in the performance of the act, was within the scope of his employment, if done during the course of the discharge of his duty to the master which relates to the passenger.

As is apparent from the cases subsequently cited, the rule may apply if the person assaulted, at the time of the assault, sustained the relation of passenger to the carrier, even though the assault was committed outside the car or train. The result, under such circumstances, may, of course, as in cases where the assault was committed inside the car, be affected by the question of provocation.

The rule which holds the company liable regardless of whether or not the employee was acting within the scope, or apparent scope, of his authority does not apply, however, if, at the time the plaintiff was assaulted off the car, he did not occupy the relation of a passenger to the company. *Missouri P. R. Co. v. Divinney* (Kan.) 69 Pac. 351.

Where the nonrelation of carrier and passenger appears to be the fact, the company is generally held not liable for its servant's assaults, unless it appears that, at the time of the assault, it was under some special duty to protect the plaintiff, or the as-

head with a lantern in the hand of a conductor who had charge of a train of cars on one of which the appellant was, at the time, a passenger. The complaint alleges that, on July 4, 1906, the appellant, with his wife and two children, went on board one of defendant's passenger trains at Tacoma, Washington, to be transported to Seattle; that he there paid the conductor the usual and customary fare for such transportation; that, under the rules and regulations of the company, he was entitled to a transfer from Seattle to Ballard; that, when they arrived at Seattle, the conductor struck the plaintiff in the face with a lantern which he was using in his business and work as conductor, and inflicted the injury for which damages are sought; that the only reason why the conductor struck the plaintiff was because the plaintiff asked the conductor for a transfer over the Ballard line. The defendant denied the material allegations of the complaint, and alleged an affirmative defense, which was denied by the plaintiff. After plaintiff had

sault was authorized or ratified by the company, or was within the scope of the servant's employment.

Thus, in *McGilvray v. West End Street R. Co.* 164 Mass. 122, 41 N. E. 116, the company was held not liable where it appeared that the car had reached the end of the route and the passenger had voluntarily alighted, and, while walking on the sidewalk, was assaulted by the conductor.

The relation of carrier and passenger continues until the passenger has had a reasonable time to leave the carrier's premises (as to which, see the subject note to *Glenn v. Lake Erie & W. R. Co.* 2 L.R.A. (N.S.) 873); and if, after he has alighted, and during the continuance of this time, he is wrongfully and unjustifiably shot by the conductor (*Brunswick & W. R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000), or knocked down by the depot watchman (*Chicago & A. R. Co. v. Tracey*, 109 Ill. App. 563), or struck by the conductor with a piece of iron (*Houston & T. C. R. Co. v. Batchler*, 32 Tex. Civ. App. 14, 73 S. W. 981; *Houston & T. C. R. Co. v. Batchler*, 37 Tex. Civ. App. 116, 83 S. W. 902), the carrier is liable.

In *Peoples v. Brunswick & A. R. Co.* 60 Ga. 281, it appeared that, before the passenger reached his destination, the conductor called him out of the coach in which he was riding and assaulted him. It was held that the company was liable, since the conductor was in the prosecution of its business when he was engaged in transporting the passenger, who was entitled to the care and protection of the conductor until he arrived at his destination.

In *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319, it was held that the railroad company was liable for an as-

introduced his testimony and rested his case, defendant made a motion of nonsuit, claiming that the relation of common carrier and passenger had ceased to exist at the time the assault was committed. The court granted the motion, and judgment of nonsuit was entered.

The testimony of the appellant was to the effect that, at the time he paid the fare to the conductor, he asked him for a transfer on the Ballard car line, which he was entitled to under the rules of the company, and the conductor replied, saying, "I will give you that between Georgetown and Seattle;" that the appellant did not see the conductor as he was issuing transfers, and as the train rounded the corner of Yesler Way in Seattle, and while the conductor was standing on the back platform of the car upon which the appellant was situated, the appellant again asked for a transfer on the Ballard line, whereupon the following colloquy ensued:

He [the conductor] says: "Why didn't

you ask for a transfer when I was in the car to give a transfer?" "Well," I says, "I didn't see you." Then he told me to stand out to one side, because the train came to a stop at that time, and he was going down on the ground.

Q. And then when it came to a stop what happened?

A. He says to get out of the road for the passengers, and I stepped off, and I told him then,—I says that I was told—

Q. When you stepped off where did you go with reference to the train?

A. I stood right by the side of him, right close.

Q. Where was he?

A. He stood on the step there, or on the side of the step,—the handle of the car going in the—

Q. How close to the car?

A. He stood right up close to it, so he put his coat right up against the side, helping the passengers.

Q. Off the car?

sault by the porter of a sleeping car upon a passenger while walking along by the side of a special train made up for the purpose of conveying him and other passengers to their destination beyond a washout in the road, and while in search of the conductor at the request of the passenger, in order that the conductor might be informed that the passenger had paid for and was entitled to sleeping-car accommodations to the end of his journey.

In *Texas & P. R. Co. v. Bowlin* (Tex. Civ. App.) 32 S. W. 918, the railroad company was held liable to a passenger for the loss of an eye caused by its depot policeman striking him with a billy merely because he attempted to go back into the depot, from which he was taken and shown his train by the policeman, after having aroused him from a deep sleep into which he had fallen while awaiting the train, which was delayed one hour.

In *James v. Metropolitan Street R. Co.* 80 App. Div. 364, 80 N. Y. Supp. 710, the court said: "If a passenger falls from a car, and, when a conductor alights to make inquiry, meets the conductor with a blow, he cannot expect to hold the employer liable for an assault provoked by violence."

Assault while purchasing ticket or attending to baggage.

The liability of a railroad company for assaults upon passengers by its servants in charge of its business extends to the platform or area along the cars, necessary to be used or traversed by the passengers while engaged in purchasing tickets and getting their baggage checked, and other lawful and peaceful acts in connection with their travel. *Gasway v. Atlanta & W. P. R. Co.* 58 Ga. 216.

In *Fick v. Chicago & N. W. R. Co.* 68 Wis. 47 L.R.A. (N.S.)

469, 60 Am. Rep. 878, 32 N. W. 527, the railroad company was held liable for an assault upon one who, after purchasing a ticket, merely demanded a return of the proper amount of change from the ticket agent, who thereupon came out of the ticket office and committed the assault upon the station platform.

In *McKernan v. Manhattan R. Co.* 22 Jones & S. 354, it was held that the railroad company had the right, upon refusing to sell a ticket to an intending passenger because of intoxication, to request him to leave the station, and to use such force as might be necessary to enforce compliance with the request; but that, where he was unnecessarily assaulted by the ticket seller while peaceably leaving the station, the railroad company was liable.

In *Georgia R. & Bkg. Co. v. Richmond.* 98 Ga. 495, 25 S. E. 565, it was held that the railroad company was not liable where it appeared that plaintiff, after purchasing a ticket and failing to take the train, left the station premises and at a later hour returned to the station for the purpose of upbraiding the station agent for a real or fancied breach of duty at the earlier hour, and a difficulty ensued, in which he was assaulted by the agent.

In *Daniel v. Petersburg R. Co.* 117 N. C. 592, 4 L.R.A. (N.S.) 485, 23 S. E. 327, it appeared that, seven days after deceased had completed his journey, he applied at the station for his trunks, which had been checked and carried on the same train with him, and, when he was informed of the storage charges, he became angry and severely abused the agent in the office, who shot him in the back as he was going out the door. It was held that, though the contract of carriage had ceased, the servant did the shooting while in the service of the rail-

A. Yes, sir.

Q. And then you said to him what?

A. I said to him that I was told that I was going to get a transfer between Georgetown and Seattle, and I says: "I didn't see any of you in there." He says: "Don't bother me. I ain't got any time now." And so I knew he was speaking in a very angry tone.

Q. What was he doing at that time when you were talking to him?

A. He was helping the passengers coming off the car.

Q. Well, then what happened between you—and him after that?

A. When they were all out I said to him, "Am I entitled to a transfer on the Ballard line, or am I not?" And he says, "Damn it, I told you before."

Q. He says what?

A. He swore.

Q. What did he say?

A. He says, "Damn it, I told you before," he says, "that I was in the car there," he

says, "and why didn't you open your face then?" And I turned around and I says to him, "I didn't see you in the car, and I don't believe you were in there." And so I turned around and was going to the car, and he says, "What is that?" and he came for me, and kind of raised up his left hand and struck me on the shoulder a little bit, and just only turned me around, and he says, "What is that?" and I says, "I didn't see you in the car, and I don't believe you were in there." He says, "Don't say that to me," he says, and then he hauled off with his lantern and struck me right over the head.

Q. With what?

A. With a lantern, so the glass and everything was all over my face, and I fell down.

This is the substance of the plaintiff's testimony.

road company and in the scope of his employment, and that the violent language of the deceased, though warranting ejection, did not justify or excuse the killing.

In *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373, it appeared that plaintiff, after purchasing a railroad ticket, applied to the baggage agent to check his trunk, whereupon an altercation took place between them, and the agent assaulted him. It was held that the company was not liable, since the assault could not be regarded as authorized by the master, nor as an act done in the execution of the service; that the company could not be held responsible on the ground that plaintiff was a passenger, as it was not tried on that theory in the court below; and, if it had been so tried, the duty would then have been imposed upon the plaintiff so to demean himself as not, by misbehavior, to provoke a personal quarrel between them.

In *Georgia R. & Bkg. Co. v. Richmond*, supra, it was held that one who, after purchasing a ticket and failing to take the train he intended to take, left the station premises, and at a later hour returned to the station for the sole purpose of arranging for the storage or checking of his baggage, was not at the time a passenger; nevertheless, he had a right to go to the station for that purpose, and, if he conducted himself properly and was unlawfully assaulted by the agent while engaged in transacting this business with him, the railroad company was liable.

Assault while awaiting arrival of train.

In *St. Louis Southwestern R. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741, it was held that the holder of a ticket for passage over connecting roads, who went to the station of a connecting line ten 17 L.R.A. (N.S.)

hours before the train was due to arrive, and was assaulted by the night agent two and one-half hours before the arrival of her train, was a passenger, and the company was liable for the assault; it appearing that it was customary to keep the station open for the use of passengers at all hours, and that the agent consented to her staying there.

In *Krantz v. Rio Grande Western R. Co.* 12 Utah, 104, 30 L.R.A. 297, 41 Pac. 717, it was held that the railroad company was liable for an assault by defendant's section foreman upon a person in the presence of its ticket agent, who represented the company and made no effort to prevent the assault, in one of its station houses in a sparsely settled country, where it appeared that the public was permitted to use such station houses at all times, before and after the arrival and departure of trains, and that there was an implied invitation to persons intending to avail themselves of the railroad service to enter and occupy the premises; since in such station houses an offer to pay fare by a person entering the station with such purpose and the acceptance by or on behalf of the company are not necessary to entitle him to protection against assaults by the company's servants.

In *Andrews v. Yazoo & M. Valley R. Co.* 86 Miss. 129, 38 So. 773, it was held that, where it appeared that plaintiff went to the depot more than two hours before the arrival of the train he intended to take, and that he went there merely for the purpose of writing up his daily reports, and not for the purpose of then securing passage upon the train, or with the intention of establishing the relation of carrier and passenger, he was not a passenger; and the railroad company was not liable for an assault upon him by

determination of this question depends the other question, whether the conductor was acting within the scope of his employment at the time the assault was made. If he was, the company was responsible for his tortious acts. If he was not, it cannot be held responsible, for it is well settled that the liability of the master for intentional acts which constitute legal wrongs can only arise when the acts complained of are within the apparent scope of the master's business. It is equally well settled that, within such scope, the master is liable, for the contract on the part of the company is to safely carry its passengers and to compensate them for all unlawful and tortious injuries inflicted by its servants. It is contended by the respondent—and that was evidently the view taken by the trial judge—that in this instance the appellant had ceased to be a passenger at the time the assault was made upon him; and many cases are cited to sustain such contention. But an investigation of these cases convinces us

that the decisions rendered were based upon an entirely different state of facts from the facts proven in this case. Booth on Street Railway Law, p. 445, is quoted as follows: "But the general rule, applicable alike to general-traffic roads and street railways, that all parts of their stations, platforms, and the approaches thereto must be kept in a safe condition, cannot be extended so as to include the public street in which passengers are received and discharged, and over which the street railway company has no control. The street is in no sense a passenger station for the safety of which the company is responsible. When a passenger steps from a car upon the highway and terminates his relations and rights as a passenger, the company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk." This may be conceded to be the law, and it may be conceded that the distinction made between street railways and the ordinary steam railroad is

the depot agent, growing out of an altercation over a private matter.

In *Central R. Co. v. Motes*, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990, it appeared that plaintiff, while waiting at a union depot for his connecting train, persisted in disregarding the company's regulations against sleeping on the benches, and the agent in charge of the depot jerked him into an upright position. It was held that the company was not liable, since the plaintiff, by his actions, had forfeited his right longer to remain in the waiting room, and might very properly have been ejected therefrom.

In *Chicago & A. R. Co. v. Randolph*, 65 Ill. App. 208, where the plaintiff testified that he came to the depot for the purpose of taking a train, but no train upon which passengers were allowed to ride was due to leave within five hours of the time he came there, and he was rightfully expelled from the depot, it was held that the company did not owe him the duty it did to a passenger; and where, after the expulsion, he, by his own highly provoking and unjustifiable language and conduct, brought on what was in fact a second difficulty with the ticket agent, in which he was shot, the railroad company was not liable.

When the conduct of the plaintiff is such as to relieve the company from liability on account of the assault committed by its servant upon the plaintiff, it is immaterial, so far as the question of the liability of the company is concerned, whether the battery is disproportioned to the insult, or not. It was so held in *Georgia R. & Bkg. Co. v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965, where plaintiff, intending to take a train, was allowed to go in the waiting room at a time when the train was not due, and when the waiting room was not open for passengers, and, after being dis-

covered in an act of immorality, heaped offensive and insulting language upon the watchman, who then assaulted him.

Assault on person passing to train.

One who has purchased his ticket, and is passing at the proper time from the depot to a train, is a passenger, and entitled to protection against assaults by the servants of the railroad company. *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; *Busch v. Interborough Rapid Transit Co.* 187 N. Y. 388, 80 N. E. 197, affirming 110 App. Div. 705, 96 N. Y. Supp. 747; *McFarlan v. Pennsylvania R. Co.* 199 Pa. 408, 49 Atl. 270.

In *Watkins v. Pennsylvania R. Co.* 21 D. C. 1, where it appeared that the holder of a ticket for passage over connecting roads, in attempting to go upon a train of one of the connecting roads, was interrupted by the gate keeper and assaulted by him, it was held that the connecting company was liable for damages resulting from such assault. This case was affirmed on rehearing in 52 Am. & Eng. R. Cas. 159.

In *McKinley v. Chicago & N. W. R. Co.* 44 Iowa, 314, 24 Am. Rep. 748, it was held that the railroad company was liable for an assault by a brakeman upon a passenger who, at a station where compelled to change cars, undertook to enter, and insisted upon entering, a car intended only for ladies, or for gentlemen accompanied by ladies, though the brakeman used such force and violence as to render himself criminally liable.

In *Priest v. Hudson River R. Co.* 65 N. Y. 589, it appeared that the railroad company placed an agent at the entrance to its passenger cars with instructions to refuse admission to anyone not having a ticket; that plaintiff attempted to enter a car without a ticket; that he was stopped by the agent,

a just one. The learned author, further on, bases the distinction upon the ground that the contractual relation is ended when the passenger alights from a street car, and that, if he again boards the car, he is responsible for another fare under another contract. But this reasoning is not applicable to the facts proven in this case, for it must be conceded that, under the contract made by the respondent, the appellant had not arrived at his destination when he alighted from the car in the city of Seattle, for he had paid for transportation to the city of Ballard. It was necessary for him to alight for the purpose of changing cars, and, to receive the benefit of his contract, it was necessary for him to travel outside of the car between the car from which he alighted and the Ballard car. The trip was a continuous one, and the fact that he had to change cars could not in justice or fairness affect his rights as a passenger. The learned author just quoted, after stat-

ing the rule, says [p. 503]: "Therefore, the master is not liable for an act committed by his servant after he has stepped aside from his employment to commit a tort. Thus the act of a street-car driver in making an assault on a passenger who has just left the car and gone to the sidewalk for the purpose of making a complaint at the company's office against the driver is not a tort for which the employer can be held responsible, although the assault was prompted by a quarrel between the driver and the passenger before the latter left the car." At first blush, this quotation might seem to sustain in a measure the respondent's contention. But the author cites, to sustain the text, *Central R. Co. v. Peacock*, 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709. An examination of that case shows a state of facts entirely different from those in the one at bar. There the plaintiff, after having been insulted by the conductor, got off at a stopping place, saying that he was going

who told him he could not enter without one; that there was still time enough to procure one before the departure of the train; that plaintiff persisted in his attempt to enter the car, whereupon the agent struck him. The railroad company was held not liable for the assault.

In *Dickerman v. St. Paul Union Depot Co.* 44 Minn. 433, 46 N. W. 907, it was held that, where a passenger wrongfully violated a reasonable rule of a carrier by passing through the gate without exhibiting his ticket, the gate keeper had a right to take hold of him and detain him until he complied with the rule.

In *Brown v. Interborough Rapid Transit Co.* 56 Misc. 637, 107 N. Y. Supp. 629, it was held that a passenger on a street car, carried beyond his destination while asleep, ceased to be a passenger on alighting; and, when he sought to obtain passage upon a return car with the avowed intent of paying no fare, the company was not liable if its employees resorted to force to prevent him from boarding the car.

Assault on street, growing out of difficulty commenced on car.

Where an assault by the carrier's employee upon a passenger off the car is but a continuation of a wrong done by the employee in the car, the carrier will be held responsible.

Thus, in *McQuerry v. Metropolitan Street R. Co.* 117 Mo. App. 255, 92 S. W. 912, a street-car conductor unjustifiably assaulted a passenger on the car, ordered him off the car, then, after chasing him a block, shot him. The court said: "We have here every element of a continuous assault, and, as it began during the existence of the relation of carrier and passenger, and appears as a consistent and indivisible whole, the fact that part of it occurred on the car and 17 L.R.A. (N.S.)

part in the street does not affect the relation between the parties."

In *Savannah Street R. Co. v. Bryan*, 86 Ga. 312, 22 Am. St. Rep. 464, 12 S. E. 307. it was held that, where a street-car conductor, without just cause, kicked a passenger off the car platform, and the passenger went immediately to the office of the company to make complaint, reaching the office in about twenty minutes, and was there again assaulted by the conductor, who had arrived at the same time, the company was liable for both assaults.

And, where a street-car driver insulted and abused a passenger so that he was compelled to leave the car, and then pursued him into the street and assaulted him there, after which the driver returned to his car, it was held, in *Wise v. Covington & C. Street R. Co.* 91 Ky. 537, 16 S. W. 351, that the insult in the car and the assault in the street constituted one tort, and would not be separated so as to relieve the company from liability for the assault in the street.

In *O'Brien v. St. Louis Transit Co.* 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939, it was held that, where a quarrel of words, between a street-car conductor and a passenger, was commenced on the car, and the conductor, striking at the passenger who was getting off the car backwards, held to him and followed him to the sidewalk, where he shot him, the company was liable for his death.

In *Wise v. South Covington & C. Street R. Co.* 17 Ky. L. Rep. 1359, 34 S. W. 894, it was held that, when the passenger is the aggressor in a difficulty beginning on a street car and continued off the car to the sidewalk, the carrier's employee has the right to defend himself; and, in such event, plaintiff cannot recover, even though the servant uses more force than is actually necessary.

to the company's office to report the conductor. The car went on some distance after the plaintiff alighted, when it was stopped by the conductor, who left it, went across the street, and intercepted the plaintiff on the public sidewalk upon which he had been walking for a block or more, and the assault was there committed. The court, in the course of its comment, says: "After he had alighted and walked a square, could he resume his place in the car without paying another fare, without the assent of the conductor? Would the conductor be justified in omitting to charge another fare? We think not. Had he remained in the car until the stables were reached and the horses were being changed, the carrier would have understood his journey was not completed, and whilst the horses were being changed he would still have been regarded as a passenger, and would have been entitled to protection as against the employees, if he then had gone into the office

to execute his declared purpose to report,"—citing several cases to sustain that doctrine, which the court said was properly laid down. "Those cases," said the court, "only establish that, while the car or boat may actually stop, the passenger need not confine himself to the boat, car, or vehicle in order to preserve his relation and rights as a passenger; but that is not the case here." It will be seen that the case cited which would have sustained the right of plaintiff to recover cannot be distinguished in principle from the case at bar. In one instance the horses were to be changed; in the other, cars were to be changed. In the one the plaintiff had the privilege of leaving the car and still maintaining his rights as a passenger. In this instance he was compelled by the necessities of the case to alight from the car, therefore making a much stronger case in favor of plaintiff than the cases approved by the court in the case cited by respondent. The next case

In *Reed v. New York & Q. C. R. Co.* 116 App. Div. 709, 102 N. Y. Supp. 19, where it appeared that the passenger, after alighting, pulled the conductor off the car because the conductor had refused to give him a transfer on the ground that he had not paid his fare; and the passenger then used abusive and threatening language, and was the aggressor in physical violence,—it was held that he could not recover of the railroad company for his injuries received in the affray which followed.

In *Hanson v. Urbana & C. Electric Street R. Co.* 75 Ill. App. 474, it was held that, when a passenger on a street car had arrived at his destination, and had safely alighted on a public street, the contract of carriage was at an end, and the carrier was under no obligation to protect him from an assault by the conductor at a point some 25 feet from the car and near the sidewalk, although they had had a previous difficulty upon the car some time before the passenger alighted.

In *Palmer v. Winston-Salem R. & Electric Co.* 131 N. C. 250, 42 S. E. 604, it appeared that an intoxicated passenger, who had used grossly insulting words to the motorman on the street car, had arrived at his destination, alighted, deposited his bundles on the sidewalk, returned to the car, got into an altercation with the motorman, and turned and left the car; whereupon the motorman followed him up, and two or three steps from the car, struck him on the head, knocking him down. It was held that the company was not liable for the assault.

In *Central R. Co. v. Peacock*, 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709, the company was held not liable where it appeared that the passenger voluntarily left the street car before reaching his destination and walked a block before being assaulted by the driver, though the passenger intended to resume his place on the car after reporting the driver

for using profane and abusive language to him without any cause, such intention not having been communicated to the driver.

In *Reilly v. New York City R. Co.* 46 Misc. 72, 91 N. Y. Supp. 319, the street railway company was held not liable where the passenger voluntarily alighted before reaching her destination, and went into the company's office for the purpose of making complaint against the conductor for failing to give back her change out of \$1 handed him on the car and was assaulted by the conductor in such office upon his return trip an hour later, when she renewed her demand for the change.

A railroad company cannot be held liable for a personal encounter between its conductor and a passenger who had been rightfully ejected from the train, the assault being an entirely separate affair from the ejection from the train, incited by plaintiff and committed after he had ceased to be a passenger. *Chicago & E. I. R. Co. v. Stratton*, 111 Ill. App. 142; *Eads v. Metropolitan Street R. Co.* 43 Mo. App. 536.

In *Peavy v. Georgia R. & Bkg. Co.* 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70, it was held that, where a passenger was rightfully ejected from a train by the conductor, and, after he had reached the ground, used grossly obscene and profane language, reeking with insult, on which a mutual combat with pistols ensued, the railroad was not liable for the consequences, though the ejected passenger was wounded in the conflict.

But in *O'Brien v. St. Louis Transit Co.* 185 Mo. 263, 84 S. W. 939, and *O'Brien v. St. Louis Transit Co.* (Mo.) 110 S. W. 705, it was held that, if a passenger, after striking a street-car conductor, was trying to get off the car, and the conductor was holding him and beating him, and thus followed him to the sidewalk, where he killed him, the company was liable for his death.

cited, *viz.*, *Hanson v. Urbana & C. Electric Street R. Co.* 75 Ill. App. 474, was where the plaintiff, while traveling on the car, had an altercation with the motorman about a personal matter entirely disconnected from the car service, and was assaulted by the motorman. After the assault, plaintiff remained in his seat, until he arrived at his destination, when he got off with safety on the public street, and, while he was approaching the sidewalk, the motorman got off on the opposite side of the car, followed him up, and again assaulted him. The action brought consisted of two counts, one for the assault made while on the car, and the other for the assault made on the street, and the appellate court allowed him to recover on the first count only, saying: "We hold, under the evidence in this case, there should be no recovery under the second count in the declaration. When the plaintiff in error arrived at his destination and safely alighted from the car on the public street, that then the contract of carrier and passenger was at an end." There is certainly no parallel between the two cases. In this case the plaintiff had not arrived at his destination. On the contrary, it was his request to be taken to his destination under the terms of his contract which was the subject of the controversy. The next case, *viz.*, *Palmer v. Winston-Salem R. & Electric Co.* 131 N. C. 250, 42 S. E. 604, is also a case where the plaintiff had arrived at his destination and had got off the car and deposited his bundles on the sidewalk, then returned to the car and resumed the altercation with the motorman, and again got off the car, when the motorman followed him up and assaulted him. No comment seems to be necessary on this case. An excerpt from the opinion of the court, however, shows what the decision would have been if the facts presented had been similar to the facts in this case: "If the plaintiff had been a passenger, or his passage had not been fully terminated; or if, when he left the car at his destination, the employee . . . had assaulted him,—the defendant concedes that there would be no question as to the liability of the company,"—citing *Daniel v. Petersburg R. Co.* 117 N. C. 592, 4 L.R.A. (N.S.) 485, 23 S. E. 327; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Strother v. Aberdeen & A. R. Co.* 123 N. C. 197, 31 S. E. 386. But, said the court, "here the passage had terminated, for the passenger had deposited his bundle and then returned to the car." And, without specially reviewing the other cases cited, we find them all to be of the same character as those above noticed. A case more directly in point is *Wise v. Covington & C. Street R. Co.* 91 Ky. 17 L.R.A. (N.S.)

537, 16 S. W. 351, where it was held that a street railway company is liable for assault by the driver upon a passenger after the latter had left the car on account of the insults of the driver, where the assault was a direct continuance of the abuse begun on the car. In this case, as above indicated, appellant had not arrived at his destination, and the assault was a direct continuance of the controversy begun on the car.

Respondent seems to place some stress upon the fact that there had been no angry words passed between the appellant and the conductor on the car. The fact that the appellant, in demanding his rights, had demeaned himself in a gentlemanly manner, and had not precipitated a row in the car, should not militate against his right to recover. He did only what he was compelled to do to urge his rights. When he made a request for the transfer, the conductor told him to get off the car and out of the way, as he was busy helping the passengers off. This he did. He did not leave the car. Did not show any inclination or make any intimation that he was intending to leave it, but remained and persistently demanded his rights. We think, under all authority and in accordance with principles of right, that the appellant should be deemed a passenger at the time of the assault, and should be allowed to recover.

The judgment will be reversed, with instructions to overrule the motion for nonsuit.

Hadley, Ch. J., and Rudkin, Mount, Fullerton, and Root, JJ., concur.

NEW YORK COURT OF APPEALS.

VINCENZO ZECCARDI, Resp't.,

v.

YONKERS RAILROAD COMPANY, Appt.

(190 N. Y. 389, 83 N. E. 31.)

Carrier — assault on passenger — liability.

A street car company is not liable for an assault by its motorman upon a passenger who has left the car to stop a fight between the conductor and a person who has been ejected from the car.

(Chase and Hiscock, JJ., dissent.)

(December 20, 1907.)

Note. — As to liability of railway or street railway for assault by employee on passenger outside of car or train, see note to *Blomsness v. Puget Sound Electric R. Co.*, ante, 763.

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of a Trial Term for Westchester County granting a nonsuit in an action brought to recover damages for an assault upon plaintiff by defendant's servant. Reversed.

The facts are stated in the opinion.

Mr. Anthony J. Ernest, with **Mr. Henry A. Robinson**, for appellant:

As a matter of law, the plaintiff Zeccardi terminated his contract relation as a passenger when he left the street car.

Platt v. Forty-second Street & G. Street Ferry R. Co. 4 *Thomp. & C.* 406, 2 *Hun.* 124; **McKay v. Hudson River Line**, 56 *App. Div.* 201, 67 *N. Y. Supp.* 651; **Reilly v. New York City R. Co.** 46 *Misc.* 72, 91 *N. Y. Supp.* 319; 3 *Thomp. Neg.* § 3186, p. 624, note 98; 7 *Thomp. Neg.* § 3171, p. 545; **Creamer v. West End Street R. Co.** 156 *Mass.* 320, 16 *L.R.A.* 490, 32 *Am. St. Rep.* 456, 31 *N. E.* 391; **Duchemin v. Boston Elev. R. Co.** 186 *Mass.* 353, 66 *L.R.A.* 980, 104 *Am. St. Rep.* 580, 71 *N. E.* 780; **Buzby v. Philadelphia Traction Co.** 126 *Pa.* 559, 12 *Am. St. Rep.* 919, 17 *Atl.* 895; **Conway v. Lewiston & A. Horse R. Co.** 87 *Me.* 283, 32 *Atl.* 901, 90 *Me.* 199, 38 *Atl.* 110; **Fielders v. North Jersey Street R. Co.** 68 *N. J. L.* 343, 59 *L.R.A.* 455, 96 *Am. St. Rep.* 552, 53 *Atl.* 404, 54 *Atl.* 822; **Harten v. Brightwood R. Co.** 18 *App. D. C.* 200; **West Chicago Street R. Co. v. Walsh**, 78 *Ill. App.* 595; **Lake Street Elev. R. Co. v. Gormley**, 108 *Ill. App.* 59; **Palmer v. Winston-Salem R. & Electric Co.** 131 *N. C.* 250, 42 *S. E.* 604; **Indianapolis Street R. Co. v. Tenner**, 32 *Ind. App.* 311, 67 *N. E.* 1044; **Chattanooga Electric R. Co. v. Boddy**, 105 *Tenn.* 666, 51 *L.R.A.* 885, 58 *S. W.* 646; **Smith v. City & Suburban R. Co.** 29 *Or.* 539, 46 *Pac.* 136, 780; **Louisville R. Co. v. Meglery**, 25 *Ky. L. Rep.* 1687, 78 *S. W.* 217; **Ashton v. Lancashire & Y. R. Co.** [1904] 2 *K. B.* 313, 73 *L. J. K. B. N. S.* 701; **Mitchell v. Rochester R. Co.** 4 *Misc.* 576, 25 *N. Y. Supp.* 744, affirmed in 77 *Hun.* 607, 28 *N. Y. Supp.* 1136; **Goldberg v. Interurban Street R. Co.** 90 *N. Y. Supp.* 347; **Sickels v. Brooklyn Heights R. Co.** 113 *App. Div.* 680, 99 *N. Y. Supp.* 953; **Tingley v. Long Island R. Co.** 109 *App. Div.* 793, 96 *N. Y. Supp.* 865; **Mills v. New York C. & H. R. Co.** 5 *App. Div.* 19, 39 *N. Y. Supp.* 280; **Green v. Baltimore & O. R. Co.** 214 *Pa.* 240, 63 *Atl.* 603; **Pittsburg, C. & St. L. R. Co. v. Krouse**, 30 *Ohio St.* 222; **Archer v. Union P. R. Co.** 110 *Mo. App.* 349, 85 *S. W.* 934; **Finnegan v. Chicago, St. P. M. & O. R. Co.** 48 *Minn.* 378, 15 *L.R.A.* 399, 51 *N. W.* 122; **Drew v. Central P. R. Co.** 51 *Cal.* 425; **Davis v. Houston & T. C. R. Co.** 25 *Tex. Civ. App.* 8, 59 *S. W.* 844; **Ratteree v. Galveston, H. & S. A. R. Co.** 36 *Tex. Civ.* 17 *L.R.A.* (N.S.)

App. 197, 81 *S. W.* 566; **St. Louis, I. M. & S. R. Co. v. Beecher**, 65 *Ark.* 64, 44 *S. W.* 715.

The present case is not governed by the rule that, as a matter of law, persons are entitled to the rights of passengers when upon steam-railway-station premises.

Parsons v. New York C. & H. R. R. Co. 113 *N. Y.* 362, 3 *L.R.A.* 683, 10 *Am. St. Rep.* 450, 21 *N. E.* 145; **Clussman v. Long Island R. Co.** 9 *Hun.* 618; **Wandell v. Corbin**, 17 *N. Y. S. R.* 718, 1 *N. Y. Supp.* 795; **McKay v. Hudson River Line**; **Reilly v. New York City R. Co.**; and **Creamer v. West End Street R. Co.**,—*supra*.

Where a passenger leaves a car or train to serve some private purpose, such act terminates his rights under the contract, even in cases where the carrier is a steam railway controlling station premises, etc.

Sickels v. Brooklyn Heights R. Co. *supra*; **Com. v. Boston & M. R. Co.** 129 *Mass.* 500, 37 *Am. Rep.* 382; **Hickey v. Boston & L. R. Co.** 14 *Allen*, 429; **Gavett v. Manchester & L. R. Co.** 16 *Gray*, 501, 77 *Am. Dec.* 422; **State v. Grand Trunk R. Co.** 58 *Me.* 176, 4 *Am. Rep.* 258; **DeKay v. Chicago, M. & St. P. R. Co.** 41 *Minn.* 178, 4 *L.R.A.* 632, 16 *Am. St. Rep.* 687, 43 *N. W.* 182; **Chicago, B. & Q. R. Co. v. Harrison**, 100 *Ill. App.* 211; **Chicago, R. I. & P. R. Co. v. Sattler**, 64 *Neb.* 636, 57 *L.R.A.* 890, 97 *Am. St. Rep.* 666, 90 *N. W.* 649; **Hendrick v. Chicago & A. R. Co.** 136 *Mo.* 548, 38 *S. W.* 297; **Johnson v. Boston & M. R. Co.** 125 *Mass.* 75; **Buckley v. Old Colony R. Co.** 161 *Mass.* 26, 36 *N. E.* 583; **Glenn v. Lake Erie & W. R. Co.** 165 *Ind.* 659, 2 *L.R.A.* (N.S.) 872, 112 *Am. St. Rep.* 255, 75 *N. E.* 282; **Imhoff v. Chicago & M. R. Co.** 20 *Wis.* 344; **Chesapeake & O. R. Co. v. King**, 49 *L.R.A.* 102, 40 *C. C. A.* 432, 99 *Fed.* 251; **Pennsylvania R. Co. v. Zebe**, 33 *Pa.* 318, 37 *Pa.* 420; **Deery v. Camden & A. R. Co.** 163 *Pa.* 403, 30 *Atl.* 162; **Drake v. Pennsylvania R. Co.** 137 *Pa.* 352, 21 *Am. St. Rep.* 883, 20 *Atl.* 994.

Mr. Charles F. Brown also for appellant.

Mr. F. X. Donoghue, for respondent:

The plaintiff, having paid his fare, was entitled to be carried to his destination, and to be protected against unlawful injuries from defendant's employees.

Wandell v. Corbin, 17 *N. Y. S. R.* 718, 1 *N. Y. Supp.* 795; **Alabama G. S. R. Co. v. Coggins**, 32 *C. C. A.* 1, 60 *U. S. App.* 140, 88 *Fed.* 455; **Parsons v. New York C. & H. R. R. Co.** 113 *N. Y.* 362, 3 *L.R.A.* 683, 10 *Am. St. Rep.* 450, 21 *N. E.* 145; **Palmeri v. Manhattan R. Co.** 133 *N. Y.* 261, 16 *L.R.A.* 136, 28 *Am. St. Rep.* 632, 30 *N. E.* 1001.

Whether the conductor was acting within the scope of his authority, or not, in causing

EXCEPTIONS by defendant to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover damages for the alleged negligent killing of plaintiff's husband, which resulted in a verdict in plaintiff's favor. Overruled.

The facts are stated in the opinion.

Messrs. E. H. Vaughan, Edward T. Esty, and Jay Clark, Jr., for defendant.

Messrs. George S. Taft and George R. Stobbs, for plaintiff:

It cannot be said, as a matter of law, that plaintiff's intestate was not in the exercise of due care.

Wagner v. Boston Elev. R. Co. 188 Mass.

437, 74 N. E. 919; Meagher v. Crawford Laundry Machinery Co. 187 Mass. 586, 73 N. E. 853; Foster v. New York, N. H. & H. R. Co. 187 Mass. 21, 72 N. E. 331; Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90; 5 Thomp. Neg. § 5434.

It cannot be held, as a matter of law, that the deceased assumed the risk of injury in returning to his work of lifting the pole, after being shown that one of the legs of the jack was settling more than the other.

Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366; Gagnon v. Seaconnet Mills, 165 Mass. 221, 43 N. E. 82; Wagner v. Boston Elev. R. Co. supra; Moylon v. D. S. McDonald Co. 188 Mass. 499, 74 N. E. 929;

Jones v. Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92.

If injury results to a servant from the operation of a railroad train without sufficient help, the company is liable. Georgia P. R. Co. v. Propst, 90 Ala. 1, 7 So. 635; Stoddard v. St. Louis, K. C. & N. R. Co. 65 Mo. 514; Flike v. Boston & A. R. Co. and Booth v. Boston & A. R. Co. supra; Means v. Carolina C. R. Co. 124 N. C. 574, 45 L.R.A. 164, 32 S. E. 960, S. C. on subsequent appeal, 126 N. C. 424, 35 S. E. 813. On the first appeal of the last case, an instruction was held too broad which declared that a railroad company is negligent, as a matter of law, towards the employees operating a freight train, in failing to furnish a conductor where a passenger coach is attached. 122 N. C. 990, 29 S. E. 939.

The fact that the railroad was in the hands of a receiver, and not paying running expenses, and, for this reason, was operated with insufficient help, will not relieve the receiver from liability. Graham v. Chapman, 33 N. Y. S. R. 349, 11 N. Y. Supp. 318.

But, where the men employed constitute the usual and a sufficient crew for all ordinary occasions, a master will not be held liable because use could have been made of another man at the time of the accident. Relyea v. Kansas City, Ft. S. & G. R. Co. 112 Mo. 86, 18 L.R.A. 817, 20 S. W. 480.

A master will be held responsible for his failure to employ enough competent persons to do his work safely at all times, as respects others employed. Hill v. Big Creek Lumber Co. supra.

This principle renders a railroad company liable where an adequate number of competent men were not continuously in charge of a train, due to the company's so arranging its time table that its two chief employees were compelled temporarily to leave their places of duty to get their meals. Pennsylvania Co. v. McCaffrey, 139 Ind. 430, 29 L.R.A. 104, 38 N. E. 67.

The mere hiring of sufficient help is not, in all cases, a full performance of the master's duty to his employees.

Thus, it is negligence for a railroad company to start a train without sufficient help, and, if injury resulted because of the absence, 17 L.R.A. (N.S.)

of a brakeman, who, by reason of oversleeping, failed to get aboard in time, the company cannot defend on the ground that it had hired sufficient help. Flike v. Boston & A. R. Co. supra.

The employee has the right to insist that the assistance of an adequate number of men will be continued until it can safely be dispensed with; and, if taken away by authority of the master when it cannot be done without danger to the employee, and when he has no choice by which he can protect himself, the master will be liable. Mason v. Edison Mach. Works, 24 Blatchf. 93, 28 Fed. 228.

But, where the master has no actual or implied notice of an employee's temporary absence from duty, he will not be liable for an injury due to such absence. Cheeney v. Ocean S. S. Co. supra; Reichel v. New York C. & H. R. R. Co. 130 N. Y. 682, 29 N. E. 763; Potter v. New York C. & H. R. R. Co. 136 N. Y. 77, 32 N. E. 603; National Tube Works Co. v. Bedell, 96 Pa. 175.

And the mere fact that a substitute did not remain at a switch continuously during the temporary absence of the regular switchman cannot properly be construed as an implied notice to the company that the switch was unattended. Parker v. New York & N. E. R. Co. 18 R. I. 773, 30 Atl. 849.

If, however, there is insufficient help due to the absence of a servant who occupies the position of vice principal, the master will be liable. McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094; Gerrish v. New Haven Ice Co. 63 Conn. 9, 27 Atl. 235.

It is negligence, for which the master is liable, to order two men to move pieces of timber so heavy that the work cannot safely be done with less than four or five men. Supple v. Agnew, supra; Craig v. Chicago & A. R. Co. 54 Mo. App. 523.

But it is not the duty of the master to assign more than a sufficient number of men to load a heavy iron frog onto a car, in anticipation of an injury caused by the sudden letting go by one of the employees. Scanlon v. Lake Shore & M. S. R. Co. 24 Ohio C. C. 266.

A servant may recover for a resulting injury provided he could not, and the master

Urquhart v. Smith & A. Co. 192 Mass. 257; 78 N. E. 410; Cooney v. Commonwealth Ave. Street R. Co. 196 Mass. 11, 81 N. E. 905.

Morton, J., delivered the opinion of the court:

As this case finally went to the jury there were two questions for them to consider: First, whether the plaintiff's intestate was in the exercise of due care or had assumed the risk; and, secondly, whether the defendant or its superintendent was negligent in not providing more men to do the work, and, if they were negligent, whether

could, by the exercise of ordinary care, have known that the number of men assigned to do the work then in hand was insufficient to do it with reasonable safety. Louisville & N. R. Co. v. Semones, 21 Ky. L. Rep. 444, 51 S. W. 612.

It is the duty of the master to exercise ordinary care to assign an adequate number of servants to each particular piece of work (here the carrying of a railroad rail over a ditch), that the work may be done with reasonable safety to themselves; and a servant does not assume the risk arising from the master's failure herein, unless he knows of the failure and the attendant risks, or, in the ordinary discharge of his duty, must necessarily have acquired that knowledge. Bonn v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.) 82 S. W. 808.

But when the servant knows, or ought to know, that the help provided is inadequate, and is, or should be, as fully acquainted as his master with the attending danger, and yet continues in the service, he assumes the risk. Texas & P. R. Co. v. Rogers, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; Texas & P. R. Co. v. Smith, 31 L.R.A. 321, 14 C. C. A. 509, 30 U. S. App. 176, 67 Fed. 524; Slavens v. Northern P. R. Co. 38 C. C. A. 151, 97 Fed. 255; Long v. Coronado R. Co. 96 Cal. 269, 31 Pac. 171; Swift & Co. v. Rutkowski, 167 Ill. 156, 47 N. E. 362; White v. Owosso Sugar Co. 149 Mich. 473, 112 N. W. 1125; Fricker v. Penn Bridge Co. 197 Pa. 442, 47 Atl. 354; Mayott v. Norcross Bros. 24 R. I. 187, 52 Atl. 894; San Antonio Traction Co. v. De Rodriguez (Tex. Civ. App.) 77 S. W. 420; Seery v. Gulf, C. & S. F. R. Co. 34 Tex. Civ. App. 89, 77 S. W. 950; Texas & P. R. Co. v. Miller, 36 Tex. Civ. App. 240, 81 S. W. 535; Kelley v. Chicago, M. & St. P. R. Co. 53 Wis. 74, 9 N. W. 816.

This rule was applied in Mad River & L. E. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312, wherein it was held that a conductor who takes charge of and runs his train for a month without sufficient number of hands, if injured by such delinquency, must abide by the maxim, *Volenti non fit injuria*.

And it is held that, where the master has provided sufficient help, and such help

such negligence was the cause of the death of the plaintiff's husband. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the court to direct a verdict in its favor, and to the instructions which the court gave in regard to the second question.

It could not have been ruled, as matter of law, that plaintiff's husband was not in the exercise of due care, or that he assumed the risk. There was testimony tending to show that he had only been in this country about two months, that he did not speak or understand English, that he had worked as a laborer in shoveling and picking; and

is at hand and ready to assist, it is contributory negligence for a servant to attempt to do the work alone or without calling for sufficient assistance. Way v. Chicago & N. W. R. Co. 76 Iowa, 393, 41 N. W. 51; Dunlap v. Barney Mfg. Co. 148 Mass. 51, 18 N. E. 599; Alberts v. Bache, 69 Hun, 255, 23 N. Y. Supp. 502.

The injured employee will not be debarred from recovering, however, where the number of men is insufficient for the safe performance of the work assigned, unless the deficiency is so obvious as to prevent an ordinarily prudent person from engaging in the work. McMullen v. Missouri, K. & T. R. Co. 60 Mo. App. 231; Mew v. Charleston & S. R. Co. 55 S. C. 90, 32 S. E. 828.

For the purpose of showing notice to the company that the help was insufficient, co-employees of the plaintiff may testify that they complained to their superiors that additional help was needed. Savannah, F. & W. R. Co. v. Goss, 80 Ga. 524, 5 S. E. 777; Harvey v. New York C. & H. R. R. Co. 19 Hun, 556.

In the absence of evidence to the contrary, it will be presumed that a reasonably sufficient number of competent workmen was employed. Hilton v. Fitchburg R. Co. 73 N. H. 116, 68 L.R.A. 428, 59 Atl. 625; Potter v. New York C. & H. R. R. Co. supra.

It will not be assumed that the employee knew, at the time of his injury, that the number of men employed to assist him was insufficient to do the work with reasonable safety to himself. McMullen v. Missouri, K. & T. R. Co. supra.

Whether or not the master in the particular case performed his duty of employing a sufficient number of men to do the particular work with reasonable safety to the employees is a question of fact to be determined by the jury. Southern P. Co. v. Lafferty, 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 537; Denver, S. P. & P. R. Co. v. Wilson, 12 Colo. 20, 20 Pac. 340; Supple v. Agnew, 191 Ill. 439, 61 N. E. 392; Harvey v. New York C. & H. R. R. Co. supra; Wright v. Southern P. Co. 14 Utah, 383, 46 Pac. 374.

that he went to work on the job the day before he was killed, having previously had no experience in that kind of work. There is nothing to show that he was not doing in the usual way the work which he was set to do. And there was evidence warranting the jury in finding that, if any warning was given by the superintendent, the deceased failed to understand it, and that, from want of experience, he did not appreciate the danger of the poles falling and therefore did not assume the risk. There was also evidence warranting them in finding that his failure to avoid the danger may have been due to confusion on his part resulting from the imminence of the peril and his want of experience. The fact that the others escaped and that he might perhaps have done so if he had been less confused, or had moved more quickly, was a matter for the consideration of the jury in passing upon the question of his due care. It could not be ruled, as matter of law, that he was wanting in due care because in a moment of sudden peril he failed to use the best means of escape. *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90.

We see no error in the instructions in regard to the matter of alleged negligence on the part of the defendant in failing to supply a sufficient number of workmen for the erection of the pole in safety. Such negligence stands on the same footing as negligence in furnishing suitable appliances. In a sense workmen are appliances. If a master knowingly employs servants who are incompetent by reason of their habits or otherwise he is liable for an injury occasioned to a fellow servant by their incompetency, just as he would be liable for an injury caused by a defective machine. *Gilman v. Eastern R. Co.* 13 Allen, 433, 90 Am. Dec. 210; *McPhee v. Scully*, 163 Mass. 216, 39 N. E. 1007. And, on principle, we do not see why a master should not also be held liable for injuries resulting from his negligence in failing to furnish a suitable number of servants to do the work required of them. There was evidence warranting the jury in finding that a sufficient number of men was not furnished by the defendant to enable those engaged in erecting the pole to do the work in safety, and that such negligence was the proximate cause of the death of the plaintiff's husband.

Exceptions overruled.

17 L.R.A. (N.S.).

ILLINOIS SUPREME COURT.

JOHN D. CASEY, Admr., etc., of Patrick E. Blackwell, Plff. in Err.,
v.

WILLIAM P. ADAMS.

(234 Ill. 350, 84 N. E. 933.)

Elevator — death of police officer — liability.

A police officer who accompanies an express wagon, to protect it from strikers, to a building, and who, upon its backing up to the elevator opening to receive its load, steps into the opening either to get out of the way of those loading the goods, or to protect the employees of the express company in taking possession of them, is either a trespasser or a licensee, to whom the owner of the building owes no duty except to refrain from wilfully or wantonly injuring him; and he is therefore not liable for the officer's death by falling down the shaft, although the opening is unlighted and unguarded, and the elevator not at the opening.

(April 23, 1908.)

ERROR to the Branch Appellate Court, First District, to review a judgment affirming a judgment of the Superior Court for Cook County in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

Statement by Scott, J.:

On July 21, 1905, John D. Casey, administrator of the estate of Patrick E. Blackwell, plaintiff in error, brought suit in the superior court of Cook county against William P. Adams, defendant in error, to recover damages for the death of plaintiff in error's intestate, alleged to have been caused through the negligence of defendant in error. To the declaration the defendant interposed the general issue, and upon a trial, at the close of the evidence for plaintiff, under direction of the court, the jury returned a verdict of not guilty. Motions for a new trial and in arrest of judgment were overruled, and judgment was entered by the court against plaintiff in error. An appeal was taken to the appellate court for the first district. There the cause was assigned to the branch court, where the judgment of the superior court was affirmed. Plaintiff in error was

Note. — The question as to the liability of the owner of an elevator for injury to trespassers or licensees is treated in a case note to *Davis v. Ohio Valley Bkg. & T. Co.* 15 L.R.A. (N.S.) 402.

granted a certificate of importance, and brings the record here for review.

The declaration alleges, in substance, that the defendant, on May 10, 1905, owned a certain large business building in the city of Chicago, different portions of which were then and there occupied by various firms and persons as tenants of defendant in carrying on their business, and that defendant had then and there in said building in his control a certain large, open freight-elevator shaft extending from the upper floors of said building to the basement and immediately inside the wall of said building, which wall was next to and parallel to a certain alleyway; that in said elevator shaft he owned and controlled and operated a large freight elevator for the use of his said tenants and those transacting business with them; that he then and there had and maintained, a short distance above the ground floor of said building, a large doorway or opening in the wall about 5½ feet wide and 6 feet high, the bottom of which was about 4 feet from the surface of said alleyway, and which doorway opened directly from said alleyway into said elevator shaft, with only the thickness of said wall between the two; that through said doorway the said tenants, their employees and those with whom they transacted business, were accustomed to pass, with the knowledge and consent of defendant, in taking and delivering goods for said tenants from said elevator to wagons standing in said alleyway and from said wagons to said elevator, and that, by reason of the premises, it was then and there the duty of defendant to have exercised ordinary care toward keeping and maintaining said doorway in a reasonably safe condition for such use by such persons, and for the reasons, among other things, that there was no light in said elevator shaft and but poor light in said alleyway, and that from the situation of said elevator shaft, doorway, and alleyway a person approaching and about to enter said doorway from a wagon in said alleyway would not ordinarily expect to find, and might, through no want of ordinary care on his part, fail to discover, the existence of said elevator shaft immediately inside of said doorway, all of which defendant knew, or by the exercise of ordinary care could have known; that the reasonable safety of such persons required, and it was then and there the duty of defendant to place and maintain, a chain or other sufficient barrier across said doorway, or a sufficient warning or notice in said doorway to apprise such person or persons, in the event said elevator was away from said doorway, of the presence of said elevator shaft, and to prevent them from falling into said shaft; but that defendant, in

disregard and violation of his duty, negligently failed to place and maintain such chain or protection across said doorway, or a sufficient warning or notice in said doorway for the purpose aforesaid.

The declaration further alleges that an express wagon belonging to Wells-Fargo & Company, in charge of one of its servants, at the request of one of the tenants of the building, who had the right to use said elevator, shaft, and doorway, as aforesaid, called at said doorway in said alleyway to collect and receive certain goods which said tenant was to convey by said elevator from one of the upper floors of said building which it occupied down to the doorway and there deliver to said express company for transportation; that said wagon was backed by the driver thereof up to and against said wall immediately in front of said doorway; that said elevator was then and there away from said doorway, and that, by reason of the negligence and failure on the part of defendant, as aforesaid, said Patrick E. Blackwell, who was then a police officer of the city of Chicago, accompanying said wagon and riding therein for the purpose of protecting the property of said express company and its employees, at its request and under the orders of his superior officer, while he was in the performance of his duty and in the exercise of due care and caution for his own safety, then and there stepped from said wagon to the bottom sill of said doorway, and accidentally fell down said elevator shaft into the basement of said building, thereby receiving injuries which resulted in his death.

Defendant in error owned the building mentioned in the declaration. It was 7 stories high, and extended from Wabash avenue 170 feet west along Congress street to an alley running north and south, 15 or 20 feet in width. On the opposite side of the alley and immediately west is the Siegel-Cooper building, 8 stories high. In front of these buildings, on Congress street, 26 feet above the ground, is the structure of an elevated road. The structure is but 7 feet from the street line. The doorway to the elevator shaft is 41 feet from that line. That structure and the building on the opposite side of the alley to some extent prevented light entering the elevator shaft through the doorway. There was no light in the shaft except that which came in through the opening in the outer wall, which was 27 inches in thickness, and when the doors were opened no chain or barrier of any kind was placed across the opening. The shaft and the doorway were located and the elevator was used as averred by the declaration.

The accident occurred on May 10, 1905, during a teamsters' strike in the city of Chi-

cago. To protect the property carried by various common carriers in that city, at their request a large force of police officers was detailed, among whom was the deceased. Some time during the day a servant of one of the tenants in the building engaged Wells-Fargo & Company, an express company, to transport certain goods of the tenant from the building. When the express wagon, which was in charge of one of the servants of the express company, came to the building for the merchandise, it was driven into the alleyway and backed up to the opening leading into the elevator shaft. The deceased came with the wagon, under orders from his superior officer to ride on and remain with this wagon to protect the property and employees of said company and the goods carried by the wagon from the strikers. When the wagon arrived the elevator was some distance above the opening, coming down, loaded with the goods to be taken away. It was a dark, cloudy day, and the wagon was a large covered wagon, open only in front and rear. Immediately after it stopped, the deceased, who was riding inside of the wagon, was seen to step sideways and a little backwards upon the tailboard of the wagon, which was dropped and projected out from the rear end of the bottom of the wagon bed. Continuing in the same direction and moving the same way he then apparently stepped upon the bottom sill of the doorway or opening and disappeared into the elevator shaft below. The injuries received from the fall resulted in his death a short time afterward. He left surviving him a wife and two children.

It is contended by the plaintiff in error (1) the branch appellate court erred in holding that the deceased was a mere licensee or trespasser upon the premises of defendant at the time of his injury; (2) the said court erred in holding that the deceased was guilty of negligence which contributed to his injury and death.

Mr. James C. McShane, for plaintiff in error:

Deceased was not a trespasser or naked licensee at the time in question, but was there at the invitation, expressed or implied, of defendant's tenant.

B. Shoninger Co. v. Mann, 219 Ill. 242, 3 L.R.A.(N.S.) 1097, 76 N. E. 354; *Illinois C. R. Co. v. Hopkins*, 200 Ill. 122, 65 N. E. 656; *John Spry Lumber Co. v. Duggan*, 182 Ill. 218, 54 N. E. 1002; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; 2 *Cooley*, Torts, 3d ed. 1265; *Siddall v. Jansen*, 168 Ill. 43, 39 L.R.A. 112, 48 N. E. 191; *Tobin v. Portland S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 415; *Gordon v. Cummings*, 152 Mass. 513, 9 L.R.A. 640, 17 L.R.A.(N.S.)

23 Am. St. Rep. 846, 25 N. E. 978; *Elliott v. Pray*, 10 Allen, 378, 87 Am. Dec. 653; *Fisher v. Jansen*, 30 Ill. App. 91; *Webster Mfg. Co. v. Mulvany*, 68 Ill. App. 607; *Wright v. Perry*, 188 Mass. 268, 74 N. E. 328; 10 Am. & Eng. Enc. Law, 2d ed. p. 960, ¶¶ 2, 3; *Foster v. Portland Gold Min. Co.* 52 C. C. A. 393, 114 Fed. 615; *Anderson & N. Distilleries Co. v. Hair*, 103 Ky. 196, 44 S. W. 658; *Mackie v. Heywood & M. Rattan Co.* 88 Ill. App. 119; *Low v. Grand Trunk R. Co.* 72 Me. 313, 24 Am. Rep. 331; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619.

On petition for rehearing.

An invitation from defendant's tenant conferred the same rights upon deceased as though the invitation was extended by defendant himself.

B. Shoninger Co. v. Mann; *Illinois C. R. Co. v. Hopkins*; *Bennett v. Louisville, & N. R. Co.*; and *John Spry Lumber Co. v. Duggan*,—supra.

Messrs. Frank M. Cox and J. F. Dammann, Jr., for defendant in error:

The mere showing of a general invitation to the public is not sufficient proof of an invitation to the deceased.

Thomp. Neg. p. 978; *Grand Tower Mfg. Co. v. Hawkins*, 72 Ill. 386; *Woolwine v. Chesapeake & O. R. Co.* (*Manning v. Chesapeake & O. R. Co.*) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81.

In order to establish the fact that an invitation was extended, it should be shown, also, that deceased was there for the purpose of the business to which the building was dedicated, and in that part of the building included in the invitation.

Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; *Pittsburgh, Ft. W. & C. R. Co. v. Bigham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317; *Murray v. McLean*, 57 Ill. 378; *Turner v. Klekr*, 27 Ill. App. 391; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *Flannigan v. American Glucose Co.* 33 N. Y. S. R. 867, 11 N. Y. Supp. 688.

The deceased was at best a licensee as he was on the premises in his capacity as a police officer.

Gibson v. Leonard, 143 Ill. 182, 17 L.R.A. 568, 36 Am. St. Rep. 376, 32 N. E. 182; *Hamilton v. Minnesota Desk Mfg. Co.* 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693; *Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500; *Beehler v. Daniels*, 18 R. I. 563, 27 L.R.A. 512, 49 Am. St. Rep. 790, 29 Atl. 6; *Baker v. Otis Elevator Co.* 78 App. Div. 513, 79 N. Y. Supp. 663; *Kelly v. Henry Muhs Co.* 71 N. J. L. 358, 59 Atl. 23; *Eckes v. Stetler*, 98 App. Div. 76, 90 N. Y. Supp. 474; *New Omaha Thomson-Houston Electric*

Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89; Woods v. Miller, 30 App. Div. 232, 52 N. Y. Supp. 217; Parker v. Barnard, 135 Mass. 116, 46 Am. Rep. 450; Woods v. Lloyd, 1 Monaghan (Pa.) 254, 16 Atl. 43; Woodruff v. Bowen, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113; Ryan v. Thomson, 6 Jones & S. 133.

Scott, J., delivered the opinion of the court:

Defendant in error maintained an elevator shaft and operated a freight elevator therein for the use of his tenants and employees in receiving and discharging merchandise. The deceased was a police officer directed by his superior to ride on the wagon of the express company for the purpose of protecting the express company's horses, its employees, and the wagon and merchandise therein, from striking teamsters. When the employee of the express company in charge of this particular wagon backed the wagon up to the doorway opening into the elevator shaft the deceased stepped into the opening, which from the outside seemed dark, fell down the shaft, and received a fatal injury. The wagon and the employees of the express company came there at the request of a tenant to receive goods. The deceased had no connection whatever with the business of the tenant. His sole duty was to act as a guard for and on behalf of the express company, to protect its employees and property, and the property of others while in its custody. The tenant had no business to do with the deceased, and the deceased did not have occasion to see or communicate with any person within the building. He was not allured, induced, or invited by the defendant in error or his tenant to enter the building. It must be inferred from the evidence that he entered the building for one or the other of two purposes: Either (1) as a matter of convenience, for the purpose of getting out of the way of those who were about to place in the wagon packages which the tenant desired to ship; or (2) for the purpose of better protecting the employees of the express company while taking possession of the goods that were to be shipped, and for the purpose of better protecting the goods themselves as soon as they passed into the possession of the express company. If he went into the building for the first purpose, he was a mere trespasser, and defendant in error owed him no more duty than would the owner of the building across the alley if the deceased had elected to step into that building to wait while the goods were being loaded. If, on the other hand, he stepped into the building that he might better perform his duties as police officer, he was licensed so to do by the law itself, 17 L.R.A. (N.S.)

even in the absence of permission given by the owner of the building. Cooley, Torts, 313; Woodruff v. Bowen, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113. In such case, however, he would be a mere licensee, to whom defendant in error would owe no duty except the duty to refrain from inflicting a wilful or wanton injury upon him. It was so held by this court in Gibson v. Leonard, 143 Ill. 182, 17 L.R.A. 588, 30 Am. St. Rep. 376, 32 N. E. 182, in reference to a member of a fire-insurance patrol who entered a building for the purpose of protecting property therein from fire, and who, while using an elevator in the building, was injured by the falling of the counterweight, which, according to his contention, was not properly secured. The rule announced in that case must be held applicable to the policeman who enters without any express or implied invitation from the owner.

It is unnecessary to consider the question of contributory negligence.

The judgment of the Branch Appellate Court will be affirmed.

Petition for rehearing denied June 4, 1908.

KANSAS SUPREME COURT.

A. HENLEY et al., Pliffs. in Err.,
v.

E. E. MYERS, Receiver of Consolidated
Barb Wire Company.

(76 Kan. 723, 93 Pac. 168.)

Corporation — stockholder's liability act — tort.

1. The statute (§§ 1302 and 1315 of the General Statutes of 1901) which declared the double liability of stockholders to be an asset of an insolvent corporation, and authorized the appointment of a receiver to enforce it for the benefit of corporate creditors, protected the owner of a judgment founded on tort, as well as claimants whose demands originated in contract.

Same — statute — repeal.

2. In virtue of the general saving clause (Gen. Stat. 1901, § 7342, ¶ 1), which provides that the repeal of a statute shall not affect any right which accrued under it, the holder of a judgment rendered against a Kansas corporation in an action

Headnotes by MASON, J.

Note. — As to impairment of obligation of contract by change of remedy of creditor of corporation against stockholder, see note to Myers v. Knickerbocker Trust Co. 1 L.R.A. (N.S.) 1171; and see subsequent case of Harrison v. Remington Paper Co. 3 L.R.A. (N.S.) 954.

founded on tort, upon which an execution had been issued and returned *nulla bona* before the repeal of the act (Gen. Stat. 1901, § 1302) providing that, under such circumstances, the liability of stockholders might be enforced for the benefit of creditors by means of a receiver to be appointed for that purpose, may have such remedy notwithstanding such repeal.

Same — effect of repeal.

3. The statute (Gen. Stat. 1889, §§ 1200, 1204) which authorized an action to be brought on a corporate debt directly against the stockholder of a corporation that had ceased business for a year conferred no right of action upon one having a claim founded on tort against a corporation whose operations ended January 15, 1899, for the reason that such statute was repealed January 11, 1899, and, after its repeal, no remedy against stockholders remained to such a claimant, excepting that by the appointment of a receiver.

Same — stockholder's liability — limitations.

4. Under the statute (Gen. Stat. 1901, § 1302) which authorized the appointment of a receiver of an insolvent corporation to enforce the personal liability of stockholders for the benefit of corporate creditors whenever an execution on a judgment against the corporation should be returned *nulla bona*, in the absence of special circumstances demonstrating insolvency in some other manner, the statute of limitation did not begin to run against a creditor who wished to invoke that remedy, until the rendition of a judgment and the issuance and return of an execution, provided he showed reasonable diligence in causing these steps to be taken. Where the court, at the time of giving judgment, stayed execution for five months pending the making of a case for review, the fact that the plaintiff consented to such stay will not be deemed to show a want of diligence; and an action was begun in time if brought within three years from the expiration of such stay.

Same — transfer of stock — compliance with statute.

5. The statute (Gen. Stat. 1901, § 1283) providing that, as soon as a transfer of stock is shown upon the books of a corporation, the president and secretary shall file with the secretary of state a statement of such change, and that no transfer of stock shall be legal or binding until such statement is so made, imposed upon those who, at the time of its enactment, owned corporate stock, and thereafter sold it, the duty, in order to relieve themselves of liability for debts of the company, of procuring a record thereof to be made in the office of the secretary of state; and, although one who sold stock caused a transfer thereof to be duly entered on the books of the company, thereby charging the corporate officers with a duty under the statute to cause the public record to be made, unless he took some further step to secure the performance 17 L.R.A. (N.S.)

of such duty, he remained chargeable with the corporate debts.

Constitutional law — impairing contract — stock transfer.

6. So interpreted, the statute did not so impair the obligation of the stockholder's contract resulting from his ownership of the stock as to render it obnoxious to the Federal Constitution.

On Rehearing.

Corporation — stockholder's liability — "dues" — tort.

7. In the provision of the Kansas Constitution (§ 2, art. 12, repealed in 1906) that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder," the word "dues" was used in a sense broad enough to cover a judgment rendered against a corporation in an action founded upon tort.

Same — judgment in tort — creditor.

8. In view of such interpretation of the constitutional provision referred to, § 1192 of the General Statutes of 1889 (repealed in 1899), authorizing the owner of a judgment against a corporation upon which an execution had been returned unsatisfied to proceed against any of the stockholders and hold them liable thereon to the extent of the amount of their stock, applied to judgments founded on tort as well as upon contract, notwithstanding that, elsewhere in the same act, the person to whom the right is given is described as a creditor of the corporation, and the claim against it as a debt.

Same — liability of stockholder — extent.

9. Said section imposed upon the stockholder a liability for the payment of corporate obligations, including those founded upon tort, to the extent of the stock owned.

Same — stockholder — new remedy against — constitutionality.

10. Section 1302 of the General Statutes of 1901 (repealed by chap. 152, Laws 1903), which substituted for all other methods of enforcing the individual liability of stockholders an action to be brought by a receiver, was available against stockholders who became such prior to its enactment. Its application to them did not constitute an impairment of the obligation of the contract arising out of their membership in the corporation, even although the new remedy might be more efficient than the old, and might incidentally, under some circumstances, prove somewhat more burdensome, so long as it involved no actual increase in their liability.

(March 9, 1907.)

ERROR to the District Court for Douglas County to review a judgment in plaintiff's favor in an action brought to enforce defendants' statutory double liability as stockholders of a corporation. Affirmed.

The facts are stated in the opinion.

Messrs. George J. Barker, W. W. Nevison, and Bishop & Mitchell for plaintiffs in error.

Mr. R. E. Melvin for defendant in error.

Mr. Frank Doster, *amicus curiæ*.

Mason, J., delivered the opinion of the court:

May 1, 1900, W. H. Stevenson recovered a judgment against the Consolidated Barb Wire Company, a Kansas corporation, in an action founded upon a tort. December 7, 1900, an execution was issued, which was returned unsatisfied January 2, 1901, because no property could be found on which to levy. On June 27, 1903, Stevenson filed a motion for the appointment of a receiver to close up the affairs of the corporation. On September 12, 1903, E. E. Myers was appointed as such receiver. On October 6, 1903, the receiver sued several stockholders to collect the amounts for which they were liable in addition to their subscriptions; the action being based upon §§ 1302 and 1315 of the General Statutes of 1901 (now repealed), which authorized such procedure for the benefit of creditors. He recovered a judgment, from which the defendants prosecute error.

The most difficult question presented is whether the statute referred to protected the owner of a judgment founded on tort, as well as claimants whose demands originated in contract. So much of it as is here important reads as follows:

"Sec. 1315. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and, in addition thereto, for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors."

"Sec. 1302. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent; and, upon application to the court from which said execution was issued, or to the judge thereof, a receiver shall be appointed, to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All

collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct."

This statute was enacted while § 2 of article 12 of the state Constitution was in force, reading: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." The constitutional provision was not self-operating (*Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331), but may aid in the interpretation of the act passed in pursuance of it.

A similar question arising upon similar statutes has frequently received the attention of the courts, but the authorities are not in entire harmony on the subject. In 1 *Cook on Corporations*, § 217, it is said: "The statutory liability imposed upon the stockholders in corporations is a liability exclusively for debts and demands accruing against the corporation by reason of its contracts. It cannot, therefore, be enforced to pay damages recovered against the corporation in an action in tort." And in 26 *Am. & Eng. Enc. Law*, 2d ed. pp. 1024, 1025: "Unliquidated damages arising from the commission of a tort by the corporation or its agents are usually held not to be 'debts,' within the meaning of that term as used in the statutes imposing liability upon stockholders. But in Ohio and South Carolina they have been held to be 'dues,' within the purview of their statutes." On the other hand, the discussion of the subject in the valuable article on Corporations by the late Seymour D. Thompson in the *Cyclopedia of Law and Procedure* (10 Cyc. Law & Proc. 684) includes this statement: "A judgment against a corporation is certainly a debt of the corporation, without reference to the question whether it was founded upon a tort, or upon a contract. Hence, where it is sought merely to subject what remains unpaid by the shareholder in respect to his shares, it is clear that any demand against the corporation which has been reduced to a judgment will be available as a basis of such a proceeding, without reference to the nature of the original claim. If it is merged in the judgment, it becomes a 'debt of record' in the language of the common law; and upon this point there will be no difference of judicial opinion. So, as already seen, constitutional provisions and statutes securing to creditors dues from corporations by a superadded individual liability of their

shareholders are remedial in their nature, and hence embrace judgments against the corporation for damages in actions for its torts."

Manifestly the question whether a stockholder must respond to a demand of the character here involved depends upon the language of the constitutional or statutory provisions in virtue of which the liability is asserted. The decisions for the most part turn upon the force to be given to the word "debt." While the statute under consideration does not use that word, much the same effect is produced by its employment of the term "creditors" to describe those for whose benefit the remedy is furnished. The word "debt" has several recognized meanings. Any financial obligation is a debt in a broad and general sense; but, where the term is used technically and restrictively, it implies an ascertained amount, and sometimes, as well, a foundation in contract. The same distinction exists in the use of the word "creditor," which may mean one having any character of claim against another, or one having a liquidated demand based on an agreement. Illustrations of the various uses of these words may be found in 2 Words and Phrases Judicially Defined, 1713, 1714, 1718-1721, 1891, 1892; 8 Words and Phrases Judicially Defined, 7628. The cases in which stockholders have been held not liable for demands against the corporation arising out of tort are collected in the works from which the foregoing quotations are made. See also cases cited in *Marshall, Corp.* § 406. They proceed upon the theory that such liability exists only with respect to obligations originating in contract. Where that view prevails, it can make no difference that the claim has been placed in judgment, although that consideration is often spoken of as affecting the matter; for a judgment is not a contract in the sense that it can be regarded as in the nature of an agreement. 23 Cyc. Law & Proc. pp. 673, 674. Nearly all of these cases are controlled by one or the other of these two reasons: (1) That the statute to be construed is penal, the stockholder's liability being incurred only as a penalty for some act or omission of the directors, and on that account a strict construction is required; (2) that the statute uses some expression beyond the mere word "debt,"—for instance, "debt contracted,"—indicating that only contractual obligations are within its purview. Neither of these reasons can have any application here. The statute quoted is clearly remedial, and, beyond the bare use of the word "creditors," there is nothing in its language to suggest a limitation of its benefits to any particular class of claimants; indeed, the clause making the double liability an

asset of the corporation tends strongly against such restriction.

In *Ward v. Joslin*, 44 C. C. A. 456, 105 Fed. 224, it was held that, under the Kansas laws as they existed prior to 1899, a judgment against a corporation, to be available as a demand against a stockholder, must have been based, not only upon a contract, but upon such a contract as the corporation had legal authority to make; and the decision was affirmed by the supreme court. 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807. The statute there considered (*Gen. Stat.* 1889, § 1200) provided that, if any execution against a corporation proved fruitless, liability should attach to the stockholders; but in other sections of the same act (*Gen. Stat.* 1889, §§ 1204, 1206 the liability was described as one for the payment of debts. In each opinion the word "dues," occurring in the Constitution, was treated as relating only to contractual obligations. The statute now under consideration differs materially from the earlier one, and the presence of the provision making the double liability an asset of the corporation affords especial ground for applying the arguments thus made in favor of giving the word "dues" a broad meaning in *Rider v. Fritchey*, 49 Ohio St. 285, 15 L.R.A. 513, 30 N. E. 692: "Can the stockholders of an Ohio corporation be held for obligations of the corporation growing out of torts? It follows, from what has already been stated, that we must assume that this street railroad company was organized under a law which imposed upon stockholders just such liability as the constitutional provision requires. We look, therefore, to the Constitution as our guide. The provision (§ 3, art. 13) is: 'Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock.' The question turns upon the import of the word 'dues.' It has been contended that provisions creating individual liability on the part of the stockholders are in derogation of the common law, and are therefore to be construed strictly. Authorities in support of this rule are not wanting, and, in so far as such liability is attached by way of penalty for the omission of some act required by the statute, as in some of the states, it is probable that the weight of authority favors the proposition. But all concede that this is a remedial provision, and to hold that there must be applied to it the same test as if it were a penal law is to hold that all remedial laws

must be so construed; for every remedial law must of necessity be in derogation of the common law. Where the provision is simply remedial, though it does impose an obligation which did not attach at common law, we see no reason to insist upon what is called a strict construction, but believe that the ordinary rule, which requires the court to inquire simply as to the intent of the lawmakers, reading the provisions as they were intended to be read, will best attain the ends of justice. This leads us to look to the intent of the section quoted. Speaking in general terms, it must be manifest that the intent was to provide that those who derive advantage from the authority of the state given by our incorporation laws shall at the same time assume responsibility for the acts of the artificial creature which they have called into legal being, affecting the rights of others. Having in mind this general intent, and the provision being remedial, it should, we think, be construed with a view to remove the evil and extend the benefit proposed. . . . It would seem to be the undoubted duty of the court to give the word 'dues,' as found in the section quoted, such construction as will secure the apparent object of the Constitution makers in its adoption. Constitutions are necessarily couched in terse language, and we look there for the use of words in a broad, comprehensive sense. . . . It is difficult to see any reason why the framers of the Constitution should intend to afford one who gives credit for goods or money to a corporation a right to demand compensation of the stockholders in case of insolvency, and deny a like right to one who intrusts it with the care of his person, as in the case of a passenger, or to one, even a stranger, who, without fault on his part, is injured by the negligence of the corporation's agents. It may well be asked: Are the rights of things more sacred than the rights of persons? Is there any rule of public policy which would justify the protection of rights arising *ex contractu*, which would not equally call for protection of rights arising *ex delicto*, or any claim for unliquidated damages? . . . As conclusion, we are of the opinion that the word 'dues' should receive a beneficial construction,—one which will include within its scope as well a demand for unliquidated damages for a tort as a claim for a debt arising upon contract."

This reasoning is approved and adopted in *Flemmikin v. Marshall*, 43 S. C. 80, 28 L.R.A. 402, 20 S. E. 788. We regard it as sound and convincing, and in principle decisive of the question here presented in favor of the view taken by the trial court.

A further contention made by plaintiff in 17 L.R.A. (N.S.)

error is that, granting a judgment against a corporation for a tort to be an obligation for which, under any circumstances, a stockholder might be held upon his additional liability, the present action cannot be maintained, because the section referred to was repealed before its benefit had been invoked by the making of an application for a receiver. See chapter 152, p. 284, Laws 1903, effective March 17, 1903. As the judgment was not based upon a contract, the legislature doubtless had power, by taking away the remedy, to deprive the creditor of the means of enforcing its payment. *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211. But such power was not attempted to be exercised in this instance; for, while the repealing act itself contains no saving clause, there must be read into it a reservation in favor of any right accrued, as well as of any proceeding commenced, in consequence of the first paragraph of § 7342 of the General Statutes of 1901, which reads: "The repeal of a statute does not . . . affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed." When the judgment had been rendered and the insolvency of the corporation had been demonstrated by the issuance and return of an execution *nulla bona*, a right at once accrued to its owner, under the existing statute, not only to have a receiver appointed for the corporation, but by this means to enforce the stockholders' liability to him. This right, by the terms of the statute quoted, survived the repeal, although no proceeding had been begun to assert it. This proposition is substantially covered by the decision in *Consolidated Barb Wire Co. v. Stevenson*, 71 Kan. 64, 79 Pac. 1085, although there the question presented was only whether a receiver could be appointed; his right to maintain an action against the stockholders not being involved.

It is next claimed that, if any cause of action of the character here presented ever existed against the defendants, it had been barred by the statute of limitations before steps were taken to enforce it. The corporation permanently suspended business January 15, 1899. It is argued that, with the expiration of one year from that date, a right accrued to Stevenson to bring action directly against the stockholders of the corporation under §§ 1200 and 1204 of the General Statutes of 1889, which authorized such a proceeding; that this right was barred by limitation, because not exercised within three years; and that, under the authority of *Cottrell v. Manlove*, 58 Kan. 405, 49 Pac. 519, when the bar was permit-

ted to fall against this remedy, it excluded every other as well. A fatal fault with this argument is that the section referred to was repealed January 11, 1899, several days before the corporation ceased to do business, and more than a year before such cessation had continued long enough to warrant a direct action against the stockholders. Laws 1898, chap. 10, § 17, p. 36. Therefore, no right of action accrued to Stevenson under it prior to its repeal, and after its repeal the only remedy against stockholders left to corporate creditors whose claims were based upon torts was that by the appointment of a receiver. *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518. To pursue this remedy it was necessary that he should first of all reduce his claim to judgment. This he accomplished May 1, 1900, and no want of diligence can be attributed to him prior to that time.

It is further contended, however, that it was incumbent upon Stevenson to cause the commencement of an action against the stockholders, or at least to apply for the appointment of a receiver, within three years from the time judgment was obtained. The application was not made until September 12, 1903, and the action was not begun until October 6, 1903. Before he could ask for a receiver, however, it was necessary that the insolvency of the corporation should be exhibited by the issuance and return of an execution. It was within the power of the judgment creditor to cause these preliminary steps to be taken at any time, and he could not extend the statute of limitations indefinitely by neglecting to act. It was incumbent upon him to perfect his right of action within a reasonable time, which could never be more than the statutory period. *West v. Topeka Sav. Bank*, 66 Kan. 527, 63 L.R.A. 137, 97 Am. St. Rep. 385, 72 Pac. 252. He took out an execution December 7, 1900. Whether this would, under all circumstances, be deemed reasonable promptness, need not be determined. Pending the settlement of a case made, a stay of execution was granted, which expired October 9, 1900. Until that time, therefore, no attempt could have been made to enforce the judgment. The record shows that the defendant in error consented to the stay order; but, even if this can be regarded as a voluntary submission to a suspension of proceedings, the delay so occasioned, in view of its purpose to facilitate a review, cannot be deemed an unreasonable one. The interval between the expiration of the stay and the issuance of an execution—from October 9th to December 7th—was hardly long enough to show a lack of diligence; but even this need not be decided, for the present action was begun, not only within three

years from the return of the execution, but within three years from the end of the stay, and was, therefore, brought within due time, irrespective of any further allowance for the taking of the preliminary steps.

The plaintiffs in error were stockholders in the Consolidated Barb Wire Company from some time in 1887 until January 15, 1899, when they sold their stock in good faith. The transfer was duly entered upon the books of the company, but no statement of such change of ownership was ever filed with the secretary of state. Section 1283 of the General Statutes of 1901, which took effect January 11, 1899, provides: "It shall also be the duty of the president and secretary of any such corporation organized under the laws of this state, as soon as any transfer, sale, or change of ownership of any such stock is made as shown upon the books of the company, to file with the secretary of state a statement of such change of ownership, giving the name and address of the new stockholder or stockholders, the number of shares so transferred, the par value, and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act." In the original act (Laws 1898, chap. 10, § 12, p. 32) there followed this proviso, which has since been repealed, but which is of importance as indicating clearly that the restriction on the transfer of stock was intended to affect the matter of the personal liability of stockholders: "Provided, however, that no transfer of stock shall release the party so transferring from the liability of the laws of this state as to stockholders of corporations for profit, for ninety days after such transfer and the filing and recording thereof in the office of the secretary of state."

The ground of the claim against the plaintiffs in error is that, by reason of the statute quoted, the sale of their stock was not effective to relieve them from liability for the debts of the corporation because no record of it was ever made in the office of the secretary of state. English and Federal cases hold that, where one who has transferred his stock remains charged with corporate debts because the transfer is not properly registered, it is upon the principle of negligence on his part, and that he can relieve himself from liability by showing that he has been reasonably diligent in the matter, and that the fault has been that of the company's officers. 10 Cyc. Law & Proc. pp. 716, 717. The statute here involved is too explicit to leave room for construction. It makes the liability absolute until the required statement is filed. The duty to supply such record is imposed upon the president and secretary, and not upon the

stockholders; but this is true as well of the ordinary requirement that, to be effective, transfers must be entered in the books of the company. In either case it can hardly be doubted that the transferrer can, if necessary, have the aid of the courts to see that the duty is performed. 19 Am. & Eng. Enc. Law, pp. 881, 882. Probably, if a stockholder were driven to that remedy, the registration, when made in pursuance of an order so obtained by him, would, by relation, be effective from the time his proceeding was begun; or it may be that any affirmative action on his part—a mere request or demand that the officers perform their duty—might relieve him from liability. But no such question is here presented, for it is not shown that any step was taken by the defendants to compel or to urge a compliance with the law.

The argument is strongly pressed, however, that the statute is invalid as to those who already owned corporate stock at the time of its enactment, for the reason that it seeks to change their contractual liability,—to impair the obligation of the contract which resulted from such ownership. We cannot agree to this contention. Before the act was passed, one who had sold stock of a corporation, in order to relieve himself from liability for its debts, was obliged to see that the transfer was noted by its officer upon its books. The enactment merely imposed an additional duty to see that a similar notation was made upon a public record. The change imposed no restraint upon the transfer of the stock, but related only to the means by which it should be accomplished and the manner in which it might be evidenced. It is essentially a matter of method, of procedure, rather than of ultimate substantial rights. "Whether the state may impose added conditions or duties upon individuals with regard to their contracts depends upon the nature of such requirements. If they amount to a change of the obligation itself, they are, of course, ineffectual; but an obligation cannot be said to be impaired by a statute which merely imposes an additional duty on the owner in order that he may preserve it. Therefore recording acts and acts of kindred nature are constitutional." 8 Cyc. Law & Proc. p. 994.

The judgment is affirmed.

All the Justices concur.

A rehearing having been granted, the following additional opinion was handed down December 7, 1907:

In the original opinion in this case, in holding that the plaintiffs in error, as stockholders, could be held upon their double lia-

bility for the payment of a judgment against the corporation founded upon a tort, some stress was placed upon the fact that the statute of January 11, 1899, provided that such liability should be considered an asset of the corporation in the event of insolvency. Gen. Stat. 1901, § 1315. The court overlooked the consideration, which seems sufficiently obvious, that to base the decision upon the language of that statute would involve an assumption that the legislature could change the essential character of the liability of one who had already become a stockholder. Upon this phrase of the matter being suggested, a rehearing was granted with special reference to this question: "Under the Constitution and statutes of Kansas as they existed prior to January 11, 1899, could a stockholder ever be held liable beyond the amount of his subscription for the payment of a corporate obligation which originated in tort?" The affirmance of the judgment of the trial court was based, as the opinion showed, upon an approval of the reasoning of the Ohio court in giving a broad meaning to the word "dues" as used in the Constitution. The language of the statute of 1899, expressly providing that the stockholders' liability should be deemed a corporate asset, was referred to as affording a special ground for applying the arguments quoted from *Rider v. Fritchey*, 49 Ohio St. 285, 15 L.R.A. 513, 30 N. E. 692, and also as a basis for distinguishing the present case from *Ward v. Joslin* (C. C.) 100 Fed. 676, Id. 44 C. C. A. 456, 105 Fed. 224, affirmed in 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807. The effect of the decision in that case, however, was somewhat overstated. The precise matter there determined was that a stockholder could not be compelled to contribute to the payment of a judgment against the corporation founded upon a contract which the corporation had no power to make, but against which it was estopped to defend. Such a liability was said not to be one of those the risk of which was assumed by the contract of membership in the corporation; and, while the argument employed might be thought to apply as well to the case of a corporate liability based upon tort, that question was not involved or directly discussed.

Upon the grounds indicated in the original decision, this court is of the opinion that the word "dues," as used in the Constitution, was not intended to be limited to contractual obligations. Granting that no liability could be fastened upon the plaintiffs in error by the act of 1899, the question remains whether they were liable under the statute which that act superseded. So far as here important it reads: "If any execu-

tion shall have been issued against the property or effects of a corporation, . . . and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." Gen. Stat. 1889, § 1192. "If any corporation, created under this or any general statute of this state, . . . be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit." Id. § 1204. "Any . . . corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year." Id. § 1200. "No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him." Id. § 1206. The language of § 1192 in terms covers an execution in any case regardless of the character of the claim out of which the judgment grew. Two of the other three sections refer to "debts" in describing the obligations for which stockholders shall be held, and the third refers to the claimants as "creditors." As all are parts of the same chapter, doubtless the subsequent sections should be looked to in interpreting the first one. Therefore, although that purports to be complete in itself, perhaps it should be interpreted as though it, too, described the remedy it provided as one for the enforcement of corporate debts. Even so, in view of the meaning already assigned to the constitutional provision, the word "debts" must be deemed to have been used in a broad sense, so as to include judgments founded upon torts.

Upon the rehearing, the plaintiffs in error seek to press the argument with regard to the impairment of the obligation of their contract one point further. They not only maintain that the legislation of 1899 could not make them liable for the torts of the

corporation, if they had previously been liable only for its contracts, but they also contend that the procedure it provided for the enforcement of whatever liability did exist is not available against them, because it is more burdensome than that of the earlier statute which was in effect when they acquired their stock. This exact contention was upheld in *Evans v. Nellis* (C. C.) 101 Fed. 920, decided by the United States circuit court for the northern district of New York. It was there held that the later law visited additional hardships upon the stockholder, first, in depriving him of the right to avail himself of any defense he might have against the particular creditor pursuing him; second, in subjecting him to an action for the full amount of his stock, whether the corporate indebtedness was large enough to require so large a payment or not; and, third, in compelling him to pay a part of the expenses of the receivership. That case having been taken by writ of error to the circuit court of appeals, the questions involved were from there certified to the Supreme Court, where the matter was disposed of by answering only one question,—whether the receiver was entitled to maintain the action; the court saying, upon the authority of *Waller v. Hamer*, 65 Kan. 168, 69 Pac. 185, that he could not do so, because no action had been brought against all the stockholders. The court expressed no opinion regarding the validity of the statute as applied to conditions existing at the time of its enactment. *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74. It is settled that a corporate creditor who became such while the earlier statute was in force could not be deprived of his right to proceed thereunder by the enactment of the new law. *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. But it does not follow that one who became a stockholder prior to 1899 is exempt from being proceeded against under the later act. The constitutional prohibition against legislation impairing the obligation of a contract protects a creditor from a change of procedure that makes his remedy substantially less effective, but does not protect a debtor against a change that merely affords better facilities for compelling him to perform his engagement. *Phelps-Bigelow Windmill Co. v. North American Trust Co.* 62 Kan. 529, 64 Pac. 63; *North American Trust Co. v. Phelps-Bigelow Windmill Co.* 66 Kan. 775, 71 Pac. 1129; 8 Cyc. Law & Proc. p. 995, note 15. The state Constitution, prior to its amendment in 1906, contained this provision: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and

such other means as shall be provided by law." [Art. 12, § 2.] At the time the plaintiffs in error became members of the corporation, a statute had been passed in pursuance of this provision, fixing the individual liability of stockholders at double the amount of their stock. The act of 1899 did not affect the measure or character of their liability, but merely changed the manner of its enforcement. The change did not make their contract more burdensome, except as any change of remedy might incidentally do so. In a particular case some possible hardship might result; but in its general application the new procedure was obviously more equitable than the old, and better adapted to protect the rights of the stockholders.

Substantially the question here presented has been considered in a series of cases arising upon a change in the Minnesota statute providing remedies for the enforcement of the stockholders' liability for debts of the corporation. Of this question it was said, in *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* 80 Minn. 125, 83 N. W. 36 (adhered to after reargument in *London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co.* 84 Minn. 144, 86 N. W. 872): "There is no merit in the claim of counsel that the statute of 1899 impairs the obligation of a contract, because as to stockholders who became such prior to its passage it makes a radical and unwarranted change from the former practice of an action in equity to enforce the shareholder's double liability. The power of the legislature to modify or change a remedy, provided no substantial right is impaired, cannot be questioned. And there is no such thing as a vested right to a particular remedy. The legislature may always alter the form of administering right and justice. No substantial right is affected by the law in question, for in no manner does it increase the liability of the stockholder. It may afford a new remedy,—a different course of procedure; but this fact does not make it obnoxious to the fundamental law which forbids the impairment of contracts." The court then quoted from *Com. v. Cochituate Bank*, 3 Allen, 42: "It will at once be perceived that no objection to a change of remedy can be successfully urged on account of its being more speedy and effectual. That objection might be urged as to all changes in the forms of proceeding or the organization of the legal tribunals to act thereon. Every statute extending the equity powers of this court would be obnoxious to objections of this character. The objection, to be tenable, must go beyond this, and show that the statute increased the actual liabilities of the stockholders and was something

more than a change in the mode of enforcing a pre-existing liability. . . . The proceedings under . . . [this statute] may require the action of the court upon an estimated value of such assets, rather than an absolute ascertainment of the amount; but the principle to be applied is the same, varying only in the mode of arriving at the result as to the deficiency chargeable upon the stockholders."

The same statute was involved in *Converse v. Aetna Nat. Bank*, 79 Conn. 163, 64 Atl. 341. The court there said: "It [the stockholder, itself a corporation] therefore incurred, by becoming a shareholder in a Minnesota corporation, a liability to perform such contractual obligations as were attached by the laws of Minnesota to the ownership of its capital stock. . . . One of these obligations was to be answerable for the debts of the corporation, in case of a deficiency of corporate assets to the extent of the par value of its shares of stock. . . . The amount of this liability could not be thereafter increased by subsequent legislation. The mode of enforcing it could be varied within reasonable limits. . . . To enlarge the remedies of its creditors, whether against the corporation or its shareholders, impairs the obligation of no contract." A part of the new statute, however, was held to be inoperative, upon the theory that it added to the liability of the stockholder by compelling him to respond to an assessment the amount of which was increased by an estimate of expenses to be incurred in prosecuting future actions. But in *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, the Supreme Court of the United States upheld even this portion of the later act, saying: "By becoming a member of a Minnesota corporation, and assuming the liability attaching to such membership, he [the stockholder] became subject to such regulations as the state might lawfully make to render the liability effectual. It is further urged that, in imposing upon the stockholder the additional expense in a proceeding where the expenses incident to the enforcement of the liability in other states and against other parties are taken into consideration and included in the estimate, there is an unwarranted increase in the amount which could be recovered against the stockholder under the former statute. But, remembering at all times that the obligation of the shareholder was the creature of the Constitution of Minnesota, we think the fact that the additional expenses were included in the assessment cannot operate to defeat it. Such expenses are incident to the ascertainment of the trust fund, which it is necessary to realize from the liability of stockholders,

and, as long as these expenses are kept within the amount of the original liability, no legal right is violated."

A special consideration based upon the history of this litigation would of itself compel a denial of the contention of plaintiffs in error that the procedure of the act of 1899 cannot be invoked against them. Stevenson, the judgment creditor, originally attempted to reach them under the provisions of the repealed statute, claiming, under the authority of *Woodworth v. Bowles*, supra, that the repeal was not effective as to him. But this court held that, as he had not shown that his judgment was founded upon a contract, he was not within the rule there declared, and denied him relief, saying that the only remedy open to him was that given by the new law. *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518. Pursuant to this ruling, he instituted the present proceeding. Under these circumstances, the question of his right to do so cannot be regarded as still open.

In the original opinion it was said that §§ 1200 and 1204 of the General Statutes of 1889 were repealed by the act of 1899. Upon the rehearing, attention was called to the fact that § 1200 has never been repealed. The statement referred to was technically inaccurate, but substantially correct so far as affects the present case. Section 1204 provided that, if a corporation should be dissolved, leaving debts unpaid, suits might be brought thereon directly against the stockholders. Section 1200, in its original form (Gen. Stat. 1868, chap. 23, § 40), undertook to tell how a corporation might be dissolved, mentioning but two ways,—by the expiration of the time limited in its charter, and by a decree of a court. In 1883 it was amended by adding a provision that, for the purpose of enabling a creditor to prosecute suits against the stockholders to enforce their individual liability, a corporation should be deemed to be dissolved whenever it had suspended business for more than one year. This addition manifestly referred to suits brought under the provisions of § 1204; and when that section was repealed the new part of § 1200 necessarily became entirely inoperative, there being nothing left to which it could apply. The section itself was not repealed, but appears as § 1310 of the General Statutes of 1901. That portion of it which defines generally the methods by which a corporation may become extinct is still in force. But the rest of it, which merely fixed a time when a cause of action should arise under § 1204, for all practical purposes disappeared when that section was wiped out.

In the course of the first opinion it was remarked that, as the judgment was not 17 L.R.A. (N.S.)

based upon a contract, the legislature doubtless had power, by changing the law, to deprive the creditor of the means of enforcing its payment,—citing *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211. The court held that the legislature had not attempted this. Therefore the question whether such an attempt could have been successful was, of course, outside of the case. The expression could not have amounted to a decision, and was intended rather as a concession for the purpose of the argument, than as even an intimation of opinion. As it has been brought in question in the reargument, it may be regarded as withdrawn.

The judgment is affirmed.

KANSAS SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,

v.

R. M. MADDEN.

(— Kan. —, 93 Pac. 586.)

Negligence — independent contractor.

1. It is a general rule that one who employs another to do a piece of work is not liable for the other's collateral negligence, unless the relation of master and servant existed between them. The following exceptions to the general rule apply to and govern this case:

(a) Whenever an injury to a third party results from the failure of the employer to perform a duty which he owes to such party, he will not be permitted to avoid his liability by letting the performance of the work to another.

(b) One who has a piece of work to perform which, in its nature, is dangerous to others, is under obligation to see that it is carefully performed so as to avoid such

Headnotes by PORTER, J.

Case Note. — Liability of employer for acts of an independent contractor in setting out fire.

The following note includes only cases involving the liability of the principal for fire set out by an independent contractor for the purpose of clearing land, and does not comprehend cases where the damage resulted from the escape of fire employed by the contractor for some other purpose. The extra-hazardous nature of the first mentioned undertaking being deemed to justify such separation.

No absolute rule by which the liability of the employer in such cases may be determined can be derived from the decisions, which will be found to turn on a variety of considerations, such as whether the use of

injury; and he cannot delegate the obligation to an independent contractor, and thus avoid his liability in case the work is negligently done to the injury of another.

Railroad — fire guard — negligence of contractor.

2. A railroad company let a contract to another to burn a fire guard along its right of way. Through the negligence of the contractor, the fire escaped his control and damaged the property of the plaintiff.

Held: (a) That the work was performed as a part of the operation of the railroad, and that the railroad company could not, by delegating the work to an independent contractor, avoid the liability placed upon it by statute.

(b) That, the work being of a character from which, in the natural course of things, injurious consequences to others might be

expected to result, unless means were adopted to prevent such consequences, the railroad company was bound to see that measures were taken to prevent such injury, and could not avoid the obligation by letting the work to an independent contractor.

(January 11, 1908.)

ERROR to the District Court for Butler County to review a judgment in plaintiff's favor in an action brought to recover damages for injury to property caused by escaping fire. Affirmed.

The facts are stated in the opinion.

Messrs. L. F. Parker, H. C. Sluss, and W. F. Evans for plaintiff in error.

Mr. T. A. Kramer for defendant in error.

fire was necessarily contemplated by the contract, the extent to which discretion in regard to the manner of its use was reposed in the contractor, or whether existing conditions were such as to impose upon the landowner a duty to see that proper precautions to prevent the spread of the fire were taken; in other words, whether the injury was a natural and probable consequence of the performance of the work at the time and in the manner agreed upon.

That the duty of a landowner with respect to the setting out of fire is not in all cases to be considered absolute, is demonstrated by the cases of Kellogg v. Payne, 21 Iowa, 575, and Whitson v. Ames, 68 Minn. 23, 70 N. W. 793, in which the fact that the party setting out fire for purposes of burning over farm property was an independent contractor was regarded as relieving the owner from liability.

In *St. Louis, I. M. & S. R. Co. v. Yonley*, 53 Ark. 503, 9 L.R.A. 604, 13 S. W. 333, 14 S. W. 800, it was held that a railroad company could not be held liable for injuries resulting to adjoining property owners from the negligent performance by a third person of his contract to burn the brush growing upon its right of way, when such burning, if carefully done, would have caused no injury.

A railway company cannot be held liable for injuries caused by fire which spread to adjoining land because of the negligent manner in which the work of burning up brush and rubbish was performed by the employee of a subcontractor, where it is not alleged that such burning was in itself an act necessarily dangerous. *Callahan v. Burlington & M. River R. Co.* 23 Iowa, 562.

No action is maintainable against a railway company where a subcontractor cut a road through plaintiff's premises outside the right of way, and set fires which were negligently allowed to spread, and burned the plaintiff's timber, where such injury was not the natural result of the work contracted for. *Eaton v. European & N. A. R. Co.* 59 Me. 520, 8 Am. Rep. 430.

In *Shute v. Princeton Twp.* 58 Minn. 337, 59 N. W. 1050; it was held that a town

which entered into a contract for the repair of a highway, including the destruction by fire of rubbish which had theretofore been cut and piled, the time and circumstances of such burning being wholly within the contractor's control, was not liable for damages caused by the manner in which such work was done.

In *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544, it was held that a landowner was not liable where a person employed to clear land, who could have performed his contract either by carrying the wood and brush away or by burning it, and who was subject to no direction and control as to the manner in which he should do the work, set fire to some of the brush wood, and the fire spread to the premises of the adjoining owner.

In *Wright v. Holbrook*, 52 N. H. 120, 13 Am. Rep. 12, it was held that one to whom a job of clearing a piece of land had been let, who was at liberty to do it in his own way and use his own discretion and judgment, was alone liable for damages resulting from the escape of fire set out by him.

In *Rogers v. Florence R. Co.* 31 S. C. 378, 9 S. E. 1059, it is held that a railroad company was not liable where damage resulting from fire originating within the limits of its right of way was caused by the act of the servants of an independent contractor engaged by the company to build the road, even under a statute making the railroad corporation responsible for damages resulting from fire "originating within the limits of said road in consequence of the act of any of its authorized agents or employees."

In *Woodhill v. Great Western R. Co.* 4 U. C. C. P. 449, it was held that a railroad having no control over the time when burning was to be done was not responsible for damages resulting from the use of fire by a subcontractor who was not required by his contract to perform the work of clearing in that way.

In *Carroll v. Plympton*, 9 U. C. C. P. 345, it was held that a municipality was not liable where fire spread from timber being burnt on a road by a contractor.

Porter, J., delivered the opinion of the court:

In 1904 plaintiff in error entered into a contract with Isaac Gregory to burn the grass on a strip 300 feet wide on each side of its right of way in Cowley county for a distance of 7 miles. While engaged in burning the strip, the fire escaped from his control, ran over the land of defendant in error, and destroyed the grass on the ground

and the hay in stack. The owner of the land recovered a judgment against the railroad company for the amount of the damages and attorneys' fees. The railroad company brings error.

The sole contention of the railroad company is that Gregory was an independent contractor, not an employee of the company, and, inasmuch as the relation of master and servant did not exist, the company is not

In *Gillson v. North Grey R. Co.* 35 U. C. Q. B. 475, it was held that a railroad, under the supervision of whose engineer the work of construction was being carried on, was not liable for fire set out by a subcontractor over whom the engineer had no power of control, although the engineer, while not directing him to set fire on any particular day, had pressed him to proceed promptly with the work, and although there was testimony that there was no other mode of clearing the land but by burning. It was held by a majority of the court that the setting out of fire for the purpose of clearing land is not necessarily such an improper act as to render the person for whom such work is done liable for damages resulting therefrom.

A contrary conclusion was reached in *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386, where a landowner who employed a contractor to burn up certain brush and rubbish was held liable for injuries caused by the spread of the fire to a neighbor's premises; the ground of the decision being that, as the materials to be burned were in direct contact with similar materials on his neighbor's premises, and he had arranged to have the work done after a long drought, while the materials were in a highly inflammable condition, the injury was the natural and probable consequence of the performance of the work in the time and manner agreed upon.

In *Hannan v. Shepparton* (1892; Vict.) 14 Australian Law Times, 83, as cited in note to *Jacobs v. Fuller & H. Co.* 65 L.R.A. 854, it was held that a municipal council which contracted with a person for the destruction of dead animals by burning in a paddock belonging to the council, the work being highly dangerous at the time when the contract was made, but susceptible of being safely performed if certain precautions were observed, was responsible for injuries caused to the plaintiff's property as a result of the contractor's failure to observe those precautions.

In *Threlkeld v. White*, 8 New Zealand L. R. 513, according to a statement thereof in a note to *Thomas v. Harrington*, 65 L.R.A. 755, where the defendant was held liable for the negligence of a contractor for the clearance of land in allowing fire to spread onto the adjoining premises, one of the grounds assigned for the decision was that the fire was used "as a part of the work undertaken." The court laid it down that, if the evidence shows that the landowner contemplated the use of fire for purposes

of clearing his land, he is legally in the same position as if he had, by the contract, expressly allowed the use of fire.

In *Black v. Christchurch Finance Co.* [1894] A. C. 48, reversing (1891) 10 New Zealand L. R. 238, according to a statement thereof in a note in 65 L.R.A. 853, the defendants were held liable where the ground of the plaintiff's claim was that the defendants lighted, or caused or procured to be lighted, the fire on their own land in a negligent and improper manner, and wrongfully and negligently permitted it to spread to the lands of the plaintiff, with the result that the injury complained of was done to the plaintiff's growing crops of grass seed, and fences, and firewood. In delivering the judgment of the privy council, Lord Shand said: "It has not been disputed that, if Nyman, in what he did, was acting under the defendants' contract by which the burning of the bush had been let or contracted for, the defendants must be responsible for the consequences. The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbor's property (*sic utere tuo ut alienum non laedas*); and, if he authorizes another to act for him, he is bound not only to stipulate that such precautions shall be taken, but also to see that these are observed; otherwise he will be responsible for the consequences. See *Hughes v. Percival*, L. R. 8 App. Cas. 443, and authorities there cited. Cases may, indeed, occur in which no precautions could be adopted which could reasonably be expected to avert the danger, of which the present appears to be a pretty clear instance, for it is scarcely conceivable that, when once the fire was lit, not at a suitable or favorable time, but with the wind blowing as it was, any means which could be suggested would have saved the consequences which occurred. In any view, no preventive means of any kind were adopted; and there can be no doubt as to the liability of the defendants if they are responsible for Nyman's act."

For a discussion of the liability of an employer for acts of an independent contractor where injuries result from nonperformance of absolute duties of employer, see exhaustive note to *Anderson v. Fleming*, 66 L.R.A. 119.

responsible for his negligence. The contract between the railroad company and Gregory was in writing, but was not put in evidence. It appears, however, that he had no other employment with the company, and the work was to be completed within a specified time, for which he was to be paid the sum of \$12 per mile. He testified that he was his own boss; that he procured from the owners of adjacent lands their consent to enter thereon for the purpose of burning the fire guard. On the day the fire was set out there was a strong wind blowing in the direction of the land of plaintiff, and it was this which caused the fire to escape control. Gregory testified that he was ordered by the foreman of the section gang of defendant company to do the work that day; and that, in pursuance of such order, he set out the fire which caused the damage.

The single question to be determined, therefore, is whether, under the circumstances of this case, the railroad company is liable for the negligence of Gregory. The general rule is that the employer cannot be held responsible for the negligence of an independent contractor. The party injured must look to the person whose actual negligence caused the injury. *Kansas C. R. Co. v. Fitzsimmons*, 18 Kan. 34; *St. Louis, Ft. S. & W. R. Co. v. Willis*, 38 Kan. 330, 339, 16 Pac. 728; *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692, 32 N. E. 1052; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Uppington v. New York*, 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 206. For additional authorities, see note to *Central Coal & I. Co. v. Grider*, 65 L.R.A. 455. There are, however, numerous well-established exceptions to the general rule. One of these is said to be that, where the employer retains the right to exercise authority as to the manner and method in which the work shall be performed, he will be held liable for injuries to third parties the same as though the relation of master and servant existed between him and the contractor. With respect to this exception, the test most usually applied is not whether the owner actually exercised control over the work, but, Did he have the right to exercise direction or control? *Atlantic Transport Co. v. Coneys*, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335; *Pickens v. Diecker*, 21 Ohio St. 212, 8 Am. Rep. 55; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. Of course, the fact that the owner exercised control over the work during its performance would furnish some ground for the inference that he had reserved the right to do so by the terms of the contract 17 L.R.A. (N.S.)

itself. It is also apparent that, in a case where the injuries resulted directly from his interference, it would make no difference whether or not the relation of master and servant existed, because, under such circumstances, he would be regarded as the principal tortfeasor. *Davie v. Levy*, 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395; *Faren v. Sellers*, 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363; *Mahar v. Steuer*, 170 Mass. 454, 49 N. E. 741.

On precisely the same principles rests the exception to the general rule which was recognized in *Cloud County v. Vickers*, 62 Kan. 25, 29, 61 Pac. 391, that, where the injury is caused by defective construction inherent in the original plan of the employer, or where defective plans and specifications for the work have been adopted by the employer, the latter is liable. Again, where the work to be done is in its nature dangerous to others, however carefully performed, the employer will be held liable; because it is incumbent upon him to foresee such danger, and to take precautions against it. *Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231, 234, 13 S. E. 277; *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618. Nor is a person permitted to escape liability for his failure to perform a duty imposed upon him by law. This principle is true whether the duty arises by virtue of a statute, as in *Chicago, K. & W. R. Co. v. Hutchinson*, 45 Kan. 186, 25 Pac. 576, or where the duty is one imposed upon him by law. *Fowler v. Saks*, 7 Mackey, 570, 7 L.R.A. 649. The cases illustrating the general rule and the numerous exceptions thereto may be found in a monographic note to *Covington & C. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 375. See also extensive note to the case of *Central Coal & I. Co. v. Grider*, 65 L.R.A. 455, and note to *Louisville & N. R. Co. v. Tow*, 66 L.R.A. 941.

Some of the exceptions we have noted above apply with more or less force to the present case. It is the contention that the railroad company made itself liable by directing that the work should be done at a time when a strong wind was blowing. It directed the work to be done on a certain day. Presumably this was in accordance with the contract. There was evidence showing that the fire escaped from the control of Gregory on account of the high wind, and that, except for the order and direction of the foreman, the fire would not have been set out on that day. The fire was set out on Monday; the order of the foreman was given on the Saturday before, and there was no reason to suppose at that time that Monday would not be a suitable day for

the work. It is not reasonable to presume that, when the foreman directed Gregory to begin the work on the following Monday, it was the intention thereby to deprive him of the use of all discretion in the matter, or that the order meant that he should begin the work on that day regardless of wind and weather. The right of the employer to exercise a limited control over the work without thereby destroying the independent character of the contract has been recognized by the courts in numerous cases. The rule seems to be well established that, where the control reserved does not apply to the mode or manner of having the work done, and does not in any way take the work out of the hands of the contractor, it will not destroy the independent nature of the contract. *Kansas City, M. & O. R. Co. v. Loosely*, 76 Kan. 103, 90 Pac. 990. In other words, the relation of master and servant is not to be inferred from the reservation by the employer of powers which do not deprive the contractor of his right to use his own methods in accordance with his contract. See cases cited in note to *Central Coal & I. Co. v. Grider*, *supra*. It would hardly be a safe rule to establish to say that the mere direction of an employer that he wanted the work done at a certain time should render him liable for injuries resulting to third parties, unless it were shown that the injuries were such as might reasonably be expected to result from the giving of the order.

There are two exceptions, however, to the general rule relieving an employer from liability caused by the negligence of an independent contractor, which, in our opinion, govern this case, and take it out of the operation of the rule. Whenever an injury to a third party results from the failure of the employer to perform a duty which he owes to such party, he will not be permitted to avoid his liability by letting the performance of the work to another. A familiar illustration is found in the law of master and servant. Where the master owes to the servant the duty of providing a safe place to work, or there is imposed upon him by the law any duty or obligation to the servant, he cannot, by letting out the performance of the work to an independent contractor, escape liability for injuries to the servant, caused by his failure to perform the obligation; and it makes no difference whether the duty is imposed by statute or by the common law. *Pickard v. Smith*, 10 C. B. N. S. 470; *Gray v. Pullen*, 5 Best & S. 970.

A railroad company is liable in damages to any person whose property is injured by fire caused by the negligent operation of its railroad. Our statute (Gen. Stat. 1901, 17 L.R.A. (N.S.)

§ 5923) recognizes this common-law liability, and provides that, in actions against railroad companies to recover such damages, certain rules of evidence shall obtain. It also allows the person injured to recover a reasonable attorney's fee in prosecution of the action. Thus there is cast upon the railroad company an obligation to the owner of property injured by fire caused by the operation of the railroad, which is in many respects different from the obligation resting upon an individual who negligently permits fire to escape. This obligation is one which the railroad company cannot escape by farming out the contract for a part of the operation of its railroad to an independent contractor. In *Fowler v. Saks*, *supra*, the owner of a building, who let a contract to repair his building, which required the taking down of a party wall, was held liable to the adjoining owner for damages resulting therefrom. It appeared in that case that there was a building regulation in the District of Columbia requiring the owner of a building taking down a party wall to respond in damages to the adjacent owner for any injuries occasioned thereby. In the opinion the court uses this language: "A party [who] is under an antecedent obligation to do a thing, or to do . . . [it] in a particular way, . . . cannot get rid of his responsibility by deputing it to somebody else." It was also said that the duty in that case rested upon defendant by operation of the common law aside from any building regulation, and was one which could not be delegated to an independent contractor. The object of burning the fire guard which caused the injury to plaintiff's property was to enable the railroad company to operate its railroad without injury to the property of others. The purpose for which the work was performed was the same a railroad company has in view when it provides screens and spark arresters upon its engines. The work was therefore performed by the company in the operation of its railroad. Thus, in *Pound v. Port Huron & S. W. R. Co.* 54 Mich. 13, 19 N. W. 570, the railroad company employed a contractor to grade its roadbed. Cattle escaped upon the right of way by reason of his failure to keep up the fences along the right of way. The company was held not to be released from its liability for the damage for the reason that the duty to keep its right of way fenced was imposed upon it by law.

The present case falls within another exception to the general rule, which may be stated as follows: One who has a piece of work, the performance of which is in its nature dangerous to others, is under an obligation to see that it is carefully performed so as to avoid such injury, and he

cannot delegate the obligation to an independent contractor, and thus avoid his liability in case the work is negligently done to the injury of another. That such is the law is settled by the weight of reason and authority. Thus, in *Bower v. Peate*, L. R. 1 Q. B. Div. 321, 326, a leading case, Cockburn, Chief Justice, used the following language: "That a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

In *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, the contractor was employed to construct a sewer for defendant. Owing to his negligence, a gas main was broken, and gas escaped into the house where plaintiffs resided, causing injury to them and their property. Defendant was held liable because it owed a duty to the public, including plaintiffs, so to construct the sewer as not to injure the gas main; and it was said that this duty could not be delegated to another so as to relieve it from liability. To the same effect, see *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Dalton v. Angus*, L. R. 6 App. Cas. 740; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21 L. ed. 485; *Black v. Christchurch Finance Co.* [1894] A. C. 48. *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, also a party-wall case, was ruled the same way. In this case the court says: "The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute,"—citing *Bower v. Peate*, supra. "It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others, incident to the performance of the work let to contract, that raises the duty, and which the employer cannot shift from himself to another, so as to avoid liability, should injury re-

sult to another from negligence in doing the work."

In *Circleville v. Neuding*, 41 Ohio St. 465, and *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L.R.A. 701, 24 N. E. 269, the same doctrine is declared. In the latter case the railroad company employed a contractor to do for it certain plumbing which involved the opening of the public highway for the purpose of laying a drain. Plaintiff, in the nighttime, fell into the ditch by the negligence of the contractor in not protecting it. The railroad company was held liable. It was stated in the syllabus, as follows: "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has let the work without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an employee of an independent contractor." The same principle is also one of the grounds upon which the exception is predicated in *Fowler v. Saks*, supra. Indeed, authorities might be multiplied in support of the proposition that, where the work is inherently dangerous to others, the employer is under an obligation to see that it is carefully performed, and cannot escape the liability by the employment of an independent contractor. In the following cases, most of which involved damages occasioned by fires set out by contractors, the railroad company or employer was relieved of liability on the ground that the negligence was that of an independent contractor; but, so far as we have examined the cases, in none of them does it appear that the contractor was employed for the purpose of setting out fires as in the present case; the fires were either set out to facilitate the work of clearing the land or right of way or for some incidental purpose, and escaped through the negligence of the contractor or his employees: *Eaton v. European & N. A. R. Co.* 59 Me. 520, 8 Am. Rep. 430; *Callahan v. Burlington & M. River R. Co.* 23 Iowa, 562; *Burbank v. Bethel Steam Mill Co.* 75 Me. 373, 46 Am. Rep. 400; *Woodhill v. Great Western R. Co.* 4 U. C. C. P. 449, 451; *Carroll v. Plympton*, 9 U. C. C. P. 345; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Gillson v. North Grey R. Co.* 35 U. C. Q. B. 475. In the last-mentioned case

two of the judges dissented, and one of the questions involved was whether there was such an interference on the part of the employer as to destroy the independent character of the contract.

The case of *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296, is apparently opposed to this doctrine. There the railroad company was engaged in constructing a well from which to supply water for its engines. The running water interfered with the work, and the railroad company contracted with the owner of a small, portable, steam engine to pump the accumulating water in order to keep it out of the way. The plaintiff driving on the highway was injured by reason of his horses' fright at the engine. It was held that, as the railroad company had no control over the use of the engine, it was not liable. Upon examination, however, it will be found that the principles upon which the decision turned are not in conflict with the doctrine we are considering. Here was an independent contract to do something which might be said to be a part of the operation of the railroad; but obviously the question whether the work was a part of the operation of the road was unimportant, for the reason that the company owed no particular duty by statute or common law to the public or to the plaintiff. The work was not dangerous, nor did it constitute a nuisance. In the opinion it was said that the use of a portable steam engine for the purpose of pumping water in close proximity to a public highway was not necessarily a nuisance if the engine was used in the proper manner. Injury could only result from its negligent use. It was also remarked that the work was not of a character which imposed upon the employer any peculiar obligation to the plaintiff or others using the highway, and that, if the employer had been under peculiar obligations to the person injured, it would have been liable for a breach of that duty, regardless of the relation between the employer and the person whose negligence caused the injury; in other words, the company might let to an independent contractor the performance of work in connection with the operation of its road without necessarily becoming liable to third persons for the negligence of the contractor. It is only where the company owes some duty or obligation to the third party, placed upon it by statute or arising out of the peculiar nature of the work itself, which prevents it from escaping liability by an independent contract.

The general rule and the particular exception we are considering were well stated by Lord Blackburn in *Dalton v. Angus*, supra, in the following language: "Ever since 17 L.R.A. (N.S.)

Quarman v. Burnett, 6 Mees. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it." Let it be conceded that the burning of the fire guard was a part of the operation of the railroad, and the conclusion irresistibly follows that the defense of an independent contract is of no avail. The statute placed upon the company an additional and peculiar obligation to the owner of property injured by fire in the operation of its road; it is made liable, not only for all damage sustained, but for reasonable attorneys' fees in an action brought to recover therefor. No obligation to pay attorneys' fees rested upon an individual through whose negligence damages by fire should result to the property of another; and, in order to recover against the individual, the plaintiff would be obliged to prove negligence, while the statute provides that, where the action is brought against the company, and the fire was caused by the operation of the road, negligence is presumed as soon as these facts are shown.

We find no difficulty in determining that the work of burning the fire guard was a part of the operation of the road. The company could not, therefore, absolve itself from the liability by letting out the work to an independent contractor, for the reason that it owed to the plaintiff an obligation placed upon it by the law to respond in damages for all injuries by fire thus caused; and for the further reason that it employed a dangerous agency, which, in the experience of everyone, required that precautions be taken to prevent damage to the property of others. Thus, a second duty was cast upon the railroad company not to cause the work to be done, either directly by its employees or indirectly by a contractor, without seeing that precautions were taken to prevent the escape of fire and consequent injury to the property of plaintiff. Neither of these obligations or duties could be avoided by dele-

gating the performance of the work to another.

It follows that the judgment must be affirmed.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH OF PENNSYLVANIA

v.

FRANK PAESE, Appt.

(220 Pa. 371, 69 Atl. 891.)

Trial — degree of crime — court.

1. In the absence of dispute as to the facts attending a homicide, the question whether or not the provocation was sufficient to reduce the crime to manslaughter is for the court.

Case Note. — Killing or assaulting of a relative or friend of defendant as a sufficient provocation to reduce a homicide to manslaughter.

This note deals simply with the question whether an assault upon a friend or relative of the defendant may constitute a provocation which, if the other necessary conditions are present, will operate to reduce a homicide to manslaughter. It does not deal with "cooling time," and other elements essential to manslaughter as distinguished from the higher degrees of homicide, even though those elements were involved in cases presenting the question under annotation.

Relatives.

The authorities seem agreed that the killing or assaulting of a relative will amount to a sufficient provocation to reduce the killing of the wrongdoer to manslaughter, provided no previous wrongful intent on his part is shown.

Thus, in *Collins v. United States*, 150 U. S. 62, 37 L. ed. 998, 14 Sup. Ct. Rep. 9, where defendant's half brother had been assaulted by deceased, who was partially drunk, and defendant, after securing his pistol, shot the offender, an instruction was held correct to the effect that, if the defendant, in a moment of passion aroused by the wrongful treatment of his brother, and without any previous preparation, did the shooting, the offense would be manslaughter, and not murder.

And in *State v. Horn*, 116 N. C. 1037, 21 S. E. 694, it was held that seeing deceased shoot down defendant's brother, or seeing the brother and deceased a few moments after deceased had shot him, amounted to sufficient provocation to reduce the killing to manslaughter.

So, it was held in *Guffee v. State*, 8 Tex. App. 187, that, if defendant's brother was shot by deceased in defendant's presence, he would be guilty only of manslaughter in killing the brother's slayer, if he had no prior unlawful purpose.

In *Young v. State*, 41 Tex. Crim. Rep. 442, 55 S. W. 331, where there was evidence that

Homicide — manslaughter — provocation.

2. The killing of a motorman by shooting him will not be reduced to manslaughter by the fact that, being a powerful man, he had just assaulted a smaller man, a friend of the one doing the shooting, because of misunderstanding as to payment of fare, if the assault had ceased, and he was retiring from the combat.

Instruction — definition — manslaughter.

3. An instruction defining "manslaughter" is not erroneous in stating that it is necessary, to constitute that offense, that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty.

(March 2, 1908.)

defendant and his brother had sought to bring about a simple assault on deceased, who, during the trouble, killed the brother, when he himself was shot by defendant, the court said: "Furthermore, the court should have charged the jury that, if they believed from the evidence that deceased shot appellant's brother, and that appellant had provoked the difficulty without the apparent intention of killing deceased, and, after deceased had shot appellant's brother, his mind having been rendered incapable of cool reflection, he thereupon shot and killed deceased, either before deceased retreated or afterwards, still appellant, under this state of facts, would not be guilty of any higher grade of offense than manslaughter. In other words, if appellant seeks a difficulty without the apparent intention of killing, and deceased shot his brother, and, actuated by that cause alone and sudden passion produced thereby, appellant slays deceased, he would not be guilty of any grade of homicide above manslaughter."

So, in *McLaurin v. State*, 64 Miss. 529, 1 So. 747, where defendant's wife attacked another woman with her fists, and was then struck by such woman with an ax handle, and it appeared that, during the progress of this fight, defendant went for his gun, and, upon returning and seeing his wife's face covered with blood and the other woman retreating down the road, shot her, the court said: "The judgment which assumed absolutely that this was murder and could be nothing else, and which refused to permit the jury to consider whether it was murder or manslaughter, was erroneous. The provocation was adequate, and the time which elapsed between it and the killing was so brief as to render it at least a proper question for the determination of the jury, notwithstanding the previous threats made by appellant, whether in the commission of the act he was impelled by the heat of passion occasioned by the provocation, or by previous malice."

In *Campbell v. Com.* 88 Ky. 402, 21 Am. St. Rep. 348, 11 S. W. 290, where the father of deceased's wife had gone to the deceased's house and found that his daughter and her

APPEAL by defendant from a judgment of the Court of Oyer and Terminer for Dauphin County convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. John E. Fox, O. G. Wickersham, and John R. Geyer, for appellant:

What provocation will reduce murder to manslaughter?

Stat. 13 Richard II. (1389); 2 James I. (1604) chap. 8; Lambard, 205; 3 Coke, Inst. p. 50; Lambe's Case, 1 Hale, P. C. 455-484; Morely's Case, Kelyng, 53; Stephen, History of Crim. Law, Eng. pp. 63, 98, § 215; Com. v. Honeyman, Addison (Pa.) 147; Com. v. Bell, Addison (Pa.) 156; 1 Am. Dec. 298; Kelly, Crim. Law, § 518; State v. Grugin, 147 Mo. 39, 42 L.R.A. 774, 71 Am. St. Rep. 553, 47 S. W. 1058; 18 Chas. II.; Fost. C. L. pp. 292, 294, 314; Queen v. Tooley, 2 Ld. Raym. 1296; Case of Manslaughter, 12 Coke, 87; 1 East, P. C. 215, 292; Reg. v. Mawgridge, J. Kelyng, 119; Mikell, Cases on Crim. Law, 613; Royley's Case, Cro. Jac. 296; Stanley's Case, J. Kelyng, 88; 1 Hawk. P. C. chap. 31, § 34; Salisbury's Case, 1 Plowd. 100; 1 Russell, Crimes, 516, 592; Wharton, Homicide, 2d

ed. §§ 445, 446; Wharton, Crim. Law, 9th ed. §§ 459, 460; Reg. v. Fisher, 8 Car. & P. 182; Reg. v. Harrington, 10 Cox, C. C. 370; State v. Gut, 13 Minn. 341, Gil. 315; Campbell v. Com. 88 Ky. 402, 21 Am. St. Rep. 348, 11 S. W. 290; 2 Bishop, Crim. Law, 722. 710; McLaurin v. State, 64 Miss. 529, 1 So. 747; State v. Hill, 20 N. C. 629 (4 Dev. & B. L. 491), 34 Am. Dec. 396; Cannon v. State, 57 Miss. 147; Collins v. United States, 150 U. S. 62, 37 L. ed. 998, 14 Sup. Ct. Rep. 9; Com. v. Mosler, 4 Pa. 264; Lynch v. Com. 77 Pa. 205; 1 East, P. C. 238, 289, 290; 4 Bl. Com. 192; State v. Roberts, 8 N. C. (1 Hawks) 351, 9 Am. Dec. 643; Kilpatrick v. Com. 31 Pa. 198.

What is the measure of the burden placed upon the defendant to reduce an unlawful killing to manslaughter?

Tiffany v. Com. 121 Pa. 165, 65 Am. St. Rep. 775, 15 Atl. 462; Com. v. Frucci, 216 Pa. 86, 64 Atl. 879.

Messrs. John Fox Weiss, W. H. Musser, and Leroy J. Wolfe, for appellee:

The provocation was not sufficient to reduce the crime to manslaughter.

Com. v. Drum, 58 Pa. 9.

children had been turned into the street, and, after exchanging some words with the deceased, had shot him, the court said: "The jury should have been told, as a matter of law, that the father had the right to protect the person of his daughter from great bodily harm, even against the assault and battery of the husband; and, further, that, if they believed, from the testimony, the daughter of the accused, prior to the day on which the deceased lost his life, had been assaulted and beaten by her husband so as to endanger her life, or he had inflicted upon her person great bodily injury, and that the accused was apprised of that fact; and if they further believed that the assault and beating of the wife was renewed on the night . . . [of the homicide] and that he was informed of that fact,—the accused had the right to arm himself and go to the residence of the deceased to protect his daughter from the personal violence of the husband; and if, on reaching the place of trouble, he found his daughter and her children expelled from their home into the street by the deceased, and, suddenly meeting with the deceased, in sudden heat and passion caused by the beating and ill-treatment of the wife from the appearances then surrounding them, shot the deceased when not in necessary self-defense and without malice, he is guilty of manslaughter."

So, in *Maria v. State*, 28 Tex. 698, it was held that the court should have instructed the jury that the whipping of the child of defendant by deceased amounted to sufficient legal provocation to reduce the killing of such person from murder to manslaughter, if in fact, in consequence of the whip-

ping of her child by deceased, defendant was suddenly so enraged as to be incapable of cool reflection, and, while so enraged, struck the blow of which deceased died, the act being attributable to such sudden passion, and not to a preconceived design.

And in *Reg. v. Harrington*, 10 Cox, C. C. 370, where defendant had killed his daughter's husband after having seen him assault her, although not in such a manner as to endanger her life, the court said that such circumstances might be a ground for reducing the killing to manslaughter; and that, if it became necessary, the point might be reserved.

But such acts afford no ground for mitigation where the killing is wantonly done. Thus is *Johnston's Case*, 5 Gratt. 660, where brothers-in-law, who had been on hostile terms because one, after the death of the other's sister, had married defendant's daughter, were about to engage in a fight, one of them having assaulted the other, it was held that defendant was guilty of murder where he had not been attacked, but deliberately killed the one who committed the assault, since he acted merely as a volunteer.

In *Crockett v. Com.* 100 Ky. 382, 38 S. W. 674, where it appeared that defendant's brother was engaged in a fight with the deceased when he was killed, the jury were told that defendant would be guilty of manslaughter only if the killing was in sudden heat and passion caused by some provocation reasonably calculated to excite his passion beyond the power of self-control if he had no previous malice. Nothing was said, however, as to whether or not an assault on, or conflict with, the brother, would amount

Mitchell, Ch. J., delivered the opinion of the court:

Briefly stated, the substance of the case was that three Italians who had been drinking (but to what extent they were affected by it became a question for the jury) got into an altercation about fares with the conductor and motorman of a car. A fight ensued between one of them, not the appellant, and the motorman, in which the latter, alleged to be much the larger and heavier man, beat the other severely. He then started back to his post at the front of the car when the appellant drew a revolver and fired five shots, stepping forward as he fired each shot. Appellant was tried and convicted of murder of the first degree.

The first assignment of error is that the court refused to affirm the following point: "If the jury believe that the deceased had just made an attack and committed a violent assault and battery upon George Paese, who was much the inferior of the deceased in size and weight, and that this was done in the presence of the defendant, who was the friend and companion of George Paese; and they also find that this attack so excited the passion of the defendant as to destroy

all self-control, and that, in this condition of ungovernable rage and without sufficient cooling time, he shot and killed the person so attacking,—the grade of the homicide is clearly but manslaughter." Before taking up the exact question raised by this point, it may be well to dispose of two smaller matters that were claimed at the argument to be in the case. It was claimed that the deceased kicked the appellant in the stomach as he passed him just before the shooting. The jury found there was no such kicking. It was further claimed that the disparity in size and apparent strength of the two men in the fight might make the appellant justly apprehensive for the life or grievous injury of his friend, and he might therefore intervene to prevent a felony. But the evidence is practically undisputed that the fight was over and the deceased was retiring from the scene when the appellant drew his revolver. The single question, therefore, remains whether, conceding the beating to have been such as, if inflicted upon the appellant himself, would have permitted the jury to reduce the killing to manslaughter, it can have that effect when made upon another merely a friend.

to sufficient provocation to reduce the killing to manslaughter.

In *State v. Neville*, 51 N. C. (6 Jones, L.) 423, it was held that, in order to reduce the killing by a husband of one who had committed a criminal assault upon his wife to manslaughter, the killing must have occurred on the spot, and the mere hearing of such assault subsequently, by however good authority, would not be sufficient to reduce the degree of the crime.

So, in *State v. Bone*, 114 Iowa, 537, 87 N. W. 507, where defendant claimed that, shortly before the killing, he was informed by his wife of a criminal assault upon her by the deceased, an instruction that this information would not be a sufficient provocation to reduce the homicide to manslaughter was held correct, and the further instruction that if, after having had time to reflect on the matter, upon seeing the offender, he followed him and brought on a fatal conflict out of resentment for the supposed injury to his wife, he would be guilty of murder in the second degree was upheld.

In *Lide v. State*, 133 Ala. 43, 31 So. 953, also, it was held that the fact that the defendant had been told by his wife, three days before the homicide, that deceased had committed a criminal assault upon her, was not sufficient to reduce the homicide to manslaughter; but this was upon the ground that the defendant had sufficient cooling time, and not upon the ground of the insufficiency of the provocation.

Friends.

There is apparently little authority upon the question whether the killing or assaulting of a friend will constitute sufficient

provocation to reduce a homicide to manslaughter. Most of the cases touching upon this question are dealt with in *Com. v. PAESE*. The question apparently is not entirely settled. It would seem that cases of strong attachment and friendship might be shown which would present a much stronger ground for mitigation than the mere status of relationship where little in common exists between the parties. Upon such facts appearing, it might well be argued that the killing or assaulting of such friend should afford sufficient provocation to reduce the homicide to manslaughter.

But two cases in addition to those dealt with in *Com. v. PAESE* have been disclosed which bear in any way upon the question. In *Moffatt v. State*, 35 Tex. Crim. Rep. 257, 33 S. W. 344, it was held that defendant would be guilty only of manslaughter if he participated with a friend, who killed deceased in a sudden passion produced by an assault upon him by the deceased.

And in *Com. v. Honeyman*, Addison (Pa.) 147, where deceased struck at one who was dancing in company with defendant, and that one then left the house, when defendant knocked deceased down and killed him, he was held guilty of murder. The court said: "Suddenly interfering in favor of a friend engaged in combat with another, and killing the other in defense of this friend, has been held but manslaughter. This must be on the supposition of passion excited by the danger of the person in whose favor the killer interferes in the quarrel." The cases referred to by the court here are those of *Case of Manslaughter and Huggett's Case*, which are dealt with by the court in *Com. v. PAESE*.

To reduce an intentional blow, stroke, or wounding resulting in death to voluntary manslaughter, there must be sufficient cause of provocation and a state of rage or passion without time to cool, placing the prisoner beyond the control of his reason, and suddenly impelling him to the deed. If any of these be wanting,—if there be provocation without passion, or passion without a sufficient cause of provocation, or there be time to cool, and reason has resumed its sway, the killing will be murder. *Com. v. Drum*, 58 Pa. 9 (17). What is sufficient provocation for this purpose has not been exactly defined, and is probably incapable of exact definition, for it must vary with the myriad shifting circumstances of men's temper and quarrels. It is a concession to the infirmity of human nature, not an excuse for undue or abnormal irascibility, and therefore to be considered in view of all the circumstances. It is usually said that the sufficiency of the provocation is for the court; and such is the general rule; but it must not be taken too broadly, but applied to cases where the facts are undisputed or clearly established. Thus, for example, in a case put by Sir Matthew Hale (1 Hale, P. C. 455), and much cited by writers on the subject of provocation: "If A be passing on the street, and B, meeting him (there being convenient distance between A and the wall), takes the wall of A, and thereupon A kills him, this is murder; but, if B had jostled A, this jostling had been a provocation, and would have made it manslaughter." But even of this case, assuming the question of sufficiency to be for the court, Russell says it "probably supposes considerable violence and insult in the jostling." 1 Russell, Crimes, 714. In Hale's time, when the streets even of London were rarely paved, "to take the wall" of another meant practically to force the other into the middle of the street with its attendant inconveniences, dirt, etc., and perhaps danger from vehicles and horses. Hence to "take the wall" of a woman or a man of superior rank was a serious insult, likely, in the days when all gentlemen habitually went armed, to be promptly followed by the invitation to "draw." The view of it as an insult has its survival to the present day in the canons of politeness in passing a lady on the street, and there were in my younger days, and perhaps even yet, circumstances and parts of the country where the discourtesy of taking the wall of a lady would provoke resentment and perhaps a breach of the peace from her escort. In the case put by Hale there might, as indicated by the comment of Russell, be considerable discrepancy and doubt upon the evidence as to the exact facts of the jostling, and these, of course,

would have to be passed upon by the jury necessarily involving their sufficiency as provocation. While, therefore, the sufficiency of the provocation is in general for the court, it may in some cases be so combined with questions of fact as to be for the jury. In the present case there being no disputed facts, the appellant's own point stating them as he claimed them to be, the learned judge was right in ruling upon them as a matter of law.

The next question is whether his ruling was correct. Though the sufficiency of the provocation has not been exactly defined, there are some points in regard to it which are well settled. Thus, no words or mere gestures, however false, foul, or insulting, will free a party killing from the guilt of murder. Russell, Crimes, 714. Nor will slight or trivial injuries, though they amount in law to an assault, nor in all cases even a blow. Russell, Crimes, 715. Chief Justice Agnew, in *Com. v. Drum*, supra, classes the two offenses together, and says: "Insulting or scandalous words are not sufficient cause of provocation; nor are actual indignities to the person of a light and trivial kind." But in the case before him the alleged provocation was the threat of serious injury, and the weapon used in the killing was a knife, and in the sentence quoted he was not dealing with details which the case did not call for, but merely rounding out, for the information of the jury, his general discussion of the subject. He certainly did not mean to depart from the accepted law, which is thus stated by Foster: "Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder. Nor are indecent provoking actions or gestures expressive of contempt or reproach, without an assault upon the person. This rule will, I conceive, govern every case where the party killing upon such provocation maketh use of a deadly weapon, or otherwise manifesteth an intention to kill, or to do some great bodily harm. But, if he had given the other a box on the ear, or had struck him with a stick or other weapon not likely to kill, and had unluckily and against his intention killed, it had been but manslaughter. The difference between the cases is plainly this: In the former the *malitia*, the wicked, vindictive disposition already mentioned, evidently appeareth; in the latter it is as evidently wanting. The party, in the first transport of his passion, intended to chastise for a piece of insolence which few spirits can bear. In this case the benignity of the law interposeth in favor of human frailty; in the other, its justice regardeth and punisheth the apparent malignity of the heart." Fost. C. L. chap. 6, p. 290, of Homicide.

On the other hand, certain circumstances have been held to be sufficient provocation. Thus, in general, serious injury immediately inflicted or threatened to wife (or husband), child, or servant will, on account of the relationship of the parties, reduce the killing to manslaughter in similar cases as if the injury had been to self. The appellant claims that the same rule should be held in the case of a more distant relation, and even of a friend or companion; and his counsel have presented a brief of unusual learning and diligence on this point. The fullest discussion to be found is in *Com. v. Bell, Addison (Pa.)* 156, tried in 1793, where Judge Addison, after the manner of the time, delivered an elaborate charge, discussing the law in detail and referring to cases. In the course of it he says: An attack on the person and safety of a friend is a provocation sufficient to extenuate to manslaughter a sudden killing in the peril and defense of this friend." This was said *obiter*, as there was nothing in the case to which it could apply; but the same view has been stated from time to time by writers of considerable standing. Three cases are constantly cited and reiterated as authority for the doctrine: *Case of Manslaughter*, 12 Coke, 87; *Huggett's Case*, Hale, P. C. 465, s. c. J. Kelyng, 59; and *Queen v. Tooley*, 2 *Ld. Raym.* 1296. Critically examined, they afford the doctrine very doubtful support. *Case of Manslaughter*, supra, is reported in six lines, thus: "Divers men playing at bowls, . . . two of them fell out and quarreled, the one with another, and the third man, who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died. This was held manslaughter for this: That it happened upon a sudden motion in revenge of his friend." The absence of report as to the circumstances and extent of the quarrel, the fact that the fatal blow was struck with an instrument not usually classed as a deadly weapon, etc., make this case of uncertain applicability, and yet it is perhaps the strongest authority for the point it appears to decide. *Huggett's Case* is still more uncertain as to the facts. Hale says a press master with an assistant undertook to press a man for the Army, and, a stranger interfering, a quarrel took place in which the stranger killed the assistant, and it was held manslaughter only. Kelyng, in a fuller report, apparently based on the record of a special verdict, says the assumed press master and his assistant acted without warrant, and, on the stranger interfering and requiring to see the warrant, they were shown a paper which they declared to be no warrant, and drew their swords and a fight ensued, in which the pretended press master was

killed. The judges divided eight against four, holding it to be manslaughter only. *Queen v. Tooley*, supra, was an arrest of a woman on suspicion of a misdemeanor, by a constable not in his own parish and without a warrant. The prisoners assaulted the constable for the purpose of rescue, but, on being shown his staff, desisted, and the woman was taken to the roundhouse. Shortly after, the prisoners again drew their swords and assaulted the constable, and, on one Dent coming to his aid, one of the prisoners killed Dent. It was held by seven judges against five that it was manslaughter only. Both *Huggett's* and *Tooley's Case* involved the elements of personal liberty in the right to resist an illegal arrest, and are discussed by Russell and by Wharton under that head. 3 *Russell, Crimes*, § 3, p. 732; Wharton, *Homicide*, chap. 8, § 295. Both were decided by a divided court, and are severely commented on by Foster, who says they have "carried the law in favor of private persons officiously interposing farther than sound reason founded in the principles of true policy will warrant," and "the doctrine advanced in it utterly inconsistent with the known rules of law touching a sudden provocation in the case of homicide." *Crown Law, Homicide*, §§ 10 et seq. p. 312. Mr. Wharton says: "By this high authority, *Tooley's Case* was greatly shaken, and it may now be considered as entirely overruled." *Homicide*, § 296. And that it had been overruled was flatly said by Alderson, J., in *Rex v. Warner*, 1 *Moody, C. C.* 380, and by Pollock, C. B., in *Reg. v. Davis, Leigh & C. C. C.* 64. On this very insufficient foundation, the commentators have gone on reiterating the same doctrine; but the most diligent search through Hale, Hawkins, East, Plowden, Russell, and Wharton fails to discover any real adjudication to support it, or any other decision than the three already discussed that can be said to really bear upon it.

The American reports furnish but one additional case, and that so clearly against all the precedents as to be of no authority. *Moore v. State*, 26 *Tex. App.* 322, 9 *S. W.* 610, was a case of an affray at a saloon with some drunken negroes. Deceased, one of the negroes, got into an altercation, and, when one apparently his friend attempted to persuade him to go home, he went out to his horse and got his gun, warning the others not to approach. While sitting on his horse with the gun lying across his lap, one McAdoo attempted to take the gun, and in the struggle it was discharged and McAdoo killed. The others then fired on deceased and killed him. This was held to be manslaughter; but, as the deceased was acting on the defensive and in no way the aggressor

at the time the gun was discharged, this ruling cannot be sustained, even under the old English authorities, unless the affray be held to have continued as one transaction until the killing of deceased,—a view that the report perhaps permits, but does not clearly sustain. In *State v. Gut*, 13 Minn. 341, Gil. 315, the defendant, indicted as one of a lynching party who killed an Indian while in jail, sought to justify on the ground that the Indian had killed his friend, but was held guilty of murder; the court saying: "Had the defendant been present when his friend was killed, and, under the excitement of the moment and in the heat of passion, taken the life of the slayer, it might, perhaps, be different." In *Reese v. State*, 90 Ala. 624, 8 So. 818, the defense was that the deceased had killed the defendant's cousin an hour before; but the court said that "did not tend in the slightest degree to mitigate the offense," and a verdict of murder in the first degree was sustained. These are all the additional cases that the editors of the American & English Encyclopedia of Law have been able to present. 21 Am. & Eng. Enc. Law, 2d ed. p. 126.

Courts do not sanction the increase of excuses for taking life, already too numerous, except under compulsion of weighty authority. Such authority has not been found in favor of the doctrine that a mere bystander may interfere to the extent of killing with a deadly weapon in a stranger's quarrel, without being guilty of more than manslaughter. On the contrary, the fact that the annual thousands of homicides of the United States have produced no case in its favor is strongly persuasive that the doctrine, beyond the recognized cases of husband and wife, parent and child, or master and servant, has no proper place in American jurisprudence. For the protection of the weak and unfortunate and the assertion of the duties of humanity, reliance must be had on the ancient and settled right to interfere to prevent a felony, with its well-guarded limitations that the injury to be prevented must be serious, must be imminent and not past, the quarrel in actual progress, and the necessity for the use of a deadly weapon clear of doubt. *Hale*, P. C. 484; *Kilpatrick v. Com.* 31 Pa. 198. Cases of killing without the use of a deadly weapon, and apparently lacking the element of presumed intent to kill, will be governed by the passage from *Foster* already cited.

The second assignment of error is to the portion of the charge defining "manslaughter," in which it was said: "Voluntary manslaughter is never attended by legal malice or depravity of heart, that condition or frame of mind, before spoken of, exhibiting wickedness of disposition, recklessness 17 L.R.A. (N.S.)

of consequences, or cruelty. Being sometimes a wilful act, as the term 'voluntary' denotes, it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty." As stated by the learned judge below in refusing a new trial: "It is contended that the vice in this definition of voluntary manslaughter is contained in the statement that 'it is necessary that the circumstances should take away every evidence of cruel depravity of heart or wanton cruelty;' and that this statement of the law puts too great a burden upon the defendant." That portion of the charge is exactly in the language of *Agnew, J.*, in *Com. v. Drum*, 58 Pa. 9. That charge, as is well known, was prepared by Judge Agnew with great care, and, before delivery, was submitted to the careful review of Chief Justice Thompson and other justices of this court. Though its language in places partakes of the sentimental style of the older books, it was based largely on *Russell on Crimes*, the most authoritative modern book on criminal law, and its substantial accuracy has never been challenged. On the contrary, it was intended as a precedent and guide in similar cases, and as such has been frequently approved by this court. The very passage now complained of was quoted to the jury by *Starrett, J.*, when presiding in the oyer and terminer of Allegheny, and was affirmed by this court. *Lynch v. Com.* 77 Pa. 205. It is too late now to subject it to mere verbal criticism.

The judgment is affirmed, and the record remitted to the court below for the purpose of execution.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON, Appt.,
v.
ELIZABETH FENN.

(47 Wash. 561, 92 Pac. 417.)

Bigamy — marriage — validity — violation of statutes.

A marriage by one of the parties to a divorce proceeding within the time prohibited by statute, which the statute expressly declares shall be void whether contracted within or without the state, is not void

Case Note. — Law governing validity of marriage.

The earlier cases on this subject are presented in the note to *Hills v. State*, 57 L.R.A. 155, which is supplemented by a case note to *Gabisso's Succession*, 11 L.R.A. (N.S.) 1082. In addition to the cases cited in those notes attention is called to the case of *Re Chace*, 26 R. I. 351, 69 L.R.A. 493, 58 Atl.

if contracted in a foreign country, by whose laws it is valid, after the party has acquired a domicile there; but it is invalid if the parties went to the foreign country for the purpose of evading the local law and with the expectation of returning to their former home.

(November 15, 1907.)

APPEAL by the State from a judgment of the Superior Court for Pierce County sustaining a demurrer to an information charging defendant with bigamy. Reversed.

The facts are stated in the opinion.

Messrs. H. G. Rowland, Robert M. Davis, and H. G. Fitch for the State.

978, holding that the marriage of a ward, solemnized in a sister state by the law of which it is valid, is not void because no license was procured with the consent of the guardian as required by the law of the ward's domicile (which was also the forum), nor because the law of the domicile and forum renders void all his contracts. The court said that, even if the failure to procure a license would have rendered the marriage void if solemnized in Rhode Island (*lex domicilii et fori*), it was nevertheless not so subversive of good morals, or so threatening to the fabric of society as to fall within the exception to the general rule that a marriage valid where celebrated is valid everywhere. While both parties in that case were domiciled in Rhode Island, and the marriage was celebrated in Massachusetts, the court states that, for aught that appears, the parties entered into the contract of marriage in the most perfect good faith and without any intention of evading the law of Rhode Island.

In *Sturgis v. Sturgis* (Or.) 15 L.R.A. (N.S.) 1034, 93 Pac. 696, a marriage celebrated in Washington, and valid by the law of that state, was held valid in Oregon, though the parties were domiciled in the latter state and resorted to Washington to celebrate the marriage in order to avoid the requirement of the law of Oregon as to the consent of the guardian of one of the parties, who was an infant. The decision appears to be referred to the general principle that a marriage valid where celebrated is valid everywhere; but the necessity of invoking that principle is not apparent, as the question in the case was as to the validity of the marriage, and it seems to be assumed that the marriage would not have been void, even if it had been celebrated in Oregon without the guardian's consent.

In the nature of the case, the question whether a law of the domicile and forum on the subject of marriage is expressive of such a public policy as will induce the courts of that jurisdiction to refuse to recognize a foreign marriage contrary to its terms, even though valid by the law of the place where celebrated, depends upon the nature and 17 L.R.A. (N.S.)

Messrs. Edward E. Cushman and Daniel Landon for respondent.

Rudkin, J., delivered the opinion of the court:

An information was filed against the defendant in the court below accusing her of the crime of bigamy. A demurrer to the information was sustained, and, the state refusing to plead further, judgment of dismissal was entered, from which the present appeal is prosecuted.

The information is in the usual form in such cases, and charges a crime, unless it contains matter which, if true, would constitute a defense to the action. The matter set forth in the information and relied on as a defense is this: The respondent was

purpose of the local law, and to some extent upon the local conditions, and is peculiarly a question which the courts of each state must answer for themselves. By referring to the note in 57 L.R.A. 169, it will be observed that there is a conflict of authority upon the question whether the courts of a state which has enacted a statute prohibiting the remarriage, during the life of the former spouse or a shorter period, of a person for whose misconduct a divorce has been granted, will recognize as valid the remarriage of such a person, occurring out of the state while he was still domiciled within the state. It will be noted that *Lanham v. Lanham*, post, 804, distinguishes in this respect a statute which, by way of penalty or punishment, prohibits the remarriages of the guilty party from a statute which imposes a restriction upon the marriage of both parties, whether innocent or guilty, regarding the latter as expressive of a public policy which should induce the courts of the forum to refuse to recognize the foreign marriage. A similar distinction was made in *McLennan v. McLennan*, 31 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pac. 802 (cited in the note in 57 L.R.A. 155). As applied to a case where, as in *STATE v. FENN*, the remarriage was celebrated, contrary to the provisions of the statute, before the expiration of the time for appeal from the decree of divorce, there would seem to be an additional reason for holding the statute applicable to a foreign marriage between parties domiciled at the forum, since the decree, even if technically a final one, might very properly be regarded, in applying the principles of comity, not fully to have dissolved the marriage relation until the expiration of the time for the appeal.

The decision in *Kresh v. Kresh*, 68 Misc. 461, 111 N. Y. Supp. 437, was merely to the effect that proof of the festivities usually attendant upon a "ritual" marriage in a foreign country was not sufficient to establish the marriage in the absence of proof of a compliance with the statutory requirements, where it appeared that the woman subsequently, in the courts of the foreign coun-

made in favor of the law of the domicile of the parties. But a statute declaring marriages void, regardless of where contracted, and regardless of the domicile of the parties, would be an anomaly, and so far reaching in its consequences that a court would feel constrained to limit its operation, if any other construction were permissible.

We are satisfied that the prohibition in question was directed solely against marriages within the state, or by persons domiciled within the state, but contracted in other states for the purpose of evading our laws; and that no other persons or marriages are included or contemplated. Within the above rule, the information before us does not contain matter which constitutes a defense, for it does not appear that the Victoria marriage was void. If the parties to the Victoria marriage had their domicile in this state at the time the marriage was contracted, and went to Victoria for the purpose of evading our laws and thereafter returning to this state, such marriage was null and void, and, much as we regret it, the prosecution must fail. If, on the other hand, the parties to the Victoria marriage were domiciled there at the time the marriage was contracted, such marriage does not fall within the prohibition of our statute, and is valid.

The judgment of the court below is therefore reversed, with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

Mount, Root, Dunbar, and Fullerton, JJ., concur. Hadley, Ch. J., and Crow, J., not sitting.

WISCONSIN SUPREME COURT.

SARAH A. LANHAM, Resp't.,

v.

ART LANHAM et al., Appts.,

(— Wis. —, 117 N. W. 787.)

Marriage — violation of statute — extra-territorial ceremony.

1. A legislative declaration that it shall not be lawful for a divorced person to marry again within a year from the date of the divorce declares a public policy which will prevent the recognition by the courts of the state of a marriage between its citizens who go to another state to avoid the provisions of the statute, and, after the ceremony, return to their former domicile.

Marriage — cohabitation — removal of disability.

2. Continued cohabitation by persons who

Note. — See note to preceding case as to law governing validity of marriage.
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contracted marriage in contravention of the statute forbidding marriage within a specified time after divorce, after the expiration of the specified time, will not establish a valid common-law marriage.

(Siebecker, J., dissents.)

(September 29, 1908.)

APPEAL by contestants from a judgment of the Circuit Court for Monroe County reversing a judgment of the County Court refusing to allow petitioner support out of the estate of James W. Lanham, deceased, as his widow. Reversed.

Statement by Winslow, Ch. J.:

The plaintiff applied to the county court of Monroe county for an allowance for her support out of the estate of James W. Lanham, deceased, claiming that she was the widow of said deceased. The application was contested, and denied in the county court; but, on appeal, that judgment was reversed, and an allowance granted, and from this judgment the heirs of Lanham appeal. The facts are few and simple. On and prior to the 15th day of September, 1905, the plaintiff was a resident of this state, and was the wife of one J. R. Sherman. On the day named she obtained a judgment of divorce from Mr. Sherman for the purpose of marrying the deceased, who was then a resident of Wisconsin and a man eighty-four years of age. After the divorce, both parties learned that the law of Wisconsin prohibited the plaintiff from marrying again until the expiration of one year from the divorce. For the purpose of avoiding the effect of the law, they went to Menomonee, Michigan, October 10, 1905, and were there married by a justice of the peace, and returned to Wisconsin on the following day. They immediately assumed the relations of husband and wife, and lived and cohabited together in Monroe county until Lanham's death, March 13, 1907. On March 8, 1907, the plaintiff made application to the county judge of Monroe county for a permit to marry Lanham; but he was then very ill, and no ceremony was ever performed. The circuit court concluded that there was a valid common-law marriage between the parties, resulting from their living and cohabiting together as man and wife after the expiration of one year from the date of the decree of divorce, and held that the plaintiff was the lawful widow of the deceased, and entitled to an allowance as such.

Messrs. Higbee & Higbee, for appellants:

A marriage which the local lawmaking power has declared shall not be allowed any validity, either in express terms or by necessary implication, is a well-recognized ex-

ception to the rule that a marriage valid where contracted is valid everywhere.

Sturgis v. Sturgis (Or.) 15 L.R.A. (N.S.) 1034, 93 Pac. 696; *Re Chace*, 26 R. I. 351, 69 L.R.A. 493, 58 Atl. 978; *Stull's Estate*, 183 Pa. 625, 39 L.R.A. 542, 63 Am. St. Rep. 776, 39 Atl. 16; *Pennegar v. State*, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; *Brook v. Brook*, 9 H. L. Cas. 193; *Sussex Peerage Case*, 11 Clark & F. 85; *Williams v. Oates*, 27 N. C. (5 Ired. L.) 535; *Georgia v. Tutty*, 7 L.R.A. 50, 41 Fed. 753; *Conn. v. Conn*, 2 Kan. App. 419, 42 Pac. 1006; *McLennan v. McLennan*, 31 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pac. 802; *Kruger v. Kruger*, 36 Nat. Corp. Rep. 442.

The legislature has declared against such a marriage on the ground of public policy.

Laws 1905, chap. 456, § 1; *Williams v. Williams*, 63 Wis. 58, 23 Am. Rep. 253, 23 N. W. 110; *Zahorka v. Geith*, 129 Wis. 505, 109 N. W. 552; *Story*, Conf. L. §§ 86, 87; *Wharton*, Conf. L. §§ 159-165B; *McLennan v. McLennan*, supra.

There was an entire absence of proof as to the law of Michigan; and in such case a court of this state must presume the law there to be the same as here.

Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; *MacCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707; *Hyde v. German Nat. Bank*, 115 Wis. 170, 91 N. W. 230; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *People v. Loomis*, 106 Mich. 260, 64 N. W. 18; *Com. v. Graham*, 157 Mass. 73, 16 L.R.A. 578, 34 Am. St. Rep. 255, 31 N. E. 706; *Jackson v. Jackson*, 82 Md. 17, 34 L.R.A. 776, 33 Atl. 317; *Com. v. Stevens*, 196 Mass. 280, 82 N. E. 33.

The relationship between these parties having been illegal in its inception, it must be held to have continued so, unless there is affirmative proof of subsequent marriage.

Drawdy v. Hesters, 130 Ga. 161, 15 L.R.A. (N.S.) 190, 60 S. E. 451; *Com. v. Stevens*, supra; *Hackett v. Potter*, 135 Mass. 349; *Thompson v. Thompson*, 114 Mass. 566.

Messrs. Masters, Graves, & Masters, for respondent:

A marriage is presumed to be valid, and the burden of establishing the contrary fact rests on the party who attacks it.

26 Cyc. Law & Proc. p. 877; 3 Elliott, Ev. § 2486; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232.

The burden of proving restrictions, in another state, upon the remarriage of divorced persons, is upon the person alleging them.

State v. Shattuck, 69 Vt. 403, 40 L.R.A. 428, 60 Am. St. Rep. 936, 38 Atl. 81; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Ward v. Morrison*, 25 Vt. 593; *Frame v. Thormann*, 102 Wis. 654, 79 N. W. 39. 17 L.R.A. (N.S.)

There must be an express declaration that a marriage consummated outside of the state is void; and no general statute declaring marriages void for incapacity of the parties has any application to marriages other than those consummated within the state of enactment.

Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; *Hills v. State*, 61 Neb. 589, 57 L.R.A. 155, 85 N. W. 830; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189; *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408; *State v. Shattuck*, supra; *State v. Richardson*, 72 Vt. 49, 47 Atl. 103; *Phillips v. Madrid*, 83 Me. 205, 12 L.R.A. 862, 23 Am. St. Rep. 770, 22 Atl. 114; *Fuller v. Fuller*, 40 Ala. 301; *State v. Bentley*, 75 Vt. 163, 53 Atl. 1068; *Sutton v. Warren*, 10 Met. 451; *Putnam v. Putnam*, 8 Pick. 433; *State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59; *Com. v. Hunt*, 4 Cush. 49; *Stack v. Stack*, 6 Dem. 280; *Re Chace*, 26 R. I. 351, 69 L.R.A. 493, 58 Atl. 978.

No more reason exists for giving the statute extraterritorial force, than any other legislative enactment forbidding the doing of an act.

Charles v. People, 1 N. Y. 180; *Sims v. Sims*, 75 N. Y. 466; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *Van Voorhis v. Brintnall*, supra; *Western Transp. & Coal Co. v. Kilderhouse*, 87 N. Y. 430; *Phillips v. Madrid*, supra.

A valid common-law marriage was entered into after the expiration of one year from the date of the divorce.

Williams v. Williams, 46 Wis. 475, 32 Am. Rep. 722, 1 N. W. 98; *Reaves v. Reaves*, 15 Okla. 240, 2 L.R.A. (N.S.) 353, 82 Pac. 490; *State v. Bittick*, 103 Mo. 183, 11 L.R.A. 587, 23 Am. St. Rep. 869, 15 S. W. 325; *State v. Zichfeld*, 23 Nev. 304, 34 L.R.A. 784, 62 Am. St. Rep. 800, 46 Pac. 802; *Farley v. Farley*, 94 Ala. 501, 33 Am. St. Rep. 141, 10 So. 646; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Collins v. Voorhees*, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054; *Hyde v. Hyde*, 3 Bradf. 509; *Donnelly v. Donnelly*, 8 B. Mon. 113; *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Adams v. Adams*, 57 Miss. 267; *Reading F. Ins. & T. Co's Appeal*, 57 Am. Rep. 457, note; *Chamberlain v. Chamberlain*, 68 N. J. Eq. 736, 3 L.R.A. (N.S.) 244, 111 Am. St. Rep. 658, 62 Atl. 380; *Schuchart v. Schuchart*, 61 Kan. 597, 50 L.R.A. 180, 78 Am. St. Rep. 342, 60 Pac. 311; *Petit v. Petit*, 45 Misc. 155, 91 N. Y. Supp. 979; *Eaton v. Eaton*, 66 Neb. 676, 60 L.R.A. 605, 92 N. W. 995; *Manning v. Spurck*, 199 Ill. 447, 65 N. E.

342; *Barker v. Valentine*, 125 Mich. 336, 51 L.R.A. 787, 84 Am. St. Rep. 578, 84 N. W. 297; *Re Schmidt*, 42 Misc. 463, 87 N. Y. Supp. 428; 1 Bishop, *Marr. Div. & Sep.* § 970; *University of Michigan v. McGuckin*, 62 Neb. 489, 57 L.R.A. 917, 87 N. W. 180; *Teter v. Teter*, 88 Ind. 494, 101 Ind. 129, 51 Am. Rep. 742; *Flanagan v. Flanagan*, 122 Mich. 386, 81 N. W. 258.

Winslow, Ch. J., delivered the opinion of the court:

Section 2330, Stat. 1898, as amended by chapter 456, p. 785, Laws of 1905, provides, among other things, that "it shall not be lawful for any person divorced from the bonds of matrimony by any court of this state to marry again within one year from the date of the entry of such judgment or decree, and the marriage of any divorced person solemnized within one year from the date of the entry of any such judgment or decree of divorce shall be null and void." A proviso to the section authorizes the circuit judge to grant permission to the divorced parties to remarry within the year, but this is of no moment here. The first question is whether the Michigan marriage was valid, notwithstanding the provisions of this law.

The general rule of law unquestionably is that a marriage valid where it is celebrated is valid everywhere. To this rule, however, there are two general exceptions, which are equally well recognized, namely: (1) Marriages which are deemed contrary to the law of nature as generally recognized by Christian civilized states; and (2) marriages which the lawmaking power of the forum has declared shall not be allowed validity on grounds of public policy. An exhaustive review of the many and somewhat conflicting authorities upon this general subject will be found in a note to *Hills v. State* in 57 L.R.A., at page 155. The first of these exceptions covers polygamous and incestuous marriages, and has no application here; and the question presented is whether the case comes within the second exception.

A state undoubtedly has the power to declare what marriages between its own citizens shall not be recognized as valid in its courts; and it also has the power to declare that marriages between its own citizens contrary to its established public policy shall have no validity in its courts, even though they may be celebrated in other states, under whose laws they would ordinarily be valid. In this sense, at least, it has power to give extraterritorial effect to its laws. The intention to give such effect must, however, be quite clear. So the question must be, in the present case, whether our legislature, by the act quoted, declared a public policy, and clearly indicated the intention that the law 17 L.R.A. (N.S.)

was to apply to its citizens wherever they may be at the time of their marriage. To our minds there can be no doubt that the law was intended to express a public policy. There have been many laws in other states providing that the guilty party in a divorce action shall not remarry for a term of years, or for life, and these laws have generally been regarded merely as intended to regulate the conduct of the divorced party within the state, and not as intended to follow him to another jurisdiction and prevent a marriage which would be lawful there; in other words, they impose a penalty local only in its effect. Under this construction, the remarriage of such guilty party in another state has generally been held valid, notwithstanding the prohibition of the local statute. Of this class are the cases of *Frame v. Thormann*, 102 Wis. 654, 79 N. W. 39, *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, and *State v. Shattuck*, 69 Vt. 403, 40 L.R.A. 428, 60 Am. St. Rep. 936, 38 Atl. 81, and others which might be cited.

It is very clear, however, that the statute under consideration is in no sense a penal law. It imposes a restriction upon the remarriage of both parties, whether innocent or guilty. Upon no reasonable ground can this general restriction be explained, except upon the ground that the legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages. The inference is unmistakable that the legislature recognized the fact that the sacredness of marriage and the stability of the marriage tie lie at the very foundation of Christian civilization and social order; that divorce, while at times necessary, should not be made easy, nor should inducement be held out to procure it; that one of the frequent causes of marital disagreement and divorce actions is the desire on the part of one of the parties to marry another; that, if there be liberty to immediately remarry, an inducement is thus offered to those who have become tired of one union, not only to become faithless to their marriage vows, but to collusively procure the severance of that union under the forms of law for the purpose of experimenting with another partner, and perhaps yet another, thus accomplishing what may be called progressive polygamy; and, finally, that this means destruction of the home and debasement of public morals. In a word, the intent of the law plainly is to remove one of the most frequent inducing causes for the bringing of divorce actions. This means a declaration of public policy, or it means nothing. It means that the legislature regarded frequent and easy divorce as against good mor-

als, and that it proposed, not to punish the guilty party, but to remove an inducement to frequent divorce.

To say that the legislature intended such a law to apply only while the parties are within the boundaries of the state, and that it contemplated that, by crossing the state line, its citizens could successfully nullify its terms, is to make the act essentially useless and impotent, and ascribe practical imbecility to the lawmaking power. A construction which produces such an effect should not be given it, unless the terms of the act make it necessary. The prohibitory terms are broad and sweeping; they declare, not only that it shall be unlawful for divorced persons to marry again within the year, but that any such marriage shall be null and void. There is no limitation as to the place of the pretended marriage in express terms, nor is language used from which such a limitation can naturally be implied. It seems unquestionably intended to control the conduct of the residents of the state, whether they be within or outside of its boundaries. Such being, in our opinion, the evident and clearly expressed intent of the legislature, we hold that, when persons domiciled in this state, and who are subject to the provisions of the law, leave the state for the purpose of evading those provisions, and go through the ceremony of marriage in another state, and return to their domicile, such pretended marriage is within the provisions of the law, and will not be recognized by the courts of this state. Further than this we are not required to go. This view is sustained by the following cases: *Brook v. Brook*, 9 H. L. Cas. 193; *Sussex Peerage Case*, 11 Clark & F. 85; *Georgia v. Tutty* (C. C.) 7 L.R.A. 50, 41 Fed. 753; *Pennegar v. State*, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; *McLennan v. McLennan*, 31 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pa. 802; *Stull's Estate*, 183 Pa. 625, 39 L.R.A. 542, 63 Am. St. Rep. 776, 39 Atl. 16; *Kruger v. Kruger* (Ill. Super. Ct.) 36 Nat. Corp. Rep. 442.

Another view of the question, leading to the same result, has been suggested to our minds, which will be stated. The statute cited is an integral part of the divorce law of this state, and in legal effect enters into every judgment of divorce. This being so, must not any judgment of divorce be construed as containing an inhibition upon the parties, rendering them incapable of legal marriage within a year, which must be given "full faith and credit" in all other states, under § 1, art. 4, of the Constitution of the United States? And, if it be entitled to receive such faith and credit, how can a marriage within another state be considered

valid anywhere? Are not the parties incapable of contracting such a marriage anywhere, for the reason that they have not yet been relieved of their incapacity to marry another, resulting from their former marriage, or, in other words, for the reason that their divorce is not complete until the expiration of the year? We suggest these questions, without definitely expressing an opinion upon them or making them a ground of decision.

The Michigan marriage being held void, the question recurs whether the finding that there was a common-law marriage, resulting from the fact that the parties lived and cohabited together as man and wife for about six months, can be sustained. This must be answered in the negative. This court has held that, where cohabitation is illegal in its inception, the relation between the parties will not be transformed into marriage by evidence of continued cohabitation, or by any evidence which falls short of establishing either directly or circumstantially the fact of an actual contract of marriage after the bar has been removed. *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Spencer v. Pollock*, 83 Wis. 215, 17 L.R.A. 848, 53 N. W. 490; *Thompson v. Nims*, 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502. There was no such evidence here. At most, the evidence only shows that the parties continued to live together after the expiration of the year in the manner of husband and wife, and talked about a remarriage, which never took place on account of the husband's illness and death. The evidence in fact rebuts any inference of remarriage, rather than supports it.

Judgment reversed, and action remanded to the Circuit Court, with directions to affirm the judgment of the County Court.

Siebecker, J., dissents.

WEST VIRGINIA SUPREME COURT OF APPEALS.

ACME FOOD COMPANY

v.

J. B. OLDER, Plff. in Err.

(— W. Va. —, 61 S. E. 235.)

Pleading — note — allegation of promise — sufficiency.

1. The clause, "whereby he promised and agreed, for a valuable consideration, . . . to pay," etc., in a declaration in assumpsit on a promissory note, is a sufficient averment of a promise, and is not merely descriptive of the note. It is affirmative and

Headnotes by **POFFENBARGER, F.**

narrative as well as descriptive, and yet not violative of the rule against duplicity.

Same — sale — indebitatus count.

2. To sustain an action for the purchase price of goods completely sold so as to pass the title, but not delivered, a common *indebitatus* count for goods bargained and sold is appropriate.

Sale — action — title.

3. Neither an action for goods bargained and sold, nor for goods sold and delivered, will lie, if the title to the property has not passed to the vendee.

Damages — breach of executory sale.

4. If an executory contract of sale has been broken by the vendee before the title has passed, the measure of damages, in an action by the vendor, is the difference between the contract price and the value of the property.

Case Note. — Right of seller, upon breach of an executory contract, to maintain an action for the contract price.

This note is limited to that class of cases which deal directly with the question whether a seller, upon the breach of an executory contract, may maintain an action for the contract price. It, however, does not include those cases dealing with the question of the vendor's remedy upon the vendee's refusal to take an article manufactured for him, these cases being gathered in a case note to *Gardner v. Deeds*, 4 L.R.A.(N.S.) 740; nor have those cases been included in which the sole question involved was one merely of pleading. Cases which involved the breach of a contract, but in which, by its terms, the title was to remain in the vendor until the payment of the contract price,—in other words, those that pass on the question as to the remedy of a conditional vendor upon the buyer's refusal to accept,—have also been excluded from this note. Cases of that nature may be found in a subject note to *National Cash Register Co. v. Hill*, 68 L.R.A. 100.

It seems to be generally conceded that, in the case of the breach of an "executed" contract, the seller has three remedies, *viz.*: To store the property for the vendee and sue for the purchase price; to sell it as agent for the vendee and recover any deficiency; or to keep the property, and recover the difference between the contract price and the market value. It is also further held, or conceded, by practically all the cases on the subject, that, in case of the breach of an "executory" contract, whether he has any other remedy or not, a vendor may, in the event of the refusal to accept the goods, if he so elects, maintain an action for damages, and, as in the third remedy mentioned applicable to executed contracts, may recover the difference between the contract price and the market value. The question here under consideration, however, is whether that remedy is exclusive, or whether a seller under an executory con-

Payment — purchase-price note — action.

5. In the absence of an agreement to the contrary, a promissory note given for the purchase money of property is not payment thereof; but the contract constitutes a valuable consideration for the note, and an action may be maintained thereon, even though the property was never delivered, and the title thereto never passed.

Action — purchase-price note — failure of consideration.

6. In an action between the maker and payee, on a negotiable note based upon such consideration, after maturity, the defendant may defeat or limit the amount of the recovery thereon, by proving, in the one case, a total unexcused nonperformance, on the part of the vendor, of his contract to deliver the property, or loss, on the part of the vendee, of the benefit of the contract,

tract may maintain, at his election, as in case of executed contracts, an action for the contract price. It is obvious that cases which merely declare that the measure of damages for breach of such a contract is the difference between the contract price and the market price, without expressly or impliedly holding that that measure of damages is exclusive, are of no value on this question.

A goodly number of cases, however, do exist which have expressly passed on this subject, and they almost unanimously have held, with *ACME FOOD CO. v. OLDER*, that, in case of a breach of an executory contract for the sale of goods, the seller cannot recover the contract price, but his remedy is limited to an action for damages, being allowed, as above stated, to recover the difference between the contract price and the market value at the place and time of delivery.

Thus, in *John Deere Plow Co. v. Gorman*, 9 Kan. App. 675, 59 Pac. 177, it was held that an action to recover the contract price of goods cannot be maintained when the contract is executory.

So, in *Singer Mfg. Co. v. Cheney*, 21 Ky. L. Rep. 550, 51 S. W. 813, it was held that, where the buyer of logs had the right to inspect them when tendered, and to reject such as did not meet the requirements of the contract, the title did not pass until the logs were accepted; and therefore the measure of damages for the buyer's refusal to take and pay for the logs was not the contract price, but the difference between the price agreed to be paid for the logs at the time and place of delivery and the sum for which the seller could, by reasonable effort, have sold them after the buyer failed to take them.

In *American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705, it was held that, where the contract for the sale of personality is executory, and the title and possession still remain in the seller, his remedy against the buyer who unlawfully refuses to accept and pay for the goods is

occasioned by want of title in the vendor, and, in the other, refusal of the vendee to accept the property, and notice of his intention not to do so, given before the title passed; all on the theory of failure of consideration in whole or in part.

Same — measure of recovery.

7. In the latter case, the recovery is limited to the difference between the contract price and the value of the property at the time and place at which it was when the contract was broken.

Contract — failure to read — fraud.

8. A man is not permitted to defeat, or be relieved from, the obligation of a written contract, merely by showing he signed it without having read it and in ignorance of its contents; but he is at liberty to show that, by the artifice, deception, and fraud of the other party or his agent, he was induced to sign it without having read it, and

upon the assurance, and under the belief, so superinduced by the other party, that it was a paper wholly different in character from the one signed.

(March 31, 1908.)

ERROR to the Circuit Court for Putnam County to review a judgment in plaintiff's favor in an action in assumpsit to recover the purchase price alleged to be due on a contract of sale, the declaration containing a special count on a promissory note given therefor. Reversed.

The facts are stated in the opinion.

Messrs. Jerome Dudding and S. S. Green, for plaintiff in error:

When a party elects the form of action he intends to bring, the declaration filed

an action of assumpsit on a special count to recover damages for a breach of contract; and the measure of his damages is the difference between the contract price of the goods and the net price which they produce at a resale fairly made, after deducting all expenses incurred in taking care of the goods and selling them, and not the contract price of the goods.

In *McCormick Harvesting Mach. Co. v. Balfany*, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10, where an action was brought to recover the price of a harvester and binder the title to which, as the court held, never passed to the vendee, it was said: "Before a seller can maintain an action for the agreed price of a chattel there must be such a delivery, actual or constructive, as will pass the title and vest the ownership of the property in the purchaser. If the possession and the title remain in the seller, and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained."

Other cases, in addition to those cited in *ACME FOOD CO. v. OLDER*, recognizing this rule, are *Stewart v. Scott*, 54 Ark. 187, 15 S. W. 463; *Burnham v. Roberts*, 70 Ill. 19; *Brand v. Henderson*, 107 Ill. 141; *Thorn v. Danzinger*, 50 Ill. App. 306; *Pittsburgh, C. & St. L. R. Co. v. Heck*, 50 Ind. 303, 19 Am. Rep. 713; *Dolman v. Studebaker*, 52 Ind. 286; *Indianapolis, P. & C. R. Co. v. Maguire*, 62 Ind. 140; *Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. 348; *Hamilton v. Finnegan*, 117 Iowa, 623, 91 N. W. 1039; *Williams v. Jones*, 1 Bush, 621; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172; *Restad v. Engemoen*, 65 Minn. 148, 67 N. W. 1146; *Sherman Nursery Co. v. Aughenbaugh*, 93 Minn. 201, 100 N. W. 1101; *Funke v. Allen*, 54 Neb. 407, 69 Am. St. Rep. 716, 74 N. W. 832; *Unexcelled Fire-Works Co. v. Polites*, 130 Pa. 536, 17 Am. St. Rep. 788, 18 Atl. 1058; *Jones v. Jennings Bros.* 168 Pa. 493, 32 Atl. 51; *Hooper v. Bromley Bros. Carpet Co.* 11 Pa. Super. Ct. 634; *Newport & S. Valley R. Co. v. Seager*, 17 L.R.A. (N.S.)

19 Pa. Co. Ct. 465; *Brown v. McCaffrey*, 40 W. N. C. 69; *Adler v. Kiber*, 5 Tex. Civ. App. 415, 27 S. W. 23; *Ganson v. Madigan*, 13 Wis. 68; *Hemmingway Mfg. Co. v. Council Bluffs Canning Co.* 62 Fed. 897; *Star Brewery Co. v. Horst*, 58 C. C. A. 362, 120 Fed. 246; *Boswell v. Kilborn*, 15 Moore, P. C. C. 309; *Atkinson v. Bell*, 8 Barn. & C. 277.

As was well pointed out in *ACME FOOD CO. v. OLDER* by a review of a long list of authorities, practically every case in which, upon the breach of the contract, the seller was permitted to recover the contract price, although the goods had not been delivered, was one in which the conditions on the part of the seller were fully performed before the breach, making it, in effect, an executed contract, or was one in which the contract was for the special manufacture of some article or articles, cases of the latter kind being regarded as exceptions to the general rule as to executory contracts.

Among this class of cases are the New York authorities, many of which would seem to imply that, even on the breach of an executory contract, the seller could, if he so chose, recover the contract price. On examination of the cases, however, not one has been found which discussed the question and expressly held that, upon the breach of an executory contract, the seller may recover the contract price.

A case typical of this class is *Isaacs v. Terry & T. Co.* 125 App. Div. 532, 109 N. Y. Supp. 792, where the court, in distinguishing between the breach of an ordinary executory contract and a contract for the sale of goods to be manufactured, said, *obiter*: "The general rule is well settled that, upon the breach of an executory contract for the sale of a chattel, the vendor has three remedies, viz.: To store the property for the vendee and sue for the purchase price; to sell it as agent for the vendee and recover any deficiency; or to keep the property and recover the difference between the contract price and the market value." It will be noticed, however, that the court, in this case, evidently did not have in mind the dis-

must conform to the rules governing in the form of action adopted.

Grubbs v. National L. Maturity Ins. Co. 94 Va. 589, 27 S. E. 464; 1 Barton, Law Pr. 310.

The special count is merely descriptive.

2 Tucker's Com. 146; *Cooke v. Simms*, 2 Call (Va.) 39; *Wooddy v. Flournoy*, 6 Munf. 509; *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571; *Waid v. Dixon*, 55 W. Va. 191, 46 S. E. 918.

If the material facts are doubtful, and a

distinction between an executed contract and an executory contract, for it cited therefor *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415, a case held in *ACME FOOD CO. v. OLDER* to involve the breach of an executed contract.

In addition to many others which might be cited, and to those reviewed in *ACME FOOD CO. v. OLDER* as really involving executed rather than executory contracts, are *Campbell v. Woods*, 122 Mo. App. 719, 99 S. W. 468, where, upon tender of certain stock sold, the vendee refused to accept, and it was held that the measure of damages was the contract price, and not the difference between the market value and the contract price; *Sour Lake Townsite Co. v. B. Deutser Furniture Co.* 39 Tex. Civ. App. 86, 94 S. W. 188, where, upon tender of certain furniture bought, the buyer refused to accept.

In *Cowan v. De Hart*, 84 N. Y. Supp. 576, however, where a person was guilty of a breach of contract to purchase stock at a certain time and price and it was held that, if the seller so elects, he may recover as his measure of damages the agreed price of the stock, it would seem that the contract was executory; but the court did not have in mind the distinction between executory and executed contracts.

In Georgia, it seems as if, per statutory provision, a seller may, even upon the breach of an executory contract, have his choice of the three remedies as above stated. This was clearly recognized in *Rounsaville v. Leonard Mfg. Co.* 127 Ga. 735, 56 S. E. 1030, where it was held, however, that, upon the breach of an executory contract for the sale of goods, the seller cannot deliver the goods to a common carrier, consigned to the buyer, instead of storing them, and, having done so, treat the contract as executed on his part by suing the buyer for the purchase price of goods sold and delivered. To the same effect is *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 59 L.R.A. 122, 94 Am. St. 112, 42 S. E. 378.

There is still another class of cases which, at first view, would seem to hold, at least indirectly, that in the case of the breach of an executory contract the seller may recover the contract price. This class of cases consists of those in which the seller sold the goods and was permitted to recover the difference between the contract

price and what was received for them at the sale, if fairly made. It will be noted that this remedy is the same as the second remedy mentioned as open to the seller under an executed contract, and in effect amounts to a recovery of the contract price.

This remedy as applied to executory contracts, however, is not inconsistent with the rule above stated, that a seller, upon the breach of an executory contract, cannot recover the contract price, but is limited to a recovery of the difference between the contract price and the market value, for these cases have evidently proceeded upon the theory that the price of the goods received at a sale fairly made is sufficient evidence of the market value of the goods, thus, in effect, applying again the general rule which, as above stated, is the only one open to a seller under an executory contract.

Among this class of cases is *Hewes v. Germain Fruit Co.* 106 Cal. 441, 39 Pac. 853, where the seller, upon the breach of an executory contract for the sale of raisins, sold them at private sale and recovered from the buyer the difference between what he received for them and the contract price.

So, in *Fox v. Woods*, 96 N. Y. Supp. 117, it was held that, in an action for breach of a contract to purchase a lease of a house and furniture therein, the plaintiff was entitled to recover the difference between the contract price of the furniture and what she was able to obtain therefor on a resale fairly conducted, and the pro rata amount of rent she was compelled to pay less any amount she received for the rent of rooms in the house during such period, together with certain expenses to which she was placed in packing the articles in the house.

In *Scribner v. Schenkel*, 128 Cal. 250, 60 Pac. 860, where a buyer of hogs, after accepting a portion of them under the contract, declined to pay for any more of them, it was held that the seller might, without tender of delivery, sell the remainder of the hogs at the actual market price, and recover from the buyer as the measure of damages for a breach of his contract the difference between the contract price of the undelivered hogs and the price actually received in the market. To the same effect is *Levis v. Royal Packing & Drying Co.* 1 Cal. App. 241, 81 Pac. 1086 (refusal, after part delivery, to pay for rest of prunes contracted for).

Behrman v. Newton, 103 Ala. 525, 15 So. 838; *White v. Wolf*, 185 Pa. 369, 39 Atl. 1011; 3 Am. & Eng. Enc. Law, p. 904.

Messrs. Leo Loeb and Andrew S. Alexander, for defendant in error:

The court commits no reversible error in instructing the jury to find for a party in whose favor the evidence plainly and decidedly predominates.

Williamson v. Nigh, 58 W. Va. 629, 53 S. E. 124; *Cobb v. Glenn Boom & Lumber Co.* 57 W. Va. 49, 110 Am. St. Rep. 734, 49 S. E. 1005; *White v. L. Hoster Brewing Co.* 51 W. Va. 259, 41 S. E. 180; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Ketterman v. Dry Fork R. Co.* 48 W. Va. 606, 37 S. E. 683; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L.R.A. 148, 31 S. E. 993; 6 Enc. Pl. & Pr. p. 678; *Gentry v. Singleton*, 63 C. C. A. 231, 128 Fed. 679; *Boston & M. R. Co. v. Sargent*, 72 N. H. 455, 57 Atl. 688; *Arnold v. Prout*, 51 N. H. 587; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; *Ketchum v. Wilcox*, 5 Kan. App. 881, Appx., 48 Pac. 446; *Bagley v. Cleveland Rolling Mill Co.* 22 Blatchf. 342, 21 Fed. 159; *Peet v. Dakota F. & M. Ins. Co.* 1 S. D. 462, 47 N. W. 532; *Hartman v. Alden*, 34 N. J. L. 518; *McCleneghan v. Norton*, 4 Neb. (Unof.) 209, 93 N. W. 695; *Star Wagon Co. v. Matthiessen*, 3 Dak. 233, 14 N. W. 107; *McCormick v. Holmes*, 41 Kan. 265, 21 Pac. 108.

Fraud is never presumed, and, where it is alleged, the facts sustaining it must be clearly made out.

Oberlin College v. Blair, 45 W. Va. 812, 32 S. E. 203; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560; *Knott v. Seamands*, 25 W. Va. 99; *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838, 31 S. E. 960; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Clay v. Deskins*, 36 W. Va. 350, 15 S. E. 85; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Calwell v. Caperton*, 27 W. Va. 397; *Hale v. West Virginia Oil & Oil Land Co.* 11 W. Va. 229.

Poffenbarger, P., delivered the opinion of the court:

The Acme Food Company obtained a judgment against J. B. Older, in the circuit court of Putnam county, for \$425.45, the amount of a verdict rendered by a jury by direction of the court, and of this judgment Older complains, assigning a number of errors.

The court overruled his demurrer to the declaration and each count thereof. The sufficiency in law of the common counts is admitted, but there was a special count on 17 L.R.A. (N.S.)

a promissory note which the attorneys for the plaintiff in error say was clearly bad. It alleges that the defendant "made, executed, and delivered to the plaintiff a certain promissory note . . . whereby he promised and agreed, for value received, as acknowledged and set out on the face of said note, to pay to plaintiff," etc., and then avers nonpayment thereof after the day when the same became due. Upon the authority of *Cooke v. Simms*, 2 Call (Va.) 35; *Woody v. Flournoy*, 6 Munf. (Va.) 506, and *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571, it is charged that this count does not allege a promise or undertaking to pay the amount named in the note; the clause, "whereby he promised and agreed" is said to be merely descriptive of the note. If it amounted to no more than a participial phrase, using the word "promising," as in the fourth count of the declaration in the case of *Cooke v. Simms*, it would be insufficient, nor is there any other clause or phrase in the count that would supply the omission. After the common counts in the preceding part of the declaration, a promise in consideration of the indebtedness stated in the common counts is averred; but neither in the special count, nor after it, is there such an averment, unless the phrase above quoted is such. In the clause assigning breaches of the undertaking there is a recital in which reference is made to the promises and undertakings set out in the several counts, but no averment of a promise. However, we think the language above quoted from the declaration is sufficient. The word "whereby" is grammatically and logically equivalent to the words "and by it," so that it has the same effect as if the pleader had said the defendant had made his note and, by it, promised and agreed to pay, etc. It is undoubtedly descriptive of the note, but it is also affirmative and narrative of the legal effect thereof, or rather of the act of the defendant in making the note. It clearly performs a double function, and yet it does not subject the count to the rule against duplicity, for the descriptive effect is subsidiary to, and included in, the statement or narration respecting the act of the defendant. The descriptive function is really a necessary one. It specifies the means by which the promise was made.

Two of the common counts are for goods bargained and sold, not sold and delivered, and there is rather a query as to whether there can be a common *indebitatus* count for goods sold, but not delivered. Chitty's Pleading, 11th Am. ed. 340, says: "In general, the consideration must have been executed, not executory." Volume 2 of the same work, at page 57, prescribes a form of common count for goods bargained and sold.

Lord Eldon indicated the distinction between the two forms of declaring in *Ex parte M'Gae*, 19 Ves. Jr. 607, 609. There may be an executed contract, passing title without delivery of possession, as in the case of the retention of a seller's lien. There, a count for goods sold and delivered could not be maintained, but one for goods bargained and sold could be, for the contract is complete and the seller entitled to recover the price, although the goods have not been delivered. It is an executed contract. *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432. See also *Simmons v. Swift*, 5 Barn. & C. 857; *Rhode v. Thwaites*, 6 Barn. & C. 388; *Atkinson v. Bell*, 8 Barn. & C. 277.

Most of the other errors assigned involve consideration of the evidence, and the attorneys for the defendant in error strenuously insist that it is neither incorporated into, nor identified by, the bills of exception. Bill of exception No. 1, taken for the purpose of making the evidence a part of the record, is a skeleton bill. In this, under the heading, "Plaintiff's Evidence," there are six numbered paragraphs, purporting to identify the documentary and oral evidence introduced by the plaintiff. The first clause calls for "Exhibit J. B. O. Ex. 1," describing it as a paper writing called "order blank and note," and marked as aforesaid, and directs insertion thereof. No paper so marked is found in the record, but a paper called an order blank and note by the attorney in the examination of the witness for the plaintiff, but which is, in fact, an order and a note, the note sued on, is found, and a witness for the plaintiff says it is marked "J. B. O. Ex. 1." The second calls for a paper writing marked "G. S. Ex. A," with the evidence of George H. Simpson and directs insertion thereof. A paper is found marked as indicated, and the testimony of Simpson refers to it. The third calls for a paper writing marked "Ex. Z," with the evidence of George H. Simpson, and a paper so marked is found in the record. The fourth calls for a paper writing called "Ex. E," letter of J. B. Older, August 20th, addressed to Acme Food Company. Just such a letter, so marked, is found. No. 5 directs the insertion of the deposition of J. W. Calland with the exhibits filed therewith, and such a deposition is found in the certificate of the stenographer. No. 6 directs the insertion of the testimony of J. B. Older and George H. Simpson, taken by the stenographer in shorthand and written out in longhand by her, and her certificate shows such testimony. Under the heading, "Defendant's Evidence," similar directions are given, and all the papers and evidence directed to be inserted are found in the cer-

tificate of Ethel L. Vicroy, stenographer. She is named in the bill of exceptions as the stenographer. The identification of the documents and testimony is clear and complete. There is not the slightest uncertainty as to anything. They were not, in fact, inserted in the bill. The clerk certifies the skeleton bill, and, along with it, the stenographer's certificate, in which the oral testimony is all set out, accompanied by the exhibits, means for identifying which are found in the descriptions given by the witnesses and the marks found on the papers themselves, corresponding to the "earmarks," given in the skeleton bill. Though not physically incorporated in the bill of exceptions, they are clearly in it and a part of it in a legal sense.

The defendant pleaded nonassumpsit and filed two special pleas. By the first special plea he averred fraud in the procurement of the note, and, by the second, denied execution thereof. The material facts shown by the evidence are as follows: The plaintiff was a manufacturer and dealer in poultry and animal food at Chicago, Illinois. On the 8th day of August, 1904, their salesman, J. W. Calland, obtained from Older, at the city of Charleston, his written order on a printed form for their products, amounting to \$402.50. At the bottom of the order, and above his signature, there was the following memorandum and note: "To be shipped Sept. 1st, 4 per cent discount if paid by Aug. 23. One hundred and twenty days after date, for value received, I, we, or either of us, promise to pay to Acme Food Co., or order, four hundred and two ———— dollars, at Acme Food Co.'s office, Chicago, Ill., with interest after maturity until paid." Below the note there was a printed guarantee of the goods sold by the plaintiff. At the same time, Calland gave to Older a paper called "Shipping directions," at the heading of which there was written or printed this direction: "These shipping instructions must be filled out complete and attached to all orders and notes." It was directed to the Acme Food Company, and contained blanks for the name of the consignee, his address, and sizes of packages of the different kinds of food, with blanks for numbers of packages and prices. Calland filled in Older's name and his address, and inserted some of the quantities to be shipped, and then wrote below the order the following: "Terms ninety days. An extension of time will be given until sold." Calland admits the execution and delivery of this paper, but says it was delivered after the order and note were signed by Older. Older says it was delivered at the same time and was a part of the same transaction. Older further says

he did not read the order and note, but that Calland read to him all of it except the note, and that he, under the belief that it had been truly read to him, signed it, under the impression that it was merely an order for goods. On the other hand, Calland says Older read it himself before he signed it.

On the 16th day of August, 1904, the plaintiff wrote the defendant the following letter:

August 16, '04.

J. B. Older, Esq.,
Confidence, W. Va.

Dear Sir:—

We are in receipt of your order of August 8th, for one case of Acme Poultry Food, 100 lbs. in 10-lb. pails, and 6,000 lbs. of Acme Food, which you request us to ship to Reed House, West Virginia, under date of Sept. 1st. Wish to advise we have manufactured, marked, and set aside these goods in our warehouse, and the same will be shipped you on the date specified, and we have accepted of your note bearing date of Aug. 8, '04, for the amount of \$402.50, due one hundred and twenty days after date. Thanking you for the order, and with kind regards, we are,

Yours very truly,
Acme Food Company.

On the 20th of August, Older replied as follows:

Confidence, W. Va., Aug. 20, 1904.
Acme Food Co.,
Chicago, Ill.

Dear Sir:—

I have reconsidered the matter in regard to the amt. of stock food to be shipped to me. I think (1,000) one thousand pounds will be all that I can handle at first. I live 7 miles from the R. R. and have no storage room and cannot get any. Also I think that is too large a quantity to be disposed of in this locality. That is the packages are too large to introduce this food at first to each individual. If you wish you can send me one thousand pounds on the same terms as agreement with agent. If you prefer not to send this amount you need not send any, as I do not deem it prudent to send as much as 3 tons, for I do not believe that I can dispose of that amt. this fall.

J. B. Older.

On the 26th of August, 1904, the goods were shipped, and, with the bill of lading, the consignor inclosed the following printed notice: "We desire to call your attention to the liberal discount which is offered for cash, and we know that you will find it to 17 L.R.A. (N.S.)

your advantage to avail yourself of this discount as it will, in the majority of cases, equal the freight. In other words, it is equal to an annual interest of from 10 to 15 per cent. In extending this credit, unusual time has been given, and this credit has been granted with the understanding that the obligation will be met promptly at maturity. Therefore, no extension will be granted, but, on the other hand, the amount is to be met upon the date specified. Please do not write for extension, but if you are unable to avail yourself of the cash discount, arrange your business whereby this bill shall be paid upon maturity."

After the receipt of this, Older wrote the following letters:

Winfield, Putnam Co., West Va.,
Sept. 8, 1904.

Acme Food Co.,
Chicago, Ill.

Gentlemen:—

Your letter of Aug. 16th informing me of the receipt of my order of Poultry Food was received. I replied to that letter telling you not to send so much, and to not send over 1,000 lbs. You now send me 6,000 lbs. I positively refuse to accept the goods, as you have utterly failed to comply with your contract with me, as made by your agent J. W. Calland. The agent agreed that goods were not to be paid for until sold.

Very truly,
J. B. Older. (Pr. Dudding.)

Winfield, Putnam Co., West Va.,
Sept. 19, 1904.

Acme Food Co.,
Chicago, Ill.

Gentlemen:—

I have your letter of the 15th, inst., relating to "Acme Food." I am willing to comply with my contract with your salesman, J. W. Calland, which contract was the goods should be paid for when sold, and he to assist me in selling,—that is he, Calland, to come here to the county, travel with me, and appoint agents to sell the stuff, I to do the collecting. As soon as this is done, or your company makes this part of the agreement good, I will receive the goods; but not otherwise.

Very truly yours,
J. B. Older. (Pr. Dudding.)

The inquiry as to whether, in this state of the case, the court could properly direct a verdict for the plaintiff, renders necessary the ascertainment of certain legal principles relating to the remedies and measure of relief for breach of a contract of sale of personal property. The trial court must have assumed either that the note sued on was a

contract, separate and distinct in all respects from that of the sale of the goods, or that the order for the goods, accepted by the seller, constituted a contract of sale under which the title to the goods passed, or that the contract was executory, and, though title did not then pass, the tender of delivery entitled the seller to the same remedy and relief as if the contract had been an executed one. If the first of these assumptions is correct, the special plea No. 2, denying under oath the making, execution, and delivery of the note, raised a vital issue which should have gone to the jury, as will be more clearly indicated in a subsequent portion of this opinion. But, if the other assumptions be true, this would make no practical difference, for the ordering of the goods is not denied; on the contrary, it is admitted. Although the note may not have been executed, the plaintiff would be entitled to a verdict for the purchase price of the goods, which amounts to the same thing; and the error in directing the verdict was harmless. Hence, the necessity of determining whether the sale was executory or executed, and, if executory, whether the subsequent tender of the goods, made by the plaintiff, gave it the right to sue for and recover the purchase price, or only damages for the breach of the contract on the part of the buyer in revoking the order before delivery and refusing to accept the goods, on the assumption that the jury may find he did countermand it.

It is important, also, to observe and remember that an executory contract, under which the title does not pass until the seller has done certain things, by way of preparation of the subject-matter of the contract for delivery, or the identification thereof, or the performance of a condition precedent, such as putting it on board the cars for shipment, or depositing it in a specified place from which the purchaser is to take it, may become executed by the performance of all these things before the purchaser has dissented from, or renounced, or repudiated, his contract, or given notice that he will not accept. In cases of this kind, the measure of relief ought to be, and is, the same as in the case of an executed contract of sale. This conclusion is reconcilable to legal principles. By the executory contract of purchase, the buyer agrees to take the property. By this agreement, he makes himself liable in damages in the event he fails to perform. From this liability, he cannot escape by refusing to accept the property when tendered. Moreover, he has, for a valuable consideration, made a standing offer to accept, which is binding upon him. This offer he cannot rightfully withdraw, but, unlike a contract for the lease

or sale of real estate, it is incapable of compulsory specific performance. Therefore, if, before the purchaser under an executory contract of sale repudiates it or gives notice of his intention not to accept, the seller performs all the antecedent things stipulated to be done on his part, he thereby accepts and takes advantage of the standing offer of acceptance made by the purchaser, and completely closes the executory contract and makes it an executed one, passing the title into the purchaser. Then he may clearly sue for the purchase price. The property has become that of the purchaser, who owes the seller the purchase money, a debt pure and simple, the amount whereof is fixed by the contract, and is not merely liable for damages for the breach of a contract. In such case, it is not an action for damages for refusing to accept the goods. The title has been accepted, whether the goods are actually in the buyer's possession or not. On the performance of all those things which the contract imposed upon the seller, in the absence of any dissent on the part of the buyer, the title passes by the mutual consent of both parties, and so every technical requirement of the law of contracts is complied with.

The authorities all agree that the purchase price of goods sold may be recovered if the contract has been executed. As to the measure of damages, when the contract is executory and the buyer has refused to accept the goods, there seems to be a conflict of authority. One question, then, to be determined, is whether the contract was executory, and, if so, and there has been a refusal to accept, whether the measure of damages is the purchase price or only damages for the breach of the agreement to accept. Actual delivery to the vendee is not always necessary to the passing of title. Whether the title has passed depends upon the intention of the parties, to be ascertained from the terms of the contract, when they are clear and unambiguous, and from the terms and admissible extraneous evidence, when they are not so. *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432; *Morgan v. King*, 28 W. Va. 1, 57 Am. Rep. 633; *Hood v. Bloch Bros.* 29 W. Va. 244, 11 S. E. 910; *Haxall Bros. v. Willis*, 15 Gratt. 424. It is not necessary to refer to the many illustrations to be found in the books, showing under what circumstances title may pass without delivery or payment of the purchase money, or the rules for determining whether it does or not. It suffices to direct attention to the importance of remembering that title does often pass under such circumstances, and that whether, under the evidence in any given case, it has passed, is sometimes a question for the jury. Per-

haps, by reason of the clearness and certainty of the terms of the written or verbal contract, or the conclusion deducible from the uncontroverted facts, it is more frequently a question for the court. When the contract, at its inception, is executory, it is necessary to bear in mind the requisite of performance of the conditions precedent, in determining the measure of the damages or the amount of recovery, it being dependent upon the vesting of title in the buyer.

It is sometimes said that the vendor in an executory contract of sale has, on the refusal of the vendee to accept the property, an election as to whether he will treat it as his own and sue for damages for the breach, or treat it as that of the purchaser and sue for the price; and that, in the latter case, he may sell the property and recover the difference between the contract price and the price obtained on such sale, or store it for the vendee and recover the whole purchase price. Sedgw. Damages, § 753; Benjamin, Sales, p. 794, note 3; Tiedeman, Sales, § 333; 24 Am. & Eng. Enc. Law, 2d ed. p. 1118. In the first three of these authorities it is said this is the prevailing American rule. The last work cited indicates that it is not. It states the general rule as follows: "Where title has not passed, and the contract is still executory, it is usually held that the remedy by an action for damages is exclusive, and that an action for the agreed price cannot be maintained." Sutherland on Damages, 3d ed. vol. 3, § 644, says: "To entitle the seller to recover the full value,—either the contract or the market price,—the sale must be executed so as to pass the title to the purchaser; the property must be at his risk, and he thus qualified to bring trover for it. Then, and not till then, an action either for goods sold and delivered, or bargained and sold, may be maintained; the former if there has been delivery, and the latter if there has not. The sale of a specific chattel passes the property in it to the vendee without delivery, and the risk of property which is the subject of a sale attends the title. But, where the sale is of goods generally, no property in them passes until there is a subsequent appropriation according to the contract of the goods to which it applies. Where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and pay the price 17 L.R.A. (N.S.)

is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee. . . . Several cases in New York seem to affirm the right of a vendor to tender goods on an executory contract of sale and sue for the price, though the agreement did not give him the right of selecting and appropriating the particular goods to it. When articles are ordered to be manufactured they are treated as the property of the vendee when made, and notice thereof given to him with request to take them away. The vendor has then an immediate right of action for the price."

The classification of the cases, made by the text writers, is, in some instances, inaccurate. The writers seem not to have observed in all instances the distinctions and tests above mentioned. In other words, they have frequently classed cases in which the title had passed, or in which there was evidence from which the jury might have found the fact, as cases in which it had not passed. In other instances they have failed to observe that the executory contract had become executed so as to pass the title before any renunciation was made by the vendee. Indeed, there are very few cases in which the seller has been allowed to recover the purchase price when the title to the property had not passed to the buyer. The doctrine of election, when the title has not passed, seems to have grown out of an unfortunate and inaccurate interpretation of certain cases made by Mr. Sedgwick in his work on Damages. He having stated the proposition a good many years ago, certain courts cited his work as authority for it, and, later, the editors of that work have cited these cases to sustain it. His text may have been misinterpreted. Thus, *Dustan v. McAndrew*, 44 N. Y. 72, cites Sedgwick on Damages. Then in the eighth edition of Sedgwick, *Dustan v. McAndrew* is the first case cited. On examination, *Dustan v. McAndrew* will be found to have been a fully executed contract. The hops had been delivered at the place of delivery specified in the contract before there was any dissent on the part of the purchaser. It may also have been an executed contract passing the title at its inception. At any rate, it is not a case in which the title had not passed. An older edition of Sedgwick, the fifth, cited *Graham v. Jackson*, 14 East, 498; *Bement v. Smith*, 15 Wend. 493, and *Thompson v. Alger*, 12 Met. 428, to sustain his proposition. In *Graham v. Jackson*, the case of a sale by a bought-and-sold note, made by a broker in New York, it appeared that the defendant had bought of the plaintiff 300 tons of Campeachy logwood, which the memorandum described as

"shipped at New York . . . to be of real merchantable quality; such as may be determined to be otherwise by impartial judges to be rejected." Before any objection was made by the purchaser, the logwood arrived in England. Supposing it not to have been an executed contract at its inception, passing the title, it had been executed when the action was brought. It had been delivered at the place stipulated. Upon delivery, it became the property of the purchaser, he having given no notice of intention not to receive it. It is not clear that it was an executory contract. If the broker and the seller agreed at the time upon the specific wood loaded on a ship then at New York, ready to be carried to Liverpool, the seller having nothing more to do with it, then, under all the authorities, it was an executed contract of sale, passing title. *Bement v. Smith* was an action brought by the manufacturer of a carriage, made to the order of the defendant for an agreed price. There was no dissent on the part of the defendant until after the sulky had been made and delivered. Therefore, if it were an executory contract in the first instance, it had become executed before the purchaser withdrew his offer to accept. But it was a contract for the manufacture of an article, made to the order of the buyer, and was analogous to that of a contract of a sculptor to make a statue, or a painter to make a picture, or a tailor to make a suit of clothes; in all which cases the article, when done, appears to have been intended to be the property of the person for whom it was made. It is not a contract for the manufacture of an article for sale on the market. In a practical sense, it is an agreement on the part of the manufacturer to use his material and bestow his labor and skill in the fabrication of an article for another person.

As the passing of title is a question of intention, to be ascertained from the facts and circumstances, in the absence of an express stipulation as to when it shall pass; and it appears that the article so specially made was intended for no person other than him who ordered it, not the manufacturer for his own use or for sale in the market generally,—it seems clear that the intention was that the article should become that of the former on the completion thereof. Cases of this kind are regarded as exceptions to the general rule respecting the vesting of title. That of *Bement v. Smith* was expressly declared in the opinion to be analogous to a contract by a tailor to make a garment, or a shoemaker to make a pair of shoes. Another case of the same kind is that of *Ballentine v. Robinson*, 46 Pa. 177, in which the price of an engine made to a special

order was the matter in controversy. The court said: "The present is not strictly the case of a sale. The plaintiffs agreed to build the engine according to directions of the defendants, and to furnish the necessary materials for it. When it was completed the defendants had notice, and were bound to take it away and pay the contract price; but, instead of taking it and paying the price, they requested the plaintiffs to sell it. In such a case the right of property was clearly in them on notice of the completion of the article." In view of this language, the case is certainly not one that can be cited in support of the proposition that the seller may sue for the price when the title has not passed. The court expressly found and declared that it had passed. Another case of the same kind is *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313, in which the subject-matter of the controversy was the purchase price of a carriage constructed for the defendant, in accordance with his order and direction. The court followed *Bement v. Smith*. In the opinion the *Sedgwick* rule was discussed, as well as its approval in *Swan's Treatise*, but the court refrained from committing itself to it, saying: "We sanction and apply the rule in the determination of the particular case before us." It did not determine whether the title had passed or not. It could not have applied the principle of *Bement v. Smith* and *Ballentine v. Robinson* as it did without finding that the title had passed. *Chicago v. Greer*, 9 Wall. 726, 19 L. ed. 769, is classed as a case asserting right of action for the price when the title has not passed, but it involved not a mere sale of goods. The contract was to manufacture hose for the city, and had not been fully performed at all, the city having countermanded its order before the goods had all been manufactured and delivered. It was an action for damages for breach of a contract, not for the price of the goods. One of the questions was whether the value of materials so prepared for the purposes of the contract as to make them less valuable for other purposes and unfit for sale in the market could be given in evidence as a circumstance bearing on the question of damages. The declaration was for damages for the breach, not for the price, and the court did not discuss or state any rule governing the measure of damages. *Thompson v. Alger*, supra, cited to sustain the text in *Sedgwick*, was an action for the purchase price of certain corporation stock, and the court found and expressly declared that the title had passed, and, in that connection, stated that, if it had not, the measure of damages would not have been the contract price. It said: "The contract of the vendor to sell to

the defendant 180 shares of railroad stock required a previous transfer of the shares on the books of the corporation. This, from the very nature of the case, was a previous act; and, when done, it passed the property on the books of the company to the defendant." *Hayden v. Demets*, 53 N. Y. 426, is a case in which the title had passed. Originally the contract was executory, but, without any dissent on the part of the purchasers, a tender of the property was made. *Pacific Iron Works Co. v. Long Island R. Co.* 62 N. Y. 272, was a case of the same kind. In *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190, there was no withdrawal or renunciation before a tender was made. In *Harris Mfg. Co. v. Marsh*, 49 Iowa, 11, there was a delivery at the place stipulated in the contract and the title passed. In *Wade v. Moffett*, 21 Ill. 110, 74 Am. Dec. 79, the suit was for the purchase price of a certain mule, sold at auction, clearly a case of an executed contract. In *Bell v. Offutt*, 10 Bush, 632, the hogs for the purchase price of which the action was brought had been delivered at the place stipulated in the contract, without notice of dissent. *White v. Solomon*, 164 Mass. 516, 30 L.R.A. 537, 42 N. E. 104, involved an executed contract of sale. There had been a delivery of the subject-matter within the time and at the place stipulated and without any dissent on the part of the purchaser until after this condition had been performed. *Smith v. Bergengren*, 153 Mass. 236, 10 L.R.A. 768, 26 N. E. 690, involved an executed contract. The defendant had made a conditional promise to pay the plaintiff \$2,000 in case the former should renew his professional practice in a certain city. He did renew it, and thereby made the contract absolute. *Thorndike v. Locke*, 98 Mass. 340, was an executed contract, as appears from the syllabus, reading as follows: "One who has sold shares in a corporation, with a written agreement to take back, at the expiration of a specified time, all of them which the purchaser may then own, and to pay therefor a stipulated price, is liable to pay the full stipulated price, after the expiration of the time, and a tender of the shares then remaining unsold by the purchaser, both before action brought and at the trial thereof, and a refusal by the vendor to receive them." *Rodman v. Guilford*, 112 Mass. 405, involved an executed contract. At the time the action was brought the goods were in the actual possession of the defendant. It was rosewood cut into pieces of a certain shape for which the defendant had agreed to pay 10 cents per pound. When he received the wood it was discovered that some of the pieces were imperfect. On this fact he based his defense to the action on the

contract, and the court held that he was bound to pay the agreed price for the 176 pounds which had been delivered according to the contract. In *Nichols v. Morse*, 100 Mass. 523, it appeared that the property had been delivered before the seller had any notice of the intention of the buyer not to accept. Hence, it was an executed contract. It will be found, on examination of some of these Massachusetts cases, that the distinction between the measure of damages on an executed contract and the measure thereof on an unexecuted contract is marked, and not violated in any instance. *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480, was an action based upon a subscription to the capital stock of a corporation. The court said it was not a contract to purchase stock of the corporation, but that, if it had been, the measure of damages would be the contract price of the stock, it having been tendered before suit was brought. It does not appear whether it was tendered before the subscriber declared his intention not to take it. On the face of the statement of the case, the contract was executed, if it be regarded as a contract for the sale of property; but we think the court rightly held it to be not a contract for the sale of property. It was an agreement to pay into a corporation a certain amount of money for corporate purposes, the consideration for which was the agreement of all the other stockholders to do likewise. *Barton v. McKelway*, 22 N. J. L. 165, was an action for the purchase price of mulberry trees, delivered pursuant to the contract, at the place agreed upon, and the defendant had done nothing more than refuse to take them into his possession,—a clear case of an executed contract. In *Crawford v. Avery*, 35 Miss. 205, the price of a cotton gin was sued for, and it appeared that delivery thereof had been made without any prior objection on the part of the purchaser. In *Walker v. Nixon*, 65 Mo. App. 326, the action was for the price of a suit of clothes which had been made to the order of the defendant. In *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963, the goods had been actually received by the defendants, and they refused to pay for them and insisted upon returning them on the ground that they were not the kind of goods contracted for. In *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415, it is said: "The vendor of personal property not delivered has three remedies against the vendee in default." That is a sound proposition of law when properly applied, as it was in that case; but it is not applicable in all cases, nor does the court say so. Delivery is not always essential to the passage of title. The title may pass without delivery. In that

case it did. The action was for the purchase money of the plaintiff's interest in the assets of a copartnership, consisting of real estate, stock on hand, and other property. The subject-matter was incapable of actual delivery. The plaintiff had agreed to sell, and the defendant to buy, this interest. Under the circumstances, the contract was executed, passing the title immediately. The subject-matter had been identified. It was the sale of specific property, and nothing remained to be done by the seller. In *Sedgwick v. Cottingham*, 54 Iowa, 512, 6 N. W. 738, the plaintiff had contracted to sell to the defendant a car load of wheat, to be shipped to a point named, where it was to be taken from the car by the defendant, and paid for upon being weighed by him; and the car had been shipped to the designated station and placed on the side track, where it was accidentally destroyed. The title had clearly passed. *Bloyd v. Pollock*, 27 W. Va. 75, a parallel case. *Rosenbaum v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737, involved an executed contract. The goods had been actually received by the purchasers, who contended that they were not the goods ordered.

Schwarzer v. Karsch Brewing Co. 74 App. Div. 383, 77 N. Y. Supp. 719, seems to assert a right of action for the price before passage of title. In the opinion it is said: "The contract being valid and enforceable, the brewing company was bound to perform it, or to pay such damage as could be legally enforced by reason of a breach. It was therefore powerless to prevent completion of the contract by the Brunswick Company. The latter completed its contract and tendered performance." In another place it says: "The brewing company could not prevent the Brunswick Company from performing its contract and recovering the purchase price of the articles, whether the brewing company gave notice that they would not fulfil the terms of their contract, or not." No authority is cited for that proposition. The cases mentioned in the reference immediately preceding the statement are *Dustan v. McAndrew*, 44 N. Y. 72, *Hayden v. Demets*, 53 N. Y. 426, both of which we have here analyzed and ascertained to have involved executed contracts, and *Quick v. Wheeler*, 78 N. Y. 300. This last case expressly decided that there had been no revocation of the order under which the delivery had been made, and the court settled this question, in order that it might say an action for the price was maintainable. In the last clause of the syllabus, it is said: "Also held, that, on delivery of the timber at the place specified, plaintiff could treat it as belonging to defendant and sue for the purchase price; that he was not confined

to an action for damages." In this way the court marked the distinction. Impliedly it said, if the title had not passed, the plaintiff would have been confined to his action for damages. *Higgins v. Murray*, 73 N. Y. 252, on hasty examination, might be regarded as giving a right of action for the price, when the property has not passed; but it does not do so. It merely says: "But, when the contract is fully performed, both as it respects the character of the article, and the delivery at the place agreed upon or implied, and the defendant is notified; or if a specific time is fixed, and the contract is performed within that time,—upon general principles I am unable to perceive why the party making such a contract is not liable. One person agrees to manufacture a wagon for another in thirty days for \$100, and the other agrees to pay for it. The mechanic performs his contract. Is he not entitled to enforce the obligation against the other party; and if, after such performance, the wagon is destroyed without the fault of the mechanic, is the undischarged liability canceled? It does not depend upon where the technical title is, as in the sale of goods. . . . If the plaintiff had agreed to deliver the tent in *Lewiston*, as a part of the contract for its manufacture, he could not have recovered anything; but this was not a part of the contract. . . . As before stated, the point as to who had the title is not decisive. It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action." By this statement, the court simply meant that the legal title may have been in the manufacturer, by way of pledge for the purchase price, while the beneficial title was in the defendant. It was a mere retention of possession, not title, to secure the manufacturer's lien. *Putnam v. Glidden*, 159 Mass. 47, 38 Am. St. Rep. 394, 34 N. E. 81, is classed as an authority sustaining the supposed *Sedgwick* rule, but it does not do so. It simply says that, if the vendor elect to keep the property for the vendee and sue for the entire contract price, he cannot maintain a second suit for the expense of keeping the property. It does not proceed upon the theory that the title had not passed. On the contrary, it assumes that it had passed. In the opinion the general rule that the vendor has an election when the vendee returns or declines to receive property sold him is merely stated. It was a second suit for the expense of keeping property, and did not involve the merits of the original action. *Morse v. Sherman*, 106 Mass. 430, involved a contract for the sale of all the goods in a store, of a certain kind, at a certain price.

The court held that the jury, upon the facts proven, would be warranted in finding that it was the intention of the parties to make the sale absolute, subject only to the seller's lien for the price; and that, on such finding, the plaintiff was entitled to recover the purchase price.

Having seen how little authority there is for the supposed rule, we turn to those decisions which assert the contrary, and they are numerous. In *White v. Solomon*, 164 Mass. 516, 519, 30 L.R.A. 537, 42 N. E. 104, Field, Ch. J., said: "Where the title does not pass to the vendee by the contract, and he declines to receive and accept the goods sold, the damages are the injury suffered from the breach, which usually is the difference between the price agreed upon and the market value of the goods at the time and place of delivery." For this proposition, he cites *Collins v. Delaporte*, 115 Mass. 159; *Whitney v. Thacher*, 117 Mass. 523; *Schramm v. Boston Sugar Ref. Co.* 146 Mass. 211, 15 N. E. 571; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172; *Laird v. Pim*, 7 Mees. & W. 474,—all of which sustain him. In *Tufts v. Bennett*, Morton, Judge, said: "The rule seems to be pretty clearly established that the measure of damages in such a case is the difference between the market value of the goods at the time and place of delivery and the contract price,"—for which he cites *Barry v. Cavanagh*, 127 Mass. 394; *Whitney v. Boardman*, 118 Mass. 242; *Clement & H. Mfg. Co. v. Meserole*, 107 Mass. 362; *Cutting v. Grand Trunk R. Co.* 13 Allen, 381; *Valpy v. Oakeley*, 16 Q. B. 941, found in 21 English Ruling Cases, 39. *Gordon v. Norris*, 49 N. H. 376, ably and exhaustively reviews the cases on the subject, and states the conclusion as follows: "When the vendee refuses to receive and pay for ordinary goods, wares, and merchandise, which he has contracted to purchase, the measure of damages which the vendor is entitled to recover is not ordinarily the contract price of the goods, but the difference between the contract price and the market price or value of the same goods at the time when the contract was broken." In *Laird v. Pim*, cited, an action for the purchase price of land, the vendee having refused to accept a deed and pay the purchase price, Baron Parke said: "The measure of damages, in an action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. . . . It is clear he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again." In 17 L.R.A. (N.S.)

Valpy v. Oakeley the contract had been broken by the purchaser before execution thereof, and, it appearing that there was no difference between the value of the property in the hands of the vendor and the purchase price, Lord Campbell said: "The question then remains as to the amount of damages; and I think these must be only nominal. Justice requires such a decision; and I rejoice that the law confirms it. . . . And, there being no difference shown between the market price at the time of default and the contract price, the vendees could have recovered only nominal damages; no more, therefore, can the assignees. The case rests upon the principle of stoppage *in transitu*." In *Simmons v. Swift*, 8 Dowl. & R. 693, the action was for the value of bark sold. The purchaser had taken part of it and refused to take the balance. The court found the title did not vest in the vendee until the very bark had been ascertained, and then declared "that neither an action for goods sold and delivered, nor for goods bargained and sold, would lie against the vendee for the amount." An examination of the English cases will disclose that they uniformly hold this. In one or two American cases it is said these decisions turn upon the form of the action or the allegations of the declaration; but this is an inaccurate conclusion. The reasoning in all these cases goes to the merits, and fixes the measure of damages, denying the right to recover when the title has not passed.

If the binding offer to accept be not withdrawn, or the agreement to take the goods not broken, delivery is made with the assent of the purchaser and under a "meeting of the minds of the parties," and accords with a basic principle of the law of contracts. But, if the contract be broken, and the consent of the purchaser withdrawn, before delivery, the title does not pass by the assent of the parties, and there is no power in a court of law to compel specific performance of any kind of a contract. It has no remedy appropriate to, nor capable of administering, such relief. As the damages are deemed full and adequate compensation even by courts of equity, they ordinarily refuse specific performance of contracts of sale of personal property. Both courts recognized the right of a party to an executory contract of such character to break it and force the other party to take damages in lieu of the performance of the promise, covenant, or other duty. And the injured party can rightfully do no act by which his damages will be increased, as abandoning the property to waste or destruction. On the contrary, he is bound to minimize the damages when it can be readily done.

There is evidence tending to show that, before the goods contracted for by Older had been delivered to the railway company in Chicago for shipment, he modified the order and conditionally canceled or countermanded it, thereby giving notice that he would not receive the goods. This constituted a breach of the contract before the title passed, if the letter was received before delivery was made. The declaration contained no special count for damages for breach of the contract, and, if the jury had found that the note was not executed by the defendant, they would necessarily have found, but for the instruction given by the court, that the plaintiff could not recover on this declaration, for it must be presumed that they would have applied the law to the facts found. However, if the defendant executed the note, a contract to pay money, sufficiently declared upon, there might have been a recovery on the count based on it, notwithstanding the nonexecution of the contract of sale,—nontransfer of title. In this view, it is a case of failure of consideration in whole or in part, unless, by executing the note, the defendant precluded himself from the right to break his contract and put the plaintiff to the proof of damages for the breach, instead of an action for the price. The note was a mere promise to pay money; it was not given without consideration, for the executory contract of sale was a sufficient consideration at the time it was given. It was a valid note, resting upon a valuable consideration. Therefore an action could be maintained upon it. In the absence of proof of failure of consideration, fraud in the procurement thereof, payment, or set-off, the whole thereof would be recoverable. But, if the thing for which the note was in reality given failed, this could be shown by way of defense in whole or in part, as the case happened to be. Page, Contr. §§ 1474 et seq., citing numerous cases. In some respects, the note is one thing and the executory contract upon which it was based another. As to right of action, pleading, and evidence, each stands on its own footing, but, in substance, in the settlement of the ultimate rights of the parties, both are to be considered together. The giving of the note did not take away any of the rights of either party respecting the executory contract of sale out of which it grew or on which it was based. If the purchaser had refused to deliver the goods, that fact could have been proven as constituting a total failure of consideration by way of full defense to the action on the note. In most of the jurisdictions the note is regarded as having had no effect beyond that of postponing the right of action on the original contract until the expiration of the pe-

riod of credit stipulated in the note. It was not payment in advance for the property. On this subject, see American notes to Valpy v. Oakeley, 21 English Ruling Cases, 39, 46; Benjamin, Sales, 7th ed. 773; Dan. Neg. Inst. 4th ed. chap. 39; and 18 Am. & Eng. Enc. Law, p. 167. A note is not in this state regarded as absolute payment of the debt for which it is given, unless there is an express stipulation to the effect that it shall be. *Cushwa v. Improvement Loan & Bldg. Assn.* 45 W. Va. 490, 32 S. E. 259; *Dunlap v. Shanklin*, 10 W. Va. 662; *Merchants Nat. Bank v. Good*, 21 W. Va. 465; *Miller v. Miller*, 8 W. Va. 550; *Poole v. Rice*, 9 W. Va. 73. In *Valpy v. Oakeley* accepted bills for the iron had been given. Lord Campbell said: "But we must here look to the time of the bankruptcy [the act constituting the breach of the contract]. At that time bills given for the iron were outstanding. While current, they were payment. When dishonored, they were waste paper; it was as if no bill had been given." This case is on the same footing. The action is between the original parties to the contract, not between a bona fide holder of the note, acquired by purchase in the market or otherwise, and the maker thereof; and all the equities come in. The parties stand as if no note had been given, except for the purposes of mere pleading and practice. Under his common-law right to do so, the defendant may have revoked his order, withdrawn his offer to accept the goods before delivery thereof, and thereby taken away the plaintiff's right to recover the value thereof, and conferred upon him in lieu thereof the right to recover damages for the breach of the contract, and, if he did, the recovery on the note would be limited to the amount of the damages.

We think, too, the evidence was sufficient to carry to the jury the question of the execution of the note. It is not doubted that the signing of a note or other paper on presentation thereof precludes a party from denying knowledge of its contents, when the party in whose favor it is executed, or his agent, has done nothing calculated to mislead, deceive, or take advantage of him. To allow him to plead his mere ignorance of the contents of the paper, under such circumstances, is to permit him to take advantage of his own negligence and wrong. *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830. But, when it is said that a man who has signed a deed or other paper cannot question it merely because he signed and delivered it without having read it, an entirely different proposition is stated. If the opposite party has induced him by trickery, fraud, or any kind of artifice not to read it, with the view to obtaining

from him a paper which he could not otherwise have obtained. the right to prove these circumstances and thereby establish the fact that he believed he was signing an entirely different paper, and so relieve himself from the obligation thereof, is undoubted. It has been decided over and over. *Hale v. Hale*, 62 W. Va. 609, 59 S. E. 1056; *Curlett v. Newman*, 30 W. Va. 182, 3 S. E. 578; *Kerr, Fraud & Mistake*, 388, 389; *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655; *Holbrook v. Burt*, 22 Pick. 546. The defendant swears the plaintiff's agent assumed to read the whole paper signed by him, but actually read only a part of it, and omitted to read the note, a very important and material part. The paper itself was peculiar in form; containing, first, an order for goods, second, a note for the amount of the order, and third, a long contract of guaranty. The agent also gave to the purchaser another paper which stated that it was to be attached to all orders and notes, and that paper stated mere terms of purchase and gave a right of extension, all inconsistent with the note. The testimony of the defendant to the effect that he did not know there was a note in the paper, taken in connection with these circumstances, was sufficient to raise a question proper to be submitted to the jury as to whether the note had been actually executed or not. If the signature to the paper as a note was fraudulently procured, the paper is not, in law, a note, although signed and apparently one.

Whether there was a right of extension of time for payment is now immaterial. The defendant never accepted the goods. They may not have been delivered. He has made no effort to sell them, and could never do so now, if he were willing, since they were sold by the railroad company to satisfy charges for freight.

The error of the court in directing a verdict is made obvious by the principles and conclusions above stated. Therefore, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

WISCONSIN SUPREME COURT.

MINNEAPOLIS, ST. PAUL, & SAULT STE.
MARIE RAILROAD COMPANY, Appt.,

v.

RAILROAD COMMISSION OF WISCONSIN, Resp't.

(— Wis. —, 116 N. W. 905.)

Court — administrative power — legislative delegation.

1. The legislature, in delegating to a commission the power to ascertain and fix

reasonable rates and service for railroad transportation, which rates and service, thus ascertained, shall thenceforth be enforced, may make the investigation of the commission subject to review, as to its reasonableness, by the courts.

Railroad commission — order — unlawfulness — proof.

2. The statutory burden placed upon one complaining of an order of a railroad commission, to establish its unreasonableness or unlawfulness by clear and satisfactory evidence, requires the *quantum* of evidence necessary to establish fraud or prove mistake in a written instrument by one on whom the burden rests to establish such facts.

Same — reasonableness — doubt.

3. A court having power to review orders of a railroad commission which are alleged to be unreasonable will not interfere with an order with respect to the correctness of which reasonable men may well differ.

Same — review — jurisdiction.

4. An order of a railroad commission need not be confiscatory in character and effect to be subject to review by the courts, under a statute permitting a review if the order is alleged to be unlawful or unreasonable.

Court — order of railroad commission — review.

5. It is within the power of a railroad commission to require a railroad company to stop one local train each way a day at a platform half way between two stations between 7 and 8 miles apart, for the accommodation of sixty-four families; and such an order is not so clearly unreasonable that courts will interfere with it when having power to vacate orders of the commission which are shown by clear and satisfactory evidence to be unreasonable.

(Dodge, J., dissents.)

(June 5, 1908.)

Case Note. — Power to compel establishment of stations, or the stopping of trains at stations.

This note is confined to the question of the power of a court or the legislature, or the power of the latter to delegate to a commission authority, to require the establishment of a new railway station at a point where there is none; or to require the stoppage of trains at stations; and does not include cases which merely determine when such power may, or may not, under given facts, be exercised.

Legislative power to require establishment of railway stations.

It is a valid exercise of the police power for a state to require railway companies to establish stations where the public necessity and convenience require it. *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396, affirming 87 Minn. 195, 91 N. W. 465; *Louis-*

APPEAL by plaintiff from a judgment of the Circuit Court for Dane County in defendant's favor in a proceeding to vacate an order of the railroad commission requiring the stopping of trains at a certain place. Affirmed.

The facts are stated in the opinion.

Mr. Alfred H. Bright, with Mr. John B. Sanborn, for appellant:

It is well settled that the legislature, acting either directly or through a commission, has no power to make rates or require service so that the company cannot earn some return upon its investment.

Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup.

Ct. Rep. 95; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900.

Where no court review is provided, the reasonableness of the orders of railroad commissions may be tested in an action brought by the carrier to restrain their enforcement, or in an action brought by the commission to compel compliance, thus implying the right of review.

Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; State v. Des Moines & K. C. R. Co. 87 Iowa, 644, 54 N. W. 461; Pensacola & A. R. Co. v. State, 25 Fla. 310, 3 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833;

iana & A. R. Co. v. State, 85 Ark. 12, 106 S. W. 960; Com. v. Eastern R. Co. 103 Mass. 254, 4 Am. Rep. 555.

And such legislation does not impair the obligation of a corporate charter which was expressly subject to amendment, alteration, or repeal at the legislative pleasure. Com. v. Eastern R. Co. supra.

So, it is within the police power of the state to require railway companies to build and maintain depots at intersections with other railways: as such legislation does not disturb any chartered rights, nor impair the obligation of any contract relation existing between the state and the corporation. State use of School Fund v. Wabash, St. L. & P. R. Co. 83 Mo. 144; State ex rel. Barton County v. Kansas City, Ft. S. & G. R. Co. 32 Fed. 722.

And no constitutional provision is violated by a statute delegating such power to a board of railway commissioners. State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co. 87 Minn. 195, 91 N. W. 465; State ex rel. Railroad & W. Comrs. v. Minneapolis & St. L. R. Co. 76 Minn. 469, 79 N. W. 510; Railroad Comrs. v. Portland & O. C. R. Co. 63 Me. 269, 18 Am. Rep. 208.

It was said in Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401, that "it is hardly to be questioned but that it is entirely within legislative competency to empower the railroad commission to order the location of stations and the building of depots, and to apply to the courts for the enforcement of the order."

Under the railway and canal traffic act of 1854, the commissioners may compel a railway company to provide a station at a point where the traffic of a particular district can come or go without public inconvenience. Harris v. London & S. W. R. Co. 3 Railway & C. Traffic Cas. 301, cited in 7 Rapalje & M. Dig. Ry. Law, 200. 17 L.R.A. (N.S.)

Power of courts to compel establishment of stations.

The inherent power of a court, in the absence of statutory authority, to compel the establishment of a railway station where the needs of the public require it, is recognized in the following cases: Concord & M. R. Co. v. Boston & M. R. Co. 67 N. H. 464, 41 Atl. 263; People ex rel. Hunt v. Chicago & A. R. Co. 130 Ill. 175, 22 N. E. 857; State ex rel. Mattoon v. Republican Valley R. Co. 17 Neb. 647, 52 Am. Rep. 424, 24 N. W. 329, affirmed upon rehearing in 18 Neb. 512, 26 N. W. 205. Although it is denied in the following cases: State ex rel. Smart v. Kansas City, S. & G. R. Co. 51 La. 200, 25 So. 126; Nashville, C. & St. L. R. Co. v. State, supra, and Northern P. R. Co. v. Washington Territory, infra.

And such power will be exercised by a court notwithstanding a railway company is vested with broad discretion as to the locating of its station. People ex rel. Hunt v. Chicago & A. R. Co. supra.

But a court cannot, in the absence of a statute, compel a railway company to re-establish, and stop its trains at, a depot within the limits of a city wherein it maintains another station equally accessible and convenient to the public. Chicago & E. I. R. Co. v. People, 222 Ill. 396, 78 N. E. 784.

And a court has no inherent power to require a railway company to establish a station and stop its trains at a town, where it maintains a station 4 miles distant therefrom. Northern P. R. Co. v. Washington Territory, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283, reversing 3 Wash. Terr. 303, 13 Pac. 604. The court said the location of stations involves a comprehensive view of the public as well as the corporate interests, and the consideration of many circumstances concerning the amount of population and business at or near, or within convenient access to, one point or another, which are more appropriately determined by

Storrs v. Pensacola & A. R. Co. 29 Fla. 617, 11 So. 226; *Stone v. Natchez, J. & C. R. Co.* 62 Miss. 646; *State v. Alabama & V. R. Co.* 08 Miss. 653, 9 So. 469; *People ex rel. Loughran v. Railroad Comrs.* 158 N. Y. 421, 53 N. E. 163; *People ex rel. Steward v. Railroad Comrs.* 160 N. Y. 202, 54 N. E. 697.

Under the interstate commerce law and similar acts, the courts consider the reasonableness of the order of the commission before decreeing its enforcement.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Interstate Commerce Commis-*

sion v. Chicago, B. & Q. R. Co. 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824; *Interstate Commerce Commission v. Chicago G. W. R. Co.* 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; *Platt v. Lecocq*, see p. 824, 150 Fed. 391, 158 Fed. 723.

In some states an appeal to some court may be taken from the rulings of the commission.

Malmö's Appeal, 72 Conn. 1, 43 Atl. 485; *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 39 L.R.A. 794, 37 Atl. 1080, 38 Atl. 708; *Steenerson v. Great Northern R. Co.* 60 Minn. 461, 62 N. W. 826; *Jacobson v. Wisconsin, M. & P. R. Co.* 71 Minn. 519, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893; *State ex rel. Railroad & W. Commission v. Willmar & S. F. R. Co.* 88 Minn. 448, 93 N. W. 112; *State ex rel. Railroad & W. Commission v. Northern P. R. Co.* 89 Minn. 367, 95 N. W. 297; *State ex rel.*

directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards intrusted by the latter with that duty, than by the ordinary judicial tribunals; and to hold that the directors of a corporation, in determining the number, place, and size of its stations, having regard to the public convenience as well as to its own pecuniary interest, can be controlled by the courts, would be inconsistent with many decisions of high authority in analogous cases.

Power to require stoppage of trains at stations.

Requiring the stoppage of passenger and freight trains at stations, when public necessity requires it, is a valid exercise of the police power. *State v. Gladson*, 57 Minn. 385, 24 L.R.A. 502, 59 N. W. 487, affirmed in 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Com. v. Eastern R. Co.* supra; *State v. New Haven & N. Co.* 43 Conn. 351, affirmed in 104 U. S. 1, 26 L. ed. 629; *Louisianz & A. R. Co. v. State*, 85 Ark. 12, 106 S. W. 960.

It is within the police power of the state to require the stoppage, for five minutes, of every passenger train at every way station on the line. *Davidson v. State*, 4 Tex. App. 545, 30 Am. Rep. 166.

And an act requiring the stoppage of trains at a certain point is not void, as a delegation of legislative power, by reason of providing that the act should be of force if, within six months, the petitioners therefor should erect a station house at such point and convey it to the railway company. *State v. New Haven & N. Co.* supra.

And the fact that one train, running between points within the state, carries the United States mail, will not render such legislation an unreasonable interference with interstate commerce. *State v. Gladson*, supra.

But it is an improper interference with interstate commerce for the legislature to re-

quire a railway company to stop trains engaged in interstate commerce at a designated station, where adequate and reasonable facilities for the accommodation of travel to and from the same have been provided. *St. Louis, I. M. & S. R. Co. v. State*, 85 Ark. 284, 107 S. W. 989.

Although the power of a court, in the absence of statutory authority, to require the stoppage of trains at stations, is upheld in *State ex rel. Mattoon v. Republican Valley R. Co.* supra, it is denied in *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Northern P. R. Co. v. Washington Territory and Chicago & E. I. R. Co. v. People*, supra.

As to the right to require stoppage of interstate mail trains at stations, see case note to *Peterson v. State*, 14 L.R.A. (N.S.) 292.

A number of cases are to be found in which the courts enforce orders of boards of railway commissioners requiring the establishment of railway stations, or the stoppage of trains thereat (or exercise such power themselves), without questioning either the power of such boards, or the jurisdiction of the court so to do. *State v. New Haven & N. Co.* 37 Conn. 153; *People ex rel. Walker v. Louisville & N. R. Co.* 120 Ill. 48, 10 N. E. 657; *State v. Des Moines & K. C. R. Co.* 67 Iowa. 644, 54 N. W. 461; *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission*, 109 La. 247, 33 So. 214; *Louisiana R. & Nav. Co. v. Railroad Commission (La.)* 46 So. 884; *State v. Mobile, J. & K. C. R. Co.* 86 Miss. 172, 38 So. 732; *State v. Yazoo & M. Valley R. Co.* 87 Miss. 679, 40 So. 263; *State ex rel. Tompkins v. Chicago, St. P. M. & O. R. Co.* 12 S. D. 305, 47 L.R.A. 569, 81 N. W. 503; *Re Railroad Comrs.* 79 Vt. 266, 65 Atl. 82.

As to the validity of contracts of a railway company to establish and maintain stations, see the case note to *Atlanta & W. P. R. Co. v. Camp*, 15 L.R.A. (N.S.) 594.

U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121.

It is entirely settled that, unless it clearly appears that tariff rates, as a whole, will not admit of a fair return to the carrier, the act or order prescribing them does not transcend the limits of legislative or commission power; and, hence, the act or order is not, from the judicial view point, unreasonable.

Reagan v. Farmers' Loan & T. Co.; Smyth v. Ames; San Diego Land & Town Co. v. National City; and San Diego Land & Town Co. v. Jasper,—supra; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 15 L.R.A.(N.S.) 108, 68 Atl. 676; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

As to separate rates, it is held that the powers of a commission prescribing them are not transcended if their enforcement will still leave to the carrier a fair return.

Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co. 80 Minn. 191, 89 Am. St. Rep. 514, 83 N. W. 60, affirmed in 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Pensacola & A. R. Co. v. State, 25 Fla. 310, 3 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833; Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

Where the legislature, or a commission, prescribes a service regulation, it is not to be held unreasonable though it imposes additional expense on the company, and the nature and productiveness of the corporate business as a whole must be considered.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission. supra; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, 71 Minn. 519, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893; State ex rel. Taylor v. Missouri P. R. Co. and Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, supra; Re Auburn & W. R. Co. 37 App. Div. 162, 55 N. Y. Supp. 895; People ex rel. Cantrell v. St. Louis. A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 45 N. E. 824, 52 N. E. 292; Chicago Union Traction Co. v. Chicago, 199 Ill. 579, 65 N. E. 470; Railroad 17 L.R.A.(N.S.)

Comrs. v. Atlantic Coast Line R. Co. and Minneapolis & St. L. R. Co. v. Minnesota, supra.

But a regulation, though its enforcement would leave the carrier a fair return, may be such as obviously would serve neither public welfare, nor convenience, and be an arbitrary interference with the carrier's control of its property, hence, unreasonable and unconstitutional.

State v. Redmon (Wis.) 14 L.R.A.(N.S.) 229, 114 N. W. 137; State ex rel. Milwaukee Medical College v. Chittenden and Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, supra; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Wisconsin, M. & P. R. Co. v. Jacobson, supra; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 55 S. E. 572; Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 S. W. 960; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; McDonald v. Bice, 113 Iowa, 44, 84 N. W. 985.

The judicial function under the statute is confined to determining whether the commission has transcended its powers or jurisdiction.

State ex rel. Cook v. Houser; Le Feber v. West Allis; State ex rel. Milwaukee Medical College v. Chittenden; Foster v. Rowe; and State ex rel. Taylor v. Missouri P. R. Co.,—supra; Chicago, I. & L. R. Co. v. Railroad Commission, 38 Ind. App. 439, 78 N. E. 338, 79 N. E. 520; Railroad Commission v. Weld, supra.

Timlin, J., delivered the opinion of the court:

On September 15, 1906, the railroad commission of Wisconsin, upon complaint made by and in behalf of a number of persons residing in the town of Garfield, Polk county, and after hearing said complainants and the railway company, made an order that the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company erect and construct at a point on its line between the stations of Nye and Deronda, which point was formerly known as Dwight's siding or spur, a platform suitable for the loading and unloading of cream and other merchandise shipped by express: that such platform should be constructed so as to be accessible to teams, and of the kind and dimensions usually and customarily furnished at small stations where no depot is maintained, and should be sufficient to enable passengers to get on and off trains with safety. The railway company was further ordered to stop its local passenger trains numbered 84 and 85, as shown on its time card of August

10, 1906, at the point above designated for the purpose of receiving and discharging passengers and express packages. Except in the season during which cream is shipped, the trains are required to stop only upon signal or request by prospective or actual passengers. According to appellant's time card of August 10, 1906, Nye is 61.8 miles and Deronda 69.6 miles eastwardly from Minneapolis, and each about 10 miles nearer to St. Paul. Local passenger train No. 84, east bound, arrives at Nye, at 10:54 A. M., and at Deronda at 11:10 A. M., daily except Sunday. Local passenger train No. 85, west bound, arrives at Deronda at 2:47 P. M., and at Nye at 3:08 P. M., daily except Sunday. Nye and Deronda are 7.8 miles apart. The new stopping place, called Dwight, is about midway between the stations and in or about the center of an agricultural and dairying community consisting of 64 families of 294 persons, and this area, 2 by 3 miles in extent, is naturally tributary to Dwight for railroad purposes. The probable contribution to railroad traffic from Dwight will be six cans of cream daily in summer and three cans three times a week in winter, together with some shipments of butter and eggs and an occasional passenger, all of which would at current rates pay the railroad company a small profit over and above the expense caused by this extra stop at Dwight. There are five flag stations in the first 114 miles eastwardly from Minneapolis, at which trains numbered 84 and 85 stop. These trains carry no freight, but do carry express packages in a sort of combination car. The railway company formerly maintained a spur at Dwight. The order does not prevent the trains numbered 84 and 85 from making their ordinary and usual connections, and the stop is attended with no danger on account of the proximity of the trains in question to other trains on the same road at that hour. There is a good road from Dwight to Deronda, where there is a small village or hamlet. At Dwight there is a general store, a church, and a schoolhouse. There are other evidential matters, but the foregoing are the principal facts.

The railway company brought an action under § 16, chap. 362, p. 560, Laws of 1905, in the circuit court for Dane county against the railroad commission to vacate and set aside the order in question, and, after trial and hearing, the circuit court made findings of fact and conclusions of law to the effect that the order of the commission was not unreasonable, and rendered judgment refusing to vacate this order. This court is asked to review and reverse on its merits the judgment of the circuit court. After the case was presented to this court upon 17 L.R.A. (N.S.)

briefs and arguments on January 28, 1908, reargument was ordered. The following questions, but in different order, were suggested for reargument: (1) Is it within the legislative power to confer upon courts authority to review the reasonableness of rules or orders of the railroad commission? (2) What is the scope of review by courts of the orders of the railroad commission of Wisconsin, contemplated in the action provided for by § 16, chap. 362, p. 560, Laws of 1905? (3) What is the true construction of the word "unreasonable" in that section? The able counsel who presented the case on the first argument have been assisted upon the reargument by other able and distinguished members of the bar, and we gratefully acknowledge that the thorough presentation of the questions involved from varying view points and with much legal learning and acumen has been of great service to this court. We have also given the subject painstaking investigation and careful consideration.

Chapter 362, p. 549, Laws of 1905, is the first attempt in this state to regulate the rates and service of railroads by or through a commission, although much experimental legislation of this kind has come into existence by the enactment of Federal statutes and by the enactment of statutes and the adoption and amendment of Constitutions in many of the states during the last twenty-one years. The exact legal relation of the railroad to the state and its citizens presents many grave and difficult legal problems. It was unknown to the ancient jurists. Restrictions of written Constitutions and of our dual system of Federal and state control of commerce, the vastness of the interests affected, the multitude of detail, and the many-sided legal and economic nature of the questions ordinarily presented, are responsible for much of this difficulty; the extraordinary development of the carrying trade in modern times for more. Consequently the law on this subject, statute and unwritten, is more or less in a state of transition at the present time. After creating the commission, to consist of three persons, one of whom shall have a general knowledge of railroad law and the others a general understanding of matters relating to railroad transportation, it is provided that such officers shall be and remain disinterested upon pain of forfeiture of office, and that no member of the commission shall hold any other office or any position of profit, or pursue any other business, but shall devote his whole time to the duties of his office. These qualifications required for the office and these safeguards to insure the impartial exercise of its functions and the great power vested in the commission

by this act and by later statutes evince an intention of the legislature to create an office of great dignity and great responsibility. The commission has the charge and determination of interests vast in amount, delicate and complicated in their legal and economic relations, affecting the happiness and prosperity of all the people of the state, and involving the consideration and protection of private rights of the most sacred character. Experience tends to show that public officers, as well as private citizens, are apt to rise in character and dignity to meet great responsibilities, but to shift responsibility where opportunity of shifting is easily afforded, and thereby to deteriorate in efficiency and in character. Besides this, the work of the commission requires much expert knowledge of the difficult subject of transportation and rates, the consideration and application of economic as well as legal principles, and an intimacy with local and state traffic conditions. Consequently, unless required to do so by the mandate of law, the circuit courts should interfere as little as they may with the determinations and the work of the railroad commission. But courts, too, are bounden to duty, and cannot throw off at will that which is imposed upon them by law fairly construed and properly understood.

The statute in question defines the term "railroad" as used therein, and provides that every railroad is required to furnish reasonably adequate service and facilities, and that the charges made for any service rendered or to be rendered in the transportation of passengers or property, or for any service in connection therewith, or for the receiving, switching, delivering, storing, or handling of such property, shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful. In the absence of any action by the railroad commission, the railroad may fix rates, but not above the maximum therein provided. Upon complaint of any person or on its own initiative, the railroad commission may proceed to hear and investigate, and, if it be found that the rate or rates, fares, charges, or classifications, or any joint rate, or any regulation, practice, or service, be unreasonable, or unjustly discriminatory, or the service be found inadequate, the railroad commission shall have power to fix and order substituted therefor such rate or rates, fares, charges, or classifications as it shall have determined to be just and reasonable, which shall be charged, imposed, and followed in the future, and shall also have power to make such orders respecting such regulation, practice, or service as it shall have determined to be reasonable, which

shall be observed and followed in the future (§§ 12 and 14). All rates, fares, charges, classifications, and joint rates fixed by the commission shall be in force, and shall be prima facie reasonable, until finally found otherwise as therein provided. Section 16 of the act in question permits the railroad, or any other party in interest, to obtain a review of the orders of the commission by bringing an action in the proper circuit court against the commission to vacate and set aside its order on the ground that the rate or rates, fares, charges, classification, or joint rates fixed by such order are unlawful, or that any regulation, practice, or service fixed by such order is unreasonable. This action is to be tried and determined like other civil actions, except that, if new evidence is introduced at such trial, the circuit court, unless the parties stipulate otherwise, must remand the cause back to the railroad commission for further action. Either party may appeal from the judgment of the circuit court to the supreme court. The act also provides: "In all trials under this section, the burden of proof shall be upon the plaintiff to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be." Other provisions of the act need not be noticed here, except to say that the commission is given power by subdivision "a" of § 14, after hearing, to rescind, alter, or amend any of its orders, and, by § 28, to fix emergency rates and suspend existing rates.

Whether it is within the power of the legislature to confer upon courts authority to review the reasonableness of rules or orders of the railroad commission depends upon the fundamental nature of these rules or orders. If such rules and orders are purely legislative, and violate no constitutional law or paramount Federal statute, it would be incorrect to say that their reasonableness could be the subject of judicial review, because that would give the judicial branch of government a supervisory control over legislation, largely discretionary, and limited only by the judicial opinion of what is reasonable. It is argued that the power to fix rates is a legislative power, and can never be anything else, whether the rates are fixed by the legislature or by a commission, or by the action of the legislature and commission jointly; that the legislative power is, by the Constitution, vested in the senate and assembly, and cannot be delegated, except in instances expressly provided for in the Constitution. But, when we add to this that, because of the multitude of detail, the intricacy of the subject, the expert knowledge required, the numerous separate investigations of interrelated ques-

tions of fact which are necessary, and the necessity for frequent changes and adjustments in rates or service, a legislative body, the members of which are chosen for short terms from the body of the people, would find it an actual, rather than a legal, impossibility to fix just and reasonable rates, it becomes apparent that this position tends to the conclusion that, by the adoption of its Constitution, which vested the whole legislative power in the senate and assembly and forbade its delegation, the state was shorn of some of its usual and necessary powers of sovereignty, and became impotent to exercise the power of regulation. Rate regulation of railroads by direct action of the legislature has been tried and found impracticable, and its attempt generally abandoned. The business of the carrier has in these modern times so grown and expanded, and become such a large factor in the complicated social and economic life of the country, that the old modes of regulation by direct action of the legislative body are no longer adequate, and, indeed, no longer possible. But the old authority and the old principles remain, and are not to be abrogated by implication.

It was said in *Union P. R. Co. v. Peniston*, 18 Wall. 31, 21 L. ed. 787, speaking of the Federal Constitution: "Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise." Much less should those state officials upon whom rests the duty of interpreting the state Constitution derive from the words of that Constitution implications which impair the authority of the state to exercise the just and ordinary powers usually possessed by governments, and which implications would recognize within the state persons or corporations not subject to or capable of ordinary regulation by the state, and presuppose that, by the adoption of the Constitution, the state so manacled itself as to be helpless to exercise old and well-known governmental powers, or to apply such powers to new problems or new conditions. Such construction would make the mere implications of the Constitution greater than the Constitution itself, and would lose sight of the main and paramount purpose of the creation of the state and the adoption of its Constitution. A Constitution so construed would last only so long as it took to bring about an amendment or a new Constitution, made possibly in the heat of conflict, and therefore in all probability less wise and equitable than the old Constitution properly construed. This is called by counsel the doctrine of expediency; but we think it the doctrine of common sense, that forbids implications from an

instrument which tend to render nugatory, or to destroy, that instrument.

The Constitution of the United States gives Congress power to make all laws necessary and proper for carrying into execution the powers by that instrument vested in the government of the United States or in any department or officer thereof. The legislature of the state of Wisconsin needs no such enabling provision. It possesses that power. But it was said in *Boske v. Comingore*, 177 U. S. 468, 44 L. ed. 850, 20 Sup. Ct. Rep. 705; "Congress has a large discretion as to the means to be employed in the execution of a power conferred upon it, and is not restricted to 'those alone without which the power would be nugatory;' for 'all means which are appropriate, which are plainly adapted' to the end authorized to be attained, 'which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.' 'Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the Judicial Department and to tread on legislative ground.' *M'Culloch v. Maryland*, 4 Wheat. 316, 415, 421, 423, 4 L. ed. 579, 603, 605. In the more recent case of *Logan v. United States*, 144 U. S. 263, 283, 293, 36 L. ed. 429, 435, 439, 12 Sup. Ct. Rep. 622, 626, this court, referring to the above constitutional provision, said that, 'in the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and spirit of the Constitution.' Again: 'Every right created by, arising under, or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible and best adapted to attain the object.'"

So, statutes declaring that railroad rates and service shall be reasonable, and creating a commission with power to investigate existing rates and service, and to fix and determine what rates and what service are reasonable, the statute then providing that the rates and service so fixed shall be in force, have been generally upheld as a valid exercise of the legislative power. *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Georgia R. & Bkg. Co.*

v. Smith, 70 Ga. 694; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Hopper v. Chicago, M. & St. P. R. Co. 91 Iowa, 639, 60 N. W. 487; State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co. 80 Minn. 191, 89 Am. St. Rep. 514, 83 N. W. 60; Railroad Commission v. Houston & T. C. R. Co. 90 Tex. 340, 38 S. W. 750. The division of governmental powers into executive, legislative, and judicial, while of great importance in the creation or organization of a state and from the view point of institutional law and otherwise, is not an exact classification. No such exact delimitation of governmental powers is possible. In the process of enacting a law there is frequently necessary the preliminary determination of a fact or group of facts by the legislature; and it is well settled that the legislature may declare the general rule of law to be in force and take effect upon the subsequent establishment of the facts necessary to make it operative, or to call for its application, as the bankruptcy law of the United States with reference to legislative action regarding exemption laws existing or to be thereafter enacted (*Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. ed. 1113, 22 Sup. Ct. Rep. 857); or the law may be made to take effect conditionally, depending upon the action of the legislature of another state fixing the amount to be exacted (*Phoenix Ins. Co. v. Welch*, 29 Kan. 672; § 1221, Stat. 1898, and cases in note). Or it may be conditioned upon the legislative act of a city council (*Adams v. Beloit*, 105 Wis. 363, 47 L.R.A. 441, 81 N. W. 869); or upon action of the executive (*Re Griner*, 16 Wis. 424; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495); or upon judicial action involving the determination of questions of fact (*Re North Milwaukee*, 93 Wis. 616, 33 L.R.A. 638, 67 N. W. 1033, and cases cited in opinion; *Nash v. Fries*, 129 Wis. 120, 108 N. W. 210); or upon administrative action (*State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347, and cases cited in opinion); or upon a declaration of fact or the creation of a condition by vote of the electors of a municipality (*State ex rel. Faber v. Hinkel*, 131 Wis. 103, 111 N. W. 217). In short, as said by Redfield, Ch. J., in *State v. Parker*, 26 Vt. 357, "it makes no essential difference what is the nature of the contingency, so it be an equal and a fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one." The legislature may delegate any power not legislative which it may itself rightfully exercise. 17 L.R.A. (N.S.)

Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253. This power to ascertain facts is such a power as may be delegated.

The cases heretofore cited with reference to the constitutionality of laws creating a railroad board or commission and authorizing the latter to ascertain and fix reasonable rates, which rates, thus ascertained, would be thenceforth in force, rest on these rules of law. Consequently there can be no objection if the legislature, instead of making the law wholly conditional and contingent upon the ascertainment and declaration of reasonable rates by the commission, add the further contingency that the investigation and order of the commission be subject to review by the courts, and the rates so fixed by the commission upheld as not unreasonable by judicial determination. But neither the commission, nor the court, can be vested with discretion to determine whether the precedent law declared by the legislature shall or shall not go into effect in particular cases. *Re North Milwaukee*, supra: *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738. This law (chapter 362, p. 549, Laws 1905) establishes, and thenceforth assumes, the existence of rates, charges, classifications, and services discoverable by investigation, but undisclosed, which are exactly reasonable and just. It commits to the railroad commission the duty to ascertain and disclose that particular rate, charge, classification, or service. The law intends that there is only one rate, charge, or service that is reasonable and just. When the order of the commission is set aside by the court, it is because this reasonable and just rate, charge, classification, or service has not yet been correctly ascertained. When the order of the commission has been rescinded or changed by the commission because of changed conditions, it is because there is a new reasonable rate to be ascertained and disclosed, applicable to such new conditions and fixed by force of law immediately when the new conditions come into existence. But the theory and the mandate of the law is that this point always exist under any combination of conditions, and is always discoverable, although not always discovered. Until it is discovered and made known, the former rates and service prevail. The order of the commission is prima facie evidence that the rate, charge, or service found and fixed by it is the particular rate, charge, or service declared by the legislature in general terms to be lawful and to be in force. If it were conceded that the commission had power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this

was not a delegation of pure legislative power to the commission. But the theory of this law is to delegate to the commission the power to ascertain facts and to make mere administrative regulations.

If this court, or the circuit court, were, by the statute in question, authorized to investigate the subject anew, to put itself in the place of the commission and search for this reasonable and just rate, with power to substitute its own judgment of what is reasonable and just for the judgment of the commissioners, the statute might be subject to grave criticism. But the courts are not, by this statute, so authorized. The authority given to the circuit court is not to search for, or disclose, or declare this "reasonable and just" rate or service, but merely to determine whether the order of the commission is "unreasonable,"—quite a different thing. We think the legislature was within its power in conferring upon the courts such authority to inquire whether or not the order of the commission was unreasonable, and to vacate the order if so found. In doing so the courts are required to exercise no legislative power, to ascertain and disclose no rates, to declare no rule or no law unreasonable, but merely to exercise judicial power to ascertain and determine whether the commission has so far failed in its search for this lawful, just, and reasonable rate as to have found, instead, and declared, that which is unreasonable. The result of the reversal of the order of the commission is not to establish this fact or ascertain this point of reasonableness, but to leave it undisclosed, leaving the former rates to stand, or requiring the commissioners to try over again to find it. In reviewing the order of the railroad commission, the inquiry is not whether the rate, regulation, or service fixed by the commission is just and reasonable, but whether the order of the commission is unreasonable or unlawful. The nature of the inquiry is changed at this point, and the court is not investigating for the purpose of establishing a fixed point. Whether or not the order is within the field of reasonableness, or outside of its boundaries, is the question for the court. It is quite a different question from that which was before the commission in this respect. The order, being found by the court to be such that reasonable men might well differ with respect to its correctness, cannot be said to be unreasonable. From this aspect it is within the domain of reason, not outside of its boundaries. This is the view point of the reviewing court. Doubtless the court may, for the purpose of comparison and to aid it in ascertaining how far the order diverges from a reasonable standard, take evidence of and

consider such criterion. But this is only for comparison. The court cannot legally adjudicate or declare this statutory standard.

Unless the plaintiff is able to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be, the order must stand. The words "clear and satisfactory evidence" are significant, because at the time of the enactment of this statute they were used in the law of this state to describe a degree of proof greater than a preponderance of evidence and such as was necessary in order to establish fraud by that party to an action upon whom the burden of proof rested. *Bannon v. Insurance Co. of N. A.* 115 Wis. 250, 258, 91 N. W. 666; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188; *Dallman v. Clasen*, 116 Wis. 113, 117, 92 N. W. 565; *Harrigan v. Gilchrist*, 121 Wis. 127, 313, 99 N. W. 909. The same rule obtains when the party to an action seeks to prove mistake in a written instrument. *Parker v. Hull*, 71 Wis. 368, 5 Am. St. Rep. 224, 37 N. W. 351. "Clear, convincing, and satisfactory" was the expression used in *Linde v. Gudden*, 109 Wis. 326, 85 N. W. 323, in an action in which it was sought to deny the execution of a deed duly acknowledged. Like words are used in *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, at page 667, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484, 491, to describe the degree of proof necessary to overthrow a rate fixed by the legislature. We must hold that in the statute before the court the legislature used the words "clear and satisfactory" in this sense, and intended they should describe that degree of proof necessary to establish fraud or prove mistake in a written instrument. We are not able to uphold the contention of the learned attorney general, made in his first brief, to the effect that this court cannot review the order of the commissioners, unless the order is confiscatory in its character and effect, and that "unlawful" and "unreasonable," in this statute, means "confiscatory," because it seems to us that this statute authorizing a review by the court is valid, and imposes upon the court duties which it may not disregard. Indeed, the Constitution of the state seems to forbid any other interpretation. Article 7, § 8. This court therefore maintains its right and duty to review the orders of the commission to the extent authorized by this statute as here construed. By the construction here given to the law, considering the degree of proof required and the view point of the investigation by the court, and that the court is dealing with a question of fact, or a mixed question of fact and law—(Morgan's

L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214), great weight is necessarily given to the orders of the commission.

There seems no valid ground of distinction, so far as the instant case is concerned, between unlawful orders and unreasonable orders of the commission. An unreasonable order is an unlawful order. What significance may be found in the future under different circumstances in the apparently antithetic use of these terms, it is not for us to here decide. Confiscatory orders are ordinarily, but not always, unlawful or unreasonable. In order to be fairly termed confiscatory, the order must deprive the railroad of a fair return upon the value of its property, not merely reduce former rates or charges. Cases may also arise, no doubt, in which an order may be unreasonable which falls short of being confiscatory, or in which the commission clearly misapplied some rule of law; but, in the review of questions of fact, it must, under the rules here found, require a very strong case to establish unreasonableness by evidence clear and satisfactory to the circuit court. Like the United States Supreme Court, we accord to the orders of the railroad commission the weight due to the decisions of a tribunal authorized by law and informed by experience. *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. But we go further than this, and add the requirement of that particular degree of proof specified in the statute, and we consider the subject-matter and scope of the judicial investigation above referred to. We thus leave upon the railroad commission the great responsibility which we believe the legislature intended to impose. In determining whether or not the order of the commission is unreasonable, it must also be considered that every unnecessary burden imposed upon the railroad impairs its net receipts and diminishes that margin, if there be one, between the amount sufficient to assure a fair return on the value of its property, plus the amount of its fixed charges and operating expenses, and its gross receipts. In this margin the public and the railroad are interested, because it is only when this exists that betterments in construction, or improvements in service not imperative or indispensable, or reduction in rates, will ordinarily be voluntarily made by the railroad, or can ordinarily be ordered or enforced by the commission. We are not now speaking of those extreme cases where the public duty must be discharged, whatever the financial consequences to the railroad. *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, and 17 L.R.A. (N.S.)

cases in *Rose's Notes*; 3 Cook, Corp. 4th ed. §§ 900, 901, and cases in notes. But, in ordinary cases, to waste this margin is to waste the fund in which the whole public is interested. This should never be done for the benefit of the few, as against the interests of many.

It is also to be considered that this margin ought not ordinarily to be exhausted or swept away by orders or requirements of the railroad commission as fast as accumulated, because human nature or railroad nature is such that no one will long economize on operating or other expenses if his economy only furnishes a larger basis for further exactions. The rights of the public and the rights of the railroad under this new law must be ascertained and developed by the railroad commission slowly and laboriously, moving from precedent to precedent as new instances arise, after the manner of the common-law courts. As was said in *Bates v. Relyea*, 23 Wend. 336, 341: "They [these instances] must, from the nature of our legal system, be the same to the science of law as a convincing series of experiments is to any other branch of inductive philosophy." Patience on the part of the public and on the part of the carrier, and time, will be necessary. The notion that commissions of this kind should be closely restricted by the courts, and that justice in our day can be had only in courts, is not conducive to the best results. Justice dwells with us as with the fathers; it is not exclusively the attribute of any office or class; it responds more readily to confidence than to criticism; and there is no reason why the members of the great railroad commission of this state should not develop and establish a system of rules and precedents as wise and beneficent within their sphere of action as those established by the early common-law judges. We find the statute well framed to bring this about.

With reference to the order appealed from, were this court sitting as a railroad commission, it would not have made the order in question, because, while the order is, no doubt, of great convenience to the dwellers about Dwight, their interest seems to us to be overbalanced by the larger interest of the general public. But this is far from saying that we find the order to be unreasonable, or that it appears to us by clear and satisfactory evidence that the order is unreasonable. Competent and reasonable men might differ with regard to the propriety, or with regard to the justice and reasonableness, of the order before the court. It neither affects the interests of the general public, nor the interests of the railroad, to any great extent. It is undoubt-

edly within the power of the railroad commission to make such an order. No errors of law appear to have been committed. We believe the circuit court was right in affirming the order of the commission, and there is no preponderance of evidence against the findings of that court, giving the order of the commission there in evidence the force and effect to which it is entitled by statute.

The judgment of the Circuit Court is affirmed.

Marshall, J., concurring (filed June 13, 1908):

Although, as said by the court, in effect, the commission may have gone too far, that does not appear with sufficient clearness to warrant disturbing the approving judgment of the circuit court. The commission evidently considered the matter with great care, fully appreciating that both sides of the controversy were entitled to consideration. I concur in the decision and in all said in the able opinion for the court by Mr. Justice Timlin giving the commission its proper and distinguished dignity in our governmental system. A code definitely established under the law on the high plane suggested will effect the purpose of regulation,—that of preventing injustice upon the one side, and of protecting private property rights upon the other.

I write to state, in a few words, views upon some questions discussed by the court, not suggesting, however, that they differ from those voiced in the opinion.

The words "unlawful" and "unreasonable" were not used in the regulation act as synonymous respecting all situations. Just what the scope of each is, as I view the matter, I will not now undertake to say. That may well be left open for future study and refinement.

The legislative scheme embodied in the act, as I understand was conceded upon the argument, is not to take control of railroad property and business from the proprietors, but to supervise the same so as to prevent extortion and injustice and secure fairly adequate service. It contemplates, as I think, that, so long as a rate for service is not extortionate, or service afforded is fairly adequate, the proprietors shall not be interfered with. So, in every hearing upon complaint, the initial and jurisdictional question is whether, in the given case, the conduct of the proprietors is unreasonable. It were better, if it is not necessary, that such jurisdictional fact be shown affirmatively to have been found.

Further, it would seem that in case of the commission dealing with inadequate

service it should require such additional service as to remove the element of injustice, affording, in the whole, the minimum of what is reasonable, leaving proprietors free and opportunity to give additional service. In case of the commission dealing with extortionate rates for service, it should remove the element of injustice by reducing the rates sufficiently to measure the excess, leaving the proprietors free and opportunity to make further reductions.

The boundaries of reason as applied to service or rates encompasses a broad field. The law does not contemplate that the commission shall make a selection within that field. Otherwise it would be subject to condemnation as a delegation of legislative power. While it is true that there is but one reasonable rate or degree of service which it is contemplated the commission shall seek for and name, I do not think that there is only one such rate or degree in a given case which is reasonable in the general sense. There may be many, but the commission is confined to one; otherwise it would, in selecting the proper one, exercise legislative power. So, the one degree or rate, so far as the commission is concerned, considering that it is merely to prevent extortion and injustice and compel the giving of service which is fair, is the minimum service or maximum rate.

I think the law contemplates a full judicial review by the circuit court of the action of the commission when properly challenged, the court to try questions of law and fact the same as the commission, giving such weight, however, to the decision of the latter on all matters of fact that it shall stand unless shown to be wrong by clear and satisfactory evidence; and, in case of an appeal to this court, that the scope of review shall be the same as in case of any appeal from a judgment in an action tried by the court.

If the regulation system shall be firmly established along the lines indicated, it will be upon a logical basis, which cannot be said of such systems generally. The commission which has charge of the matter here, backed by opportunity for support by a broad judicial review, subject to the deference which, as indicated, should be given to its decisions, can soon work out a plain course of administration, giving to our commonwealth a distinguished position in the field of safe, adequate, rational regulation.

Bashford, J.: I concur in the foregoing opinion of Mr. Justice Marshall.

Dodge, J., dissenting (filed June 10, 1908):

The opinion filed on behalf of the court

delegation of authority to find and declare that point is a delegation of authority to exercise legislative choice. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738. The court's opinion seems to me to concede that the duty of the commission in selecting and declaring a specific rate or service involves something more than mere discovery of a fact, for it proceeds to assert the inability of courts to review such act of the commission. It is there said that the court can only inquire whether the point fixed by the commission is "within the field of reasonableness," thus implying that more than one such point might have been selected within such fields. If the fiat of the legislature can, as said, be effective to create some one definite and fixed rate which is reasonable to exclusion of all others, and that such exact point can be ascertained by processes not legislative, why cannot such fact be ascertained by the court, as well as the commission? If, as said, there is then only one reasonable rate or service, any variation from that ideal is, of course, legislatively unreasonable, and the court, if convinced by the proof that the ideal is something different from the commission's order, obviously must adjudge that order unlawful.

I think, therefore, that this law should be so construed as to indicate to the commission a duty to find the reasonable rate, which is antithetic to the unreasonable one which the law condemns; and that point of reasonableness is the maximum rate or minimum service consistent with reason. So construed and conscientiously applied, I fully agree in the constitutionality of the law and in the hope of high value to the public of the services of an able and expert commission. If that be the construction, I find no longer any difficulty with the purpose of protection against injustice to the railroad companies afforded by a judicial review of *de novo* of the very fact which the commission finds and decides. This construction recognizes the reserved right in the legislature, performing its constitutional duty, to impose other rates than this maximum reasonable one, and preserves to the people and to the railroad companies the assurance that the resolution of questions of expediency and public policy shall rest with the representatives of the people responsible directly to them at the ballot box. My dissent from the judgment announced is upon the ground that I cannot convince myself that the service rendered by the railroad company at the time of the complaint to the commission was other than reasonably adequate. I deem this a jurisdictional fact, essential, under the statute, to the commission's authority to prescribe any service or rate.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493. Neither the commission, nor the court below, have made any finding upon that subject.

Since my view cannot prevail in the case, I deem it wholly unnecessary to discuss the evidence and considerations bearing upon the reasonable adequacy of that service.

ARKANSAS SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, Appt.,
v.

W. B. LILLARD.

(— Ark. —, 110 S. W. 1035.)

Telegraph — improper matter — refusal to transmit.

1. A telegraph company cannot escape liability for the statutory penalty for refusing to transmit over its lines a telegram informing a railroad superintendent that there was no fire in a railroad station, and asking whether it was the duty of the passenger or agent to make it, on the theory that it was improper.

Agent — authority — acts.

2. That the agent in charge of a railroad station was the agent of a telegraph company to receive messages for transmission over its lines may be established by proof that, in the absence of the operator, he did receive such messages.

Evidence — contents of telegram.

3. Oral evidence of the contents of a telegram is admissible in an action to hold the company liable for refusal to transmit it.

(May 11, 1908.)

Case Note. — Right to refuse telegraph message because of its character.

There seems to be but little direct authority upon this question, as an exhaustive search has disclosed but one other case in which the right of a telegraph company to refuse a message on this ground was specifically presented for adjudication; but it seems to be the undoubted rule of law, as gathered from these and some other cases not strictly in point on this note, that a telegraph company has no right to refuse a message unless it is couched in indecent or libelous language.

Thus, in *Western U. Tele. Co. v. Ferguson*, 57 Ind. 495, in which it appeared that a telegraph company refused to send the following message: "Send me four girls . . . to tend fair," it was held that the company could not successfully resist an action to recover the statutory penalty for such refusal, upon the ground that it believed that the sender desired the girls for purposes of

APPEAL by defendant from a judgment of the Circuit Court for Miller County in plaintiff's favor in an action brought to recover the statutory penalty for refusal to transmit a telegram. Affirmed.

Statement by Hart, J.:

This is a suit to recover the statutory penalty of \$500, under § 7946 of Kirby's Digest, for alleged wilful refusal of the defendant telegraph company to send a message tendered for transmission by the plaintiff, W. B. Lillard. The message alleged to have been tendered and refused was as follows:

5:40 P. M. Stamps, Ark.,
December 24th, 1906.
Superintendent Cotton Belt Railway,
Pine Bluff, Arkansas.

No fire in depot. Is it agent's or passenger's place to make one? Wire answer.
W. B. Lillard.

The evidence adduced at the trial shows that the plaintiff, W. B. Lillard, delivered the telegram in question, with the money required to send same, at the office of the telegraph company to a person seemingly in charge of the office, but who was in reality the porter at the station; that afterwards, but during the business hours of the telegraph company, the station agent came in and told the plaintiff, Lillard, when the message was given him by the porter, that it would not be sent. The telegraph operator came in before the office was closed for the day. The record is silent as to whether or not the message was delivered to him, but it was not transmitted over the wire.

prostitution. The court said that it knew of no provision of law which would authorize a telegraph company or its agents to inquire into or impugn the motives of anyone who might desire to transmit a message in decent language over its lines, or to make such company a censor of public or private morals, or a judge of the good or bad faith of anyone who might seek to use its lines; and that, if the message offered for transmission was expressed in decent language, and if the charges were tendered, it was the duty of the company to accept it, and it had no discretion; but, if the message was expressed in indecent, obscene, or filthy language, the company would have the undoubted right to refuse it.

And in *Nye v. Western U. Teleg. Co.* 104 Fed. 628, which was an action for libel, the court laid down the rule that, while it was certain that no telegraph company could assume to act as censor of the language of messages offered, or of the purpose they were intended to accomplish, yet it would be its right and duty to refuse to transmit a message which, upon its face, was obscene, profane, or clearly libelous, and manifestly 17 L.R.A. (N.S.)

The offices of the telegraph operator and of the station agent were in the same room, and, in the absence of the operator, the station agent acted in his place. There was a verdict and judgment for \$500, and defendant has appealed.

Messrs. George H. Fearons, Todd & Hurley, and Rose, Hemingway, Cantrell, & Loughborough, for appellant:

The telegram never reached the operator, and for its destruction only the station agent, who was not in the employment of the telegraph company, was responsible.

Western U. Teleg. Co. v. Weniski, 11 Ark. Law Rep. 544; *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Houston, C. A. & N. R. Co. v. Bolling*, 59 Ark. 395, 27 L.R.A. 190, 43 Am. St. Rep. 38, 27 S. W. 492; *Little Rock Traction & Electric Co. v. Walker*, 65 Ark. 144, 40 L.R.A. 473, 45 S. W. 57; *Peter Anderson & Co. v. Diaz*, 77 Ark. 606, 4 L.R.A. (N.S.) 649, 113 Am. St. Rep. 180, 92 S. W. 861.

The telegram could not have been tendered in a bona fide expectation that the agent would transmit it.

St. Louis & S. F. R. Co. v. Trimble, 54 Ark. 354, 15 S. W. 899; *Brenner v. Jonesboro, L. C. & E. R. Co.* 82 Ark. 128, 9 L.R.A. (N.S.) 1060, 118 Am. St. Rep. 56, 100 S. W. 893; *State v. Western U. Teleg. Co.* 76 Ark. 125, 88 S. W. 834.

Mr. L. A. Byrne, for appellee:

When one goes into a telegraph office to send a message, and finds a man in charge who acts for the company, the presumption is that he has the authority to act for his employer.

intended only for the purpose of defamation.

And in *Gray v. Western U. Teleg. Co.* 87 Ga. 350, 14 L.R.A. 95, 27 Am. St. Rep. 200, 13 S. E. 562, which was an action to recover the statutory penalty for delay in delivering a telegraph message, it was said that a despatch, to be entitled to transmission, must be free from indecency or profanity, but, if proper in tone and expression, a telegraph company could have no concern with its import, unless it sought to subvert either crime or tort; but that, if it disclosed either of these objects, the company, for its own protection, should refuse to handle it.

And in *Peterson v. Western U. Teleg. Co.* 65 Minn. 18, 33 L.R.A. 302, 67 N. W. 646, which was also an action for libel, the rule was laid down that a telegraph company, being a common carrier, was bound to transmit all proper messages delivered to it for that purpose, but was not bound to send indecent or libelous communications.

As to liability of telegraph company for handling libelous message, see case note to *Western U. Teleg. Co. v. Cashman*, 9 L.R.A. (N.S.) 140.

State v. Harris, 3 Ark. 578, 36 Am. Dec. 460; Little Rock & Ft. S. Teleg. Co. v. Davis, 41 Ark. 83; St. Louis, I. M. & S. R. Co. v. Hendricks, 48 Ark. 177, 3 Am. St. Rep. 220, 2 S. W. 783; 1 Am. & Eng. Enc. Law, 2d ed. p. 957.

The telegram contained nothing that could be objectionable to the telegraph company; and the motive of the plaintiff cannot be inquired into by the defendant.

Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752.

Hart, J., delivered the opinion of the court:

1. Appellant contends that the telegram was an improper message to transmit over the wires. A telegraph operator may refuse to send a message that is obscene, slanderous, blasphemous, profane, indecent, or the like, but the telegram in question was not of such character, and was entirely proper to be transmitted. Doubtless the object of the message was to report the servants of the railroad company for neglect of duty in not keeping up the fire in the station, but the object of the sender cannot affect the right to recover in a suit to enforce the penalty prescribed by the statute. Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752; St. Louis & S. F. R. Co. v. Trimble, 54 Ark. 354, 15 S. W. 899.

2. There is nothing in the contention of appellant that the message was not delivered to an agent of the company. It is not important to consider whether or not the station porter was also the employee of the telegraph company, and, as such, empowered to receive messages for transmission over the wire; for the undisputed testimony is that, in the absence of the operator, the station agent received messages for transmission. This was sufficient to establish his agency. It would often be difficult to prove the relation of master and servant except by the fact that the one performs service for the other. St. Louis, I. M. & S. R. Co. v. Hendricks, 48 Ark. 177, 3 Am. St. Rep. 220, 2 S. W. 783.

3. It is lastly contended that the trial court erred in admitting oral testimony of the contents of the telegram. This contention is without foundation; for the language of the telegram was not a matter in issue. Besides, appellee testified that he left the telegram in the possession of the station agent, and does not know what he did with it.

Affirmed.
17 L.R.A. (N.S.)

ARKANSAS SUPREME COURT.

J. L. JOHNSTON et al., Appts.,
v.
A. Z. SCHNABAUM.

(— Ark. —, 109 S. W. 1163.)

Note — indorsement — collection.

1. A bank which, upon receiving a note for collection, indorses it, "Previous indorsements guaranteed. Pay to the order of any bank or banker;" and forwards it to a correspondent for collection,—does not render itself liable on the paper.

Same — explanation — parol evidence.

2. A bank which, in order to facilitate the collection of a customer's note, places its unrestricted indorsement thereon, may explain such indorsement by parol evidence as against a purchaser with notice.

Same — indorsement for collection.

3. An indorsement, by a bank, of a note, to pay to the order of any bank or banker, shows on its face that it passes title for collection only.

Same — maker's liability — irregular indorsements.

4. Sureties who place their names on the face of a note as makers are primarily liable to a holder, notwithstanding any irregularity in the indorsements.

Same — payment by stranger.

5. A stranger who pays the amount of a note and receives a delivery of it to himself will be held to be a purchaser until an intention to the contrary appears.

(April 20, 1908.)

Case Note. — Right to show by parol evidence that indorsement unrestricted in form was made for purpose of collection only.

The general rule that parol evidence is inadmissible to vary or contradict the legal effect of a written instrument applies not only to ordinary contracts, but also to indorsements of negotiable paper. However, in many jurisdictions there is an important exception in that the indorsement and transfer may be proven to have been for collection purposes merely; but in such case the authorities are in hopeless conflict, both as to what extent, and between what parties, such testimony will be allowed. Those jurisdictions which permit its admission predicate their decisions on the reasoning that the signature of the indorser is not a complete written contract, but is inchoate and imperfect, and that, according to mercantile usage and the real nature of the transaction, authority is given to fill up the indorsement with the true agreement. On the other hand, many courts apply the parol evidence rule strictly, refusing to recognize the exception made by other courts. They hold that the contract is complete whether the indorser has set his contract out in writing, or left it to be implied by

A PPEAL by defendants from a judgment of the Circuit Court for Randolph County in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed in part.

The facts are stated in the opinion.

Mr. George T. Black, for appellants:

Parol evidence is admissible to show the character of an undertaking of a third party, other than the payee, whose name appears upon the back of a note.

2 Enc. Ev. p. 537; Smith v. Childress, 27 Ark. 329; Dickinson v. Burr, 15 Ark. 372; Payne v. Flournoy, 29 Ark. 501.

Messrs. J. B. McCaleb and Witt & Schoonover, for appellee:

After the note has passed into circulation, and the accommodation indorser's lia-

bility has become fixed, he cannot make the defense of want of consideration against anyone except the accommodated party.

Joyce, Defences to Com. Paper, 279.

One who indorses paper after its maturity is liable on it as an indorser to his immediate indorsee and to subsequent holders.

7 Cyc. Law & Proc. p. 826.

Where the judgment of the trial court is right and correct, the case should not be reversed for error in the instructions.

St. Louis Southwestern R. Co. v. Russell, 64 Ark. 238, 41 S. W. 807.

McCulloch, J., delivered the opinion of the court:

J. L. Johnston and G. H. Counts, together with G. S. Johnston, now deceased, executed

the note, or his right to sue thereupon; but not to vary the effect of the assignment.

And parol evidence, explanatory of an indorsement, has been admitted in the following cases as between immediate parties: Dickinson v. Burr, 15 Ark. 372; Allyn v. Williams, 97 Cal. 403, 32 Pac. 441; Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Friend v. Duryee, 17 Fla. 111, 35 Am. Rep. 89; Sheldon v. Southern Exp. Co. 48 Ga. 630; Stack v. Beach, 74 Ind. 571, 39 Am. Rep. 113; Geneser v. Wissner, 69 Iowa, 119, 28 N. W. 471; Lovejoy v. Citizens' Bank, 23 Kan. 331 (set out in JOHNSTON v. SCHNABAUM; M'Donough v. Goule, 8 La. 472; Hamburger v. Miller, 48 Md. 325; Church v. Barlow, 9 Pick. 547; Barker v. Prentiss, 6 Mass. 430; United States Nat. Bank v. Geer, 55 Neb. 462, 41 L.R.A. 444, 70 Am. St. Rep. 300, 75 N. W. 1088, reversing on rehearing 53 Neb. 67, 41 L.R.A. 439, 73 N. W. 266; Hudson v. Wolcott, 39 Ohio St. 618; Rhodes v. Risley, 1 D. Chip. (Vt.) 52, 1 Am. Dec. 696; Denton v. Peters, L. R. 5 Q. B. 475.

In Dale v. Gear, 38 Conn. 15, 9 Am. Rep. 353, s. c. 39 Conn. 89, the court held that, in the exceptional case of a note being indorsed for some special purpose, and therefore held in trust only, as where indorsed and delivered for collection, such state of facts could be pleaded and proven by parol.

And parol evidence is admissible to prove whether the holder is in possession of a note as owner or agent for collection, when innocent parties will not be affected thereby. Carhart Bros. v. Wynn, 22 Ga. 24.

In McWhirt v. McKee, 6 Kan. 412, it was permitted to be proven by parol evidence that an assignment of a note was made only for the purpose of collection, on the ground that such oral testimony did not contradict the assignment, did not vary it, and did not even explain it; that, as the contract was outside of the assignment, and being parol in character, it could be proven by oral testimony.

In Kuntz v. Tempel, 48 Mo. 71, in holding parol evidence explanatory of an indorsement admissible, the court said: "This parol evidence contradicts nothing. The law only implies a particular undertaking in the absence of an actual one; and, where the latter is shown, there is no room for the former."

And in Lawrence v. Stonington Bank, 6 Conn. 521, it was held competent for the indorser of a note to prove that the indorsee gave no consideration for it, but held it merely as agent of the payees for collection.

In Smith v. Childress, 27 Ark. 328, parol evidence was held admissible to show that a note was assigned for collection merely, as testimony to prove that the indorser had not parted with his beneficial interest in

the note, or his right to sue thereupon; but not to vary the effect of the assignment.

And parol evidence, explanatory of an indorsement, has been admitted in the following cases as between immediate parties: Dickinson v. Burr, 15 Ark. 372; Allyn v. Williams, 97 Cal. 403, 32 Pac. 441; Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Friend v. Duryee, 17 Fla. 111, 35 Am. Rep. 89; Sheldon v. Southern Exp. Co. 48 Ga. 630; Stack v. Beach, 74 Ind. 571, 39 Am. Rep. 113; Geneser v. Wissner, 69 Iowa, 119, 28 N. W. 471; Lovejoy v. Citizens' Bank, 23 Kan. 331 (set out in JOHNSTON v. SCHNABAUM; M'Donough v. Goule, 8 La. 472; Hamburger v. Miller, 48 Md. 325; Church v. Barlow, 9 Pick. 547; Barker v. Prentiss, 6 Mass. 430; United States Nat. Bank v. Geer, 55 Neb. 462, 41 L.R.A. 444, 70 Am. St. Rep. 300, 75 N. W. 1088, reversing on rehearing 53 Neb. 67, 41 L.R.A. 439, 73 N. W. 266; Hudson v. Wolcott, 39 Ohio St. 618; Rhodes v. Risley, 1 D. Chip. (Vt.) 52, 1 Am. Dec. 696; Denton v. Peters, L. R. 5 Q. B. 475.

In Georgia the admission of parol evidence to prove that an indorsement unrestricted in form was made for purposes of collection only is governed by statute. Thus, in Lynch v. Goldsmith, 64 Ga. 42, under Code, § 2756, and in Galceran v. Noble, 66 Ga. 367, under Code 1873, § 3808, parol evidence was held admissible as between immediate parties.

But in Woodward v. Foster, 18 Gratt. 200, where an attempt was made to vary the legal import of a blank indorsement on the ground that the parol-evidence rule has no application to contracts the terms of which are not written out, but are implied by law, the court said: "There is no just ground in principle for the distinction thus contended for. When the legal import of a contract is clear and definite, the intention of the parties is, for all substantial purposes, as distinctly and as fully expressed as if they had written out in words what the law implies. It is immaterial how much or how little is expressed in words, if the law attaches to what is expressed a clear and definite import. Though the writing

to one Redwine, as guardian of an infant, their negotiable promissory note for the sum of \$197, with interest from date, and, at or before maturity of the note, Redwine delivered it, bearing his blank indorsement, to the Bank of Maynard for collection and deposit of the proceeds to his credit. Appellants J. L. Johnston and Counts were sureties on the note for G. S. Johnston, the principal obligor. Subsequently, and after the maturity of the note, the Bank of Maynard, which was located at Biggers, Randolph county, Arkansas, received a verbal message from appellee, Schnabaum, requesting the bank to send the note to the Randolph County Bank at Pocahtontas, and that he (Schnabaum) would "take it up." The Bank of Maynard made the following indorsement on the back of the note:

Previous indorsements guaranteed. Pay to the order of any bank or banker.

[Signed] Bank of Maynard.
by J. L. Talbert, Cashier.

The note was then forwarded to the Bank of Randolph County for collection. Appellee paid the full amount of the note and interest to the bank, and the note was delivered to him without further indorsement thereon, and the amount so paid was sent by the collecting bank to the Bank of Maynard, and

the latter in turn paid it over to Redwine. Appellee held the note a year or longer, and then instituted this action on the note against the appellants J. L. Johnston and Counts as makers and the Bank of Maynard as indorser. Redwine was also sued, but the action was dismissed as to him.

Appellee testified that he instructed Robinson, the person by whom he sent the message to the Bank of Maynard, to request the bank to send the note to the Bank of Randolph County, but not to mark it paid; and that he would "take it up as received, and would carry it until Johnston could pay it off." His testimony shows, further, that he did not, in making the payment, intend to discharge the debt, but intended to purchase the note and hold it for payment by the makers. Robinson, in his testimony, denied that appellee instructed him to request the Bank of Maynard not to mark the note paid, or that he expected to hold the note as secured. He testified that appellee only told him to request the bank to send the note to the Bank of Randolph County, and that he would "take it up." This, the evidence shows, was the only message ever delivered to the bank, and that the note was forwarded in response to this message. The court instructed the jury that, if the Bank of Maynard made the indorsement in question, and that the note had not been paid

consists only of a signature, as in the case of an indorsement in blank, yet, where the law attaches to it a clear, unequivocal, and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement than if the whole contract has been fully written out in words. The mischiefs of admitting parol evidence would be the same, in such cases, as if the terms implied by law had been expressed."

And in *Day v. Thompson*, 65 Ala. 269, where a draft was indorsed, for the sole purpose of enabling plaintiff to collect it, the court said: "The parol evidence, allowed to be introduced in the court below, to show that the defendant indorsed the bill in suit for the sole purpose of transferring the title to the plaintiff, and with no intent of rendering himself personally liable, was improperly admitted. The contract imported by the regular indorsement of a bill or note is of a fixed and definite character, and is interpreted by the law. It is legally incapable of explanation, contradiction, or modification by parol evidence. This rule is founded on the soundest principles of reason and public policy, as well as on the weightiest authority. The reasons for its application to commercial paper are more cogent, if anything, than to other written contracts."

In *Third Nat. Bank v. Clark*, 23 Minn. 263, it was held that there can be no such 17 L.R.A. (N.S.)

thing as an indorsement wholly or partly in parol; and that, in an action on the note, what the indorser and indorsee may have intended by the indorsement, except so far as it is expressed in the writing, is of no consequence.

In *Martin v. Cole*, 3 Colo. 113, it was held that the legal import of a general indorsement cannot be varied by parol evidence tending to show that the indorsement was for collection only, or, in other words, that the contract made was different from that expressed, and that the indorsement was a restricted one. To the same effect are the following: *Dunn v. Ghost*, 5 Colo. 134; *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145; *Johnson v. Ramsey*, 43 N. J. L. 279, 39 Am. Rep. 580, overruling *Johnson v. Martinus*, 9 N. J. L. 144, 17 Am. Dec. 464.

It is unanimously held that the title of a third person, who has taken in good faith and for value before maturity, cannot be affected by parol proof that an unrestricted indorsement was made for purposes of collection only. *Coors v. German Nat. Bank*, 14 Colo. 202, 7 L.R.A. 845, 23 Pac. 328; *Meador v. Dollar Sav. Bank*, 56 Ga. 605; *Goodwin v. Davenport*, 47 Me. 112, 74 Am. Dec. 478; *Hamburger v. Miller*, supra.

And this is also true of a bona fide indorsee for value, who takes after maturity. *Parker v. Stallings*, 61 N. O. (Phill. L.) 590, 98 Am. Dec. 84.

to appellee, the bank was liable. This was equivalent to a peremptory direction to the jury. We think that, according to the undisputed evidence, the bank was not liable.

So far as the guaranty of the previous indorsement of Redwine is concerned, that amounted only to a guaranty of the genuineness of the indorsement; and did not render the bank liable on the note. The other part of the indorsement was unrestricted, and, unless explained, would render the indorser liable. But it is shown by undisputed evidence that the note was sent to the Bank of Randolph County for collection, and that the indorsement was made only for that purpose. The question arises, then, whether parol evidence is admissible to explain or qualify an unrestricted indorsement. The authorities seem to uniformly sustain the view that, under some circumstances, parol testimony may be admissible for that purpose. Mr. Daniel, in discussing the various circumstances under which parol testimony is admissible for such purpose, says: "Secondly, it might be shown that the indorsement was upon trust for some special purpose, as from a principal to an agent, to enable him to use the instrument or the money in a particular way, or for collection." 1 Dan. Neg. Inst. 1st ed. § 721. See also, to the same effect, Joyce, Defences to Com. Paper, § 255; Doolittle v. Ferry, 20 Kan. 230, 27 Am. Rep. 166; Lovejoy v. Citizens' Bank, 23 Kan. 331; Patten v. Pearson, 57 Me. 428; M'Donough v. Goule, 8 La. 472; Lawrence v. Stonington Bank, 6 Conn. 521; Dale v. Gear, 38 Conn. 15, 9 Am. Rep. 353; Ricketts v. Pendleton, 14 Md. 320. In Lovejoy v. Citizens' Bank, supra, a note was made payable to the president of the bank individually, and was by him indorsed in blank to the bank. The court held that, notwithstanding the unrestricted indorsement, he could prove by parol evidence that the note represented a debt of the maker to the bank, and that he (the nominal payee) made the indorsement merely for the purpose of passing title to the bank. No rule of evidence is, we think, violated by admitting such explanation. While the law implies from an unrestricted indorsement a contract to guarantee payment of negotiable paper, still the fact may be shown that the purpose of the assignment was merely for collection, and not for a sale of the instrument; and, when this is shown, no liability as guarantor of payment is implied. The appellee in this case knew that the note was forwarded by the bank only for collection, and could therefore claim no greater rights under the indorsement than his immediate transferee could have claimed. Indeed, the form of the indorsement itself may be said to show on its face 17 L.R.A. (N.S.)

that it passed the title for collection only. It now reads "to any bank or banker," which would indicate that it was for collection. The other two appellants stand in a different attitude. They appeared on the face of the note as joint makers, but were in fact merely sureties for G. S. Johnston. They were primarily liable to any holder of the note for the amount thereof notwithstanding any irregularity in the indorsement. Appellee was a stranger to the contract represented by the note, and a payment by him of the amount and delivery to him of the note will be held to be a purchase until an intention to the contrary is shown. 7 Am. & Eng. Enc. Law, p. 1025. These two appellants did not, in their answer, make any denial of the transfer of the note to appellee as alleged in the complaint, but rested their defense entirely upon the plea of payment. There was some evidence tending to show that the note was paid to appellee by Johnston, the principal debtor; but there was a conflict in the testimony, and the jury settled that issue in favor of appellee.

The judgment against the Bank of Maynard is reversed, and the cause is dismissed; but the judgment against the other two appellants is affirmed.

FLORIDA SUPREME COURT.

HENRY THALHEIMER et al., Appts.,

v.

PHILIP TISCHLER et al.

(— Fla. —, 46 So. 514.)

Execution — equitable assets.

1. An equitable asset of a debtor can be reached only by proper proceedings in a court of equity, and is not subject to levy and sale under an execution at law issued upon a judgment recovered against such

Headnotes by SHACKLEFORD, Ch. J.

Case Note. — Levy under execution or attachment, upon rights under lease.

A term for years in realty was always, at common law, regarded as a chattel, being transferred as personal, and not real, estate; hence, a leasehold interest in lands for a term of years is, in the absence of statute directing otherwise, levied upon and sold by virtue of an execution, as personal property. And the lessee of personal property has also an interest therein, subject to seizure and sale in like manner as the lessee's interest in realty. Property subject to execution is generally held to be subject to attachment; so a lien on the lessee's interest in the leasehold estate may be acquired by virtue of attachment proceedings. The gen-

debtor, or upon a deficiency decree rendered against him in a suit for the foreclosure of a mortgage; and, where such levies and sales are made, and deeds executed, by the sheriff, they are all nullities, and vest no title in the purchasers.

Same — leasehold interest — option to purchaser.

2. A lease, for a term of years, of real estate, wherein the lessee is given the option, at any time after the expiration of a certain fixed period therein, to purchase the leased property for a certain stipulated price; and such lessee, in the event he failed to exercise such option to purchase, is given therein the right, at the expiration of the term, to be paid one half of the valuation of the improvements he had placed on the leased premises as fixed by three disinterested persons,—does not give the lessee such an interest in the leased premises as can be subjected to sale under an execution at law. This contemporaneous intermixture and mingling of legal and

equitable interests creates an amalgam that can only be properly disposed of and sold under a decree in equity.

Lien — assignment of equitable interest — priority.

3. One who lends money to another for the purpose of erecting a building on a lot upon the faith of a verbal agreement based upon the prior assignment of a lease combined with an option to purchase has an equity against such debtor for the amount of money so advanced or loaned, superior to that of after-acquired judgments or deficiency decrees in a mortgage foreclosure against him, or to the equity, if any, of a volunteer purchaser at an illegal execution sale of the debtor's interest in the property, even though the judgments against such debtor, on which the executions issued, may have been recovered prior to the lending of the money to him by such creditor.

(April 20, 1908.)

eral question discussed in *THALHEIMER v. TISCHLER*, as to whether an equitable interest is subject to attachment or not, is not considered in this note, no other case having been found in which this question arose in connection with rights growing out of a lease. Cases in which the lessee's creditors have attempted to seize, by execution, crops growing on the leased land, have also been excluded.

A leasehold interest in realty is regarded as a chattel real, and is subject to levy and sale under execution or writ of *fiери facias* on behalf of the lessee's creditors, the same as personality. *Sparrow v. Bristol*, 1 Marsh. 10; *Barr v. Doe*, 6 Blackf. 335, 38 Am. Dec. 146; *Acklin v. Waltermier*, 19 Ohio C. C. 372; *Doe ex dem. Glenn v. Peters*, 44 N. C. (Busbee, L.) 457, 59 Am. Dec. 563; *Bigelow v. Finch*, 17 Barb. 394 (where the above principle was recognized though the purchaser at execution sale was held to have acquired no title, because the sheriff did not execute the deed until after the term had expired); *Dalzell v. Lynch*, 4 Watts & S. 255; *Sterling v. Com.* 2 Grant, Cas. 162; *Lerew v. Rinehart*, 3 Pa. Co. Ct. 50; *Kile v. Giebner*, 114 Pa. 381, 7 Atl. 154.

In *Williams v. Downing*, 18 Pa. 60, the above rule was recognized, although a judgment for the purchaser of the lessee's interest at sheriff's sale was reversed because it appeared the lessee had made a prior sublease to third parties for the balance of his term.

And again, in *Bismark Bldg. & L. Assn. v. Bolster*, 92 Pa. 123, the same general rule was laid down, although the case turned upon the question whether the purchaser of the leasehold interest took the same subject to an unrecorded mortgage of the lease to third parties.

The general creditors of a lessee of realty may acquire a lien by virtue of attachment of the leasehold interest, since such leasehold is considered a chattel real and sub-

ject to execution; hence, it is also held to be subject to attachment. *McCreery v. Berney Nat. Bank*, 116 Ala. 224, 67 Am. St. Rep. 105, 22 So. 577; *Shelton v. Codman*, 3 Cush. 318 (where the above rule was recognized, though the lessor was not held liable to the purchaser at sheriff's sale for a breach of covenant in the lease, because the breach occurred before the sale).

But in *Mayhew v. Hathaway*, 5 R. I. 283, where the sheriff attached defendant's interest in certain buildings erected on ground leased for a period of five years, by serving the writ according to the personal-property law, it was held that the buildings, being fixtures on property leased for a period of more than one year, could be attached only in accordance with the law of real property, since a leasehold interest of more than one year is treated as realty.

In *First Nat. Bank v. Consolidated Electric Light Co.* 97 Ala. 465, 12 So. 71, where a landlord attached the lessee's interest in the leased property for rents due, under a statute giving a landlord such a lien for rents, upon the goods, furniture, and effects of the tenant upon or in the leased premises, it was held that such statute did not include within its terms the lessee's interest in the leased property.

In Texas, under a state statute prohibiting subletting without the consent of the landlord, it has been held that the lessee of real property under a lease creating no general power to sublet has no interest which will support attachment proceedings by his creditor. *Moser v. Tucker*, 87 Tex. 94, 26 S. W. 1044, 1105 (which seems to have been the first case in which the above doctrine was announced, although the action was in the nature of a creditors' bill to reach the debtor's interest held under a lease and assigned to third parties); *Boone v. First Nat. Bank*, 17 Tex. Civ. App. 365, 43 S. W. 594 (in which the lease provided that the lessee might sublet "to any responsible par-

A PPEAL by complainants from a decree of the Circuit Court for Duval County adjudging the rights of the parties in an action brought to foreclose liens in favor of complainants upon certain real estate. Reversed.

Statement by Shackelford, Ch. J.:

On the 16th day of January, 1906, the appellants, as complainants, filed their bill in chancery in the circuit court for Duval county against all the appellees, as defendants, with the exception of the appellee, A. T. French, who was made a defendant by a supplemental bill filed by the appellants on the 20th day of September, 1906, for the purpose of foreclosing certain liens in favor of the appellants created by the defendant Philip Tischler upon certain described properties.

The pleadings, exhibits, evidence, master's report, exceptions thereto, final decree, and

the proceedings generally are quite voluminous, comprising 325 typewritten pages. In view of the conclusion which we have reached, and also by reason of the fact that there is no serious dispute among the respective parties as to the facts, and the points of law growing out of the various complicated transactions are clearly and succinctly presented to us for determination, no extended statement of the pleadings and evidence is necessary. The bill sought the foreclosure of a lien against a certain described parcel of land, commonly known as the "Henderson lot," or the "Placide lot," by reason of the fact that the Placide hotel was constructed thereon, and also sought the foreclosure of a lien against two other pieces of property, known, respectively, as the "Bailey property," and the "Honeymoon (or Ward) property." The rights of the respective parties with reference to the last two pieces of property were satisfactorily settled by the court

ty in the same line of business, or in any line of business agreeable to the lessor"); Mexican Nat. Coal, Timber, & I. Co. v. Frank, 154 Fed. 217.

But in *Copeland v. Cooper Grocery Co.* (Tex. Civ. App.) 63 S. W. 886, the fact that the lessor had executed a written waiver of the conditions of the lease and the benefit of the statute prohibiting subletting was held to have taken the case out of the above rule, and given the creditor the right to attach the lessee's interest in the premises.

In *Holliday v. Ahle*, 99 Mo. 273, 12 S. W. 797, it was held, where plaintiff sought to recover as purchaser at an execution sale the lessee's interest in premises held under a tenancy from month to month, that, in the absence of the lessor's consent, plaintiff could not recover, since it is provided by statute that "no tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest, or any part thereof, to another, without the written assent of the landlord;" and the effect of that provision could not be evaded by sale on execution against the lessee.

The common-law rule, which treated a term of years as personalty, and, as such, subject to attachment or execution as personal property, rather than as real property, was applied in *Mun v. Carrington*, 2 Root, 15, which was a lease for nine hundred and ninety-nine years.

And in *Bisbee v. Hall*, 3 Ohio, 449, the common-law rule seems to have been followed; and it was held that a leasehold interest in realty for ninety-nine years was subject to sale under execution and levy, the same as a chattel.

But in *Northern Bank v. Roosa*, 13 Ohio, 335, it was held that, under a state statute, a leasehold interest for ninety-nine years was subject to levy and sale by execution, 17 L.R.A. (N.S.)

in the same manner as realty, the common-law rule having been changed by the statute.

And in the following cases it is assumed, without argument, that the lessee's interest in real or personal property may be reached by attachment or execution. *Doe ex dem. Mitchinson v. Carter*, 8 T. R. 57; *Smith v. Scanlan*, 106 Ky. 572, 51 S. W. 152; *Jackson ex dem. Schuyler v. Corliss*, 7 Johns. 531; *Jackson ex dem. Stevens v. Silvernail*, 15 Johns. 278.

Lease of personal property.

It has also been held in the following cases that the lessee's interest in personal property held under a lease is subject to execution and levy in behalf of creditors of the lessee: *Dean v. Whittaker*, 1 Car. & P. 347; *Duffill v. Spottiswoode*, 3 Car. & P. 435; *Gordon v. Harper*, 7 T. R. 9 (*dictum*); *Otis v. Wood*, 3 Wend. 498 (where the above rule was laid down, though the lessor was allowed to recover because of a forfeiture); *Van Antwerp v. Newman*, 2 Cow. 543.

So, the same general rule has been followed as to the attachment of a lessee's interest under a lease of personal property. In *Wheeler v. Train*, 3 Pick. 255, holding that the lessor could not replevin the property from the purchaser under sheriff's sale during the term of the lease.

But in *Touhy v. Wingfield*, 52 Cal. 319, it was held that a lessee under a lease of certain sheep for a term of years, the wool to be delivered to the lessor for division at the end of each year, as was the whole flock of sheep at the end of the term, the increase to be then divided between himself and the lessee, had no such interest in either the sheep or the wool as would support a seizure under attachment, since the lessor under this contract was the owner of all the sheep and wool.

below in the decree rendered, to the effect that the complainants had a lien thereon for the sum of \$15,203.12, which portion of the decree is conceded to be correct by all parties; so no further reference need be made thereto. So far as this court is concerned, the litigation is confined to the Henderson lot. The court below decreed that the complainants had a lien thereon for the sum of \$10,278.86, the amount found to be due for moneys advanced by the complainants to Philip Tischler in the years 1891 and 1892, but refused to decree a lien thereon for the further sum of \$6,269.80, the amount found to be due from Tischler to the complainants for moneys advanced in the years 1901 and 1902. The court further found and decreed that the defendants Fred K. Robinson and O. K. Robinson, her husband, were the owners and assigns of all the estate, right, title, and interest which the defendant Philip Tischler had in and to the Henderson lot on the 15th day of November, 1905, or at any time thereafter up to and including the date of the sheriff's sale to them of said property, to which we shall have occasion to refer hereinafter, subject only to the lien of the complainants thereon for the sum of \$10,278.85, together with interest thereon from the 8th day of August, 1907, at the rate of 8 per cent per annum, for principal and interest, and the further sum of \$750 for attorneys' fees, and the proportion of costs of suit which was fixed by the decree; and that, with the exception of such lien of the complainants, the Robinsons were entitled to such property, free and clear of any interest and all other claims or liens of any and all of the parties to the suit. The Robinsons seek to maintain the decree as it stands, while the complainants seek a reversal because of the claim of the Robinsons having been adjudicated to be superior to the lien of the complainants for the additional sum of \$6,269.80; and the defendant A. T. French, who has assigned cross-errors, also seeks a reversal of the decree, claiming that his title to the property in dispute is superior to that of the Robinsons, and that he is entitled thereto or the proceeds arising from the sale thereof under the decree, subject only to the lien of the complainants for the sum of \$10,278.86, together with the attorneys' fees and costs as fixed by the decree. As we understand from the briefs and oral arguments of the complainants, the Robinsons, and French, who are the only parties contending before this court, it is conceded by all of them that the decree is correct in so far as it finds that the complainants have a first lien on the property for the sum of \$10,278.86. Both the complainants and French filed exceptions to the master's re-

port, all of which were overruled by the court, which rulings are respectively assigned as error, and errors are also assigned by both the complainants and French upon the final decree; but we deem it unnecessary to copy the assignments of error or to discuss them in detail. The points presented for our determination seem to resolve themselves into the following: First. Are the complainants entitled to a lien on the property for the additional sum, as claimed by them, of \$6,269.80, and, if so, is such lien superior to the claims, liens, or titles of the Robinsons or French? Second. Are the Robinsons entitled to what was awarded them in the decree? Third. Is the claim of French superior to that of the Robinsons, and subordinate only to the claim of the complainants for the sum of \$10,278.86? The answering of these questions is the task which confronts us. In order to do this we shall have to ascertain and set forth the bases of the claims of these three contending parties to the property in dispute. This we shall now proceed to do.

Prior to the 25th day of June, 1889, the defendant Philip Tischler was the owner of the south 60 feet of lot 8, in block 32, old numbers, of the city of Jacksonville, and on that date Elizabeth A. Henderson and Philip Tischler made and executed a certain instrument in writing, which is as follows:

This indenture, made this 25th day of June, A. D. 1889, between Elizabeth A. Henderson, of the city of Jacksonville, Duval county, Florida, party of the first part, and Philip Tischler, of the same city, county, and state, party of the second part,

Witnesseth: That the said party of the first part hath letten, and by these presents doth grant, demise, and to farm let, unto the said party of the second part, his executors, administrators, and assigns, all that lot, piece, or parcel of land situate, lying, and being in the city of Jacksonville, Duval county, Florida, and more particularly described as follows, to wit: Commencing at the northeast corner of lot eight (8), in block eighty (80), new numbering, according to the map of the city of Jacksonville, and running south along the western line of Pine street forty-five (45) feet; thence west one hundred and five (105) feet; thence north forty-five (45) feet; thence east one hundred and five (105) feet to the place of beginning,—the said described property being the north forty-five (45) feet of said lot eight (8), in block eighty (80), of the new numbering of the city of Jacksonville, and block thirty-two, old numbering.

With the appurtenances, for the term of twenty-five years from the first day of October, A. D. 1889, at the yearly rental of

four hundred dollars (\$400.00), to be paid in equal quarterly payments.

And the said party of the second part doth covenant to pay to the said party of the first part the said yearly rental as herein specified, namely, in quarter yearly payments on the 1st day of January, the 1st day of April, the 1st day of July, and the 1st day of October in each and every year; and at the expiration of said term the said party of the second part will quit and surrender the premises hereby demised.

And the said party of the first part, her heirs, executors, administrators, and assigns, doth covenant that the said party of the second part, on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

And it is further covenanted and agreed that, if the party of the second part, his executors or assigns, shall at any time after the expiration of five years from the date hereof pay to the party of the first part, her executors, administrators, or assigns, the sum of seven thousand five hundred dollars (\$7,500.00) and all rent accrued to that time, that the said party of the first part will convey the said premises by a deed with apt and proper words unto the party of the second part, his executors, administrators, or assigns, or to such person or persons as he or they shall direct in fee simple, free from encumbrances, liens, or claims of every kind and character whatsoever. And it is further agreed that the party of the second part, his executors, administrators, or assigns, will pay all taxes that shall or may be legally assessed against the property hereinbefore described.

It is further covenanted and agreed by and between the parties hereto that, at the expiration of twenty-five years from the date hereof, if the party of the second part should not purchase and pay for said property as hereinbefore provided, that the value of the buildings and other improvements placed or erected on said lot by said party of the second part shall be fixed by three disinterested parties, one to be selected by each party hereto and the third to be selected by the parties so chosen, and one half of the valuation that shall be so fixed by said parties shall be paid by the said Elizabeth A. Henderson, her heirs, executors, administrators, or assigns, to the said Philip Tischler, his heirs, executors, administrators, or assigns, and the improvements be and become, upon such payment, the property of said Elizabeth A. Henderson.

In witness whereof, we have hereunto set
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our hands and seals this 25th day of June,
A. D. 1889.

E. A. Henderson. [Seal.]

Philip Tischler. [Seal.]

Signed, sealed, and delivered in presence of:

John E. Hartridge.

R. M. Call.

The property described therein is what is known as the "Henderson lot," and constitutes the bone of contention. The part already owned by Tischler and that described in the foregoing instrument constituted the whole of lot 8. Prior to this time Tischler had borrowed from the complainants the sum of \$21,000, and had executed to them a mortgage upon that portion of the lot owned by him to secure the same, with which money he had constructed a building upon that portion of the lot which he owned. In August, 1891, this building was destroyed by fire, and Tischler thereafter began the erection of a new building covering the entire lot. The building which was so destroyed was insured for \$20,000, and after expending this money in rebuilding Tischler applied to the complainants to furnish him sufficient money with which to complete such building, which the complainants agreed to advance to him, and, for the purpose of securing such advances, Tischler transferred and assigned to the complainants, on the 1st day of October, 1891, the lease made to him by Elizabeth A. Henderson, which we copied in full above, and such assignment was recorded in the public records of Duval county on the same day of its execution. After the date of such assignment, and prior to the 15th day of July, 1892, the complainants advanced to Tischler the sum of \$7,500, on which date Tischler executed his promissory note for said amount to the complainants, payable three years after date, with interest at 6 per cent per annum, with which money Tischler completed such building. On the 27th day of July, 1892, Tischler executed a mortgage to the complainants on the lot described in such lease to secure his note, given on the 15th day of July, 1892, for \$7,500; such mortgage being given because the parties thereto thought that the lease and assignment covered the land, but did not embrace the building which had been erected thereon. The building so erected upon this lot was destroyed by the historic fire in the city of Jacksonville on the 3d day of May, 1901, and \$4,000 of the insurance thereon was credited upon the amount due the complainants for the money so advanced by them. In the fall of 1901, Tischler, desiring to rebuild upon the Henderson lot, applied to the complainants for another loan of money for that purpose. As is stated by the complainants, who are appellants here: "The Henderson lease

and the assignment by Tischler to appellants having been delivered to the appellants at the time the assignment was executed, and the same being in their possession and being held by them as security for the amount then due on account of the moneys advanced in 1891 and 1892, it was agreed by and between Tischler and the appellants that they would again advance him money with which to build a building upon the Henderson lot, and that they should hold said lease and the assignment thereof as security for the said advances until the same should be repaid to them, with interest at 6 per cent. Relying upon this agreement and the fact that they had an absolute assignment of the Henderson lease in their possession as security for their advances, the appellants advanced to the appellee Philip Tischler, between August, 1901, and July, 1902, the sum of \$7,369.77, all of which money, and more, was expended by the said Tischler in rebuilding upon the said Henderson lot. There is still due on account of advances so made the sum of \$6,269.80."

In March, 1901, the Robinsons, two of the appellees, filed their bill in the circuit court of Duval county against Tischler to foreclose a mortgage executed by him for \$10,000 on that portion of lot 8 owned by him, as well as on certain other property; and the complainants were made parties defendant in that suit, and filed a cross bill therein to foreclose their mortgage for \$21,000. This suit resulted in a deficiency decree being entered in favor of the Robinsons against Tischler for \$18,262.18, upon which deficiency decree an execution was issued on the 15th day of November, 1905, and levied the same day by the sheriff upon "all the estate, right, title, and interest" of Tischler of, in, and to the Henderson lot, as well as certain other property. All of the property so levied upon was sold by the sheriff at public auction on the 1st day of January, 1906, and struck off to the Robinsons for the sum of \$3,000, to whom the sheriff executed a deed on the same day. No money was paid by the Robinsons to the sheriff on account of this bid, but it was simply credited on their execution.

Several of Tischler's creditors had recovered judgments against him in the circuit court for Duval county,—among others, I. & S. Bing, on the 7th day of March, 1892, for \$375.51 damages and \$3 costs, upon which execution issued on the 17th day of March, 1892, and the Connorsville Furniture Manufacturing Company, a corporation, on the 7th day of December, 1891, for \$209.83 damages and \$4.70 costs, upon which execution issued on the 28th day of January, 1892. These two executions came into the hands of the sheriff of Duval county on the 17th day of March, 1892, and the 28th day of January, 17 L.R.A. (N.S.)

1892, respectively, and were levied by him on the respective dates of the 25th day of June, 1906, and the 8th day of April, 1906, upon the Henderson lot and other parcels of land as the property of Tischler, all of which was sold by the sheriff at public auction on the 6th day of August, 1906, and struck off to A. T. French for the sum of \$750, to whom the sheriff executed a deed on the 10th day of August, 1906.

We believe that these constitute all the facts which are essential to an intelligent understanding of the opinion.

Messrs. Axtell & Rinehart, for appellants:

A lien for future advances may be created as between the parties and as against subsequent purchasers and judgment creditors with actual or constructive notice thereof.

3 Pom. Eq. Jur. §§ 1197-1199; 1 Jones, Mortg. §§ 373-378; *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; *Ackerman v. Hunsicker*, 85 N. Y. 46, 39 Am. Rep. 621; *Witezinski v. Everman*, 51 Miss. 841.

An equitable lien upon personal property may be created by parol, as against the owner and parties claiming by and through him, with notice.

3 Pom. Eq. Jur. §§ 1233, 1235; 1 Jones, Liens, § 28, 29.

One holding an absolute conveyance of property as security may make further advances to the mortgagor and have a charge or lien upon the property for such advances, as against the mortgagor and subsequent purchasers and creditors with notice.

McClure v. Smith, 115 Ga. 709, 42 S. E. 53; *Flanagan v. Westcott*, 11 N. J. Eq. 264; *Ferry v. Meckert*, 32 N. J. Eq. 38; *Walker v. Walker*, 17 S. C. 329.

Mr. J. E. Hartridge also for appellants.

Messrs. Horatio Bisbee and George C. Bedell, for appellee French:

Upon December 7th, 1891, the Connorsville Furniture Company secured a lien upon this land, or Tischler's interest therein; the sheriff's deed to French relates thereto, and French thereby obtained a right paramount to all other rights asserted in this cause.

Moseley v. Doe, 2 Fla. 438.

The term "real estate" has not always its broad signification of the absolute ownership or freehold in lands.

Holbrook v. Betton, 5 Fla. 99; *Swift v. Swift*, 1 De G. F. & J. 160; *Gully v. Davis*, L. R. 10 Eq. 562; *Moase v. White*, L. R. 3 Ch. Div. 763; *Acherley v. Vernon*, 10 Mod. 529.

The lien of the judgments under which French claims extended to Tischler's inter-

est, because Tischler's interest was more substantial than a mere defeasible tenancy.

Holbrook v. Betton, *supra*; Pordage v. Cole, 1 Wms' Saund. 320b; Clark, *Contr.* 651, 652; Ely v. Beaumont, 5 Serg. & R. 124; Logan v. Logan, 22 Fla. 561, 1 Am. St. Rep. 212; Gorham v. Farson, 119 Ill. 425, 10 N. E. 1; Sweezy v. Jones, 65 Iowa, 272, 21 N. W. 603; Northern Bank v. Roosa, 13 Ohio, 334; First Nat. Bank v. Bennett, 40 Iowa, 537; McLean v. Rockey, 3 McLean, 235, Fed. Cas. No. 8,891; Steers v. Daniel, 4 Fed. 587; Jackson *ex dem.* Cary v. Parker, 9 Cow. 73.

A building on leasehold property, which the tenant is entitled to remove, or to be paid for at the expiration of his term, has been considered to be realty.

Hayden v. Goppinger, 67 Iowa, 106, 24 N. W. 743; Dooley v. Crist, 25 Ill. 556; Mathes v. Dobschuetz, 72 Ill. 441; Matzon v. Griffin, 78 Ill. 477; Knapp v. Jones, 38 Ill. App. 489, affirmed in 143 Ill. 375, 28 N. E. 820, 32 N. E. 382; Griffin v. Marine Co. 52 Ill. 130; Stafford v. Adair, 57 Vt. 66.

Messrs. Bryan & Bryan also for appeals.

Shackelford, Ch. J., delivered the opinion of the court:

The first point we shall take up for consideration and determination is whether Tischler's interest in the Henderson lot was legal or equitable in its nature. If we should find that it was an equitable asset, then it was not subject to sale under an execution, and neither the Robinsons nor French acquired any title by their respective deeds from the sheriff. See *Wilson v. Matheson*, 17 Fla. 630, text 642; *Robinson v. Springfield Co.* 21 Fla. 203; *Richardson v. Gilbert*, 21 Fla. 544, text 546; *Zehnbauer v. Spillman*, 25 Fla. 591, text 598, 6 So. 214, text 217; *Neubert v. Massman*, 37 Fla. 91, 19 So. 625; *Mayer v. Wilkins*, 37 Fla. 244, text 255, 19 So. 632, text 635; *Macfarlane v. Dorsey*, 49 Fla. 341, text 347, 38 So. 512, text 514. Should we reach this conclusion, it would become futile and unnecessary to determine the question of priority between the Robinsons and French. In fact, such question would not be before us on this appeal. Whatever their respective rights might be, or what claim or interest, if any, they have or might acquire in Tischler's interest in such lot, or in the residue of the proceeds arising from the sale thereof, after the payment therefrom of the sum of \$10,278.86, together with interest, attorneys' fees, and costs, to the complainants, as fixed by the decree, and as to which there is no dispute, would be a matter to be settled by appropriate proceedings in equity.

What interest did Tischler acquire in the 17 L.R.A. (N.S.)

lot under and by virtue of the instrument which he and Elizabeth A. Henderson jointly executed on the 25th day of June, 1889, and which we have copied in full in the statement preceding this opinion? In some of the pleadings, as well as in the briefs of counsel, this instrument has been referred to as a "lease." Strictly speaking, this term does not fully describe it, and it was used, doubtless, for the sake of convenience. An examination thereof discloses that, by such instrument, Tischler leased such lot for the term of twenty-five years from the 1st day of October, 1889, at the yearly rental of \$400, to be paid in equal quarterly payments, and also acquired the right and privilege of purchasing the lot at any time after the expiration of five years from the date of the instrument, upon the payment of the sum of \$7,500 and all rent which had accrued up to the time of such purchase. Tischler was also to pay all the taxes that might be assessed against the property. It was further stipulated that, at the expiration of the term named, if Tischler failed to purchase the lot, the value of the buildings and other improvements which he had placed thereon should be fixed by three disinterested parties, one half of which valuation Elizabeth A. Henderson was to pay Tischler, and thereby acquire the title to all the improvements.

The master found Tischler's interest to be a chattel real, and that a lien thereon was created by the issuance of an execution, not by the entry of a judgment. This might be true if the equities did not so commingle with the legal estate as to be inseparable therefrom, or if the equities were postponed until the termination of the legal estate for years. The contract will not bear that construction. The execution sale could convey only the certain unexpired term of years which the lease feature of the contract has yet to run. This, however, is subject to be defeated at any moment by the exercise of the option, the assertion of the equity by Tischler or someone in his behalf, thereby destroying that certainty as to terms so essential to chattels real. This contemporaneous intermixture and mingling of legal and equitable interests creates an amalgam that can only be properly disposed of and sold under a decree in equity. As is said in 17 Cyc. Law & Proc. p. 953: "At common law a leasehold interest in lands, no matter for what term of years, was a chattel, and, in the absence of statute to the contrary, may be levied upon and sold as personal property." Also see authorities there cited, as well as text and authorities cited on page 954. We have no statute in this state changing the common-law rule in this respect, and we have no doubt that, if Tischler's interest in the lot was a leasehold interest only, it

was subject to sale under an execution. See § 1618 of the General Statutes of 1906. But, as we have seen, and as the master properly found, Tischler had not only a leasehold interest in the lot for a term of years, but also an option to purchase at any time after the expiration of five years from the date of the lease; and, in the event he failed to exercise this option, at the expiration of the term he had a further claim or right to be paid one half of the valuation of the improvements he had placed on the lot as fixed by three disinterested persons. Did this option to purchase and the right to one half of the valuation of the improvements give Tischler such an equitable interest in the lot, which was so connected with his leasehold interest as to be inseparable therefrom, as to prevent the levy of an execution thereon and its sale thereunder? It seems to us that this question must be answered in the affirmative. If Tischler had exercised his option to purchase, or if he should do so at any time before the expiration of the term, and Henderson refused to execute a conveyance to the lot upon Tischler's compliance with all the requirements of the instrument as to the payment of the amount of the purchase money agreed upon and all accrued rent, his remedy would be in a court of equity, not in a court of law. In other words, he has an equitable interest, which he could enforce in a court of equity. See the reasoning in *Holbrook v. Betton*, 5 Fla. 99, which, although not conclusive upon the point in question, because not dealing directly with it, tends to that goal. So to the same effect is *Insurance Co. of N. A. v. Erickson*, 50 Fla. 419, 2 L.R.A.(N.S.) 512, 111 Am. St. Rep. 121, 39 So. 495, 7 A. & E. Ann. Cas. 495. This being true, neither the Robinsons nor French took anything by their sheriff's deeds. *Macfarlane v. Dorsey*, *supra*.

The next question we shall consider is: Were the complainants entitled to a lien upon Tischler's interest in the lot for the additional sum of \$6,269.80 found to be due from Tischler to the complainants? The answer to this has been foreshadowed by the conclusion which we have already reached and announced in disposing of the other questions. As we have seen, French, as a volunteer purchaser at an illegal execution sale, took no title to and acquired no equity in the property involved. For like reasons, the Robinsons acquired no title to or interest in such property under and by virtue of their execution sale, based upon their deficiency decree. It seems to us that the complainants have an equitable lien or mortgage upon such property by virtue of the verbal agreement, based upon the prior assignment of the lease combined with an op-

tion to purchase, to secure the sum of \$6,269.80 found to be due to them from Tischler for money advanced by them to him upon the security of such assignment; and that such equitable lien or mortgage is long prior in point of time to any rights or equities the Robinsons may have by reason of the deficiency decree, and is superior to any equity that the Robinsons may have in or to such property.

Therefore the question propounded must be answered in the affirmative. It follows that the decree must be reversed, and that the complainants be decreed to have a first lien upon the property in question, not only for the sum of \$10,278.86 for principal and interest and \$750 as a solicitor's or attorney's fee, but also for the additional sum of \$6,269.80 and such additional solicitor's fee as may be determined by the court from the testimony; and the cause is remanded, with directions for a modification of the decree in accordance with this opinion. The costs of this appeal are to be taxed against the Robinsons and French.

Cookrell and Whitfield, JJ., concur.

Taylor, Hocker, and Parkhill, JJ., concur in the opinion.

Petition for rehearing denied May 26, 1908.

GEORGIA SUPREME COURT.

J. L. JONES et al., Plffs. in Err.,

v.
E. VAN WINKLE GIN & MACHINE WORKS.

(— Ga. —, 62 S. E. 236.)

Master — strike — interference with employees.

1. It is unlawful for any person, or association of persons, to interfere with the business of another by means of force, menaces, or intimidation, so as to prevent others from entering into or remaining in the employment of his service.

Same — Injunction.

2. An injunction may issue in a proper case to restrain persons from attempting, by threats, violence, or intimidation, or other unlawful means, to prevent any person from engaging in, remaining in, or performing the business, labor, or duties of any lawful enterprise or occupation, although

Headnotes by EVANS, P. J.

Note. — The subject of "picketing" with special reference to the question whether picketing, *per se*, is unlawful, is discussed in a case note to *Jensen v. Cooks' & Waiters' Union*, 4 L.R.A.(N.S.) 302.

the acts sought to be restrained, if committed, constitute a crime.

Injunction — picketing — intimidation.

3. Where workmen quit the service of their employer, and, as a means of inducing him to accede to their demands, establish pickets at or near the approaches of his premises for the purpose of inducing others from remaining in, or entering into, his employment, they and their confederates will be enjoined from the keeping of patrols when such patrols resort to intimidation or any manner of coercion to prevent others from entering into, or remaining in, the service of their late employer, to the irreparable damage of his business.

Same — persuasion.

4. Equity will not enjoin employees who have quit the service of their employer from attempting, by proper argument, to persuade others from taking their places, so long as they do not resort to force or intimidation, or obstruct the public thoroughfares.

(August 18, 1908.)

ERROR to the Superior Court for Fulton County to review an order granting an injunction restraining the defendants from picketing, intimidating, and otherwise interfering with plaintiff's employees and business. Affirmed.

The facts are stated in the opinion.

Messrs. **James L. Mayson and R. R. Arnold**, for plaintiffs in error:

These strikers have a right to present their side of the argument, and no right of the plaintiff is infringed as long as these arguments are unaccompanied with force or trespass.

Pope Motor Car Co. v. Keegan, 150 Fed. 148; *Everett Waddey Co. v. Richmond Typographical Union No. 90*, 105 Va. 188, 5 L.R.A. (N.S.) 792, 53 S. E. 273.

Messrs. **Wimbish, Watkins, & Ellis**, for defendant in error:

The acts of plaintiffs in error constituted an illegal conspiracy to intimidate and coerce employees of defendant in error, and those seeking such employment, from remaining in or accepting employment from defendant in error.

Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *Employing Printers Club v. Dr. Blosser Co.* 122 Ga. 509, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353, 2 A. & E. Ann. Cas. 694.

An agreement carried out, to picket the premises of another, is illegal; and, where injury results, or will probably result, will be enjoined.

Brown v. Jacobs' Pharmacy Co. and Employing Printers' Club v. Dr. Blosser Co. supra; *Franklin Union No. 4 v. People*, 17 L.R.A. (N.S.)

220 Ill. 355, 4 L.R.A. (N.S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176; *Vegehn v. Guntner*, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Perkins v. Rogg*, 11 Ohio Dec. Reprint, 585; *Atchison, T. & S. F. R. Co. v. Gee*, 139 Fed. 582; *Foster v. Retail Clerks' International Protective Asso.* 39 Misc. 48, 78 N. Y. Supp. 860; *Union P. R. Co. v. Ruef*, 120 Fed. 102; *O'Brien v. People*, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108; *Cœur d'Alene Consol. Min. Co. v. Miners' Union*, 19 L.R.A. 382, 51 Fed. 260; *United States v. Kane*, 23 Fed. 748; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Beach, Monopolies & Industrial Trusts*, p. 527; 1 *Eddy, Combinations*, p. 437, § 539; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 608; *Allis-Chalmers Co. v. Iron Molders' Union No. 125*, 150 Fed. 155; *O'Neil v. Behanna*, 182 Pa. 236, 38 L.R.A. 382, 61 Am. St. Rep. 702, 37 Atl. 843.

Messrs. **Peeples & Jordan** also for defendant in error.

Evans, P. J., delivered the opinion of the court:

The **E. Van Winkle Gin & Machine Works**, a corporation, brought this action against the **Atlanta Lodge No. 1** of the **International Association of Machinists**, an incorporated body, and certain members thereof, who had lately been in the employment of the plaintiff, but who were on a strike, to enjoin them from picketing, intimidating, and otherwise interfering with the plaintiff's employees and business. The defendants showed cause against the grant of an injunction, both by demurrer and answer. After hearing evidence, the defendants were "enjoined from placing themselves, their agents or confederates, near the approaches to the petitioner's premises described in the petition and adjoining thereto, to induce persons working for petitioner not to work for it, and persons seeking employment by petitioner not to enter petitioner's employment, by threats of violence, intimidation, or persuasion, until the further order of the court." Exception is taken to the judgment in its entirety, and specially to so much thereof as forbids the defendants from placing themselves in or near the premises of the plaintiff for the purpose of persuading persons not to enter the plaintiff's employment, or to quit the same, so long as the entrances to the plaintiff's premises were not obstructed, and so long as violence, force, and

intimidation were not used. The points raised by the demurrer were not argued in the brief, but only the legality of the decree and the sufficiency of the evidence to support it.

The lawfulness or unlawfulness of "picketing" has been the subject-matter of discussion in a large number of cases in this country. In the absence of statutes, courts have drawn from the elemental principles of the common law certain standards by which this modern factor used by labor unions as a means of settling controversies between employer and employees must be regulated. Every individual has a natural right to pursue a lawful occupation, and to conduct his business according to his own plans and policies, where he does not offend the law, or unlawfully infringe upon the rights of others. It is the right of every person or corporation to hire and discharge men at pleasure, subject to liability for damages for breach of contract; and every man has the right to work for another or to quit his service at his pleasure, subject to the same liability. But no person or association of persons has the right to interfere with the business of another by means of force, menaces, or intimidation, so as to prevent others from entering into or remaining in the employment of its service. In California it was held that a merchant is entitled to an injunction against the maintaining in front of his place of business, by a labor union, of pickets bearing placards which tend to intimidate his employees and patrons, with intent to do so, for the purpose of compelling him to pay the prices fixed by the union to his union employees. *Goldberg, B. & Co. v. Stablemen's Union Local No. 8760*, 149 Cal. 429, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806. In *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, (C. C.) 90 Fed. 608, it appeared that the unions massed large bodies around the premises in which a strike was in progress; and the defendants were restrained from collecting in and about the approaches to the complainant's mills for the purpose of picketing or patrolling or guarding the streets, approaches, and gates, for the purpose of intimidating, threatening, or coercing any of the employees or any person seeking the employment of complainant. Other cases similar in principle might be added, but these are sufficient to illustrate our point, which is that, when strikers patrol the streets and approaches of the premises where the strike is in progress, and their number is so great, or their conduct is such, as to intimidate and coerce the employees into quitting their employment, or

others from seeking employment, they are guilty of unlawful acts, and will be enjoined from a continuance of them. Sometimes the number of strikers engaged on the patrol may be so great that those intended to be affected by the demonstration will be intimidated by the number of the strikers or their sympathizers without special overt acts. The courts have repeatedly held that the assembling of strikers around the establishment of the employer in such numbers as will serve as a menace to those employed, or the keeping of patrols in front of or about the premises of the employer, accompanied by violence or any manner of coercion to prevent others from entering into or remaining in his service, will be enjoined. 24 Cyc. Law & Proc. p. 835, and the numerous cases cited in the note to the text. While there is some reference in the evidence to the pickets of the strikers having spoken to some employees, the pleadings and evidence do not make a distinct issue of a combination to injure one in his business or trade by inducing by persuasion his employees to violate existing contracts of employment, to the irreparable damage of the employer, so as to require a discussion of such a claim as a basis for injunction, or a decision in regard to it.

It is a penal offense in this state to attempt by threats, violence, intimidation, or other unlawful means to prevent any person from engaging in any lawful employment, or to hinder, by such means, any person from employing laborers. The Penal Code sections are as follows: Section 123: "If any person or persons, by threats, violence, intimidation, or other unlawful means, shall prevent, or attempt to prevent, any person or persons in this state from engaging in, remaining in, or performing the business, labor, or duties of any lawful employment or occupation, such offender or offenders shall be guilty of a misdemeanor." Section 124: "If any person or persons, singly, or together, or in combination, shall conspire to prevent, or attempt to prevent, any person or persons, by threats, violence, or intimidation, from engaging in, remaining in, or performing the business, labor, or duties of any lawful employment or occupation, such offender or offenders shall be guilty of a misdemeanor." Section 125: "If any person or persons, singly or by conspiring together, shall hinder any person or persons who desire to labor from so doing, or hinder any person, by threats, violence, or intimidation, from being employed as laborer or employee, such offender shall be guilty of a misdemeanor." Section 126: "If any person or persons, by threats, violence, or intimidation, or other unlawful means, shall hinder the owner, manager, or

proprietor for the time being from controlling, using, operating, or working any property in any lawful occupation, or shall by such means hinder such person from hiring or employing laborers or employees, such offender or offenders shall be guilty of a misdemeanor." But a court of equity is not ousted from the exercise of its peculiar functions of preventing irreparable damage merely because, in exercising such functions, it may also prevent the commission of a crime. The court does not interfere to prevent the commission of crime, although that may incidentally result, but it exerts its force to prevent individual property from destruction, and ignores entirely the criminal feature of the act. And Mr. Pomerooy (6 Pom. Eq. Jur. § 619) says that "it is everywhere the rule, following the general principle in equity, that, where there is ground for equitable interference, as where an irreparable injury is threatened to property, the fact that the act is also a crime is not a reason for refusing an injunction." This principle was recognized and applied by this court in the case of an indictable nuisance. *Columbus v. Jaques*, 30 Ga. 506. So it is no reply to the invocation of the equitable remedy to prevent irreparable injury to property that the acts which cause the damage may also be indictable.

As already said, members of a labor union, either individually or as an association, have no right, by force, menace, or intimidation, to prevent others from working upon such terms as they are willing to accept, or to hinder by such means any person from employing laborers. In many cases it may be difficult to draw the line of demarcation between intimidation and inoffensive persuasion. In a New York case (*Rogers v. Evarts* [Sup.] 17 N. Y. Supp. 264) it was said: "It may be impossible to lay down a general rule as to what surrounding circumstances will characterize persuasion and entreaty as intimidation. Each case must probably depend upon its own surroundings. But, where the evidence presents such a case as to convince the court that the employees are being induced to leave the employer by operating upon their fears rather than upon their judgments or their sympathy, the court will be quick to lend its strong arm to his protection. Rights guaranteed by law will be enforced by the courts, whether invoked by employer or employee." The very word "picket" is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude towards the individual or corporation against whom the labor union has a grievance. To quote Mr. Eddy: "It is conceivable, however, that a picket

entirely lawful might be established about a factory, but such a picket would go no further than interviews and lawful persuasion and inducement. The slightest evidence of threats, violence, or intimidation of any character ought to be sufficient to convince court and jury of the unlawful character of the picket, since the picket, under the most favorable consideration, means an interference between employer seeking employees and men seeking employment." 1 Eddy, *Combinations*, § 539. But the law does not forbid employees who have quit their employer from using legitimate argument to induce others to refrain from taking their places. The current of authority is that a court of equity will not enjoin employees who have quit the service of their employer from attempting to persuade, by proper argument, others from taking their places, so long as they do not resort to intimidation or obstruct the public thoroughfares. *Everett Waddey Co. v. Richmond Typographical Union No. 90*, 105 Va. 188, 5 L.R.A. (N.S.) 792, 53 S. E. 273; *Master Builders' Asso. v. Domascio*, 16 Colo. App. 25, 63 Pac. 782; *Christensen v. Kellogg Switchboard & Supply Co.* 110 Ill. App. 61; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Asso.* 59 N. J. Eq. 49, 46 Atl. 208; *Union P. R. Co. v. Ruef* (C. C.) 120 Fed. 124; *Perkins v. Rogg*, 11 Ohio Dec. Reprint, 585; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 89 Am. St. Rep. 648, 63 N. E. 369; *Gray v. Building Trades Council*, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172.

There was evidence before the judge that certain machinists in the employment of the E. Van Winkle Gin & Machine Works became dissatisfied and quit their employment. These machinists were members of Atlanta Lodge No. 1 of the International Association of Machinists. The appointed agent of the local lodge, acting for and in behalf of the strikers, demanded of the E. Van Winkle Gin & Machine Works that it adopt certain rules for the conduct of its business, which demand was refused. For the purpose of enforcing their demand, and to the end that their former employer might not engage men to supply their places, the strikers placed men at every approach to the plant of the plaintiff and the railway stations in the city of Atlanta. There were from four to twelve men doing "picket duty." These pickets accosted every stranger who evinced an intention to enter the manufacturing plant of the plaintiff, for the purpose of inducing

him to abandon any intent to seek employment with the E. Van Winkle works. One of the pickets suggested to a new man that "while living and doing well they had better stay out." At another time the pickets, after endeavoring to induce a man seeking employment to desist, upon his seeming reluctance to yield to their entreaties, said to him: "God damn you, you will have to get out anyway." On another occasion a man seeking employment approached an employee of the plaintiff, and asked to be directed to the plaintiff's shops. This employee volunteered to guide the inquirer, when one of the strikers who was near by came up and asked the person seeking employment if he was a machinist, and, upon being informed that he was a machinist looking for a job, the striker began to abuse the shop, saying it was a scab shop, and to curse the new men who had gone into the shops to take the places of the strikers, calling them "damned scabs." The man did not apply for a job. These and similar threats, and the constant surveillance of the plant by the pickets, caused other departments of the plaintiff's plant to shut down for lack of machinists. At this juncture of affairs the defendants were restrained by a temporary order from interference with the plaintiff's business; and after the grant of the restraining order, according to the testimony of the superintendent, "everything has assumed a different attitude, and a feeling of rest and confidence has taken place which did not exist while the premises were picketed." The quoted remarks of the strikers to the men who were seeking work were more than a peaceable and argumentative presentation of their grievance. The language implied a threat of harm, and the warning to stay out, if unheeded, might be attended with hurtful consequences. The language of these pickets was clearly intimidatory, and tended to coerce compliance with their request not to work for the plaintiff; and there was no error in enjoining such conduct. The form of the injunction is perhaps too broad, in that the strikers are enjoined from using all form of persuasion. As we have pointed out, it was not unlawful for the strikers to use legitimate argument and moral suasion in presenting their case to those who offered to take their places, so long as it is neither coercive and intimidating in character. In affirming the judgment, direction is given to so amend the decree as to make it accord with the opinion of the court in this particular.

Judgment affirmed, with direction.

All the Justices concur.
17 L.R.A.(N.S.)

ILLINOIS SUPREME COURT.

NELS TANDRUP

v.

MARSHALL E. SAMPSELL, Receiver on Chicago Union Traction Company, et al.,
Appts.

(234 Ill. 526, 85 N. E. 331.)

Receiver — joint liability for tort.

The receivers of a railroad company who are jointly and severally liable for a personal injury caused by the negligence of themselves and another company may be joined with the latter in an action by the injured person for the damages.

(June 18, 1908.)

A PPEAL by defendants from a judgment the Branch Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Mr. W. W. Gurley, with Messrs. John A. Rose and Frank L. Kriete, for appellants:

A living defendant and the executor or administrator of a deceased defendant cannot be sued jointly in the same action.

1 Chitty, Pl. p. 50; Cummings v. People, 50 Ill. 132; Supreme Lodge, K. & L. H. v. Portingall, 167 Ill. 291, 59 Am. St. Rep. 296, 47 N. E. 203; Stevens v. Catlin, 152 Ill. 56, 37 N. E. 1023; Nelson v. Humes, 12 Ill. App. 52; Eggleston v. Buck, 31 Ill. 254; Lutz v. Schmidt, 16 Ill. App. 477; Union Bank v. Mott, 27 N. Y. 633.

It was not necessary to file a plea of misjoinder; but the defect is fatal on motion in arrest of judgment and on error.

1 Chitty, Pl. 11th Am. ed. pp. 44, 46, 86; Gardner v. People, 4 Ill. 90; Sinsheimer v. Skinner Mfg. Co. 165 Ill. 116, 46 N. E. 262; Cummings v. People and Eggleston v. Buck, supra; McLean County Coal Co. v. Long, 91 Ill. 617; Nelson v. Humes and Lutz v. Schmidt, supra; Damron v. Sweetser, 16 Ill. App. 339; Scanlon v. People, 95 Ill. App. 348.

Messrs. Follansbee, McConnell, & Follansbee and Charles B. Elder, for appellee:

Where an order of the court accompanying the judgment, having reference to the means of its enforcement only, is er-

Note. — An extended search fails to reveal any other case passing on the question whether a receiver who is one of two or more joint wrongdoers may be joined with the others in an action by the injured person for damages.

roneous, it is not necessarily a ground for reversal; or, if it is reversed at all, it is reversed only as to so much of the order as has reference to its enforcement.

Rev. Stat. "Amendments and Jeofails," chap. 7, §§ 6, 7; Robinson v. Kirkwood, 91 Ill. App. 54; Danville v. Mitchell, 63 Ill. App. 647; Roberson v. Troutt, 17 Ill. App. 386; Livingston v. People, 48 Ill. App. 109; Black, Judgm. 2d ed. § 1, p. 3; 11 Enc. Pl. & Pr. p. 957.

The common-law rule that such misjoinder can "be taken advantage of on a motion in arrest of judgment, or on error," should not be applied in Illinois.

Rev. Stat. "Practice," chap. 110, § 23; Rev. Stat. "Amendments and Jeofails," chap. 7, § 6; Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E. 1011.

The judgment is enforceable against the North Chicago Electric Railway Company individually, and against the surviving receiver, who was directed to pay it in due course of administration.

Callaway v. Walters, 63 Ill. App. 562; Peirce v. Walters, 164 Ill. 560, 45 N. E. 1068.

Vickers, J., delivered the opinion of the court:

Nels Tandrup brought an action on the case against the receivers of the Chicago Union Traction Company and the North Chicago Electric Railway Company for personal injuries. He recovered a judgment for \$5,000 against both of the defendants, which has been affirmed by the branch appellate court for the first district. The North Chicago Electric Railway Company owned the street railway upon which the plaintiff below received his injury, and the receivers of the Chicago Union Traction Company were in the possession, control, and operation of the same. The facts are not in controversy. Appellant concedes that the evidence fairly tends to support the verdict. After overruling a motion for a new trial and in arrest of judgment, the trial court entered judgment against defendants, which provided, as to the receivers, it should be paid in due course of administration, and execution was awarded against the North Chicago Electric Railway Company.

Appellant's principal contention is that there is a misjoinder of parties defendant apparent upon the face of the declaration; that the receivers of the operating company are not suable in the same action with the lessor company, for the reason that a judgment at law must be a unit and the same judgment must be rendered against all defendants. Appellee replies that the rule relied on by appellant is not applicable to actions *ex delicto*, and that, if it were, appel-

lant has waived the right to insist upon such matter of abatement by having failed to demur to the declaration, plead in abatement, or raise the question specifically in the motions for new trial and in arrest of judgment. The general rule is that the nonjoinder or misjoinder of parties defendant in an action *ex delicto* is not available as matter of abatement, nor can advantage be taken of it in any way. Gould, Pl. 5th ed. § 117. If persons who are not liable are joined as defendants in an action of tort with those who are liable, the only effect is to increase the cost against the plaintiff. Dicey, Parties to Actions, p. 530. And, if the plaintiff elects to sue a part only of the joint wrongdoers, those who are sued have no means of compelling plaintiff to bring in all of the joint tortfeasors. The general rule upon this subject is that the injured party may sue one, or any, or all of several joint wrongdoers, and recover against as many as the proof shows are liable. Baker v. Michigan S. & N. I. R. Co. 42 Ill. 73; Illinois C. R. Co. v. Foulks, 191 Ill. 57, 60 N. E. 890. Every person who joins in committing a tort is severally liable for it, and cannot escape liability by showing that another person is liable also; nor can one of a number of tortfeasors compel the plaintiff to sue him jointly with other persons with whom he has joined in committing the tort. Dicey, Parties to Actions, p. 448. There is an exception to this rule where the liability of the defendant for the tort complained of grows out of ownership of real estate held jointly or in common by himself and another. In such case the misjoinder of the other tenants is pleadable in abatement although the action sounds in tort. Gould, Pl. § 76. Another exception is recognized by the common law where the nature of the wrong is such that it cannot be committed by more than one person, such as slander, and probably seduction. Since only one person can participate in the utterance of verbal slander, if two or more are charged with such offense, the misjoinder may be available by demurrer to the declaration. Subject to these exceptions, the general rule may be stated to be that a plea in abatement for nonjoinder or misjoinder of parties defendant in an action of tort is never proper, nor can the objection be otherwise successfully interposed.

Appellant has cited a number of cases where it has been held erroneous to join the administrator of one joint obligor with the survivors, and it has been held in actions *ex contractu* to be a misjoinder. These cases are not in point. Thus, the case of Eggleston v. Buck, 31 Ill. 254, was an action of debt on an appeal bond brought by the plaintiff against the administratrix of a de-

ceased obligor and the surviving obligor. The judgment was reversed by this court for the reason that the court entered a judgment for the penalty of the bond, \$1,200, and the sum of \$827.36 damages, and awarded execution therefor against the administrator and the surviving obligor. There were two errors pointed out in the judgment: First, the judgment should have been for \$1,200, the penalty of the bond, to be discharged on the payment of the damages found by the jury; second, the judgment should not have awarded execution against the administrator. The opinion then proceeds to the question of misjoinder of parties, and the holding is that it was improper to join the surviving obligor and the administrator of the deceased obligor in the same action.

The case of *Stevens v. Catlin*, 152 Ill. 56, 37 N. E. 1023, was an action of assumpsit on a promissory note against three surviving makers without joining the administrator of a fourth maker, who was dead; and it was held that the suit was properly brought as a joint action against the surviving obligors. The reason upon which this rule rests is that the joint liability of all the makers of the note survives against the remaining makers. The liability of several joint obligors under § 3 of chapter 76 of Hurd's Revised Statutes of 1905 is both joint and several. Thus the liability of obligors and covenantors, under the law, has a double aspect; that is, a joint liability and a several liability. The promisee may elect to sue one only of the several obligors. In such case the suit is brought to enforce the several liability, and the whole proceeding is governed by the same procedure as though the contract was the several contract of the person sued, or the promisee may sue all of the joint makers upon their joint liability; but it has often been decided that an intermediate number, more than one and less than all, cannot be sued, for the reason that the promisee must either elect to treat the contract as the several contract of each, or the joint contract of all. In case one joint obligor dies, the joint obligation survives against the remaining obligors. The several obligation only survives against the personal representative. In other words, the death of a joint obligor dissolves the joint liability at law which continues against the survivors (1 Chitty, Pl. 50), but the estate of the deceased obligor is liable upon the several liability. This rule has no effect upon the right of contribution among joint obligors. In this respect there is no difference between cases involving joint wrongdoers and persons who have broken both a joint and a several contract. The common liability on the joint contract passes, on the death of one contractor, to the surviving

contractors. The separate liability of each on his separate contract passes, on the death of each, to his representatives. The rule that prohibits joining the administrator of a joint obligor with the survivors is equally applicable to actions against the surviving joint tortfeasors and the administrator of a deceased wrongdoer. *Dacey, Parties to Actions*, rule 100, p. 457. In this regard both classes of cases are subject to the same rule. But there is a distinction to be kept in mind between a receiver of a going concern and an administrator of a deceased person. Receivers who, in the discharge of their duties, become liable, jointly and severally, with others, either in contract or tort, assume the liability of original parties in both aspects, whereas an administrator of a deceased person, who is called upon to answer for the debt, default, or wrong of his intestate, has only a several liability resting upon him.

All of the cases cited by appellant are cases where the administrator of a deceased obligor was sought to be held jointly with the surviving obligors, or cases where the administrator of such deceased obligor was omitted and the objection was that he should have been brought into the joint action. These cases are not applicable to the question involved in this case. The receivers of the Chicago Union Traction Company, when sued for a wrongful act committed by them and other persons jointly, have both the joint and several liabilities resting upon them, and the person who has been injured by the wrongful act of the receivers jointly with other wrongdoers cannot be deprived of his right to treat all wrongdoers who have injured him as jointly liable, and of joining them in one suit, by the circumstance that the law provides a different mode of obtaining satisfaction of the judgment against different tortfeasors. Joining the receivers with other wrongdoers who are jointly and severally liable, in one action, deprives neither defendant of any right, privilege, or defense that he would have if sued alone; whereas, if the plaintiffs in such cases were compelled to bring a separate action against each defendant, the labor, expense, and delay incident to a multiplicity of suits would often be so great as to practically amount to a denial of justice. Where, as in the case at bar, other persons are jointly liable with the receiver for an injury, we see no substantial reason why they may not be treated as joint tortfeasors and sued together. The recovery of a judgment in an action of tort jointly against several does not merge the several liability of each wrongdoer in the joint judgment. The plaintiff's claim may still be regarded and treated as a joint and sev-

eral claim. The plaintiff may, after judgment, take out an execution, and compel one defendant to pay the whole judgment, and such defendant will have no right to insist that the plaintiff proceed against the other defendants for a *pro rata* share of the judgment. The plaintiff in such case may pursue any or all of the judgment debtors by any and all processes recognized by the law until he obtains satisfaction. Nothing short of a satisfaction of the demand, or a release, under seal, of one joint tortfeasor, is available as a defense by other wrongdoers who are jointly liable. In the case at bar appellee may proceed by execution against the North Chicago Electric Railway Company and collect his entire judgment from it, or, if he so elect, he may apply to the court appointing the receivers for an order on the receivers to pay his judgment, and in neither case will the party proceeded against have any just cause or legal right to complain. In this respect the rights and liabilities of the parties defendant are in all respects precisely what they would be if the judgment were a several and separate judgment against each. There was no error in bringing this suit against defendants jointly. In *Peirce v. Walters*, 164 Ill. 560, 45 N. E. 1068, this court sustained a judgment brought jointly against the receiver of the railroad company and the engineer, for an injury caused by the negligence of the engineer. In that case the objection was made, as it is here, that there was a misjoinder of parties defendant. This court held that the parties could not raise the question after having pleaded the general issue to the declaration. We might well rest our judgment in this case upon the ground that defendants waived the question of misjoinder by a failure to point out this objection on demurrer to the declaration, or by failing otherwise to raise the question in the court below; but we prefer to rest our judgment on the ground already stated, that there was no misjoinder of parties in this case, and hence no question of waiver is involved.

Appellant insists that the court erred in admitting the testimony of physicians which it is claimed was based on subjective symptoms. We have carefully examined the question thus raised, and find that the ruling of the court below is within the rule established by the decisions of this court.

Finding no error in the record, the judgment of the Branch Appellate Court for the First District is affirmed.

17 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

HENRY W. McGLONE, Sheriff, Appt.,
v.

JOHN B. WOMACK et al.

(— Ky. —, 111 S. W. 688.)

Statute — title — sufficiency.

1. A title "An Act to Promote the Sheep Industry and to Provide a Tax on Dogs" does not violate the constitutional provision forbidding a statute to relate to more than one subject, where the subject of the statute is the promotion of the sheep industry only by providing a tax on dogs.

Dog tax — constitutionality.

2. A tax on dogs for the promotion of the sheep industry by providing funds to make good losses of sheep caused by dogs is a police measure, and not within constitutional provisions requiring taxes to be for public purposes and uniformly assessed.

Same — right to keep.

3. The legislature may require as a condition of the right to keep a dog the payment of a sum which shall go to indemnify the owners of sheep which may be injured by dogs.

Special privileges — tax for sheep owners.

4. A statute imposing a tax on dogs to indemnify the owners of sheep killed by them does not violate a constitutional prohibition of the granting of exclusive separate public emoluments or privileges.

Tax — remuneration of collector.

5. The compensation of the tax collectors under a statute laying a tax on dogs for the remuneration of the owners of sheep killed by them, which is to be assessed and collected as other taxes, should be paid in the same way and at the same rate at which they are remunerated for the collection of other taxes, in the absence of any provision of the statute upon the subject.

(O'Rear, Ch. J., and Nunn and Carroll, JJ., dissent.)

(June 17, 1908.)

Case Note. — Constitutionality of tax on dogs for benefit of sheep owners.

A tax or license fee imposed upon dogs for the purpose of raising a common fund for repairing of mitigating such losses as may be inflicted by them by wounding or destroying sheep is a valid exercise of the police power, and is not a tax within a constitutional requirement that taxes shall be imposed only for public purposes. *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; *Longyear v. Buck*, 83 Mich. 236, 10 L.R.A. 43, 47 N. W. 234; *Hendrie v. Kalthoff*, 48 Mich. 306, 12 N. W. 191; *Mitchell v. Williams*, 27 Ind. 62; *State v. Cornnall*, 27 Ind. 120; *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459; *Cole v. Hall*, 103 Ill. 30.

APPEAL by defendant from a judgment of the Circuit Court for Carter County in plaintiffs' favor in a suit to enjoin the enforcement of a dog tax. Reversed.

The facts are stated in the opinion.

Messrs. James Breathitt, Attorney General, J. S. Morris, N. B. Hays, C. H. Morris, and Hazelrigg, Chenault, & Hazelrigg for appellant.

Messrs. James Andrew Scott and W. C. Marshall for appellees.

Barker, J., delivered the opinion of the court:

This action was instituted by appellees, citizens of Carter county, Kentucky, and owners of dogs, to test the validity of an act of the general assembly of the commonwealth of Kentucky approved March 1, 1906, entitled "An Act to Promote the Sheep Industry and to Provide a Tax on Dogs." Acts 1906, chap. 10, p. 25. By the 1st and 2d sections of the act, a license tax of \$1 *per capita* is required to be assessed upon every dog four months old within the commonwealth, which the owner of the animal is required to pay. This tax is required to be levied and collected as are other taxes, and paid over to the state treasurer, but to be kept separate from the other public accounts and taxes by the auditor and treasurer. The funds thus raised are declared to be for the purpose of indemnifying losses by the killing or injuring of sheep by dogs. The 3d and 4th sections of the act provide how the losses by the killing of sheep by dogs shall be proved and paid; and, if there be any surplus after paying all losses occurring by the killing of sheep by dogs, it shall be paid over to the school fund of the county in which it was assessed. There are several other provisions of the act, but a consideration of them is not necessary to an adjudication of its validity. The peti-

tion sets forth the act and the fact that it was about to be enforced by the sheriff and assessor of Carter county, and prays for an injunction restraining these officers from its enforcement on the ground of its invalidity. A general demurrer to the petition was overruled, and, the officers declining to plead further, a judgment was rendered in accordance with the prayer of the petition; and, from this judgment, this appeal is prosecuted.

The first objection to the act is that its title is inimical to § 51 of the Constitution, which provides that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title;" it being said that the title of this act relates to two separate subjects of legislation, and is therefore invalid. If the act under consideration does relate to two subjects, it goes without saying that it is void as a whole. But we do not agree that the title before us relates to two subjects. The subject-matter of the act is the promotion of the sheep industry, and this is to be accomplished by the imposition of a tax on dogs. No other attempt to promote the sheep industry is indicated by any provision in the act taken as a whole. It may be that the title to the act is somewhat awkwardly expressed. What it really means is that it is an act to promote the sheep industry by providing a tax on dogs, and, when thus read, all duality disappears. A second objection to the act is that it is violative of § 171 of the Constitution, in that the taxes imposed are not collected for public purposes; and, third, it is invalid because in violation of §§ 172 and 174 of the Constitution, which require all property in the commonwealth, not exempted from taxation by the Constitution, to be assessed at its fair cash value and taxed in proportion thereto. These two objections may be

It was said in *Van Horn v. People*, supra, that, as the charge laid on the owners of dogs is a pecuniary burden imposed by public authority, it partakes, no doubt, of the character of a tax, and for many purposes might be so spoken of without harm; but no accession of public revenue, either general or local, is authorized or aimed at, the ends sought being different, the purpose being to prescribe a regulation under which dogs, as animals dangerous to sheep and of far less public utility, can alone be held, and which, if carried out, will tend to discourage an undue increase of dogs, and at the same time afford new protection against the effects of the mischief to which they are most given.

It was said in *Longyear v. Buck*, supra, that a constitutional provision for the taxation of property by value does not preclude a *per capita* tax on dogs; and such tax can 17 L.R.A. (N.S.)

seldom prove burdensome, as each person assesses himself, determining himself how many dogs he will own and keep; and the fund arising from this source, which is imposed as a police regulation, may be appropriated by the legislature to the purpose, in some measure, of a recompense to those who have suffered damages from dogs.

And such a license fee is in no sense a tax in contravention of a constitutional provision that all revenues shall be raised by levying a tax by valuation, so that every person shall pay in proportion to his property. *Cole v. Hall*, supra.

But an act for the taxation of dogs and the protection of sheep, which should take effect at the option of the electors of a community, was held, in *Bowen v. Tioga County*, 6 Pa. Co. Ct. 613, to violate a constitutional prohibition of local legislation.

considered together, and they involve a most important part of the claim that the act is invalid.

The first question to be determined is whether or not the statute before us is a revenue statute, or whether it was enacted for the purpose of police regulation. That it was not intended as a revenue statute is obvious from the most superficial reading. The title declares the purpose of the enactment to be the promotion of the sheep industry by the levy of a tax on dogs, and the body of the act shows clearly that its object is to remunerate the owners of sheep for any losses they may suffer by the killing of their sheep by dogs. The license tax imposed, then, was intended by the legislature to be a regulation of dogs, and in this way to promote the sheep industry. This confronts us with the question as to whether or not it is within the competency of the legislature to regulate dogs in the manner undertaken to be done in the statute before us. That dogs are an appropriate subject of regulation under the police power of the state is established by an overwhelming weight of judicial authority; and unquestionably it is entirely within the power of the legislature to prohibit the ownership of dogs at all, and to provide, where their ownership is allowed, any regulation which the legislative discretion may impose. Nowhere has this doctrine been asserted with greater clearness than by our own court.

In the case of *Bradford v. McKibben*, 4 Bush, 545, an act was upheld which authorized the killing of any dog found on the premises of a neighbor without the presence of its owner or keeper. In its opinion the court said: "Whatever may be the temptations, therefore, to entice a dog from home without the presence of its owner or keeper, even though it be for the propagation of his species, his innocence is no protection to him. If he is found roaming on a neighbor's premises without the presence of his protector, his life is forfeited, if the owner of the premises on which he is found will exact the penalty, and chooses to execute the sentence." In the case of *Com. v. Markham*, 7 Bush, 480, an ordinance of the city of Frankfort provided "that all persons owning or controlling dogs within the city of Frankfort are hereby required annually, on the 10th day of April, to apply to the city clerk to register, and procure a brass collar, duly stamped, for each dog, and pay to the clerk at the time of registry a tax of \$2 for every dog so owned and registered; which tax the clerk shall pay into the city treasury. Any person failing to comply with the provisions of this ordinance shall, on conviction before the police judge, be fined the sum of

\$5 for each day of failure and for each dog owned or controlled by him not registered as aforesaid. The marshal or any police officer shall forthwith kill any dog found upon the streets without such collar so procured from the city clerk." The charter of the city of Frankfort only authorized the council to levy ad valorem taxes on the real and personal estate of its citizens for local revenue; so that, if the ordinance was for revenue only, it was void as being contrary to the charter. The court held that the act was sanitary, and not for revenue, and upheld the ordinance under the police power delegated to the city by its charter. In the opinion it is said: "Presuming that the owners of worthless or pestilent dogs would not pay such a tax for such a license, the expulsion or destruction of inferior or dangerous dogs, as well as protection to the useful class, was the constructive aim of this enactment by the council. The purpose was sanitary, and not fiscal. How far the end may be accomplished by the means prescribed is for the municipality, and not the judiciary, to decide. And this court cannot adjudge that, because a more adaptable expedient, molded in better form, might have been chosen, that which has been adopted was unauthorized." In the case of *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, the Supreme Court of the United States upheld as constitutional a law of the state of Louisiana requiring dogs to be placed upon the assessment rolls, and limiting any recovery by the owner to the value fixed by himself for the purpose of taxation. The court, through Mr. Justice Brown, in a very learned opinion, discusses in a broad and philosophic manner the whole subject of the property in dogs, and the question as to whether or not and how far these animals are subject to the police power of the state. The rule as to the right of the state to prohibit the keeping of dogs is thus stated: "Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens. That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits, and vegetables do not cease to become private property by their decay; but it is clearly within the power of the state to order their destruction in times of epidemic,

or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass. *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980; *Mouse's Case*, 12 Coke, 63; *British Cast Plate Mfrs. v. Meredith*, 4 T. R. 794, 797; *Stone v. New York*, 25 Wend. 157; *Russell v. New York*, 2 Denio, 461." To the same effect is *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; *Morey v. Brown*, 42 N. H. 373. In 22 Am. & Eng. Enc. Law, title "Police Power," 2d ed. p. 930, it is said: "The police power of the state has been used to a greater extent to regulate and control the keeping of and property in dogs than any other class of domestic animals. And statutes requiring the payment of a license fee, sometimes denominated a tax, for the keeping of dogs, are very usual, as also are provisions requiring all dogs running at large to be muzzled. And the police power has even been held to extend to authorizing the summary killing of dogs found running at large contrary to law." Cooley, in his work on Constitutional Limitations, 7th ed. p. 881, note 3, thus summarizes the law on the subject in hand: "Dogs are subject to such regulations as the legislature may prescribe, and it is not unconstitutional to authorize their destruction, without previous adjudication, when found at large without being licensed and collared according to the statutory regulation. [Authorities omitted.] As a measure of internal police, the state has the power to encourage the keeping of sheep, and to discourage the keeping of dogs, by imposing a penalty upon the owner of a dog for keeping the same (*Mitchell v. Williams*, 27 Ind. 62); or by imposing a dog tax for a fund to indemnify sheep owners for losses suffered from dogs (*Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246)." In the case of *Carthage v. Rhodes*, 101 Mo. 175, 9 L.R.A. 352, 14 S. W. 181, the supreme court of Missouri upheld an ordinance of the city of Carthage licensing dogs and cats, and providing for their being impounded or destroyed if found running at large contrary to the ordinance. In the opinion it was said: "Taxation may be for the purpose of raising revenue, or for the purpose of regulation. Where for the purpose of regulation, it is an exercise of the police power

of the state. They are both distinct, co-existent powers in the state, and either or both may be exercised through a municipal corporation. In this case, by the terms of the charter, both powers are granted to the city of Carthage as to the dogs of that city. The dog-license tax required by its ordinances is easily referable to the exercise of the police power granted." In the case of *Fox v. Mohawk & H. River Humane Soc.* 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353, the court of appeals of New York upheld a statute of that state which authorized the humane society to kill unlicensed dogs without notice to the owner and without any judicial proceeding.

From the foregoing authorities and upon principle, we are of opinion that the regulation of dogs is within the police power of the state, and that it is competent for the legislature to prohibit the keeping of dogs entirely; or, if it is necessary for the public welfare, any other regulation may be adopted which to the legislature may seem most expedient for the promotion of that end. We are also of opinion that, the statute not being for revenue, but an exercise of the police power, its provisions are not regulated by any section of the Constitution relating to fiscal matters; and, although the sum required to be paid by the owner of each dog four months old is called a tax, and it is required to be assessed by the assessor, collected by the sheriff, and paid over to the state treasurer, this is only a mode of regulating the dogs within the state and protecting the sheep industry, to the extent that the burden imposed will result in the destruction of worthless and dangerous dogs, and create a fund to pay losses for the destruction of sheep by dogs. We do not think it can be doubted that, if it is competent for the legislature to prohibit the ownership of dogs, or to prohibit them running at large, it is also competent for it to impose any other regulation which, in its wisdom, is best adapted to promote the sheep industry. Therefore, it seems to us competent for the legislature to say to the owners of dogs in the state: "You may own dogs and you may permit them to run at large, but you must, as a condition precedent to this privilege, provide a fund by which their ravages on sheep may be paid for." That the state may do this legitimately seems quite clear, unless we are prepared to say that the less is not included in the greater, or a part in the whole. Surely, if dogs may be destroyed altogether, or their ownership prohibited, any less drastic legislation is entirely within the competency of the legislature. It is true in the case of *Com. v.*

Hazelwood, 84 Ky. 681, 2 S. W. 489, it was held that in our state the common-law rule that dogs were not property has been modified or abrogated by statutes which tax them and thus recognize them as property. Dogs are therefore made property by statute; and when these animals, which were not property at the common law, are raised to the dignity of property by the statute, it is entirely competent for the legislature to fix such conditions as it chooses. The statute before us, which makes dogs property, requires as a condition precedent that the owners of them shall pay a tax, the proceeds of which will insure sheep raisers against the effect of their ravages. That this can be done constitutionally is sustained by the great weight of authority. In the case of *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459, the law imposing a *per capita* tax on dogs, and appropriating the funds so created for the purpose of paying any loss occurring to the owners of sheep by the killing of the property by dogs, was upheld as a valid and constitutional exercise of the police power of the state. To the same effect is *Mitchell v. Williams*, 27 Ind. 62; *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152; *Cole v. Hall*, 103 Ill. 30; *Longyear v. Buck*, 83 Mich. 236, 10 L.R.A. 43, 47 N. W. 234; *Freund*, Pol. Power, § 434; 2 *Tiedeman*, State & Federal Control of Persons & Property, pp. 845, 846.

Nor do we think the act is inimical to that portion of § 3 of the Bill of Rights which provides: ". . . And no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services. . . ." As we view it, the statute does not confer any special privilege on the owners of sheep. It merely protects these owners from the destruction of their property by dogs. It is the duty of the state to protect every citizen in his life, liberty, and property; and it certainly is within the competency of the legislature to exercise the police power of the state to protect all property against the ravages of destructive animals. The question as to how this is to be done and what property is to be so protected is a matter of legislative discretion. Undoubtedly the sheep industry is a most important one to the whole state. All of our citizens are interested in an industry which supplies the market with wholesome meat, provides means of obtaining warm and comfortable clothing, and at the same time furnishes labor to the otherwise unemployed. It is only necessary to allude to this phase of the question. The 17 L.R.A. (N.S.)

importance of the industry as a whole is most obvious. It is equally obvious that sheep are peculiarly liable to the ravages of dogs. They have neither the fleetness to escape, nor the courage to defend themselves from attack, and their silent suffering enables the dog to prey upon them without any danger that the owner will be warned of the destruction of his property by the outcry of the dying animal. No other domestic animal that we can call to mind is so liable to destruction by dogs as the sheep. It therefore seems to us clearly the duty of the state, if the furtherance of the sheep industry is a desirable end, to so regulate the ownership of dogs as to protect the sheep from destruction by these animals. The statute is certainly a reasonable one, and lays only a small burden upon the owner of each dog; and, in effect, it only requires the owner to make good the damage done by his property. The fact that sheep are generally killed at night when it is impossible to ascertain the owner of the dog committing the ravage makes it necessary, if protection is to be had through this channel at all, that each owner of a dog should be required to contribute a small amount to a common fund dedicated to the remuneration of owners of sheep killed by unknown dogs. As said before, this is simply requiring the owners of dogs to make good the ravages of dangerous animals kept by them; and no citizen has just cause of complaint, if he keeps animals destructive to the property of others, that he is required to make good the damage done by them. The statute, in truth, is but an enforcement of the maxim, *Sic utere tuo ut alienum non laedas*, and, as such, its constitutionality is beyond successful question.

Thus far we have rested the right of the legislature to provide a fund for the payment of losses of sheep by the ravages of dogs alone upon the police power of the state; but in the case of *Kentucky Live Stock Breeders' Assn. v. Hager*, 120 Ky. 125, 85 S. W. 738, we upheld an act which appropriated \$15,000 per annum from the funds in the public treasury raised by taxation to provide for the improvement and development of live stock, agricultural and kindred interests, by the establishment and maintenance of a state fair. In the opinion, in responding to the objection to the act, that the money appropriated was not for a public purpose, it was said: "It is also insisted that a state fair is not a public purpose for which the money of the state may be appropriated by the legislature, and that the act merely gives a bounty of \$15,000 to appellant. The appropriation to the World's Fair was sustained by this court (*Norman v. Kentucky Bd. of Managers*, 93 Ky. 537, 18

L.R.A. 556, 20 S. W. 901), and, if the legislature may appropriate money in aid of a fair held in another state to properly represent the state in such a fair, it is hard to see how a fair held within the state, to make an exhibit of the products of the state, is not equally a public purpose. Such legislation has been sustained by the current of authority in the other states of the Union having Constitutions substantially the same as ours. *Daggett v. Colgan*, 92 Cal. 53, 14 L.R.A. 474, 27 Am. St. Rep. 95, 28 Pac. 51; *State ex rel. Douglas County v. Cornell*, 53 Neb. 556, 39 L.R.A. 513, 68 Am. St. Rep. 629, 74 N. W. 61; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Minneapolis v. Janney*, 86 Minn. 111, 90 N. W. 312; *Downing v. Indiana Bd. of Agriculture*, 129 Ind. 443, 12 L.R.A. 664, 28 N. E. 123, 614; *Shelby County v. Tennessee Centennial Exposition*, 96 Tenn. 653, 33 L.R.A. 717, 36 S. W. 694; *Bennington v. Park*, 50 Vt. 178. In *House of Reform v. Lexington*, 112 Ky. 171, 65 S. W. 350, and *Hager v. Kentucky Children's Home Soc.* 119 Ky. 235, 67 L.R.A. 815, 83 S. W. 605, we held that the state might appropriate money to a public purpose and make an existing corporation its agent for the disbursement of the appropriation, just as it may appoint other agencies for this purpose. We adhere to the rule laid down in those cases for the reasons there given." It would be difficult to point out a difference in principle between promoting any one agricultural interest and the promoting of all agricultural interest, in so far as being a public purpose is concerned. If the whole state may be taxed for the purpose of maintaining a state fair to exhibit the various agricultural interests, we are unable to see why it may not be taxed to prevent the destruction of sheep by dogs. But we are not driven to resting the case upon this latter principle, as we are convinced that the police power of the state affords a firm foundation upon which to base our opinion in upholding the act involved in this litigation. The act which we herein construe does not fix by its terms the compensation to the sheriff for collecting the tax, and we are asked to say in this opinion how the officers are to be remunerated. The act provides that the license tax shall be assessed and collected as other taxes, and we are of opinion that the legislature intended the officers to be paid in the same way and at the same rate at which they are remunerated for the collection of revenue taxes; that is, for the purpose of ascertaining the remuneration due the officers, the gross amount of the dog tax collected shall be added to the total amount of the revenue tax collected, and, upon the whole, the officers' remuneration shall be fixed by 17 L.R.A. (N.S.)

the terms of § 4148 of the Kentucky Statutes of 1903, 10 per cent on the first \$5,000 of the total, and 4 per cent upon the residue, the total amount of the remuneration of the officer not to exceed the sum of \$5,000.

For these reasons the judgment is reversed, with directions to sustain the demurrer to the petition and for other procedure consistent herewith.

O'Rear, Ch. J., dissenting:

While admitting the scope of the police power in the state to regulate the ownership and control of property within its borders so as to minimize the injuries that may be inflicted on others because of the predatory nature of the property, still I am unable to go so far as the majority opinion does in this case. One man's property may need regulation for the public safety, but that is far from meaning that it may be taken from him and given to somebody else. Admitting that the legislature has the power to impose a tax upon dogs as a police regulation, the tax cannot be imposed, in my judgment, for the benefit of a few persons, or for any special class of persons, for the state is as powerless to take one citizen's property and confer it upon another under the guise of police regulation, as it is under the tax regulation. By whatever name you call the act, it is the same, if the inevitable result is the same. It could not be maintained that a tax could be levied upon sheep, and the sum realized given over to those who raise horses alone, upon the idea that the horse-raising industry was of more benefit to the state than sheep husbandry. Nor would the fact that the state could appropriate its general revenues to fairs at which horses alone were exhibited, as a means of stimulating an enterprise that would be beneficial to the whole state, affect the question, in my opinion. Dogs are personal property. Ky. Stat. 1903, § 66; *Com. v. Hazelwood*, 84 Ky. 681, 2 S. W. 489. The state may regulate their ownership, as it may any other property; but I deny that it can regulate the ownership so as to confer the sole benefit directly and exclusively upon any other class of property. Nor can the fact that one class of property sometimes preys upon another class justify such legislation. Hogs are also a danger to other property. They may break into fields of corn and other grain and destroy them. Consequently the state may regulate the ownership of hogs by requiring them to be kept up by their owners, and may impose a liability on such owners for their depredations; but has the state the power to impose a license tax on hogs for the benefit of all who raise corn, or even of those engaged in raising corn who suffer damage by

breachy hogs? The imposition of a tax upon a class of property is to that extent the taking of that much of the property taxed, whether the tax be for revenue or for police regulation. And, whether one or the other, it must be for the public. The exercise of every power of government is necessarily for the public. Hence private property cannot be taken by the government for any other than a public use. The exercise of the police power is as subject to this overruling principle of our government as is any other governmental power. When the legislature exercises its power of police regulation of the ownership of dogs, as it may do, it must exercise it in behalf of the whole public, but has not the power to do so for the exclusive benefit of a special or favored class. If the principle be admitted that the only test of such legislation is whether it is within the police power to regulate the ownership of a particular species of property, no matter what may be done with the proceeds of the license fees collected by virtue of such statute, then it would be competent for the legislature to bestow that much of the citizens' property upon any object which the legislature might choose. I think that all such legislation is subject to two tests: First, Is the subject one which the state, under the police power, may regulate? second, If it is, is the regulation imposed for the benefit of the public; i. e., does the public receive the benefit? Not indirectly, but directly; for it may be assumed that the public is in a sense benefited by every industry carried on in the state, which adds to the sum of the wealth, or contributes to the happiness, of any of its citizens. The state has not the power to tax one class of property and give the proceeds directly to owners of another class, upon the idea that the latter contribute more to the good of society. I submit that the state could not levy a tax or appropriate money out of the treasury (which is the same thing) for the benefit of unfortunate sheep owners who had lost their sheep by ravages of dogs or disease; nor for one any more than for the other. Nor does the state propose to do so in this legislation. It is attempting to compel all men who own dogs to pay to those who own sheep the loss sustained by the latter from some of the dogs of some of the former. It visits vicariously a penalty which some ought to bear, upon many nowise responsible for it, merely because it is difficult to say who ought rightfully to bear it. The real effect of the statute is to make all of one class of property holders pay the losses incurred in a private business by another class, because this loss has been occasioned by the property of some of the first class. I do not believe such legis-

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lation is a valid exercise of the police power. We all recognize that sheep husbandry is a business of great value to the state. It may be admitted that the ownership of dogs is of doubtful value. The interests of the former as weighed against the latter may overwhelmingly preponderate from an economic standpoint. Notwithstanding all which, the principle of the law must be the same. It is unsafe to allow mere utilitarianism to bear down those safeguards of the citizens' rights,—those checks imposed by the people in their Constitution against the power of the majority and in favor of the individual; that which gives, if anything gives, one man a right safe from the encroachment of all other men; that which recognizes the supreme right of individual taste and judgment in the matter of acquiring property and in the pursuit of happiness. The legislation here involved makes a breach, I fear, in the dike of the people's liberties,—makes one class of people contribute to the business success of another class by the fiat of government without any direct benefit received by the former.

Hence I feel constrained to dissent from the opinion delivered by the court in this case.

Nunn and Carroll, JJ., concur in this dissent.

KENTUCKY COURT OF APPEALS.

WILLARD NICHOLS, Appt.,
v.

CHESAPEAKE & OHIO RAILWAY COMPANY et al.

(— Ky. —, 105 S. W. 481.)

Removal of cause — construction of Federal statute.

An action by an employee against a railroad company for personal injuries, in which the Federal statute requiring the use

Case Note. — Reliance upon Federal statute to defeat a defense in an action otherwise maintainable at common law, as a ground for removal of case to the Federal court.

It will be noted that the Federal statute relied upon in NICHOLS v. CHESAPEAKE & O. R. Co. was brought into the pleadings by amending the complaint for the purpose of defeating a defense set up in the answer. That distinction will here be disregarded, and all cases included in which the question of removal depended upon the necessity of construing a Federal statute which defeated a defense, whether such defense was anticipated and the Federal question pleaded in the original complaint, or by amendment after answer.

In Houston & T. C. R. Co. v. Texas, 177

of automatic couplers is relied upon to defeat the defense of assumption of risk, is within the original jurisdiction of the circuit court of the United States, although the petition states a good cause of action independently of the statute, and the action, if brought in a state court, may be removed to the Federal court under the act of Congress providing that any suit of a civil nature arising under the laws of the United States, of which the circuit courts of the United States are given original jurisdiction, which shall be brought in the state court, may be removed to the Federal court.

(November 22, 1907.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Greenup County

U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545, where the right of removal upon the defendant's application was denied, it appeared that the defendant railroad company answered the plaintiff's petition by alleging the payment in treasury warrants of certain bonds upon which the action was brought; and the plaintiff, in reply, set up the invalidity of the treasury warrants, because issued in violation of the Federal Constitution. It was held that to warrant removal the necessity therefor must appear in the plaintiff's own statement of his claim, and that, when a defense had been interposed, the reply to which brought out matters of a Federal nature, those matters, thus brought out by the plaintiff, did not form a part of his cause of action so as to allow of its removal.

The decision in *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 873, is upon the same principle, although there the action originated in the Federal court, and the plaintiff sought to sustain its jurisdiction by contending that there was a question in the case arising under the Constitution. The action was on a contract, and the plaintiff sought in its complaint to inject a Federal question into the case by suggesting that the defendant city would interpose as a defense a resolution of its common council, and that this resolution impaired the obligation of the contract and was therefore in contravention of the Constitution of the United States. The court, in disposing of this contention, says: "It is apparent that the only use the plaintiff proposes to make of the Constitution is as a barrier to a defense which the plaintiff suggests the defendant may set up. The appeal to the Constitution is made, not to support the plaintiff's cause of action, but by way of replication to an anticipated defense."

The apparent conflict between these two cases and the *NICHOLS CASE* is, perhaps, worth some consideration. Although in the latter case the Federal question was first introduced as an amendment to the complaint, it would seem that the plaintiff's

granting a petition for a removal of an action brought to recover damages for personal injuries which were alleged to have been caused by defendant's negligence, from the state to the Federal court. Affirmed.

The facts are stated in the opinion.

Messrs. Allen D. Cole, J. M. Collins, and A. B. Cole for appellant.

Messrs. W. H. Wadsworth and Worthington & Cochran for appellees.

Barker, J., delivered the opinion of the court:

The appellant, Willard Nichols, instituted this action in the Greenup circuit court against the Chesapeake & Ohio Railway Company and Phillip Cook to recover damages of them for an accident by which he was

right under the Federal statute in question was considered by the Kentucky court a part of his cause of action; not, indeed, an integral part, because questions of common law were presented independently of the provision of the Federal statute. The removal then was allowed, not because it was a strictly necessary part of the plaintiff's cause of action, but because the plaintiff had a right which turned upon a proper construction of the Federal statute. The investigation of the question in hand has led to the examination of a line of cases presenting a very similar question, viz., the right of removal where the defense itself as a whole or in part depends upon the Federal Constitution or a Federal statute. It seems that, prior to the act of 1887, removal was permitted under such circumstances. At the present time, however, the generally accepted rule denies the right to removal unless there is a Federal question presented in the complainant's statement of his cause of action. The two cases above cited were apparently decided upon this same theory evidenced by these reasons for denying removal: In the *Houston & T. C. R. Co. Case* "nothing upon the face of this petition showed any fact upon which Federal jurisdiction could be based;" and in the *Fergus Falls Case* "the appeal to the Constitution is made, not to support the plaintiff's cause of action, but by way of replication to an anticipated defense." In both instances authorities are cited in support of the holding, which deny removal where the defense is based on a Federal question.

It is submitted that the two cases under consideration present a somewhat different question in so far as they involve the question of such rights of a plaintiff as grow out of his cause of action; and, even though the Federal question is introduced only to anticipate a defense, it would seem to be a very close question, if a right, the benefit of which is so closely connected with the plaintiff's cause of action, is not sufficiently a part thereof to present a ground for removal.

thrown under one of the cars of the railroad company and received injuries by which he lost one of his legs; all of which he alleges was caused by the gross negligence of the railroad corporation and Phillip Cook, who was the engineer in charge of the train under which appellant fell. We will not set forth the allegations of the petition with more particularity, it being sufficient for our purposes to say that it states a cause of action for damages for the injuries alleged to have been received. The answer of the appellees placed in issue the material allegations of the petition by the first paragraph. In the second it was pleaded as follows: "The defendants, further answering, state that at the time of the injuries, and a long time before, the plaintiff, Willard Nichols, had been in the employment of the Chesapeake & Ohio Railway Company as switchman; that the apparatus used by him on the occasion of his injury was such as he was entirely familiar with, and that the mode used by him in uncoupling the car on the occasion stated was one with which he was also familiar; that the defects in the apparatus, if any, and the danger from accident and injury, were open and obvious, and known to the plaintiff before and at the time of his injury. Defendants state that as and for a part of the term of his employment plaintiff assumed the risks of injury from such defects and dangers. Wherefore," etc. The third paragraph pleaded contributory negligence on the part of the plaintiff. The issues were made up on these pleas by reply.

Afterwards, by permission of the court, appellant amended his petition, among other things, as follows: "He further states: That, on March 2, 1893, the Congress of the United States passed a law [27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174] entitled 'An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes and Their Locomotives with Driving Wheel Brakes, and for Other Purposes.' That the 2d section of said act is as follows: 'That, on or after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul, or permit to be hauled or used, on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' That the 8th section of said act is as follows: 'That any employee of such common carrier who may be injured by any locomotive car or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned,

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although continuing in the employment of such carrier after the unlawful use of such locomotive car or train had been brought to his knowledge.' On March 2, 1903, the said Congress passed an act in amendment of said act of 1893, which took effect September 1, 1903, and which provided, among other things, that the purpose and requirement of the former act shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce. Defendant was at all times herein mentioned a common carrier of passengers and freight for hire, carrying on interstate traffic in and through the states of Virginia, West Virginia, and Kentucky. It was defendant's duty to furnish plaintiff with suitable cars, machinery, and appliances upon and by means of which such employee might safely discharge his duties by use of ordinary care and prudence. He states that the coupling device upon the car from which he lifted the pin and the car to which the lever was attached were not effectually interchangeable. Both of said cars were regularly used by defendant and its agents and servants in moving interstate commerce, and, at the time and place of said injury to plaintiff, the same had stopped temporarily in making their trips between two points in different states. On the date of said injury defendant and its agents and servants, including the defendant Phillip Cook, disregarding their duty, negligently and carelessly placed in the train on which plaintiff was engaged to perform services as such brakeman said cars having unsecure, unsafe, and defective coupling devices, in this: That the couplers on each of said cars would not either couple or uncouple with each other automatically by impact, so as to render it unnecessary for plaintiff to go between said cars to couple and uncouple, contrary to the common law and to the statute of the United States Congress in such cases made and provided; all of which facts were known, or by the use of ordinary care and prudence might have been known, to defendant and its agents and servants in time to have prevented said injury, and were then unknown to plaintiff. In order to uncouple said cars as aforesaid, it was necessary for him to go between said cars to discharge his duty, and in so doing he was, by virtue of said act of Congress, relieved of any assumption of risk connected with the discharge of said duty. Plaintiff states that by reason of the gross negligence and carelessness of defendant and its agents and servants in failing to comply with said act of Congress, whereby he was compelled

to and did go in between said cars to discharge his duty in and about the uncoupling of said cars, he was precipitated violently to and upon the track of said railroad, one of defendant's cars passing over his right leg, then and there breaking, crushing, and mangleing it to such an extent as to render its amputation necessary to save his life, which was done. Plaintiff has suffered and still suffers great pain and is permanently disabled by reason of said injury."

Afterwards, within the time allowed by law, the appellee Chesapeake & Ohio Railway Company filed a petition for the removal of the case to the United States circuit court and executed the bond as required by law. The question of removal having been submitted to the court, the bond was approved and the case removed to the circuit court of the United States; and this judgment the appellant, Nichols, seeks to reverse on this appeal. It will be seen that, by the amended petition, the plaintiff pleaded a Federal statute and certain facts in regard to his injury, which, if true, would relieve him of the assumption of risk which, at common law, he would otherwise have been required to take. His cause of action, therefore, rests, in part, at least, upon the construction of a statute of the United States. The question, then, recurs: Was the court authorized, under this condition of affairs, to transfer the case from the state to the Federal court on the ground that the suit arose under a law of the United States?

By the act of Congress relating to the jurisdiction of circuit courts and the removal of causes, passed August 13, 1888 (1 U. S. Rev. Stat. Supp. 611, U. S. Comp. Stat. 1901, p. 503), it is provided that circuit courts of the United States "shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution or laws of the United States. . . ." By § 2 of the act in question it is provided that "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit courts of the United States for the proper district." It will thus be seen that, wherever the circuit courts of the United States have original jurisdiction of the subject-matter of the controversy, the defend-

ants may remove the same from the state to the Federal court; the right to remove being made to turn upon the question of original jurisdiction. It will also be observed that the original jurisdiction in the Federal courts is not required to be exclusive, but concurrent; and, where the jurisdiction is original, although concurrent, the right of removal exists. The first question for adjudication, then, is whether this case was one which might have been instituted originally in the United States circuit court. If so, then it could be removed; if not, the petition for removal should have been overruled.

It is insisted for the appellant that his cause of action, as alleged, does not rest alone upon the Federal statute, but that his petition states, independently of the statute, a good cause of action for damages, and this is true; but the deduction which he seeks to draw from this condition of the pleadings is not sound. The very question we have here arose in the case of *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, wherein it was contended, among other things, that Congress could not confer original jurisdiction on the circuit courts of the Union to try the questions of law arising out of the charter of the bank, which was an act of Congress; it being urged that such cases must first be tried out in the state courts, and taken to the Federal court on appeal. This position was held unsound, and concerning it Chief Justice Marshall said: "We perceive, then, no ground on which the proposition can be maintained that Congress is incapable of giving the circuit courts original jurisdiction in any case to which the appellate jurisdiction extends. We ask, then, if it can be sufficient to exclude this jurisdiction that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution,

but to those parts of cases only which present the particular question involving the construction of the Constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States a trial in the Federal courts will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal into which he is forced against his will. We think, then, that, when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

The foregoing case did not involve the question of the right of removal,—only the question of the right in Congress to confer original jurisdiction on the circuit courts of the United States; and it was there settled, once for all, that wherever a question did or might turn upon the construction of a statute of the United States, it was a case arising under the laws of the United States within the meaning of the Federal Constitution, which provides that "the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States. . . ." Section 2, art. 3. In the case of *Starin v. New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28, it is said: "The character of a case is determined by the questions involved. *Osborn v. Bank of United States*, 9 Wheat. 738, 824, 6 L. ed. 204, 224. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this subject. *Cohen v. Virginia*, 6 Wheat. 264, 379, 5 L. ed. 257, 285; *Osborn v. Bank of United States*, supra; *Nashville v. Cooper*, 6 Wall. 247, 252, 18 L. ed. 851, 852; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 201, 24 L. ed. 656, 658; *Tennessee v. Davis*, 100 17 L.R.A. (N.S.)

U. S. 257, 264, 25 L. ed. 648, 650; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 140, 28 L. ed. 96, 98; *Ames v. Kansas*, 111 U. S. 449, 462, 28 L. ed. 482, 487, 4 Sup. Ct. Rep. 437; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 416, 28 L. ed. 794, 795, 5 Sup. Ct. Rep. 208; *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 641, 29 L. ed. 261, 263, 5 Sup. Ct. Rep. 1104; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11, 29 L. ed. 319, 322, 5 Sup. Ct. Rep. 1113."

The case of *Schlemmer v. Buffalo R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, involved a question similar in principle to that we have here. There *Schlemmer*, who was an employee of the railroad, had been killed by being crushed between the cars while undertaking to couple them. The railroad was engaged in interstate traffic, and, it was pleaded, had failed to use the automatic coupler required by the statute set up in the amended petition in this case. Upon the trial the state circuit court gave a peremptory instruction in favor of the railroad on the facts, holding that the defendant had been guilty of contributory negligence. Upon appeal to the supreme court of Pennsylvania that judgment was affirmed. The plaintiff, then, by writ of error, carried the case to the Supreme Court of the United States, claiming that a Federal question was involved, in this: That it was alleged in the petition, and also shown by the evidence, that the railroad company was engaged in interstate traffic; that it had failed to use the automatic coupler required by the Federal statute, and, therefore, the employee did not assume the risk of his employment, and the state court had erred in awarding a peremptory instruction; that the peremptory instruction was a disregard of the Federal statute, or, at least, was a ruling that it did not apply to the case in hand. The question as presented involved a nice distinction between assumed risk and contributory negligence; it being insisted on one side that the state court had properly held that the plaintiff was shown to have been guilty of contributory negligence, and, this being true, his case failed, without reference to the application of the Federal statute which relieved him from the common-law assumption of risk if the railroad failed to use the automatic coupler required. We need not go into this discussion with any minuteness, because it is sufficient for our purposes to say that a majority of the court held that the pleadings and evidence showed that a Federal question was presented, and that the state court either misconstrued the Federal statute, or ignored it, and the case was, therefore, reversed. The usefulness of this case here is that, although questions of general law were

51 Vt. 440; Coulter v. Lyda, 102 Mo. App. 401, 76 S. W. 720; Mahaffy v. Mahaffy, supra; 15 Am. & Eng. Enc. Law, pp. 827, 828; 11 Am. & Eng. Enc. Law, 2d ed. pp. 243, 244.

If any part of a consideration is illegal, the whole consideration is void.

Padget v. O'Connor, 71 Neb. 319, 98 N. W. 870.

Epperson, C., filed the following opinion:

This appeal involves the validity of an antenuptial contract entered into December 11, 1897, by and between Henry Rieger, a widower, and Mrs. Amelia Lawler, a widow. The agreement was acknowledged, and its material portions follow: "Whereas, Henry Rieger and Amelia Lawler are about to enter into a contract of marriage, and whereas said Henry Rieger is the owner of certain real estate and personal property, at this date, and Amelia Lawler is also the owner of certain real estate and personal property, at this date, and whereas, said Henry Rieger and Amelia Lawler may at any time be desirous of disposing of said real estate and other property, divested of the curtesy, dower, or other claims of said Henry Rieger and Amelia Lawler either by deed or will: Now, therefore, in consideration of said Henry Rieger and said Amelia Lawler consummating and completing said contract of marriage, said Henry Rieger and Amelia Lawler hereby agree to waive and release, and do waive and release, and forever quitclaim and renounce, all dower and other interest in and to said real estate and personal property that said Henry Rieger and Amelia Lawler may now have or hereafter acquire by any means whatsoever. The intention being hereby to leave the absolute disposal of said real estate and other property now owned or hereafter acquired by either of them, unless taken in their joint names, so that, at the death of said Henry Rieger and Amelia Lawler, all of the property of said Henry Rieger and Amelia Lawler, real, personal, and mixed, shall descend to his or her lawful heirs released and divested of all claims of dower, curtesy, or other interest that said Henry Rieger and Amelia Lawler might have as widow or widower under the laws of the state of Nebraska. And, in consideration of the consummation of said marriage, said Henry Rieger and Amelia Lawler hereby releases, cancels, and waives all claims to all property of said Henry Rieger and Amelia Lawler to which they might be entitled as wife or widow, husband or widower. Any money transactions between the said parties may be represented by notes which, if not sooner paid, shall be a lien on their 17 L.R.A. (N.S.)

respective properties after death, and nothing in the above shall be construed to affect the right of either party to make a will disposing of their various properties contrary to this agreement, if either of them should so desire." Each party was the owner of real and personal property when the above contract was made, and each then had children living, the issue of a former marriage. The parties were married three months after the execution of the agreement, and lived together as husband and wife until the death of Henry Rieger on February 7, 1905. No children were born of their marriage. Henry Rieger left personal property worth \$17,560.13, and six lots in Falls City, Nebraska, valued at \$3,500, two of which were occupied by deceased and his wife as a homestead. During the settlement of his estate in the probate court, his widow made application, in pursuance of the statute, for an allowance for her support and maintenance. The heirs objected on the ground that the antenuptial contract was a bar to the allowance claimed by Mrs. Rieger. The probate adjudged the agreement void, and ordered payment of the allowance as prayed. The district court, on appeal, affirmed the order of the probate court, and the heirs bring the case here for review.

The widow (appellee) contends that the order allowing support from her husband's estate is not appealable, citing *James v. O'Neill*, 70 Neb. 132, 97 N. W. 22. This case does not support appellee's contention that an order allowing a widow an allowance is not subject to review. It was there held that an appeal would not lie from the district court to the supreme court in such matters; the proper remedy being a writ of error, which was not issued in that case. The *O'Neill* Case did not declare the law to be that an order allowing the widow support from her husband's estate was not subject to review in any manner. We have not heretofore determined the question whether an order granting a widow an allowance is subject to review in the appellate courts. We are not now dealing with a mere temporary or interlocutory order. The court below granted the application of the widow, set aside the antenuptial contract, and allowed the full sum prayed for in her petition. This much of the estate of the deceased was distributed. We think such an order is a final order, and is appealable by virtue of § 42, art. 1, chap. 20, Comp. Stat. 1907, which provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any person against whom any such order, judgment, or decree may

be made, or who may be affected thereby." The general rule seems to be that an appeal lies from the judgment of the probate court granting or refusing an allowance to the widow out of the estate of her deceased husband. 18 Cyc. Law & Proc. p. 402, note 86; Dame, Probate & Administration, § 425, p. 685. See also Forwood v. Forwood, 86 Ky. 114, 5 S. W. 361. Appellee contends that the agreement is void and not a bar to dower, and, being void for this reason, is void *in toto*, and does not affect the widow's right to support during the settlement of the estate. If the agreement in judgment here does not bar dower, it follows, as we view it, that it does not intercept the widow's allowance, and we shall therefore examine the question whether the agreement is sufficient to bar dower of the appellee in the lands of her deceased husband. At common law the right of dower could not be waived or lost by an antenuptial agreement. Gibson v. Gibson, 15 Mass. 106, 8 Am. Dec. 94; Hastings v. Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Blackmon v. Blackmon, 16 Ala. 633; Gould v. Womack, 2 Ala. 83; Logan v. Phillips, 18 Mo. 22. Two reasons were assigned by the courts to support the common-law rule: (1) The settlement being executed before marriage, the demand of dower had no existence, and no right can be barred before it accrues. (2) No right or title to freehold estate can be barred by a collateral satisfaction. 14 Cyc. Law & Proc. p. 939.

The antenuptial agreement being insufficient at common law to bar dower, the next inquiry is as to its validity under the following provisions of our decedent statute (chap. 23, Comp. Stat. 1885, p. 286) in force at the time the agreement herein was made:

"Sec. 12. A married woman residing within this state may bar her right of dower in any estate conveyed by her husband, or by his guardian if he be a minor, by joining in a deed of conveyance, and acknowledging the same as prescribed by law, or by joining with her husband in a subsequent deed acknowledged in like manner.

"Sec. 13. A woman may also be barred of her dower in all the lands of her husband by jointure settled on her, with her assent, before the marriage, provided such jointure consists of a freehold estate in lands for the life of the wife at least, to take effect, in possession or profit, immediately on the death of her husband.

"Sec. 14. Such assent shall be expressed, if the woman be of full age, by her becoming a party to the conveyance by which it is settled, and, if she be under age, by her joining with her father or guardian in such conveyance.

"Sec. 15. Any pecuniary provision that 17 L.R.A. (N.S.)

shall be made for the benefit of an intended wife, and in lieu of dower, shall, if assented to as provided in the preceding section, bar her right of dower in all the lands of her husband.

"Sec. 16. If any such jointure or pecuniary provision be made before marriage, and without the assent of the intended wife, or if it be made after marriage, she shall make her election before the death of her husband, whether she shall take such jointure or pecuniary provision, or be endowed of the lands of her husband; but she shall not be entitled to both.

"Sec. 17. If any lands be devised to a woman, or other provisions be made for her in the will of her husband, she shall make her election whether she shall take the lands so devised or the provision so made, or whether she will be endowed of the lands of her husband; but she shall not be entitled to both, unless it plainly appears by the will to have been so intended by the testator.

"Sec. 18. When a widow shall be entitled to an election under either of the two preceding sections, she shall be deemed to have elected to take jointure, devise, or other provision, unless within one year after the death of her husband she shall commence proceedings for the assignment or recovery of her dower."

The agreement before us does not fall within the provisions of our statute. No jointure was settled upon the wife. She received no freehold estate in the lands of her intended husband by virtue of the antenuptial contract. The agreement was not intended to operate as a legal jointure, and, under the statute, she was not barred of her dower. If the statutory method of barring dower is exclusive, the antenuptial contract herein is void. Fellers v. Fellers, 54 Neb. 694, 74 N. W. 1077. We are of the opinion, however, that the true rule is that such agreements are regulated by statute, and are void unless executed in accordance with the written law, except in equity, or, as stated by this court in Fellers v. Fellers, "in the absence of any contravening equitable considerations." We think the law is that provision of a statute that jointure is a bar to dower does not ordinarily deprive an intended wife of the power to bar her dower by any other form of antenuptial contract. Barth v. Lines, 118 Ill. 374, 59 Am. Rep. 374, 7 N. E. 679; McGee v. McGee, 91 Ill. 548; Naill v. Maurer, 25 Md. 532; Logan v. Phillips, supra; Gelzer v. Gelzer, Bail. Eq. 387, 23 Am. Dec. 180; Desnoyer v. Jordan, 27 Minn. 295, 7 N. W. 140; Stilley v. Folger, 14 Ohio, 610; 14 Cyc. Law & Proc. p. 940, note 20.

The supreme court of Illinois, in Barth

v. Lines, supra, held: "An antenuptial agreement entered into by parties of mature years, with a full understanding of its meaning, whereby each party released and waived his or her right of dower in the lands and estate of the other, and it was provided that each should retain his or her separate property then had or afterwards acquired, free from any and all claims of the other growing out of the marriage relation: Held, that such agreement operated as a bar to the claim of dower by the wife in the husband's lands, resting upon the consideration of his release of his legal rights in her separate estate." *Magruder, J.*, further said in the opinion in that case: "The provision of our statute that, when a conveyance is made to or in trust for an intended wife, for the purpose of creating a jointure in her favor, with her assent, to be taken in lieu of dower, such jointure shall bar any claim for dower by her in the lands of her husband (Hurd's Rev. Stat. 1885, chap. 41, § 7), 'cannot be said to deprive her of the power to bar her right to dower by any other form of antenuptial contract. . . . This, however, is not the case of a settlement or jointure, but of a contract.'" In *Naill v. Maurer*, supra, it appears that a husband and wife agreed before marriage that neither would claim during their marriage or after the death of the other any interest whatever in the property or estate of the other. After the death of the husband the wife claimed dower, and the court held "that the legal operation of the contract is not affected by art. 93, § 289, of the Code; that is a simple statutory declaration that a settlement of property by jointure or otherwise on a woman by her husband before marriage shall bar her of dower in his lands. That this is not a case of a settlement or jointure, but of a contract between competent parties, executed in good faith, and upon a good consideration by which the wife has expressly relinquished all right to claim any estate or interest in the property of her deceased husband." The court, in the opinion in the case last cited, said, with reference to the jointure statute of that state: "That is a simple statutory declaration, that a settlement of property by jointure or otherwise on a woman by her husband before marriage shall bar her of dower in his lands; but it goes no further, and cannot be said to deprive her of the power to bar her right to dower by any other form of antenuptial contract. It amounts to nothing more than a declaration of the effect of the settlement in that class of cases."

The court, in *McGee v. McGee*, supra, uses this language: "It is conceded the provision made in the antenuptial agreement 17 L.R.A. (N.S.)

does not create a jointure in favor of the wife within the meaning of our statute on that subject. That provides that, when an estate in land shall be conveyed to an intended husband or wife for the purpose of creating a jointure in favor of either of them, with his or her assent, to be taken in lieu of dower, such jointure shall bar any right or claim of dower by the party jointured in the lands of the other. None of the elements of a statutory jointure are to be found in the provision made for the intended wife by the antenuptial agreement. But may not that provision be in the nature of jointure, and may it not for that reason bar the dower of the demandant? Although the cases on this subject are not entirely harmonious, the weight of authority seems to be that any reasonable provision which an adult person agrees to accept in lieu of dower will amount to an equitable jointure, and, although it may be wanting in the requisites of a legal jointure, in equity it will bar dower." The court held in *Stille v. Folger*, supra: "A reasonable antenuptial agreement will bar the wife of dower, though its terms be not such as to constitute a good legal jointure." We take the following excerpt from *Desnoyer v. Jordan*, supra: "But it has always been permitted to the parties in contemplation of marriage to fix those rights by agreement, equitably and fairly made between them, and to exclude the operation of the law in respect to fixing such rights; so that, so far as the agreement extends, it, and not the law, furnishes the measure of such rights. That such antenuptial agreements might be made was recognized in the statute in force when this agreement was made. §§ 1, 4, chap. 69, and §§ 14-17, chap. 48, Gen. Stat. 1866. The latter of these statutes did not limit (as appellant argues) antenuptial contracts to barring dower alone. It only prescribed what sort of provision for the wife, in any such contract, should have the effect to bar dower; that it must be a jointure of a freehold estate in lands for her life, at least, to take effect in possession or profit immediately on the death of the husband, or a pecuniary provision for her benefit in lieu of dower, such jointure or pecuniary provision to be assented to by her before the marriage. But it did not disable the parties to make an antenuptial contract which should, in any other respect, fix the rights of the parties in the property of each other." in 2 *Scribner on Dower*, pp. 409-413, it is said: "With respect to the legal requisite that the estate limited in jointure be such an estate of freehold as should continue during the wife's life, no such circumstance will be necessary in equity in order to make the jointure an absolute bar to

dower if the intended wife be of age and a party to the deed, because, as she is able to settle and dispose of all her rights, she is competent to extinguish her title to dower upon any terms to which she may think proper to agree. . . . The cases are not entirely agreed upon the question as to whether an antenuptial contract, which merely secures to the wife her separate property, and makes no provision for her out of the husband's estate, is a good equitable jointure; but in a majority of the cases it is held that, if it be a part of such agreement that the wife shall relinquish her dower, it will be good in equity." We therefore conclude that the statutes of this state, which are similar to those construed by the courts in the cases above cited, do not provide the exclusive method of barring dower, or deprive parties competent to contract of the right to enter into any other form of antenuptial agreement. Antenuptial contracts attempting to intercept dower being void at common law, and the method prescribed by our statute creating jointures being exclusive only in the absence of equitable considerations, we must therefore look to the general equitable principles controlling such cases to determine the validity of the agreement in the case before us.

In the states where statutes creating jointures exist, it is generally held that an antenuptial contract, entered into in good faith by competent parties, and which is fair and equitable in its terms, will be upheld and enforced by the courts. Independent of jointure statutes, the parties may prescribe a rule by antenuptial agreement changing the one prescribed by law. Such a contract "is not a release of any right, but it is doing what is done every day in other things,—namely, providing a rule by agreement, to be applied instead of the rule which the law would furnish in the absence of an agreement. Where this rule by agreement exists, dower on common principles ought to be held not to attach." 1 Bishop, Married Women, § 418. "That before the statute of uses, and therefore independently of the sections concerning jointure, if a husband and his wife had entered into an antenuptial agreement whereby she accepted any provision therein made by him in lieu of dower, this undertaking bound her in equity, and she could not have dower on his death. The same law prevailed after the statute was enacted; whence may be traced in part the doctrine of what is called 'equitable jointure,' in distinction from jointure under the statute of uses, and the rulings thereon by the common-law tribunals." Id. § 420. "It is but a step from such a case as this to another one, of which there are several in the books, where the parties

agree beforehand that, after marriage, each shall hold his or her antenuptial property to his or her separate use, and on the death of one of them neither shall have any marital claim on the estate of the other. This is, at least in a court of equity, generally esteemed to be a good bar to dower." Id. § 423. "The principle governing these cases, it should be remembered, is not that the antenuptial contract constitutes a release of dower,—for a thing not existing cannot be released,—but it is an undertaking not to claim dower,—an introduction of a rule by agreement differing from the one which the law provides in the absence of an agreement; for the principle is well settled that, though parties marrying must take the status of marriage as the law has established it, and cannot vary it by antenuptial contract, yet, within certain legal limits, and proceeding by legal rule, they may, by such contract, vary any or all of those property rights which the status superinduces." Id. § 427. "While marriage is a sufficient consideration, yet any other valuable consideration may support an antenuptial settlement. The mutuality of the stipulations in the contract may constitute a sufficient consideration to each of the parties for the rights relinquished by the other, as, for instance, a mutual relinquishment by each of all rights in the property of the other." 21 Cyc. Law & Proc. p. 1248. See also 19 Am. & Eng. Enc. Law, 2d ed. p. 1233; Schouler, Dom. Rel. §§ 171, 173; 2 Story, Eq. Jur. §§ 1367, 1368, 1370.

Turning to the adjudged cases, we find that the supreme court of Illinois, in *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63, held: "An antenuptial contract is supported as to consideration by the subsequent marriage of the parties and mutual covenants waiving and releasing the rights of each in the property of the other. . . . Antenuptial agreements between persons contemplating matrimony, determining the rights of each in the property of the other and in their own property during and after marriage, are not against public policy, but are enforceable." Each of the parties to the agreement in *Kroell v. Kroell*, supra, was the owner of real estate when the antenuptial contract was executed. The agreement contained mutual covenants waiving and releasing the rights of each party in the property of the other. The court, in the opinion, said: "It can make no difference whether the interest of the husband in the property or estate of his deceased wife is of the same kind and amount as the interest of the wife in the estate of her deceased husband. Whatever interest either one acquired in the property or estate of the other was released by the contract. It is further con-

tended that the contract does not rest upon a sufficient consideration, and that an intended marriage is not such a consideration. The parties were married, and marriage itself has always been regarded as a sufficient consideration to support a marriage settlement. . . . It was the only consideration in the antenuptial contract passed upon in the case of *Dunlop v. Lamb*, 182 Ill. 319, 55 N. E. 354. But in this case there was another consideration which was the mutual covenants of the parties to waive their rights in the property of each other and the release of such rights. Each party conveyed and quitclaimed to the other all interest to be acquired by virtue of the marriage in the property, real and personal, of the other, and the mutual covenants were a good consideration." See *Yarde v. Yarde*, 187 Ill. 636, 58 N. E. 600; *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. 673; *Spencer v. Boardman*, 118 Ill. 553, 9 N. E. 330; *Weaver v. Weaver*, 109 Ill. 225; *McMahill v. McMahon*, 105 Ill. 596, 44 Am. Rep. 819; *Jordan v. Clark*, 81 Ill. 465; *Phelps v. Phelps*, 72 Ill. 545, 22 Am. Rep. 149.

The supreme court of Iowa, in *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551, 81 N. W. 702, held: "An antenuptial contract providing that the wife shall acquire no interest in the husband's estate is binding. . . . Marriage is a sufficient consideration for an antenuptial contract whereby the wife relinquishes her marital rights in the husband's property,"—citing in support of its conclusion *Peet v. Peet*, 81 Iowa, 172, 46 N. W. 1051; *Ditson v. Ditson*, 85 Iowa, 276, 52 N. W. 203; *Jacobs v. Jacobs*, 42 Iowa, 600. Antenuptial agreements are upheld in Kansas. In *Hafer v. Hafer*, 33 Kan. 449, 6 Pac. 537, it was decided: "The statutes of Kansas recognize the right of parties contemplating marriage to make settlements and contracts relating to and based upon the consideration of marriage; and an antenuptial contract providing a different rule than the one prescribed by law for settling their property rights, entered into by persons competent to contract, and which, considering the circumstances of the parties at the time of making the same, is reasonable and just in its provisions, should be upheld and enforced." "Marriage is a good and sufficient consideration to sustain an antenuptial contract." In the opinion in the Kansas case it was further said: "It was held in the court below that the contract was without consideration. Clearly this is not so. In addition to the reciprocal agreements therein, it has for its support the consideration of marriage, which is not only a valuable consideration, but has been held to be 'the highest consideration known in law.'" See, further, *Brown v. Weld*, 5 17 L.R.A. (N.S.)

Kan. App. 341, 48 Pac. 456. In *Forwood v. Forwood*, 86 Ky. 114, 5 S. W. 361, the rule is stated thus: "In the absence of fraud, a woman who is *sui juris* may, by an antenuptial contract, relinquish her right of dower and distributive share in her intended husband's estate; and the marriage of the parties is a sufficient consideration to sustain such contract." *Sanders v. Miller*, 79 Ky. 517, 42 Am. Rep. 237. The court, in *McNutt v. McNutt*, 116 Ind. 545, 2 L.R.A. 373, 19 N. E. 115 (a case quite similar to the one before us), reviews the authorities and states its conclusions as follows: "A contract in consideration of marriage, where each party releases all interest in the other's property, is upon a sufficient consideration as to both parties,—at least where each is possessed of property before marriage. A valid antenuptial contract founded on the consideration of marriage alone may be executed by a woman who has an estate of her own." See, further, *Buffington v. Buffington*, 151 Ind. 200, 51 N. E. 328; *Kennedy v. Kennedy*, 150 Ind. 636, 50 N. E. 756; *State ex rel. Harrison v. Osborn*, 143 Ind. 671, 42 N. E. 921; *Shaffer v. Shaffer*, 90 Ind. 472; *Bunell v. Witherow*, 29 Ind. 123. It was held in *Naill v. Maurer*, 25 Md. 532, "that the agreement or contract cannot be avoided for want of consideration; that either the reciprocal stipulations of the contract, or the proposed marriage, would constitute a consideration in every way sufficient to render the contract valid and binding." The court further said, in *Naill v. Maurer*, supra: "The contract was made in contemplation of marriage, and, as clearly appears, was intended to bar or prevent the acquisition thereby of any right by either in the property of the other, in order that the marriage proposed might take place. The main object in view was the consummation of the marriage, and it was to that end that the contract was executed. It seemed almost impossible to view the contract as founded upon any other consideration, although the reciprocal character of the stipulations might be held to constitute one sufficient to make the contract binding and effective. But, whether the marriage they proposed be expressly mentioned as a consideration or not, we think it must be regarded as such within the purview and meaning of the contract; and we accordingly hold that the contract cannot be avoided on that ground." In *McGee v. McGee*, 91 Ill. 548, *Scott, J.*, said: "The contract, in our judgment, is a reasonable one. It is one that persons advanced in life could, with great propriety, make, and especially where the parties have previously been married, and where there may be children by both marriages, among whom controversies

as to property may arise after the death of the parents. Such agreements are forbidden by no considerations of public policy, and there can be no reason why equity will not lend its aid to compel the surviving party to abide the contract. Our opinion is, the fair construction of the antenuptial agreement is that it intercepts dower of the widow, and may be set up as an effectual bar to her demand for dower in the lands of which her husband died seised." In *Stilley v. Folger*, 14 Ohio, 610, it was said by the court: "Antenuptial contracts have long been regarded as within the policy of the law both at Westminster and in the United States. They are in favor of marriage, and tend to promote domestic happiness by removing one of the frequent causes of family disputes,—contentions about property, and especially allowances to the wife. Indeed, we think it may be considered as well settled at this day that almost any bona fide and reasonable agreement made before marriage to secure the wife in the enjoyment either of her own separate property or a portion of that of her husband, whether during the coverture or after his death, will be carried into execution in a court of chancery." In *Mintier v. Mintier*, 28 Ohio St. 307, is the following: "If the antenuptial agreement in this case was intended by the parties to operate as an equitable jointure, and as such to bar all claims of the wife to dower in the real estate of the husband; if the parties were of mature age, and capable of judging in respect to their interests; if the agreement was fairly entered into in good faith and without any fraud or imposition; if it was reasonable in its terms, and was in good faith acted upon and carried into effect by Robert Mintier during his life,—no good reason is perceived why full effect should not be given to it according to the intention of the parties." In *Jacobs v. Jacobs*, supra, it was said: "It is claimed, however, that the contract was unreasonable, and without sufficient consideration, and therefore ought not, in a court of equity, to be enforced. We cannot so regard it. The law always looks upon marriage as a civil contract, and this marriage seems to have been purely a business transaction. So far as appears, the contract was freely and voluntarily entered into, without any fraud or imposition. One of the parties was a crippled widower sixty-two years old, with eleven children, and real estate worth \$12,000, and the other a widow with three children, 40 acres of land, and \$700 or \$800 in money. They were willing to marry, but each wanted the sole control of his or her own property, and to transmit it to his or her children. . . . We cannot say but that the advantages are

about equal, and the contract is fair and reasonable. We know of no reason why it should not be enforced."

In *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 22, is the following: "Antenuptial contracts whereby the future wife releases her claim to her right of dower and all other rights to the estate of her husband upon his decease are fully recognized in law. When fairly made, and executed without fraud and imposition, they will be enforced by the courts." In *Johnston v. Spicer*, 107 N. Y. 185, 13 N. E. 753, it was said: "Antenuptial contracts by which it is attempted to regulate and control the interests which each of the parties to the marriage shall take in the property of the other during coverture or after death, like dower, are favored by the courts, and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises."

A leading case is *Andrews v. Andrews*, 8 Conn. 79, where the rule is stated as follows: "I can see no reason why such an agreement, deliberately made, and upon sufficient consideration, should not be enforced in chancery. Such contracts, especially in late marriages, are not unusual. They are opposed to no rule of law, nor to any principle of sound policy. On the contrary, they are, in my judgment, highly beneficial, and are eminently entitled to the aid of a court of chancery, where such aid is necessary to carry them into effect; and especially is this true where the contract has been executed in good faith by one of the parties." See, further, *Staub's Appeal*, 66 Conn. 127, 33 Atl. 615; *Selleck v. Selleck*, 8 Conn. 85, note; *Webb v. Webb*, 29 Ala. 588; *Farrow v. Farrow*, 1 Del. Ch. 457; *Brooks v. Austin*, 95 N. C. 474; *Cauley v. Lawson*, 58 N. C. (5 Jones, Eq.) 132; *Neves v. Scott*, 9 How. 196, 13 L. ed. 102; *Marshall v. Morris*, 16 Ga. 368; *Culberson v. Culberson*, 37 Ga. 296; *Wentworth v. Wentworth*, 69 Me. 247; *Busey v. McCurley*, 61 Md. 436, 48 Am. Rep. 117; *Butman v. Porter*, 100 Mass. 337; *Freeland v. Freeland*, 128 Mass. 509; *Jenkins v. Holt*, 109 Mass. 261; *Miller v. Goodwin*, 8 Gray, 542; *Vincent v. Spooner*, 2 Cush. 467; *Tarbell v. Tarbell*, 10 Allen, 278; *Sullings v. Sullings*, 9 Allen, 234; *Herald's Petition*, 22 N. H. 265; *Carpenter v. Carpenter*, 40 Hun, 263; *Shoch v. Shoch*, 19 Pa. 252; *Ellmaker v. Ellmaker*, 4 Watts, 89; *Law v. Smith*, 2 R. I. 244; *Cunningham v. Shannon*, 4 Rich. Eq. 135; *Findley v. Findley*, 11 Gratt. 434; *Charles v. Charles*, 8 Gratt. 486, 56 Am. Dec. 155; *Faulkner v. Faulkner*, 3 Leigh, 255, 23 Am. Dec. 264; *Hinkle v. Hinkle*, 34 W. Va. 142, 11 S. E. 993; *West v. Walker*, 77 Wis. 557, 46 N. W. 819; *Hershy v. Latham*, 46 Ark.

542; *Peck v. Peck*, 12 R. I. 485, 34 Am. Rep. 702.

We think the rule deducible from the authorities under review is that in equity an antenuptial contract, in consideration of marriage and the release by each party of all interest in the property of the other, is based upon a sufficient consideration as to both parties, when each is the owner of an estate in which the other would acquire an interest by reason of the marital relations but for the antenuptial agreement, and is sufficient, when equitable and fair in its terms and entered into in good faith, to constitute an equitable bar to dower. Such is the rule for which appellants contend.

We shall now examine the authorities which are claimed to be in conflict with the rule of the decisions above referred to. It is argued that *Fellers v. Fellers*, 54 Neb. 694, 74 N. W. 1077, does not recognize the equitable rule relied upon by appellants; that this court is committed to the doctrine that the method prescribed by statute creating a jointure is exclusive; and that, the husband not having settled upon the wife any real estate, the agreement is void and unenforceable, and does not bar dower. The decision in the *Fellers Case* and the disposition made of the contract there construed was based solely upon the fact that the agreement was executory at the time of the marriage. As we view that case, no occasion existed for discussing the effect of contravening equitable considerations, or for launching a rule with reference thereto; indeed, a rule to be deduced from the authorities, and the better reasoning, is that dower may be waived by a reasonable and bona fide antenuptial agreement, though not contemplated or provided for by the statute; and such contract will be enforced in the absence of contravening equitable considerations. It seems that the *Fellers Case* was completely disposed of upon grounds not requiring a consideration of the statutory provisions relative to dower, and the discussion of "contravening equitable considerations" was *obiter dictum*. It is so considered, and the first paragraph of the syllabus is overruled. The antenuptial contract in the case before us does not depend upon a subsequent provision being made for the intended wife by will, and the covenant that either party was not to claim any interest in the property of the other may be enforced, if found to be within the equitable rule heretofore stated. As we understand the cases of *Re Pulling*, 93 Mich. 274, 52 N. W. 1116, and *Pulling v. Durfee*, 85 Mich. 34, 48 N. W. 48, the court did not declare the law in that state to be that jointure statutes similar to ours prescribed the exclusive method of barring dower, or

that such provisions deprive an intended wife of the power to bar her dower in equity by any other form of antenuptial contract. In that case there were several written instruments besides the agreement relied upon, and in one the written instruments the husband declared that he "intended to provide for her [his wife's] future consistent with his ability in a financial way." The heirs contended that the antenuptial contract was binding upon the widow and should be enforced, and the court said: "Were the agreements signed by the widow the sole evidence of what the understanding between the parties actually was, there might be some force in the contention." The case of *Curry v. Curry*, 10 Hun, 366, has been repudiated by later decisions of the same court. *Young v. Hicks*, 27 Hun, 56; *Clark v. Clark*, 28 Hun, 509. In the last case cited it was said: "But we cannot concur in the observations of the learned judge in that case [*Curry v. Curry*, supra] that antenuptial contracts are against public policy. On the contrary, we think that the current of decisions respecting marriage settlements shows that, when such contracts are freely and fairly entered into, they are generally conducive to the welfare of the parties thereto, and subserve the best purposes of the marriage relation." The case of *Grogan v. Garrison*, 27 Ohio St. 50, as pointed out in *McNutt v. McNutt*, 116 Ind. 545, 2 L.R.A. 373, 19 N. E. 115, apparently confuses postnuptial and antenuptial contracts, and appears to be in conflict with a former decision (*Stilley v. Folger*, 14 Ohio, 610) and a later utterance of the same court (*Mintier v. Mintier*, 28 Ohio St. 307). It was held in *Mowser v. Mowser*, 87 Mo. 437: "A parol antenuptial agreement between husband and wife that, upon the death of either, the other shall claim no interest in the estate of the deceased, is not admissible against the widow in a suit by her for the allowance given her by Rev. Stat. § 107, where she has received nothing as a consideration for the alleged agreement." And, further: "It is against public policy to allow a man, by an agreement before marriage, which does not secure to the wife after his death a provision for her support during her life, to bar her right to dower." *Mowser v. Mowser*, supra, seems to be an authority against the rule for which appellants contend in the case at bar, and we consider the Missouri courts as committed to a different doctrine than the one announced in this opinion. See *Farris v. Coleman*, 103 Mo. 352, 15 S. W. 767; *Moran v. Stewart*, 173 Mo. 207, 73 S. W. 177; *King v. King*, 184 Mo. 99, 82 S. W. 101; *Coulter v. Lyda*, 102 Mo. App. 401, 76 S.

W. 720. where *Mowser v. Mowser*, supra, is reaffirmed.

When we keep in view the distinction between antenuptial and postnuptial contracts, and that the law applicable to the latter, for obvious reasons, has no application to the former, we are of opinion that the authorities cited, except the Missouri cases above referred to, do not interfere with the operation of the rule in equity for which appellants contend; and we shall now proceed to apply that rule to the facts of the case under review. Both parties were *sui juris*, and each was the owner of real and personal property when the antenuptial contract was executed; the amount and value of the property of each not being clearly disclosed by the evidence. The agreement was made in contemplation of marriage, and each released all claims of dower, curtesy, or other interests in the property of the other. We are therefore not dealing with a case where the intended wife had no property in which she could request or require the intended husband to release his rights arising by virtue of the marriage, and to which he would be entitled should he survive her, and the decision herein must be limited to such cases. An apt illustration was given in *McNutt v. McNutt*, supra, as follows: "Suppose the woman's freehold estate to be of great value, yielding an annual income of \$10,000, why should courts in such a case interfere, and annul an antenuptial contract made and acted upon in good faith? Upon what imaginable ground of public policy could such an interference be justified? If she does own an estate in land, and if there is no fraud, and nothing unconscionable, she should be allowed to judge for herself whether the marriage is of itself a sufficient consideration, and courts should not, after the husband's death, substitute their judgment for hers. The truth is, it is exceedingly difficult to imagine why, in any case where there is no fraud, courts should displace the judgment of contracting parties and substitute their own. No persons in the world can so well or so justly judge as the contracting parties themselves; and it is only in the strongest and clearest cases that courts should disregard their judgment, and never where there is neither positive wrong nor a fraud." The authorities sustain our conclusion." In view of the authorities cited and the reasons given, we think the antenuptial contract in the case at bar is sufficient in equity to bar dower. The provisions of the antenuptial agreement being sufficient to bar dower, as we have determined, it is quite difficult to see how it would not intercept the statutory right to an allowance; there being no children the

issue of the marriage of the parties. As stated in *Staub's Appeal*, 66 Conn. 127, 33 Atl. 615, 616: "If she can thus bind herself as to her principal rights, it is difficult to see why she may not also do so as to this minor and incidental right to an allowance." See also *Coulter v. Lyda*, supra.

The antenuptial agreement in the instant case does not, in express terms, waive the right to an allowance, but contains sweeping provisions whereby each party releases to the other all claims of dower, curtesy, "or other interest" in his or her estate. No particular form of words is required to create an antenuptial settlement, and a liberal construction of the instrument will be indulged in order to carry out the intention of the parties. *Carswell v. Schley*, 56 Ga. 101; *Ardis v. Printup*, 39 Ga. 648; *Matney v. Linn*, 59 Kan. 613, 54 Pac. 668; *Mintier v. Mintier*, 28 Ohio St. 307; *Tucker's Appeal*, 75 Pa. 354; *Gause v. Hale*, 37 N. C. (2 Ired. Eq.) 241; *Buffington v. Buffington*, 151 Ind. 200, 51 N. E. 328; 21 Cyc. Law & Proc. p. 1259. The rule seems to be that a widow may, by appropriate and sweeping provisions of an antenuptial contract, waive her right to an allowance when the rights of minor children are not involved. 18 Cyc. Law & Proc. p. 390; *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63; *Pavlicek v. Roessler*, 222 Ill. 83, 78 N. E. 11. In *Kroell v. Kroell*, supra, it was held: "A contract executed by a husband and wife, whereby each releases and conveys to the other all interest in the other's property, and renounces all claims in law or equity of curtesy, dower, homestead, survivorship, or otherwise, constitutes a release by the wife of her right to a widow's award after the death of the husband, and bars the same, provided there are no minor children of the husband living with the widow." The contract there construed is similar to the one before us, and the court said in the opinion: "The right to a widow's award under the statute depends upon marriage, the continuance of the marriage relation until death, and the survivorship of the wife. The contract included all rights acquired by either one of the parties to it who should outlive the other in the property or estate of the other, and clearly embraced the widow's award. The contract is sweeping in its terms, and includes every interest that the petitioner acquired in or to the property of her husband by virtue of the marriage, and every interest which she would become entitled to upon his death, in case she survived him." In *Staub's Appeal*, supra, it was decided that a married woman who had entered into an antenuptial contract could bar herself of the statutory right to an allowance. And in *Cowles v.*

Cowles, 74 Conn. 24, 49 Atl. 196, it was held: "Under an antenuptial agreement providing that 'the parties hereto . . . release . . . all rights of dower, curtesy, or survivorship, as well as all other rights, either vested or inchoate, . . . which may be created or established by virtue of such marriage by the common law or any statute,' etc., the surviving widow is not entitled to an allowance from her deceased husband's estate pending settlement." In *Perkins v. Brinkley*, 133 N. C. 86, 45 S. E. 465, the wife, by antenuptial contract, agreed that she would not claim for herself "any right, title, or interest in any property" owned by the said party of the first part (her intended husband). It was held that the contract barred her as widow from any statutory allowance. There is a clear distinction between the case at bar and those cases where the rights of minors are involved. The parties to an antenuptial agreement cannot prejudice the rights of minor children, the issue of the intended marriage. See authorities reviewed in *Kroell v. Kroell*, supra. With few exceptions, the decisions holding that the widow was not barred by her antenuptial contract are cases where children were born of the marriage, or the contract was executory and the wife or widow was held to have the right to repudiate the agreement. *Weaver v. Weaver*, 109 Ill. 225; *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256. We are of opinion that the antenuptial contract relied upon by appellants is a bar to the statutory allowance claimed by appellee, unless, for considerations presently to be stated, it must be held that the agreement is unenforceable in equity.

It is argued that, if the antenuptial contract is valid, still it should not be enforced in a court of equity, for the reason that the utmost good faith is required between parties to such contracts, and, if the provisions secured to the wife be unreasonable or disproportionate to the means of the intended husband, it raises the presumption of designed concealment, and throws on him the burden of disproof. *Kline's Estate*, 64 Pa. 122. In *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 22, it was held: "While an antenuptial contract by which the future wife releases all claims against the estate of her husband upon his decease will be sustained when fairly made, yet, from the confidential relations between the parties, it will be regarded with the most rigid scrutiny; and, where the circumstances establish that the woman has been deceived, or induced by false pretenses to enter into the contract, it will be held null and void. It seems that the presumption is against

the validity of such a contract, and the burden of proof is cast upon the husband or his representatives to show perfect good faith; and strict proof will be required, particularly where the provision made for the wife is inequitable and unreasonably disproportionate to the means of the husband." The court said in the opinion: "The relationship of parties who are about to enter into the marriage state is one of mutual confidence, and far different from that of those who are dealing with each other at arms' length. This is especially the case on the part of the woman; and it is the duty of each to be frank and unreserved when about to enter into an antenuptial contract by a full disclosure of all the facts and circumstances which may in any way affect the agreement." The rule is stated in 21 Cyc. Law & Proc. p. 1249, thus: An antenuptial agreement wherein the intended wife releases "all claims against the estate of the intended husband, although valid when fairly made, will be most rigidly scrutinized, and, if the circumstances show that she has been deceived, it will be set aside." *Murdock v. Murdock*, 219 Ill. 123, 76 N. E. 57; *Barker v. Barker*, 126 Ala. 503, 28 So. 587; *Graham v. Graham*, 143 N. Y. 573, 38 N. E. 722; *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551, 81 N. W. 702. Appellee, in the case at bar, introduced no evidence, and in what respect she was deceived or overreached is not pointed out by counsel. She lived on a farm in the same neighborhood with her intended husband. Negotiations leading up to the agreement seem to have been made by the parties themselves. The antenuptial contract was read over to her more than once, and its provisions fully explained to her. There is no suggestion of fraud or concealment in the evidence. The amount and value of her property at the time of the marriage is not disclosed, but that some of it was personal property does appear. Undoubtedly she thought the reservations of her property from the control of her intended husband and the exclusion of his rights in the property she then owned and her future accumulations, should he survive her, were of more value to her and her children by former marriage than any interest she might leave in the property of her intended husband. At any rate, the interest she reserved in her own estate does not appear to be so disproportionate or unreasonable as to raise the presumption of designed concealment on the part of the husband. This marriage seems to have been in the nature of a business transaction. The parties were advanced in years. Each possessed a separate estate. They are willing to marry, but each, as disclosed by the agree-

ment, desired the control of his or her own property, and wished to transmit it to his or her children by former marriage untrammelled by the interests the law might create in the survivor. The agreement, so far as appears by the record before us, was fairly made. Appellee was not deceived or overreached. The agreement was based upon a sufficient consideration, and was executed in good faith. Appellee understood its purport, and should be held to abide its terms.

In this respect, however, and before passing from this branch of the case, it might be well to state that a court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial arrangements.

Appellee's final contention is that the antenuptial contract did not bar her right to homestead during her life, and for this reason the agreement was void *in toto*. It is unnecessary for us to determine in this action whether she is estopped by her agreement from claiming a life estate in the homestead, but, assuming that she is not, the question is whether the contract, being insufficient to bar such claim, is void *in toto*. The contract does not specifically mention the homestead interest of the survivor. It does not contain any illegal considerations. Had no homestead existed at the death of the husband, the contract would certainly be valid, and reason dictates that the existence of a homestead should not require an avoidance of the contract in its operation upon the widow's right to dower and allowance.

The lower courts erred in decreeing that the antenuptial agreement in the case under review did not bar appellee's statutory allowance during the settlement of her husband's estate; and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings consistent herewith.

Duffie and Good, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded for further proceedings consistent therewith.

A petition for rehearing having been filed, Duffie, C., on June 4, 1908, handed down the following response:

The opinion of Mr. Commissioner Epperson is found in 115 N. W. 560. In an interesting brief in support of the motion for a rehearing the opinion of Mr. Commissioner Epperson is vigorously attacked. The most vital objection urged against the opinion, in our judgment, is the fact that it overrules the former holding of this court in *Fellers v. Fellers*, 54 Neb. 694, 74 N. W. 1077, construing our statute relating to marriage settlements. We concede that an opinion establishing a rule of property should not be lightly set aside; but, when the opinion is not based upon reason, is contrary to public policy, and property rights will not be injuriously affected if overruled, the court should not hesitate in refusing to follow it further. Because the legislature provided a way in which a woman might bar herself of dower in her husband's estate, by having property settled upon her prior to her marriage, Mr. Commissioner Ryan, in *Fellers v. Fellers*, supra, took the position that the only way in which she could effectuate the purpose was by following the method prescribed by the statute. His opinion entirely ignores the right of a woman of mature years to protect her own property, or to exclude her from dower in her husband's estate by contract entered into prior to her marriage. There is nothing in our statute from which it can be inferred that the right of contract was taken away from the parties, or that a contract made before marriage by which each of the parties should renounce all claim to the property of the other arising from the marriage relation might not be made and enforced by the court. As stated in the opinion of Mr. Commissioner Epperson, the prevailing opinion is now in favor of recognizing and enforcing such antenuptial contracts when reasonable in their terms and made by parties with full knowledge of their conditions. Public policy would also seem to favor such contracts. As said in *Stilley v. Folger*, 14 Ohio, 610: "Antenuptial contracts have long been regarded as within the policy of the law both at Westminster and in the United States. They are in favor of marriage and tend to promote domestic happiness by removing one of the frequent causes of family disputes,—contentions about property and especially allowances to the wife. Indeed, we think it may be considered as well settled at this day that almost any bona fide and reasonable agreement made before marriage to secure the wife in the enjoyment either of her own separate property or a portion of that of her husband, whether during the coverture or after his death, will be carried into execution in a court of chancery."

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On the main question involved we have no doubt that the motion should be over-

capital and balance of interest due on the mortgage were paid by the defendant Storey to Henry Coburn as administrator of the mortgagee. Satisfaction of the mortgage was entered on the record thereof. Subsequent to the satisfaction of the mortgage, two attempts to revoke the letters of administration granted to Coburn were made in Chester county by Mrs. Coburn's granddaughter; but they were ineffective, and the validity of the letters remains unimpeached.

On January 9, 1906, a will purporting to have been executed by Sarah Ann Coburn was presented to the register of wills of Delaware county. It is dated May 1, 1895, recites that the testatrix was of Delaware county, Pennsylvania, and gives her husband, Henry Coburn, \$5, and the residue of her estate to her son. On the next day, January 10th, the subscribing witnesses appeared before the register of Delaware county, and testified that they saw Mrs. Coburn execute the will. No further step was taken in the matter until June 20, 1906, when the register of Delaware county entered of record a decree that, due and satisfactory proof having been made before him, "the foregoing instrument of writing be admitted and recorded as the last will and testament of Sarah Ann Coburn, late of the township of Springfield, deceased." Letters of administration with the will annexed were granted on June 23, 1906, to John W. Zeigler. On July 15, 1907, Zeigler issued a scire facias, in the common pleas of Chester county, on the mortgage given by Robert Storey, the defendant, to Sarah Ann Coburn. At the close of the evidence on the trial of the cause, the court directed a verdict for the plaintiff. The controlling question in the case is whether the payment to and satisfaction of the mortgage by Henry Coburn, who was entitled for life to the interest thereon, and was the original administrator of Sarah Ann Coburn in Chester county, was a payment and discharge of the debt secured by the mortgage. If it was, there can be no recovery on the scire facias issued in this case on the mortgage.

Robert Storey, the defendant, was called as a witness as if under cross-examination, and it was attempted to be shown by him that, at the time he paid the mortgage to Henry Coburn, the Chester county administrator, he, Storey, knew that Mrs. Coburn had left a will, and that it had been probated in Delaware county. We have read Storey's testimony carefully, and, if it had been submitted to a jury, the court would not have been justified in permitting the jury to find that he knew of the existence of the will, or that it had been pro-

bated in Delaware county. Storey is an old man, and from his testimony it is apparent that he confused the will with the assignment of the mortgage by Mrs. Coburn to her husband. When he testified that Coburn had been given \$1,500 by the will of his wife, he manifestly referred to the assignment by Mrs. Coburn to her husband of the interest on the \$1,500 mortgage. As the will shows, Coburn was not given a legacy of \$1,500 by the will. When Storey's attention was called to the fact that he had testified that the will gave Coburn \$1,500, he replied: "I was bothered up then."

The concluding part of Storey's examination is as follows:

By Mr. Hause:

Q. Before you paid off this mortgage, Henry Coburn told you that he did not get anything at all under his wife's will, except \$5, didn't he?

A. No, I did not hear him say that.

Q. He told you that he did not get anything under his wife's will?

A. He gets the interest.

By the Court: Q. Did he tell you anything about it?

A. No, he did not tell me anything.

By the assignment of the mortgage Coburn was to receive the interest during his life on the \$1,500, and Storey's testimony manifestly referred to the assignment, and not to the will. So far as the record discloses, we must therefore regard Storey as being ignorant of the existence of the will at the time he made the payment to Henry Coburn, as administrator of his wife, and had the mortgage satisfied in Chester county.

The probate of wills and the granting of letters testamentary and of administration are regulated in this state by statute. Such letters are grantable only by the register of the county within which was the family or principal residence of the decedent at the time of his decease, and, if he had no such residence in the commonwealth, then the register of the county where the principal part of his goods and estate are found. Before he receives his letters, an administrator is required to give a bond with two or more sufficient sureties for the faithful discharge of his duties, one of which requires him to "surrender his letters if a will of the deceased is subsequently found and proved according to law." By § 6, act March 15, 1832 (P. L. 136) 2 Purdon, 12th ed. 1847, jurisdiction is conferred upon the register to probate wills and grant letters testamentary and of administration; and, by § 36 of the same act, an appeal is given from all the judicial acts and decisions of

the several registers of the state to the orphans' court of the proper county.

If the aggrieved party desires to annul or set aside the action of the register in granting letters of administration, he must pursue the course pointed out by the statute. Being a judicial officer, and his decrees having the force and effect as if entered by a court, they must be regarded as conclusive until they are reversed by a direct attack made upon them, in a proceeding for that purpose. They cannot be attacked or avoided in a collateral proceeding. In *Huff's Estate*, 15 Serg. & R. 39, there had been no legal probate of the will, and letters testamentary were erroneously procured by one Robert Peebles, which were afterwards revoked by the orphans' court. That court held that, as there had been no legal probate of the will, and letters testamentary had been revoked, Peebles had no right to file an account. This court, reversing the orphans' court, said, speaking by Chief Justice Tilghman (page 42): "It appears to me that receipts of money by Robert Peebles, for the debts due . . . [the decedent], and payments made by him, . . . while the probate and letters testamentary were in force, were lawful acts, in consequence of which he might be cited to settle an account before the register, or he might go in and settle it, without citation." *Carpenter v. Cameron*, 7 Watts, 51, was an ejectment. Letters testamentary were offered in evidence and objected to. The objection was overruled because the register's act in granting the letters was conclusive until reversed on appeal. It was held that the legality of issuing the letters could not be inquired into collaterally. In *Clark v. Clark*, 6 Watts & S. 85, an action was brought by a wife against her husband to recover alimony, ordered to be paid by the court. The plaintiff died, and her administrator was substituted. One of the defenses set up at the trial was that the plaintiff had no right to letters of administration on the estate of the deceased wife. The defense did not prevail, this court holding that, in an action by the administrator against the husband, the regularity of the letters of administration could not be impeached. *Rogers, J.*, delivering the opinion, said (page 86): "The letters of administration were regularly granted to the plaintiff. It is therefore incompetent in this suit to impeach their regularity." In *Shoenberger's Estate*, 139 Pa. 132, 20 Atl. 1050, letters testamentary were issued by the register of Philadelphia county. Subsequently the register of Allegheny county, after a hearing, found that the greater portion of decedent's estate was in Allegheny county, that the letters issued in Philadel-

phia county were void, and issued letters testamentary on the estate of the deceased. This court reversed the court below, saying, *inter alia* (page 141 of 139 Pa.): "When application was made to the register of wills of Philadelphia, he had a right to inquire as to where the particular part of the goods and estate of the testator were situate in this state. It was a jurisdictional question, which it was his duty, as well as his right, to decide. He therefore had jurisdiction over the subject-matter, and his decision cannot be set aside collaterally as void. . . . While his [register's] decision stands unappealed from, it is conclusive, and cannot be reversed and set aside by the decision of the register of another county."

In other jurisdictions a like conclusive effect is given to the action of a register or probate court in granting letters testamentary or of administration. In an extended note on the subject to the report of the case of *Bolton v. Schriever*, 18 L.R.A. 242, the editors say: "The great weight of authority is now in favor of holding an appointment of an administrator valid against collateral attack, on the ground merely that the decedent was not a resident of the county, if the fact of such residence is expressly or impliedly found as a condition precedent to making the appointment." Like conclusiveness is given to the acts of a probate court in granting letters of administration in England. 1 Williams, *Exrs.* 10th Eng. ed. 431. The learned author says: "It is a legal consequence of the exclusive jurisdiction of the probate division, in deciding on the validity of wills of personalty, and granting administration, that its sentences, pronounced in the exercise of such exclusive jurisdiction, should be conclusive evidence of the right directly determined."

It is held in many jurisdictions that a bona fide payment to an administrator to whom letters have been regularly issued by an authority having jurisdiction to grant letters testamentary or of administration is a legal discharge to the debtor. *Kane v. Paul*, 14 Pet. 33, 10 L. ed. 341; *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61; *Fisher v. Bassett*, 9 Leigh, 119, 33 Am. Dec. 227; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 5 L.R.A. 541, 15 Am. St. Rep. 494, 22 N. E. 572; *Moore v. Tanner*, 5 T. B. Mon. 42, 17 Am. Dec. 35; *Steele v. Renn*, 50 Tex. 467, 32 Am. Rep. 605; *Bigelow v. Bigelow*, 4 Ohio, 138, 19 Am. Dec. 591; *Emery v. Hildreth*, 2 Gray, 228. In England the same effect is given to a payment made to a *de facto* executor. *Allen v. Dundas*, 3 T. R. 125; *Woolley v. Clark*, 5 Barn. & Ald. 744; 1 Williams, *Exrs.* 10th Eng. ed. 433. Mr. Williams says: "Upon

this principle (of the conclusiveness of a decree granting letters of administration), it was decided that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor of the deceased, notwithstanding the probate be afterwards declared null in the ecclesiastical court, and administration be granted to the intestate's next of kin."

Under these well-settled principles of law, we think it clear that the payment of the mortgage money by the mortgagor to Henry Coburn, the administrator of his wife in Chester county, and to whom the interest thereon was payable, was a legal discharge of the indebtedness, and that, therefore, the executor of the will of Mrs. Coburn, holding letters testamentary subsequently issued by the register of Delaware county, cannot maintain this action. The law gave the husband the right to administer upon his wife's estate, and there is no evidence in the case to show that either he, or the register of Chester county, in granting the letters, acted in bad faith, or with the intention of defeating the administration of Mrs. Coburn's estate under her will. The parties had lived in Chester county, the mortgage was given to Mrs. Coburn on land situate in that county, and her assignment of it to her husband and the mortgage itself were recorded in that county. The register of Chester county was not informed, and did not know the fact, if it was a fact, that Mrs. Coburn was not a resident of Chester county at the time of her death. He was informed by the petition of Henry Coburn, the husband, verified by oath, that both Henry Coburn and his wife were residents of Chester county, and that she died in that county. The letters issued by the register show on their face that she was a resident of Chester county at the time of her death, and was possessed of certain chattels and credits within the county. These were jurisdictional facts, and authorized him to issue letters of administration to the husband of the deceased, the proper party, under the statute, to receive such letters.

When demand was made by Henry Coburn for the payment of the mortgage, the letters of administration issued to him were presented to Storey. These letters disclosed on their face the jurisdiction of the register to grant them, and authorized Coburn to demand the payment of the mortgage. So far as the record shows, Storey had no knowledge of the probate of a will, or that letters testamentary or of administration had been granted to Mrs. Coburn's estate in any other jurisdiction. He was therefore compelled to pay the mortgage to Coburn, or subject himself to the costs of an action brought against him to recover the money.

17 L.R.A. (N.S.)

If an action had been brought by the administrator, and the facts had appeared on the trial of the cause as they did to Storey when payment was demanded of him by the administrator, Storey would have had no defense to the scire facias issued on the mortgage, and would have been compelled to pay the principal and interest due thereon. Storey, therefore, was not required, under the facts of the case as disclosed to him at the time, to resist payment of the mortgage. All he knew was that, the mortgagee being dead, the proper party to receive payment of the mortgage was her personal representative, duly appointed by the register of wills. There was therefore no reason or ground for Storey declining to pay the mortgage when Henry Coburn presented his letters of administration, granted by the register of Chester county, and demanded payment. The payment by Storey under the circumstances was a full discharge of the mortgage obligation.

It is contended on the part of the plaintiff that the letters of administration granted to Coburn in Chester county were invalid, and gave him no authority to collect the money due on the mortgage because of the probate of the will of Mrs. Coburn and the granting of letters of administration thereon to the plaintiff in Delaware county. This contention rests upon a misapprehension of the facts relative to the presentation of the will to the register of Delaware county and its probate and granting of letters thereon. The will was left with the register of Delaware county on January 9, 1906, and, on the following day, the subscribing witnesses appeared before the register and made the usual affidavits. The register, however, did not admit it to probate at that time. There was no further action taken in regard to the will, so far as the record discloses, until June 20, 1906, when the register entered a decree of record admitting the will to probate. Letters of administration were not granted until three days thereafter, on June 23d. The act of the two attesting witnesses appearing before the register and testifying was not a probate of the will. The probate of a will is the judicial act of the register, and is attested by his formal decree, or by some official act performed by his recognizing it as probated. The testimony of the witnesses, which the act of assembly requires in order to prove a will, is a prerequisite to the act of the register in granting probate of it. Without such testimony, the register cannot act, but, when the testimony is produced before him, and he is satisfied of the sufficiency of the proof to justify the probate of will, he enters a decree that the instrument "be admitted and recorded as

the last will and testament" of the deceased. This is a judicial decree, and is the probate of the will. Says Duncan, J., in *Logan v. Watt*, 5 Serg. & R. 212, 214: "The probate of a will does not mean the exhibition of the evidence on which it is admitted to be recorded, but the sentence or decree of the register. It is a decision of a judge, from which an appeal lies to the register's court." In that case it was held, in ejectment, that a certificate of a register that a will of lands had been duly proved was admissible in evidence, under an act of the legislature making copies of all wills and probates "good evidence to prove the gift or devise." In *Loy v. Kennedy*, 1 Watts & S. 396, the court, after reviewing the provisions of the act of 1832 as to the register's duties, said (page 398): "In the performance of this duty [in probating a will], the register is a judge, and admitting the will to probate is a judicial act, and the only remedy given to the party aggrieved is an appeal to the register's court." It was held that the decree of a register cannot be impaired in a collateral issue. In *Holliday v. Ward*, 19 Pa. 485, 489, 57 Am. Dec. 671, it is said by Black, Ch. J., delivering the opinion: "A register is a judge, and the admission of a will to probate is a judicial decision. . . . Such judgment can only be set aside on appeal, and is unimpeachable in any other proceeding. The validity of the will is a fact, which the law infers from the decision itself of the register, and not from the evidence on which that decision was based. . . . [page 490 of 19 Pa.]. His attestation may be a simple certificate that the will was proved and approved. Whether the certificate sets out no evidence at all, or evidence insufficient, the will must be received if the register has not condemned it."

It will be observed, therefore, that the probate of Mrs. Coburn's will did not take place until June 20, 1906, and that letters of administration with the will annexed were not granted until three days thereafter. It appears from the testimony of the attorney for the defendant, who was consulted by his client about making the payment to Coburn, that the attorney went to Delaware county and examined the records there to see if any letters had been taken out on the estate of Mrs. Coburn, but found that no such letters had been issued in that county. He also made inquiry at the register's office whether any proceedings had been taken in the estate of Mrs. Coburn, and was informed that there had been none. It was in consequence of this action that his counsel advised Storey to pay the mortgage to Coburn. At the time of the payment of the mortgage, April 5, 1906, it will be ob-

served that the will had not been probated, and letters had not been granted in Delaware county. There was therefore nothing to prevent the payment of the mortgage to the administrator of Mrs. Coburn in Chester county. Even if this will had been produced in Chester county, and letters granted there on the date that the probate took place in Delaware county, the payment of the mortgage by Storey to the administrator would not be invalidated. This is the rule announced in every jurisdiction, and for the reasons assigned in the numerous cases which we have already cited. The subsequent discovery of a will after the granting of letters of administration will not void or invalidate acts performed by the administrator prior to such discovery. The authority conferred by the letters granted by the register authorizes him to administer the estate, to collect moneys due, and disburse them in discharge of the legal indebtedness of his decedent. Those dealing with him in good faith, and by virtue of the authority contained in his letters, will be fully protected. Our statute requires the register, on being advised of a will, to revoke letters of administration previously granted. Kern's Estate, 212 Pa. 57, 61 Atl. 573. But there is nothing in any of our decisions which warrants the conclusion that the acts of the administrator, done in pursuance of the authority granted him, are not of valid and binding force on the executor subsequently appointed and acting under the will. The reason of the rule is that the register, in granting the letters of administration, acts in a judicial capacity, and that his decree cannot be impeached collaterally, but, if void or voidable, must be attacked directly, and in the manner provided in the statute. Unless such conclusiveness is given to the decree of the register and the action of the administrator appointed by it, confusion would result, and no person would be safe in dealing with an administrator. A contrary doctrine would result in litigation, which would be necessary to protect parties dealing with the administrator. It is apparent in the case in hand that Storey acted in the utmost good faith in paying the mortgage to Coburn, and the facts justified him in believing that Coburn was the proper legal authority to receive payment. He had known both Mr. and Mrs. Coburn. The mortgage was executed and delivered in Chester county, and covered lands situated in that county. The Coburns had resided in the county, and Storey had no information that would lead him to believe that Mrs. Coburn did not reside there at the time of her death. On the contrary, she was in that county at the time of her death, and her husband, in obtaining letters, swore that he and

his wife resided there. Coburn was the proper person to administer the estate of his wife, and also the proper person to receive the interest on the mortgage. In addition to these facts, the letters of administration, which were presented to Storey and his counsel before the payment of the money, disclosed on their face that Mrs. Coburn at the time of her death was a resident of the county, and had property and credits in that county. It would certainly be a dangerous doctrine to hold, under these facts, that the payment by Storey of the mortgage to the administrator was not a discharge of the indebtedness. Such a rule is not sustained by reason nor by any precedent to which our attention has been directed.

The assignments of error are sustained, the judgment is reversed, and judgment is now entered for the defendant.

PENNSYLVANIA SUPREME COURT.

VULCANITE PAVING COMPANY

v.

PHILADELPHIA RAPID TRANSIT COMPANY, App't.

(220 Pa. 603, 69 Atl. 1117.)

Mechanics' liens — special legislation.

1. Providing for the enforcement of mechanics' liens against the property of public service corporations, not by writ of *levari facias*, as in case of liens against other property, but by special *feri facias*, which seizes the property as a whole so as not to stop the operations of the corporation and defeat its object, is special legislation and invalid.

Same — enforcement — inoperative provision.

2. A mechanics' lien must fall if the method provided for enforcing it is inoperative.

(April 20, 1908.)

APPPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County in plaintiff's

Note. — It will be noted that in the above case the statute attempted to provide a remedy for the satisfaction of a mechanics' lien upon a particular structure of a public service corporation, by permitting a sale of all of its property as an entity, thus, in effect, extending the lien to all its property, which, as shown in *Vulcanite Portland Cement Co. v. John W. Allison Co.* 220 Pa. 382, 69 Atl. 855, rendered the statute obnoxious to a constitutional prohibition of the passage of any local or special law "providing or chan-

ging methods for the collection of debts, or the enforcement of judgments."

However, the statutes of many states, the constitutionality of which has apparently been assumed, grant to laborers, mechanics, etc., a lien upon the property of a public service corporation as an entity, although the labor or materials are bestowed only upon a particular structure or portion of its property. It is apparent that, under such statutes, the question before the court in the Pennsylvania case could not arise.

favor in an action brought to enforce a mechanics' lien. Reversed.

The facts are stated in the opinion.

Messrs. Ellis Ames Ballard and Boyd Lee Spahr for appellant.

Messrs. P. B. Steffan, Walter Biddle Saul, and Preston K. Erdman, for appellee:

The mechanics' lien acts passed prior to 1901 did not give a right of lien against the essential property of a quasi public corporation.

Foster v. Fowler, 60 Pa. 27.

The language of the act of 1901 plainly grants such a right, and, when the language is clear and admits of but one meaning, there is no room for construction.

26 Am. & Eng. Enc. Law, p. 598; Com. v. Kevin, 202 Pa. 23, 90 Am. St. Rep. 613, 51 Atl. 594; Bradbury v. Wagenhorst, 54 Pa. 182.

If the grant of a right is clear, the indefiniteness, or even the entire absence, of a provision for a remedy, does not defeat the clearly granted right; and the court will imply a remedy.

Endlich, Interpretation of Statutes, §§ 418, 419; 26 Am. & Eng. Enc. Law, p. 672; Lancaster County v. Lancaster, 160 Pa. 412, 28 Atl. 854; Com. v. Conyngham, 66 Pa. 99; Dwarrris, Stat. §§ 514-517; Ammant v. New Alexandria & P. Turnp. Road Co. 13 Serg. & R. 210, 15 Am. Dec. 593; Reid v. Northwestern R. Co. 32 Pa. 257; 17 Cyc. Law & Proc. p. 922.

A court of law has full control over its own process, and has the right to mold its executions in such a form as will meet the requirements of any particular case.

Patterson v. Patterson, 27 Pa. 40; Pearson v. Morrison, 2 Serg. & R. 20; Irwin v. Shoemaker, 8 Watts & S. 75.

Classification by the legislature in regard to the execution of liens, one remedy being provided where the lien is against the essential property of quasi public corporations, and a different remedy against all other defendants, is a proper one.

Stegmaier v. Jones, 203 Pa. 47, 52 Atl. 56; Com. v. Fisher, 213 Pa. 48, 62 Atl. 198; Wheeler v. Philadelphia, 77 Pa. 338; Com. v. Gilligan, 195 Pa. 504, 46 Atl. 124; Ayars's

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Appeal, 122 Pa. 266, 2 L.R.A. 577, 16 Atl. 356.

The subject of the act is sufficiently expressed in the title.

Com. v. Wyman, 137 Pa. 508, 21 Atl. 389; Com. v. Jones, 4 Pa. Super. Ct. 362; Re Sugar Notch, 192 Pa. 349, 43 Atl. 985; Page v. Williamsport Suspender Co. 191 Pa. 511, 43 Atl. 345; Com. ex rel. Carson v. Broad Street Rapid Transit Street R. Co. 219 Pa. 11, 67 Atl. 958.

Elkin, J., delivered the opinion of the court:

Prior to the act of 1901 (P. L. 431), there can be no question that it was the settled policy of the law, as expressed in the decisions of our courts and by statute, that the property of a public service corporation, essential to the operation of its franchises, could not be seized and sold under an ordinary writ of *feri facias*. Indeed, as far back as 1825, Chief Justice Tilghman, speaking for the court in *Ammant v. New Alexandria & P. Turnp. Road Co.* 13 Serg. & R. 210, 15 Am. Dec. 593, held that such property was entirely exempt from levy and sale on execution. To avoid the harsh consequences of this rule, and to give judgment creditors a remedy against such corporations, the act of June 16, 1836 (P. L. 755), was passed. This act provided for the sequestration of the property and earnings of a corporation in order to satisfy a judgment obtained against it. The sequestration proceedings were so cumbersome that the legislature, in 1870, by statute, provided a new process in the nature of a special writ of *feri facias*, under which the property of a quasi public corporation may be seized and sold; but, in order to do so, it is necessary to strictly follow the requirements of the act. The decisions of our courts, as well as the statutes relating to the subject, are based on a policy of the law intended to keep intact the property belonging to and essential in the operation of a public service corporation, so that its creditors may not seize and sell the same piecemeal, and, by thus disabling it, defeat the purpose for which it was created, by rendering it unable to perform its duties to the public. On this question, see *Turnpike Co. v. Wallace*, 8 Watts, 316; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315; *Philadelphia & B. C. R. Co.'s Appeal*, 70 Pa. 355; Com. ex rel. Atty. Gen. v. *Susquehanna & D. R. Co.* 122 Pa. 306, 1 L.R.A. 225, 15 Atl. 448; *Margo v. Pennsylvania R. Co.* 213 Pa. 468, 110 Am. St. Rep. 559, 62 Atl. 1081.

As to mechanics' liens, it was held in *Foster v. Fowler*, 60 Pa. 27, and *Guest v. Lower Merion Water Co.* 142 Pa. 610, 12 L.R.A. 17 L.R.A. (N.S.)

324, 21 Atl. 1001, that, under the then existing law, structures essential to the operation of a quasi public corporation are not subject to lien by the mechanic and materialman as other buildings are. These cases followed the rule hereinbefore stated, and held that it was against the policy of the law to permit a lien to be filed against the engine house, pumping station, and other structures of a quasi public corporation. Thus the law stood until the passage of the act of 1901; and it must now be determined whether this act has changed or modified the old rule so as to permit the filing of a lien against the power house of the defendant company, erected upon a lot therein described, even if the legislature had the power to do so, when enforced in the same manner as other mechanics' liens, which question has not been raised, and need not be determined for the purposes of the present case. It must be conceded that the definition of the words "structure or other improvements," used in the first section of the act, is broad enough to include the stations, power houses, and other structures of a public service corporation; but the difficulty is in the remedy provided for the enforcement of the claim. Section 46 (page 452) provides that, where judgment is recovered upon any claim, the property named in which is essential to the business of a public service corporation, "the claimant shall have execution thereupon as in other cases of judgment against corporations. Upon the distribution of any fund realized by a sale of the franchises and the whole or any part of the assets of the corporations, the court shall determine the relative value of the whole improvement to the property, to recover from part or all of which the claim was filed; and the claim shall be proved with other such claims to the extent that the value thus determined bears to the whole value of the franchises and assets sold." The ordinary process for the enforcement of a judgment obtained on a mechanics' lien is by *levari facias*, which is a proceeding *in rem*. But, as to public service corporations, a different process is provided by the act of 1901; that is to say, the claimant shall have the same kind of execution process as is provided for the enforcement of judgments against such corporations. In other words, the appellees in the present case, after having obtained a judgment on the claim filed against the power house of the appellant corporation, cannot sell the same on a writ of *levari facias*, but must proceed by special writ of *feri facias* under the act of 1870, which authorizes the seizure and sale of property essential and necessary to the existence of a quasi public corporation, not piecemeal, so as to stop its operation and

defeat the object of its charter, but as a whole. *Reynolds v. Reynolds Lumber Co.* 169 Pa. 626, 47 Am. St. Rep. 935, 32 Atl. 537. It will thus be seen that, while the act of 1901 may authorize the filing of a lien against the power house of the appellant company, that lien can only be enforced by the sale of all its property, and the remedy thus provided is not an action *in rem*, but is in the nature of a proceeding *in personam*, under the special writ of *fieri facias* provided by the act of 1870. This is the very thing that this court said, in the recent case of the *Vulcanite Portland Cement Co. v. John W. Allison Co.* 220 Pa. 382, 69 Atl. 855, could not be done. In that case it was held that the mechanics' lien laws were founded upon the theory that those who furnished labor and materials in the construction of a building should have the right to file a lien against the building itself, the structure into which their labor and materials entered, in preference to other general creditors, as a protection in so far as the building itself and the curtilage surrounding it afforded a security; but, as was plainly indicated in that opinion, such liens must be restricted to the particular buildings or structures against which the claim is filed. Under the rule of that case, the lien in the present case cannot be sustained. It is argued with much force that the lien may be valid even if the method of enforcing it cannot be sustained. This is not an open question, for the exact point was made in *Foster v. Fowler*, *supra*, in which Chief Justice Thompson, speaking for the court, said: "In the able argument of the learned counsel of the plaintiffs in error, it was claimed that we should consider the question of lien without reference to its possible enforcement. This would be too abstract and unpractical; for the lien abstractly is nothing, its consequences or results everything. The fruits of a lien are what the plaintiffs in error are contending for. We cannot, therefore, look at the question of lien without reference to the legal consequences of it, and, if they would necessarily contravene settled principles, it is evident that such an effect should not be given, and was not intended by the law, and, if it be incapable of the practical results assigned by law to it, it is inoperative,—is no lien."

We therefore hold that the method provided by § 46 for the enforcement of the judgment, not being a proceeding *in rem* so as to enforce the claim against the particular building into which the materials entered, is special legislation for this class of liens, obnoxious to the Constitution, and therefore inoperative. The method of enforcing the lien being inoperative, the lien itself must 17 L.R.A. (N.S.)

fall. The affidavit of defense is sufficient to prevent judgment.

Judgment reversed, and record remitted to the court below, with direction to enter such judgment or make such order as the pleadings require, in accordance with this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

RE BERTENSHAW.

(85 C. C. A. 61, 157 Fed. 363.)

Bankruptcy — insolvent firm — solvent partner's estate.

1. A partnership was adjudicated bankrupt, but none of the partners was adjudged a bankrupt. Application was made to the court to order an unadjudicated partner to turn over his property to the trustee of the partnership estate for administration in bankruptcy. Held, the court of bankruptcy was without jurisdiction to summarily take and administer in the proceedings against the partnership the individual estate of the solvent partner without his consent.

Same — partnership as distinct entity.

2. Under bankruptcy act of July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418, a partnership is a distinct entity, a person separate from the partners who compose it. It owns its property and owes its debts apart from the individual property of its members, which it does not own, and apart from the individual debts of its members, which it does not owe. It may be adjudged bankrupt, although the partners who compose it are not so adjudicated.

Same — trustee — estate of unadjudicated partner — administration.

3. The trustee of the estate of a bankrupt partnership is not the trustee of the individual property of the unadjudicated partners, and has no more right to administer that property than he has to administer the property of indorsers of the commercial paper of the firm, or the property of sureties for its debts.

He is not the trustee or the assignee of the claims of the partnership creditors, nor their agent or attorney to collect those claims out of other than the partnership

Headnotes by SANBORN, Circuit Judge.

Note. — The decision in the foregoing case arrays the circuit court of appeals of the eighth circuit against the position taken, or at least stated *obiter*, by the circuit court of appeals of the sixth circuit in *Dickas v. Barnes*, 5 L.R.A. (N.S.) 654, and the circuit court of appeals of the second circuit in *Re Meyer*, 39 C. C. A. 368, 98 Fed. 976, which is referred to in a case note to the former case in 5 L.R.A. (N.S.) 654.

property, and, where no partner is adjudged bankrupt, he has no power to enforce such claims against any property except the partnership property, or against any unadjudicated partner or other person who has none of the partnership property.

Same — statutes.

4. Under act March 2, 1867, chap. 176, 14 Stat. at L. 517, and the Massachusetts insolvency law of 1838 (Laws 1837-38, chap. 163, p. 449), a partnership was an aggregation of partners, and the insolvency or bankruptcy of the partners conditioned the bankruptcy of the partnership. It is not so under the act of 1898, and therefore many of the rules of law applicable under the former acts do not obtain under the latter.

Same — unadjudicated partner's property — creditors.

5. The partnership creditors may pursue unadjudicated partners by actions at law and suits in equity, before, during, and after the proceedings in bankruptcy against the partnership.

Same — discharge of partnership — effect.

6. The discharge of the partnership where the partners are not adjudicated bankrupt does not discharge the partners from their liability for the partnership debts.

Same — partnership — insolvency — what constitutes.

7. Under the act of 1898, a partnership is insolvent if the partnership property is insufficient to pay the partnership debts, because it is a person (§ 1 [19] chap. 541, 30 Stat. at L. 545, U. S. Comp. Stat. 1901, p. 3419), because any person is insolvent, under that act, whose property is insufficient to pay its debts (§ 1 [15]); and the only property a partnership has, or can convey, or apply to the payment of its debts, is partnership property, and the only debts it owes are the partnership debts.

(Hook, Circuit Judge, dissents.)

(November 19, 1907.)

PETITION for revision and reversal of a decree of the District Court of the United States for the District of Utah dismissing the petition of a partnership trustee in bankruptcy for an order upon one of the unadjudicated partners of the firm, to turn over certain individual property to be applied to the payment of partnership debts. Dismissed.

Statement by Sanborn, Circuit Judge:

On November 13, 1905, the court below found that B. F. Masterman, C. C. Surber, and Charles Joyce, doing business as the Opera House Drug Company, made an assignment for the benefit of their creditors, and, upon that ground alone, "adjudged that said B. F. Masterman, C. C. Surber, and Charles Joyce, partners doing business as the 17 L.R.A. (N.S.)

Opera House Drug Company, be adjudged bankrupts;" and added: "It is further ordered that this adjudication binds only the partnership entity, and not the partners as individuals." None of the partners was found to be insolvent or adjudged to be bankrupt. The trustee chosen by the creditors of the partnership collected the partnership property, converted it into money, and paid the expenses of the proceedings. He then had remaining \$213.35 to be distributed among the creditors, and the indebtedness of the partnership to them was \$4,180.66. Thereupon he filed a petition in the court below for an order upon C. C. Surber, one of the partners, that he should turn over to him certain real estate which did not belong to the partnership and which he owned individually, to be applied to the payment of these debts. Surber answered that this real estate was his individual property, that he had not been and was not insolvent, and that he had not been adjudged a bankrupt. The referee found the facts to be as Surber alleged, and denied the prayer of the petition, on the ground that the real estate of an unadjudicated solvent partner was not subject to administration in bankruptcy upon a simple adjudication of the partnership; and the court, upon a proper certificate, affirmed this ruling. The trustee presents this decision for revision and reversal by a petition under § 24b of the bankruptcy law. Act July 1, 1898, chap. 541, 30 Stat. at L. 553, U. S. Comp. Stat. 1901, p. 3432.

Argued before Sanborn and Hook, Circuit Judges, and Philips, District Judge.

Messrs. Willard W. Padgett, William P. Dillard, and William M. Banks for petitioner.

Messrs. Joseph B. Tomlinson, Austin M. Keene, and Edward C. Gates for respondent.

Sanborn, Circuit Judge, delivered the opinion of the court:

The adjudication in bankruptcy in this case is a distinct judgment that the partnership is a bankrupt, and that none of the partners is a bankrupt. This decision has not been challenged by appeal, those issues are now *res judicata*, and the only question here is, May the bankruptcy court, in the administration of the estate of a bankrupt, draw to itself and apply to the payment of partnership creditors, individual property of solvent partners, none of whom has been adjudged a bankrupt?

There are two conceptions of a partnership, one springing from the agreement on which it is founded, that it is an aggregation of persons associated together to share

its profits and losses, owning its property, and liable for its debts. The other that it is an artificial being, a distinct entity separate in estate, in rights, and in obligations from the partners who compose it. In most of its relations to persons and things, the latter conception is the more accurate. The supreme court of Vermont, in 1878, in *Walker v. Wait*, 50 Vt. 668, 676, declared that "a partnership or joint-stock company is just as distinct and palpable an entity, in the idea of the law, as distinguished from the individuals composing it, as is a corporation; and can contract, as an individualized and unified party, with an individual person who is a member thereof, as effectually as a corporation can contract with one of its stockholders. The obligation and the liability, *inter partes*, are the same in the one case as the other. The only practical difference is a technical one having reference to the forum and form of remedy."

Judge Cooley, in *Robertson v. Corsett*, 39 Mich. 784, said, in the same year: "The partnership, for most legal purposes, is a distinct entity,—having its own property, capable of contracting separate debts, having the right to sue in equity its several members, and to be protected against their conduct to the same extent that it might be against the conduct of strangers."

Judge Brewer, now Mr. Justice Brewer of the Supreme Court, said, in 1876, in *Cross v. Burlington Nat. Bank*, 17 Kan. 340: "Where one joins a partnership, as in this case, he makes himself a part of an entity already existing, which has acquired certain property and business, and, in acquiring it, has incurred certain indebtedness. The firm owns the property, holds the business, and owes the debts."

Thus, it may be seen that the conception of the partnership as a distinct entity, separate in estate and obligations from each of the partners, and from the individual estates and obligations of each partner, was an established and approved legal conception years before the act of 1898 was passed. Congress embodied this conception of a partnership, in the bankruptcy law of 1898, by these clear provisions:

Section 1 (19): "‘Persons’ shall include corporations, except where otherwise specified, and officers, partnerships, and women." Act July 1, 1898, chap. 541, 30 Stat. at L. 545, U. S. Comp. Stat. 1901, p. 3419.

Section 5: "Partners. (a) A partnership, during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

"(b) The creditors of the partnership
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shall appoint the trustee; in other respects, so far as possible, the estate shall be administered as herein provided for other estates.

"(c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners, and of the administration of the partnership and individual property.

"(d) The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

"(e) The expenses shall be paid from the partnership property . . . in such proportions as the court shall determine.

"(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner, to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets, and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

"(g) The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

"(h) In the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." 30 Stat. at L. 547, 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.

No express provision can be found in this legislation, and no indication or implication is perceived in it, that an adjudication of a partnership draws into the administration of its estate, in the court of bankruptcy, the property of the solvent partners who are not adjudged bankrupts. On the other hand, every provision of it is consistent with the retention and administration of their individual property, by the unadjudicated partners, and many of them are ut-

terly inconsistent with the administration of these individual estates by the bankruptcy court. Clause "c" provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property. The unavoidable inference is that the court of bankruptcy which does not have jurisdiction of any of the partners cannot have jurisdiction of all of the partners and of the administration of both the partnership and the individual property. Nor is the reason for this provision difficult to perceive. Section 5 treats exclusively of bankrupt partnerships and their members. It does not deal with solvent partnerships that have committed no act of bankruptcy, nor does it subject partnerships to adjudication in bankruptcy, solely because some of their members have been adjudged bankrupts. A member of a partnership may be adjudged bankrupt when the partnership cannot be, and, in such a case, the bankruptcy court has no jurisdiction of the partnership property. But, where one of the partners is adjudged bankrupt and the court thus acquires jurisdiction of him, the partnership is dissolved, and, if the partnership also is adjudged bankrupt, the bankruptcy court is given jurisdiction by clause "c" of the partnership and of all its members, because it then becomes necessary to marshal the properties and the liabilities of the partnership and its members, and to distribute the proceeds of the properties among the creditors, in accordance with the equitable rule recited in clause "f." The provision of clause "c" simply gives to a court of bankruptcy which has jurisdiction of one of the members of a partnership adjudged bankrupt the same jurisdiction to administer the estate of the partnership and of its members, which a court of equity would have in similar circumstances. A court of equity, in such circumstances, would not take the partnership property from the solvent partners; and clause "h" imposes upon the bankruptcy court this salutary rule of the equity practice. It provides that the property of the partnership and its administration shall not be taken from the unadjudicated partners by reason of the insolvency or bankruptcy of their fellows and of the partnership. It declares that, although the partnership and one or more, but not all, of the members of it, are adjudged bankrupts, and the court thus has jurisdiction of them, nevertheless "the partnership property shall not be administered in bankruptcy unless by consent of the partner or partners not adjudged bankrupt."

If the property of a bankrupt partnership cannot be administered by the court

of bankruptcy without the consent of the solvent partner who has not been adjudged bankrupt, *a fortiori*, the latter's individual property cannot be. A court which cannot administer the property of a partnership adjudicated a bankrupt cannot, by virtue of its jurisdiction over this partnership property, which it may not administer or touch, draw to itself and administer the individual property of the solvent partner without whose consent it may not administer the partnership property.

Hence, when clauses "c" and "h" are read and construed together, they provide, in effect, that, when a partnership and one or more of the partners, but not all of them, are adjudged bankrupt, those who are not so adjudged may administer the partnership property and, *a fortiori*, their individual property, and the court may not do so without their consent; but, if the unadjudicated members consent, the court may administer the partnership property and their individual estates. These provisions, thus interpreted, are fair, just, and reasonable. The solvent partner cannot, in any event, escape payment of the debts of the partnership. His individual property is subject to attachment, execution, and to all the ordinary processes of the law, to satisfy them. He is more competent to manage the individual property and the property of his firm which he had the shrewdness and ability to accumulate, more competent to convert them into money and to apply them upon his obligations, than any trustee chosen by his creditors can be. He knows the property, its value, its availability for various uses, its market. He has a vital interest in securing the best price for it; and the fact that it is his property, that it is to be applied to his debts, gives him a preferential equity to apply it speedily and efficiently to the payment of his obligations. The opposite practice would be unreasonable, unfair to those who have accumulated and preserved the property, and liable to much injustice. A solvent partnership may be adjudged a bankrupt. *George M. West Co. v. Lea Bros.* 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836. Suppose a partnership owes \$5,000, and one of the partners has individual property free from individual debts and subject to execution, of the value of \$50,000, and the partnership makes a general assignment and is adjudged a bankrupt. Why should not the solvent partner administer the partnership property and his own, and pay the partnership debts free from the delay and expense of a trustee? Why should the trustee of the estate of the partnership take from him his property of the value of \$50,000, or any part of it, and proceed to convert the part-

nership estate and the individual property alike into money and to distribute it according to the provisions of clause f? If the solvent partner is willing to proceed speedily and efficiently to convert this property into money and to pay the partnership debts, no sound reason for taking it from him occurs to us. The provisions of § 5 demonstrate the fact that none occurred to the Congress and the common and approved practice in equity is otherwise. The Congress enacted the provision that the partnership property, and, by more persuasive inference, the individual property of the solvent partner, should not be administered in bankruptcy without his consent, to prevent such a practice.

A "partnership" is a "person." Section 1 (19). A "person," a "partnership," is insolvent when the aggregate of its property is insufficient, at a fair valuation, to pay its debts. Section 1 (15). A partnership owns its own property and owes its own debts. It, its property, and its debts are separate and distinct from the individuals who compose it, from their individual property, and from their individual debts. The partnership does not own, cannot assign, or apply to the partnership debts, the individual property of its members, nor is it liable for their debts. The most that a creditor of a partner can secure from a partnership or from its property is the excess of the latter after the partnership debts have been paid. The partners and their individual property are, to a limited extent, to the extent of the excess of their individual property over their individual debts, but not to the full extent of ordinary indorsers or indemnitors, sureties for the debts of the partnership. The act of 1898 recognized these patent facts, and provided for separate adjudications of the partnership and of its members. Under this act the partnership may make an assignment or commit some other act of bankruptcy, and be adjudged a bankrupt, while many of its members are solvent and cannot be so adjudged. On the other hand, some of its members may be adjudged bankrupts, while the partnership is not subject to such an adjudication.

Where a partnership is adjudged bankrupt and the members of the partnership are not, the trustee takes title to the partnership property and to that only; and his full duty is discharged and all the power which he has is exercised, when he collects and converts the partnership property into money and distributes its proceeds among the creditors. The creditors of the partnership may subject the individual property of the unadjudicated partners to the payment of their debts, before, during, or after the bankruptcy proceedings, by actions at 17 L.R.A. (N.S.)

law, by suits in equity, or by other proceedings, just as they may the property of indorsers upon the commercial paper of the firm, or the property of sureties for its obligations. But the trustee of the estate of the partnership is neither the assignee or trustee of the claims of its creditors, nor their attorney or agent to collect their claims out of the individual property of the unadjudicated partners; and he has no more right or authority, at law or in equity, to seize their individual property, and to apply it to the payment of the partnership creditors, than he has to take the property of indorsers of the firm paper or the property of sureties for its obligations, and apply such property to that purpose. He is merely the trustee of the property of the partnership, not of the individual property of the partners, nor of the property of any other debtors of the creditors of the partnership; and he is without power to take or to administer such property. Nor may he maintain any action or proceeding to enforce the liability of the individual partners to the partnership creditors, because he is not the assignee of the claims of the creditors of the partnership; and he has no more right or authority than a stranger to enforce these claims against other persons than the bankrupt partnership, or against other property than the property of the partnership.

Moreover, since the property of the unadjudicated partners does not vest in, and may not be administered by, the trustee of the bankrupt partnership, the discharge of the partnership discharges that entity only from its debts, and leaves the partners still subject to their liability to pay the unpaid balance of the claims of the partnership creditors. The reason of the case and the plain provisions of the bankruptcy law, alike forbid the court of bankruptcy to draw to itself and administer the individual property of unadjudicated partners, upon a mere adjudication of the bankruptcy of their partnership.

This conclusion has not been reached without a careful examination of the insolvency law of Massachusetts from which clause "f" of § 5 is practically copied, of the bankruptcy law of 1867, and of a cloud of decisions under the present law. But these statutes have yielded little aid, and the decisions are so numerous and various that, after deliberation, the terms of the act of 1898 and their evident meaning seem to furnish the most reliable guide to a proper judgment. The Massachusetts act was an insolvency law. Mass. Laws 1837-38, chap. 163, p. 449. It gave to any debtor who was unable to pay his debts the right, upon filing a petition in court, to surrender his property to be applied to the payment of his

debts. It adopted the theory that a partnership was an aggregation of partners, and not the conception of the act of 1898 that it is an entity distinct from them. It provided that, "where two or more persons who are partners in trade become insolvent, a warrant may be issued in the manner provided in this act, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners; upon which warrant, all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as may be, by law, exempted from attachment; and all the creditors of the company and the separate creditors of each partner shall be allowed to prove their respective debts;" and that the proceeds of the respective estates should be distributed as directed by § "f" of the act of 1898. Mass. Laws 1837-38, chap. 163, p. 475, § 21. The bankruptcy law of 1867 adopted the same theory. It provided: "Where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken." Act March 2, 1867, chap. 176, 14 Stat. at L. 534, § 36.

Under the Massachusetts insolvency law of 1838 and the bankruptcy law of 1867, it was the insolvency or bankruptcy of the partners, not specified acts of bankruptcy of the partnership, that conditioned the adjudication of the partnership, and, in either case, where the partners were insolvent or bankrupt, the partnership was judicable; and all the property of the firm and of the individual partners became subject to the administration in the court of bankruptcy by the express declaration of the acts. The question arose, under the Massachusetts law, whether or not the property of the partnership and of a solvent partner could be taken and administered by the court on the petition of insolvent partners, and, after at first intimating that they might be (*Thompson v. Thompson*, 4 Cush. 127, 132), the supreme judicial court of the commonwealth finally said: "Of the four objections made to the validity of the proceedings, the first only has presented any difficulty. That is, that it was not alleged in the petition that the partners, in their individual capacity, were insolvent. A preliminary question was made whether such allegation was necessary. We cannot doubt that there must be a substantial averment of this fact; for, if one of the partners were

solvent, such solvent partner would have the legal right of settling the affairs of the partnership, and the commissioner would have no power to take by his warrant the partnership property out of his hands. Again, as each partner is liable *in solido* for the debts of the company, a partnership cannot with strictness be said to be insolvent while any of the partners are able to pay its debts." *Hanson v. Paige*, 3 Gray, 239, 242.

If the court, under the Massachusetts law, which treated the partnership as an aggregation of partners and not as a distinct entity, and which contained no express provision that the partnership property should not be administered in the court without the consent of the solvent partner, had no power to take the partnership property from a solvent partner and administer it, much less can it lawfully do so under the bankruptcy act of 1898, which treats the partnership as a distinct entity separate from the partners, and contains an express provision that its property may not be administered in bankruptcy without the consent of the solvent partner. And, if the court of bankruptcy has no power to administer the partnership property without the consent of the unadjudicated partner, much less may it draw to itself and administer his individual property.

The decisions under the act of 1898, concerning the relations of partnership and individual estates, have not been overlooked, but, upon many phases of these relations, they are confusing and inconsistent. The uniform current of authority is that, under this act, a partnership is a distinct entity separate from the individuals who compose it, that it owns its property and owes its debts, which are respectively separate and distinct from the individual property and the individual debts of its partners, and that an adjudication of the partnership a bankrupt apart from, or in addition to, the adjudication of its partners bankrupts, is indispensable to the jurisdiction of a court of bankruptcy to administer the partnership property. *Re Mercur*, 58 C. C. A. 472, 476, 122 Fed. 384, 388; *Re Stein*, 62 C. C. A. 272, 127 Fed. 547, 11 Am. Bankr. Rep. 536, 538; *Re Corcoran*, 12 Am. Bankr. Rep. 283, 287; *Re Sanderlin* (D. C.) 109 Fed. 857, 859; *Re Meyer*, 39 C. C. A. 368, 371, 98 Fed. 976, 979; *Strause v. Hooper* (D. C.) 105 Fed. 590; *Re Farley* (D. C.) 115 Fed. 359, 361; *Re Meyers* (D. C.) 96 Fed. 408, Id. 97 Fed. 757; *Re Russell* (D. C.) 97 Fed. 32; *Green River Deposit Bank v. Craig* (D. C.) 110 Fed. 137; *Re McFaun* (D. C.) 90 Fed. 592; *Re Barden* (D. C.) 101 Fed. 553; *Re Hale* (D. C.) 107 Fed. 432.

There are many decisions that a partnership is not insolvent, within the meaning of

the act of 1898, unless all its members are insolvent. *Vaccaro v. Security Bank*, 43 C. C. A. 279, 103 Fed. 436; *Re Perley*, 138 Fed. 927, 15 Am. Bankr. Rep. 54, 56; *Re Blair (D. C.)* 99 Fed. 76, 79; *Davis v. Stevens*, 104 Fed. 235, 4 Am. Bankr. Rep. 763, 772; *Re Forbes*, 128 Fed. 137, 11 Am. Bankr. Rep. 787, 791. The reason given for the latter proposition is that the creditors of the firm may have recourse to the remainder of the individual property of the partners after the individual debts are paid. But this is the only recourse such creditors could have, and the same reasoning would more cogently persuade that the bankruptcy of an individual or of a partnership would draw into the court of bankruptcy for adjudication all the property of indorsers and sureties of the bankrupts, for the creditors of such bankrupts may always have recourse to the property of their sureties. Moreover, the proposition itself is utterly inconsistent with the principle established by the uniform current of authority, that a partnership is a distinct entity separate from the partners who compose it, under the act of 1898, and the two propositions cannot both logically stand together. A partnership is a person. Section 1 (19). "A person shall be deemed insolvent, within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Section 1 (15). If a partnership is a distinct entity separate from the individuals who compose it, if its property and its debts are separate and distinct from the property of its individual members and from their individual debts, then it is insolvent under this act when the aggregate of its property is not sufficient to pay its debts. A partnership does not own, and it cannot assign or convey, the individual property of the partners who compose it. Their individual property is not its property. It cannot take or apply \$1 of their individual property to pay its debts. It does not owe, and it cannot be compelled to pay, their individual debts. The most that the creditors of the individual partners can do is to subject to the payment of their claims the excess of the property of the partnership, after the partnership debts have been paid from it, and they secure this, not because the partnership owed the debts, but because the individuals owe them, and because this excess, after the payment of the partnership debts, becomes individual property. The only logical conclusion, therefore, from the settled proposition that the

partnership is an entity distinct from its members, under this act, is that it is insolvent, under this act, when the partnership property, the only property this person has, is insufficient to pay the partnership debts, the only debts this person owes. Possibly the opposite conclusion has crept into the opinions of the courts, under this act, from the decisions under the insolvency law of Massachusetts and the bankruptcy law of 1867 where that theory necessarily obtains, because, under those laws, the insolvency or bankruptcy of the partnership was conditioned, by the express terms of the statutes, by the insolvency or bankruptcy of the partners, and the partnership was not, in the conception of those laws, a distinct entity, but a mere aggregation of partners. When, however, the act of 1898 made the partnership a person, required its consideration, adjudication, and the administration of its property as a distinct entity and declared it insolvent when its property was insufficient to pay its debts, the tests of insolvency under the insolvency law of Massachusetts and the bankruptcy act of 1867 were inapplicable to cases under it, and the only test was that declared by the act itself, the insufficiency of the property of the person, the partnership, to pay the person's, the partnership's, debts.

The construction which has been given to § 5h in an earlier part of this opinion has not been adopted in ignorance of the fact that Judge Thomas said in *Chemical Nat. Bank v. Meyer (D. C.)* 92 Fed. 896, 898, that "it is considered that subdivision 'h' means that, in case all the members of a partnership are not adjudged bankrupt, and the partnership itself has not committed an act of bankruptcy, and thereby becomes exposed to such adjudication, the partnership property shall, at the option of the other partner or partners, be administered by them or in bankruptcy."

But a thoughtful reading of this clause and of the entire section in which it occurs discloses no limitation of clause "h," or of its effect, to cases in which the partnership has not committed an act of bankruptcy, or has not been adjudged a bankrupt. On the other hand, this clause occurs in a section which treats of the bankruptcy of partnerships. It is general in its terms, contains no restriction or exception; and, where a legislative body makes no exception to, or restriction upon, a general provision, it is not the province of the courts to do so. The interpretation of this clause, therefore, is that, where a partnership has committed an act of bankruptcy, and where it has been adjudged bankrupt as well as where it has not, and one or more, but not all, of its members, have been adjudged bankrupts, the

partnership may not be administered in bankruptcy without the consent of the partner or partners who are not adjudged bankrupt (*Re Blair*, supra; *Vaccaro v. Security Bank*, 43 C. C. A. 279, 286, 103 Fed. 436, 443), and it is in accord with an established practice in equity which governs the administration of the affairs of insolvent partnerships when some of their partners are solvent (*Hanson v. Paige*, 3 Gray, 239, 242).

The authorities upon the exact question—Does the adjudication of the bankruptcy of a partnership draw into the court of bankruptcy the administration of the individual property of the members who are not adjudicated bankrupts?—are neither satisfactory nor enlightening. But one adjudication of this issue has been cited to us, and that is *Re Stokes* (D. C.) 106 Fed. 312, in which Judge J. B. McPherson answered the question in the affirmative, upon the authority of the *obiter dictum* found in *Re Meyer*, 39 C. C. A. 368, 98 Fed. 977, and summarily required the assignee for the benefit of creditors of a partner in a firm which had been adjudged bankrupt to deliver his individual property to the trustee of the estate of the partnership. It does not, however, appear in that case that this partner was solvent, and the inference from the fact that he had made an assignment for the benefit of his creditors naturally is that he was not. Remarks of judges to the effect that this question should be answered in the affirmative may be found in the opinions of the courts in the following cases; but in none of them was this legal question presented for adjudication, in none of them was the right of an unadjudicated partner to administer his individual property asserted and adjudged: *Re Meyer*, supra, an appeal from an adjudication of a partnership and one partner, bankrupts, in which the only question at issue was whether or not the established facts sustained the adjudication of bankruptcy. The question whether or not the property of the members not adjudicated bankrupts should be administered in the bankruptcy court was not at issue, and the remarks upon that question are mere *obiter dicta*; yet it is upon these remarks that the later statements to that effect, in various opinions, seem to rest. *Re Mercur* (D. C.) 116 Fed. 655, 656, and *Id.*, 58 C. C. A. 472, 122 Fed. 384, in which the only question for decision, and the only question that could be or was adjudicated, was: Can the trustee in bankruptcy of the individual estates of all the partners who have been adjudged bankrupts draw to himself and administer the property of the unadjudicated partnership? And that question was answered in the negative. By so much the more should the question whether a

court of bankruptcy may draw to itself the administration of the individual property of solvent partners, upon an adjudication of the partnership, be answered in the negative, in view of the express provisions of the act of 1898, to which attention has been and will again be called. *Dickas v. Barnes*, 5 L.R.A. (N.S.) 654, 72 C. C. A. 261, 140 Fed. 849, 15 Am. Bankr. Rep. 566, 568, in which partners attempted to present this question to the circuit court of appeals of the sixth circuit by an appeal from an order that they turn over their individual property to the trustee of the bankrupt partnership; and that court dismissed the appeal on the ground that the appellants could invoke its jurisdiction to decide this issue of law by a petition to revise only, and not by an appeal. *Re Wing Yick Co.* 13 Am. Bankr. Rep. 757, 758, in which may be found an *obiter dictum* which cites the *dictum* in the *Meyer* Case, in a proceeding where the only question was whether the petition in bankruptcy was sufficient to warrant an adjudication of the partnership. The views of the judges who have expressed their opinions in these cases in which they did not, and could not, adjudge the question here at issue, to the effect that an adjudication of the bankruptcy of a partnership drew into the court of bankruptcy the administration of the individual property of solvent and unadjudicated partners, appear to have been inspired by the following paragraph which fell from the Supreme Court in 1874, after it had referred to the bankruptcy act of 1867 and some of its provisions which were before it for consideration: "These regulations [said the court] show that, in cases where they apply, the assignees in bankruptcy of the joint stock and property of a copartnership are required to administer the separate estate of the individual members of the firm or company as well as the described estate of the copartnership; but the bankrupt act contains no regulations of a corresponding character applicable in a case where an individual member of a copartnership is adjudged a bankrupt without any such decree against the copartnership or the other partner or partners of which the copartnership is composed." *Am-sinck v. Bean*, 22 Wall. 395, 401, 22 L. ed. 801.

But, as we have seen, the act of 1867 expressly provided that, "where two or more persons who are partners in trade shall be adjudged bankrupt,"—the only way in which it provided for the adjudication of a partnership,—"all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken" and administered (14 Stat. at L. 534, chap. 176, § 36), while the act of 1898

has no such provision for the taking of the separate estates upon the adjudication of the partnership. On the other hand, the act of 1898 provides for the adjudication of a partnership bankrupt without an adjudication of any of its partners bankrupt, while the act of 1867 has no such provision. Again, the act of 1898 expressly prohibits the administration of the partnership property, and, by so much the more, the administration of the individual property of unadjudicated partners, without their consent, while the act of 1867 contained no such provision. Thus, while the act of 1867 expressly required the court which adjudged a partnership insolvent to take and administer the separate estates of the partners, and thereby sustained the rule in *Amsinck v. Bean*, the act of 1898 contains no such requirement, but forbids, not only the administration of his individual estate, but the administration of the estate of the partnership, without the consent of the unadjudicated partner (§ 5h); so that the rule in *Amsinck v. Bean* is not only without support, but it is inhibited by the provisions of the act of 1898, and cannot prevail under it. This conclusion is supported by the actual decision rendered in *Amsinck v. Bean*, and by the reason which the court gave for it. The decision was that the assignees in bankruptcy of the estate of a partner could not take and administer the property of the partnership; and the reason given for it was that, while there was a provision in the act of 1867 for the administration of the individual estate of a partner upon the bankruptcy of the partnership, there was no provision for the administration of the partnership's estate upon the bankruptcy of an individual partner, and hence it could not be made. By the same mark, the court of bankruptcy cannot take and administer the individual estate of an unadjudicated partner, upon an adjudication of the bankruptcy of the partnership, under the act of 1898, because, while there is a provision for the administration of the partnership estate upon the adjudication of a partner bankrupt in certain circumstances (§ 5e), there is no provision in that act for the administration of the individual property of an unadjudicated partner, upon an adjudication of a partnership bankrupt, and there is an express prohibition of the administration of the partnership estate in such a case, without the consent of the solvent partner (§ 5h), and, by so much the more, an inhibition of the administration of his individual estate without his consent.

The decisions to the effect that the bankruptcy of a partnership does not necessarily draw to the court of bankruptcy the administration of the individual estates of the

partners (*Re Stein*, 62 C. C. A. 272, 127 Fed. 547, 11 Am. Bankr. Rep. 536, 539; *Re Duguid*, 100 Fed. 274, 3 Am. Bankr. Rep. 794, 799; *Strause v. Hooper* [D. C.] 105 Fed. 590, 592; *Re Blair* [D. C.] 99 Fed. 76, 79) accord with this position; and the conclusion is that a court of bankruptcy, upon an adjudication of a partnership bankrupt, may not draw to itself, and administer without his consent, the individual estate of a solvent partner who has not been adjudicated a bankrupt.

The petition to revise must accordingly be dismissed; and it is so ordered.

Hook, Circuit Judge, dissenting:

A partnership composed of three members, having made a general assignment for the benefit of creditors, was adjudged bankrupt in an involuntary proceeding. In such a case it was not necessary that the partnership should have been insolvent (*Act* 1898, § 3a [4]; *George M. West Co. v. Lea Bros.* 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836), and, for the same reason, the financial condition of the partners individually was immaterial, and was not inquired into. It may be said, however, in view of subsequent proceedings, that the firm assets were barely sufficient to pay 5 per cent of its debts. None of the individual partners were adjudged bankrupt. The validity of the adjudication is not attacked. It is expressly conceded in the brief of counsel that the court had jurisdiction of the parties and of the subject-matter. At the end of the order of adjudication is this clause: "It is further ordered this adjudication binds only the partnership entity, and not the partners as individuals."

This is an unusual provision, but I take it that the court meant nothing more than that there was no adjudication that the partners individually were bankrupt. Given jurisdiction, an adjudication that a partnership is bankrupt binds everyone within the range of the law, including, of course, the partners themselves; and it is not to be supposed that the court rendered judgment in one sentence and in the next deprived it of much of its vitality and efficacy. So, it is proper to view the case as though there were a valid adjudication against a partnership with all its necessary legal incidents, but none against the members individually. The foregoing opinion proceeds upon that assumption.

When the insufficiency of partnership assets to pay partnership debts was discovered, the trustee applied for an order that one of the partners be directed to turn over a piece of property belonging to him individually. It was encumbered with a mortgage, but the trustee asserted that the mortgage debt

was the only individual debt of the partner, and that there was an equity in the property which should be applied to the partnership debts. The application was resisted by the partner, who averred that he was not insolvent, and had not been adjudged bankrupt. The court below denied the trustee's application.

I agree with the conclusion that, under the bankruptcy act of 1898, a partnership is, to some extent, to be regarded as a distinct entity, but I would not go so far as my associates have gone. The intent of Congress was to avoid defects in the prior acts, and not to create others equally, if not more, serious. The well-known interrelations between a partnership, its property, and its debts, and the individual partners, their property, and their debts, should not be overlooked or sacrificed to a fiction or form of words. That a firm's debts are its own debts is true in a sense, but they are also the debts of each partner. As Chief Justice Marshall observed in *Barry v. Foyles*, 1 Pet. 311, 317, 7 L. ed. 157, 160, "the assumpsit is made by all and by each." It has ever been the rule that the individual estate of a partner may, with due regard to the rights of his individual creditors, be subjected to the payment of partnership debts; and I am unable to discover in the bankruptcy act a purpose to wholly deny the trustee, as the representative of the firm's creditors, every remedy to that end. If, as is held, the partnership alone may be adjudged bankrupt, it is manifest that the trustee, in case of deficiency of assets, must, in some way and at some time, have the right to resort to the individual property of the partners. Otherwise the proceedings against the partnership would be incomplete, and out of harmony with the comprehensive plan of the act of Congress as universally construed. If the partners individually are not adjudged bankrupt,—and the logic of the entity theory is that they need not be,—the remedy of the trustee must either be by plenary action to enforce their liability for firm debts, or they must be considered so far parties to the proceedings against their firm that they are subject to the orders of the court, and may be compelled to bring in their individual property for administration, as was sought in the court below. A bankruptcy proceeding against a partnership alone must naturally result in the discharge from further liability for debts. That is one of the ends contemplated by the act. In whose favor does the discharge operate, and from what class of debts? A discharge of the fiction termed "distinct entity" without a discharge of the partners individually signifies nothing of substance; and, if it releases the partners individually from firm debts, that result

presupposes a subjection of their individual property to the payment of such debts. These considerations argue against the suggestion that the trustee's remedy may be by plenary action, for discharges in bankruptcy are granted those who are in the bankruptcy proceedings, and not third party debtors who have simply parted with what the sheriff or other officer could find on execution.

The individual members of a partnership which has been duly adjudged bankrupt are, by force of their relation to the firm, and the duties and responsibilities prescribed by law, parties to the adjudication, and subject to all proper orders of the court. Notwithstanding a partnership may be regarded as a legal entity for some purposes, there is, when it is declared bankrupt, little difference between the personal duty of its several members and the duty of an individual bankrupt to aid the court and facilitate the winding-up process. The act of 1898 contemplates jurisdiction over all the partners in a proceeding against a partnership. That is the true meaning of § 5c, which says: "The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

A petition by one partner to have the partnership declared bankrupt is involuntary as to a member who refuses to join. The Supreme Court has prescribed (General Order 8 [32 C. C. A. XI., 89 Fed. VI.]) that, in such case, notice shall be given the nonconsenting member, and that he shall have the right "to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act;" but that, if an adjudication of bankruptcy is made, he shall be required to file a schedule of his debts and an inventory of his personal property the same as a debtor who is adjudged bankrupt. Naturally, a like course must be pursued when, as in the case before us, creditors file the petition, and the proceeding is involuntary as to all the partners. Reference is made to the foregoing to illustrate the purpose of the act that the individual partners are brought into a partnership proceeding and made subject to the jurisdiction of the court.

In the present case all the partners were in court when the partnership was declared bankrupt. They were parties to the proceedings, both individually and as members, and became subject to all lawful orders of the court. They were individually bound for the debts of their firm, and, under long-established principles, their property was subject to be taken for the payment thereof.

Possibly the trustee should, in the case before us, have asked an order that the partners file individual schedules and inventories rather than one for the surrender of a single piece of property. But this is not the point that was made in the court below or that is presented to us for decision. It was asserted by the trustee that there was an equity in the property above the mortgage, which constituted the only debt of the individual partner. This was not denied by the partner, who maintained that he was wholly solvent and had not been adjudged a bankrupt. If these claims are true, the rights of the individual creditors of the partner were not involved, and could not have been prejudiced by the order sought by the trustee.

I do not think either the solvency of the objecting partner, or the fact that he had not been adjudged a bankrupt, or both combined, afforded sufficient reason for denying the application. That the partner was solvent was, as already observed, wholly immaterial to the adjudication against the firm. The act of bankruptcy committed was sufficient for the adjudication irrespective of the financial status of the parties. Again, if jurisdiction over the partners was obtained, there is no substantial reason why they should not have been required to surrender their property, to the end that the court might completely settle the administration, even though they were not adjudged bankrupts individually. The individual liability for firm debts nowise depends upon their being bankrupts. In fact, there may be insuperable obstacles to adjudging an individual partner bankrupt, though he may be in court and possess property that should be charged with the debts of his bankrupt firm. *Dickas v. Barnes*, 5 L.R.A. (N.S.) 654, 72 C. C. A. 261, 140 Fed. 849, presents a signal instance of this. A banking firm committed an act of bankruptcy by making a general assignment for the benefit of creditors, and was adjudged bankrupt in involuntary proceedings. The appellants, though held to be partners, were not adjudged bankrupts,—two of them because they had not individually committed an act of bankruptcy, a third because he was a wage earner, and a fourth because he was a tiller of the soil. Other partners who had individually committed acts of bankruptcy were adjudged bankrupts. An order was made by the court below that all parties found to be partners, whether adjudged bankrupts or not, should file with the referee their several schedules of debts and inventories of properties, in the same manner as if adjudged bankrupts, and should likewise surrender their property to that officer. This was the order appealed from. I will presently refer to the 17 L.R.A. (N.S.)

opinion delivered by Judge Severens for the circuit court of appeals of the sixth circuit, but desire first to speak of the claim that the part of it which applies to the case now before us is *obiter*, and therefore not to be regarded. It is said the question before that court was whether the remedy of the non-bankrupt partners was by appeal or by petition to revise; and, because the court held for the latter and dismissed the appeals, the question decided was merely one of practice, and did not involve the problem before us. I think my associates do not look at *Dickas v. Barnes* in the way it was regarded by the court that decided it. It was said by that court: "The motion to dismiss the appeals is founded on the character of the order, and that involves, in one aspect, the jurisdiction of the court in bankruptcy."

And then the court proceeded to consider whether the court in bankruptcy, by virtue of the adjudication against the partnership, had jurisdiction to compel the partners not adjudged bankrupts to file schedules and inventories and surrender their property. It would seem that the views expressed upon that question were strictly in line with the requirements of the case. The court then said: "The argument is that, not being bankrupts, they are not subject to the jurisdiction of the bankruptcy court; that the refusal to declare them bankrupts put an end to the authority of the court to retain control of their property for the purpose of the bankruptcy proceeding; and it is complained that the court, by its order, in effect, denied to them the immunity to which they were entitled by reason of the provisions of the bankruptcy act. By act of July 1, 1898, . . . wage earners and tillers of the soil are excepted from those who may be adjudged involuntary bankrupts. And, for our present purpose, we think the other appellants, who committed no act of bankruptcy, might be regarded as standing on the same footing as those who, by reason of their occupation, were exempt from an adjudication of bankruptcy. It may be conceded that, but for the relation of these parties to the partnership, the contention they make would be supported by perfectly adequate reasons. But, on account of that relation, other conditions exist. One who combines with others in a partnership enterprise becomes bound for the payment of the partnership debts. As partner, he shares the fortunes of the partnership. In certain circumstances, it may become subject to the exercise of the powers of a court of bankruptcy, where its resources will be gathered in to satisfy the claims of creditors. One of those resources is the liability of the partner, for which his individual property stands charged. It is true that, by virtue of the

rule in equity, as well as in bankruptcy, for the marshaling and distribution of assets, his individual property is first applicable to the payment of his private debts, if there be any. The surplus then becomes assets for the payment of the partnership creditors. These consequences of partnership are not derived from the bankrupt act, but from the general law; and a partner is not relieved from them by his exemption from an adjudication of bankruptcy." It was finally held that the partner was not to be regarded as a stranger, but as a party to the bankruptcy proceedings; and that the court had jurisdiction to take such steps as were necessary to ascertain what assets were available, and to subject them to the requirements of the case before it.

Re Meyer, 39 C. C. A. 368, 98 Fed. 976. In this case the partnership and one partner were adjudged bankrupt, the latter having executed an assignment of the partnership assets for the benefit of creditors. There were originally three members of the partnership. One of them died, and the remaining surviving partner was not adjudged bankrupt. There was no attempt to reach the property of the nonbankrupt partner, but the assignee in insolvency contended that the partnership adjudication was invalid because neither partner should have been adjudged bankrupt, and the court was therefore without power in respect of the partnership. Judge Wallace, who spoke for the court of appeals of the second circuit, said: "We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity."

This may not have been strictly necessary to a decision of the point involved, but I think the opinion, including the above excerpt, is a clear exposition of those parts of the present bankruptcy act which relate to the administration of partnership estates.

The precise point arose and was decided by Judge McPherson, of the eastern district of Pennsylvania. Re Stokes (D. C.) 106 Fed. 312. He held that, upon a partnership adjudication, the assignee in insolvency of an individual partner who had not been adjudged bankrupt could be compelled to surrender to the bankruptcy court the individual property of such partner.

The suggestion that § 5h of the act of 1898 furnishes a conclusive argument against the power of the court to subject

the property of a partner not adjudged bankrupt to the payment of the debts of his bankrupt firm involves, I think, a misconception of the purpose of that paragraph. It is as follows: "In the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." [30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.]

It is said this paragraph means that, when a partnership has been declared bankrupt, and also one or more, but not all, of its members, the court has no power to administer the partnership estate without the consent of the nonbankrupt members. And the argument is that, as the court has no such power, much less has it the power, when actually administering the partnership estate, to compel a nonbankrupt partner to bring in his individual property. But it is manifest that § 5h does not bear the construction given it. It deals with the bankruptcy of individual partners, not with the bankruptcy of the firm. If an individual partner becomes bankrupt, it becomes important to know the effect upon the firm of which he is a member. It not infrequently happens that a firm remains solvent and prosperous, though a member becomes insolvent, and commits an act of bankruptcy not chargeable to or connected with the business of the partnership. The provision for such cases is found in the paragraph quoted, and it has nothing to do with the bankruptcy of the partnership. It recognizes, however, that, before the bankrupt partner receives a discharge, his beneficial interest in the firm property, after the payment of firm debts, should be applied to the payment of his individual obligations. But, since his associates have an interest in the partnership property to which his individual creditors cannot look, they are justly given the preference in liquidating their joint affairs. Eventually, however, the net share of the bankrupt partner is brought into the individual proceedings. That a partnership may be an entity for certain purposes, and its property its own, does not prevent the bankruptcy of a single partner from resulting in a liquidation of the joint business, and the application of his net share therein to the payment of his individual debts. Rightly regarded, the paragraph quoted suggests the true rule for the converse situation.—the bankruptcy of the partnership and the nonbankruptcy of a

member. There is, however, this distinction: In a case covered by § 5h, the nonbankrupt partner has no contractual connection with the debts of his bankrupt copartner. He is not liable for them, and should, therefore, suffer no loss or inconvenience, save what comes from a necessary winding up of the partnership, as in other cases of dissolution. Therefore he is given the preference in the settlement of the firm business of which he is part owner. But these reasons do not apply in a case like the one before us. The nonbankrupt partner is liable for all the debts of his bankrupt firm, and the firm creditors may look to his property for satisfaction, subject to equitable limitations in favor of his individual creditors. A court of equity with all parties before it, partnership and members, grants full relief, and the law has not required it to intrust the administration of estates to resisting debtors.

UTAH SUPREME COURT.

SALT LAKE CITY, Respt.,
v.
CHRISTENSEN COMPANY, Appt.

(— Utah, —, 95 Pac. 523.)

License tax — uniformity.

1. A license tax based on the capital stock employed in trade is not within a constitutional provision for uniform taxation according to value, where the Constitution also provides that nothing in it shall be construed to prevent the legislature from enforcing an occupation tax.

Same — property tax.

2. A license tax upon business, based upon the amount of capital employed, is not a direct tax upon property, within a constitutional provision requiring taxation to be uniform.

Same — classification.

3. A classification of business according

to the capital employed, for the purpose of levying an occupation tax, does not violate the provisions of a statute that all license fees shall be uniform in respect to the class upon which they are imposed.

Same — reasonableness.

4. A classification, for the purpose of an occupation tax, of businesses employing a capital of over \$500,000 as one class, and those whose capital is between each \$100,000 below that as a separate class, and dividing those employing certain numbers of thousands of dollars below \$100,000 into classes, is not legally unreasonable.

Same — enforcement.

5. The payment of license and occupation taxes may be enforced by fine and imprisonment.

(April 14, 1908.)

APPEAL by defendant from a judgment of the District Court for Salt Lake County convicting it of carrying on business without a license. Affirmed.

The facts are stated in the opinion.

Messrs. Zane & Stringfellow, for appellant:

The ordinance is void because it does not provide a uniform and equal rate of taxation as to the class to which it applies.

Cache County ex rel. Matthews v. Jensen, 21 Utah, 223, 61 Pac. 303; Cooley, Const. Lim. 6th ed. pp. 611, 615; Cummings v. Merchants' Nat. Bank, 101 U. S. 158, 25 L. ed. 905; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 165, 41 L. ed. 671, 17 Sup. Ct. Rep. 255; State ex rel. Sanderson v. Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; Exchange Bank v. Hines, 3 Ohio St. 15.

Taxation by a uniform rule requires uniformity in the rate and in the mode of assessment. Uniformity implies equality in the burden of taxation, and this cannot exist without uniformity in both those essentials.

Anderson's Law Dict. p. 1007; Cummings

Case Note. — Right to grade license tax according to volume of business or amount of capital employed.

The amount of an occupation tax or license fee may be graded by classes according to the value of the property employed in a business, although the rates are not uniform among the several classes. Newton v. Atchison, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288; New Castle v. Cutler, 15 Pa. Super. Ct. 612; Goldsmith v. Huntsville, 120 Ala. 182, 24 So. 509; Strater Bros. Tobacco Co. v. Com. 117 Ky. 604, 78 S. W. 871; Cowart v. Greenville, 67 S. C. 35, 45 S. E. 122; Saks v. Birmingham, 120 Ala. 190, 24 So. 728.

Or according to the gross amount of sales or volume of business done. Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. 17 L.R.A. (N.S.)

Ct. Rep. 382, affirming 195 Pa. 634, 57 L.R.A. 348, 86 Am. St. Rep. 694, 46 Atl. 286; Ficklen v. Taxing Dist. 145 U. S. 1. 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Cowart v. Greenville, supra; Ex parte Mount, 66 Cal. 448, 6 Pac. 78; Sacramento v. Crocker, 16 Cal. 119; San Luis Obispo County v. Greenberg, 120 Cal. 300, 52 Pac. 797; Ex parte Hurl, 49 Cal. 557; Knisely v. Cotterel, 196 Pa. 614, 50 L.R.A. 86, 40 Atl. 861; Williamsport v. Wenner, 172 Pa. 173, 33 Atl. 544; Williamsport City v. Stearns, 2 Pa. Dist. R. 351; Allentown v. Gross, 132 Pa. 319, 19 Atl. 269.

It has been said to be unquestionably within the discretion of the taxing power to graduate the tax upon an occupation or vocation according to the extent of the

v. Merchants' Nat. Bank and Exchange Bank v. Hines, *supra*.

It is immaterial whether the tax imposed is regarded as a tax on property, or upon civil rights, to do business, or privileges, for the same principle of equality and due proportion applies to every species of tax alike.

State ex rel. Davidson v. Gorman, 40 Minn. 235, 2 L.R.A. 701, 41 N. W. 948; Curry v. Spencer, 61 N. H. 630, 60 Am. Rep. 337; Cooley, Const. Lim. 6th ed. 611; Cache County ex rel. Matthews v. Jensen, 21 Utah, 226, 61 Pac. 303.

Messrs. Ogden Hiles, H. J. Dininny, and P. J. Daly, for respondent:

The classification was not burdensome or unequal.

Banta v. Chicago, 172 Ill. 204, 40 L.R.A.

business so taxed. State v. Powell, 100 N. C. 525, 6 S. E. 424.

No unconstitutional discrimination among persons engaged in the same class of business was made by N. C. Laws 1897, chap. 168, § 35, which imposed a license fee of \$10 on all hotels whose gross receipts were over \$1,000 and less than \$2,000, and one half of 1 per cent on hotels whose gross receipts exceeded \$2,000 per annum. Cobb v. Durham County, 122 N. C. 307, 30 S. E. 338. The court said that there was no doubt that the general assembly might, in its discretion, impose as a license fee on the business of hotel keeping either a specific tax or one graduated according to the extent of the business done,—the gross receipts derived from the business; and that such tax was uniform and consistent with the Constitution when it was equal on all persons in the same class.

So, a license tax on peddlers, by which they are divided into classes according to the value of goods carried by them, each class to pay a fixed amount, does not violate the requirement of the Pennsylvania Constitution that all taxes be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. New Castle v. Cutler, *supra*.

So, a city authorized to license insurance companies may properly vary the amount charged therefor to correspond with the incomes of the different companies licensed. Burlington v. Putnam Ins. Co. 31 Iowa, 102.

And the amount of premiums received by an insurance company on business done within a municipality the previous year is a proper and fair standard by which to measure the license or franchise tax to do business in such municipality. Fidelity Casualty Co. v. Louisville, 106 Ky. 207, 50 S. W. 35.

An annual license tax may be imposed upon foreign corporations, of 4 cents on each \$1,000 of their capital stock, and of 2½ cents per 1,000 shares of less par value than \$1 each. American Smelting & Ref. Co. v. People, 34 Colo. 240, 82 Pac. 531.

Neither is a constitutional requirement of uniformity of taxation violated by a li-

611, 50 N. W. 233; Lasher v. People, 183 Ill. 226, 47 L.R.A. 802, 75 Am. St. Rep. 103, 55 N. E. 663; American Union Exp. Co. v. St. Joseph, 66 Mo. 675, 27 Am. Rep. 382; Ex parte Hurl, 49 Cal. 557; Ex parte Haskell, 112 Cal. 412, 32 L.R.A. 527, 44 Pac. 725; Warren v. Geer, 117 Pa. 211, 11 Atl. 415; Ex parte Heylman, 92 Cal. 492, 28 Pac. 675; McClellan v. Pettigrew, 44 La. Ann. 358, 10 So. 853; Re Watson, 17 S. D. 486, 97 N. W. 463; State v. Willingham, 9 Wyo. 290, 52 L.R.A. 198, 87 Am. St. Rep. 948, 62 Pac. 797; Slaughter v. Com. 13 Gratt. 776; Stull v. De Mattos, 23 Wash. 71, 51 L.R.A. 892, 62 Pac. 451; Magneau v. Fremont, 30 Neb. 843, 9 L.R.A. 786, 27 Am. St. Rep. 436, 47 N. W. 280; Aurora v. McGannon, 138 Mo. 38, 39 S. W. 469; Fahey

cense tax of \$1 per \$1,000 up to \$100,000, and 50 cents per \$1,000 in excess thereof, upon all tobacco manufactured. Strater Bros. Tobacco Co. v. Com. *supra*.

And a license tax imposed by county ordinance upon persons engaged in raising, grazing, herding, or pasturing sheep, of \$50 for every 1,000 sheep, is not invalid as discriminating, special, unequal, or partial. Ex parte Mirande, 73 Cal. 365, 14 Pac. 888.

But a similar county ordinance was held invalid in Cache County ex rel. Matthews v. Jensen, 21 Utah, 207, 61 Pac. 303, because, among other objectionable features, it was unjust and unequal in that, by grading the tax at \$50 per 1,000 sheep it permitted one having 3,000, 4,000, or 5,000 sheep to pay the same sum as one who had 999 more, and compelled him to pay \$50 more than a person who had one less sheep.

And such classification does not contravene a constitutional requirement of uniformity of taxation. Knisely v. Cotterel; Sacramento v. Crocker; Williamsport v. Wenner; Allentown v. Gross; and Williamsport City v. Stearns,—*supra*; Com. use of Titusville v. Clark, 195 Pa. 634, 57 L.R.A. 348, 86 Am. St. Rep. 694, 46 Atl. 286.

Nor violate the equality clause of the 14th Amendment to the United States Constitution, although persons in different classes pay different rates, and those in the same class pay different rates according to the amount of sales. Clark v. Titusville, *supra*.

Or constitute an invasion of a constitutional guaranty of individual liberty. Knisely v. Cotterel, *supra*.

Nor is such graduation of license fees unconstitutional as constituting a property tax. Newton v. Atchison, *supra*.

Neither is it unequal and discriminatory. Saks v. Birmingham, *supra*.

Nor is it rendered unequal and oppressive by the fact that an absolute level rate is not imposed upon each \$100 in valuation, or because, under it, a merchant whose stock or capital does not exceed \$200 is taxed \$5, while another engaged in the same business is required to pay but \$30

v. State, 27 Tex. App. 146, 11 Am. St. Rep. 182, 11 S. W. 108; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382.

The defendant's neglect and omission to comply with the ordinance was an offense for which it could be fined.

State v. Robitshek, 60 Minn. 123, 33 L.R.A. 33, 61 N. W. 1023; Cincinnati v. Buckingham, 10 Ohio, 257; Shelton v. Mobile, 30 Ala. 540, 68 Am. Dec. 143; Re Vandine, 6 Pick. 187, 17 Am. Dec. 351; Chilvers v. People, 11 Mich. 43.

Being a tax, it is not required that the proceeding for its enforcement shall be by a civil suit.

Perry v. Washburn, 20 Cal. 350; State v. Yellow Jacket Silver Min. Co. 14 Nev. 220; Cooley, Taxn. 847; Rosenbloom v. State, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053.

Frick, J., delivered the opinion of the court:

On the 27th day of November, 1906, the city, in due form, filed a complaint in the city court wherein it was alleged that the defendant was carrying on a certain business within said city without having complied

with certain sections of an ordinance requiring the payment of a certain license tax as therein specified. The defendant, appellant here, demurred to the complaint. The case, by consent of the parties, was transferred from the city court to the district court of Salt Lake county. In connection with the demurrer aforesaid, the parties submitted the case to the district court upon substantially the following agreed statement of facts:

That the appellant is a corporation, and is engaged in and carrying on the business of a shoe merchant in said city; that it has refused to comply with §§ 356 and 380 of the revised ordinances of said city; that appellant has paid all taxes except the license tax referred to in said ordinance, which latter tax appellant claims to be invalid; that appellant, for the year 1906, had been duly assessed upon all of its stock, under the laws of the state, for state, county, and city purposes (other than said license tax), and that the taxes so assessed have been fully paid; that the license tax now in question is attempted to be collected upon the same stock of goods upon which the other taxes referred to above were paid. Section 356

upon the value of \$2,700. Re Martin, 62 Kan. 638, 64 Pac. 43.

But a license fee imposed upon merchants, which is created by adopting the classification made by the appraisers of mercantile taxes, is void for want of uniformity, where the classification adopted exempts persons whose annual sales do not reach a certain amount. Williamsport City v. Stearns, supra.

And fixing the amount of a license tax upon insurance companies upon the basis of the amount of premiums received contravenes a constitutional requirement of uniformity of taxation. New Orleans v. Home Mut. Ins. Co. 23 La. Ann. 449.

So, a license fee imposed by a parish upon retail liquor dealers, the amount of which is regulated by the amount of business done, one sum being charged when the business is more than a specified amount, and another when it is less, was, in East Feliciana ex rel. Howell v. Gurth, 26 La. Ann. 140, held to conflict with this constitutional provision.

To meet this and kindred decisions, it was provided by La. Const. 1879, art. 206, that the general assembly shall graduate the amount of license taxes. This provision exempts them from the constitutional requirement of equality and uniformity. State v. Liverpool, L. & G. Ins. Co. 40 La. Ann. 463, 4 So. 504.

This provision, not indicating any standard of graduation, leaves it to the legislature to determine the method to be adopted in effecting it. State v. Traders' Bank, 41 La. Ann. 329, 6 So. 582; New Orleans v. Pontchartrain R. Co. 41 La. Ann. 519, 7 So. 17 L.R.A. (N.S.)

83; State v. Liverpool, L. & G. Ins. Co. supra; Browne v. Selser, 106 La. 691, 31 So. 290.

Thus, the division by the general assembly of companies and persons pursuing the business of insurance into different classes according to the amount of premiums collected, and the levying upon each class a different license tax, greater upon those receiving a larger amount than upon those receiving a less, is a sufficient graduation. State v. Liverpool, L. & G. Ins. Co. supra.

And that a license law requires smaller insurance companies to pay a larger tax in proportion to their premiums than larger companies does not render it unconstitutional under that provision, there being no requirement that the tax shall be in proportion to the business done, though it may impugn its justice. Ibid.

And the license fee may be graded according to the classification based upon the amount of annual receipts of a business. State v. Merchants' Trading Co. 114 La. 529, 38 So. 443.

The judiciary has no authority to interfere in the absence of any rule to guide its investigation and scrutiny. State v. Traders' Bank and New Orleans v. Pontchartrain R. Co. supra.

But a classification which imposes on a smaller business 100 per cent greater tax, in proportion, to that paid by a larger business, is void. State v. Pinckard, 119 La. 228, 43 So. 1015.

For an extended discussion of the limit of amount of license fees, see note to State ex rel. Toi v. French, 30 L.R.A. 415.

of the city ordinances provides: "It shall be unlawful for any person to engage in or carry on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required, without first taking out or procuring the license required for such business, trade, profession, or calling." Section 380, so far as material here, provides: "It shall be unlawful for any wholesale or retail merchant to commence or carry on his business without first making a statement under oath of a cash value of all goods, wares, and other merchandise which he may have in his possession or under his control for sale." The ordinance is also made applicable to bankers and brokers, who must make a similar statement showing the amount of capital employed in the business conducted by them. These statements are required to be filed with the city recorder. The ordinance divides the merchants and bankers into 22 classes. All those that exceed the sum of \$500,000 constitute the first class, and must pay an annual license tax of \$500. The lowest class is limited to \$200, which pays an annual license tax of \$1. The several classes are somewhat arbitrarily arranged. To illustrate: The amount of \$100,000 constitutes the difference between each of the first five classes; that is, the first class takes in all above \$500,000, while the fifth class reaches all above \$100,000 and not exceeding \$200,000, and so on. The fifth class pays a license tax of \$300 annually, the fourth \$350, and the third \$400, and the second \$450. The sixth class reaches all stocks valued at \$75,000 and not exceeding \$100,000, and pays \$250 as an annual tax. The seventh class reaches stocks valued at \$60,000 and not in excess of \$75,000, and pays an annual license tax of \$225. The classification is continued by this method until it reaches the lowest class as stated above. The appellant comes within the nineteenth class, the stocks of which are valued at \$1,000 and not to exceed \$2,000, and is required to pay an annual license tax of \$30. The foregoing, we think, sufficiently illustrates the classification upon which the city bases its right to impose the license tax involved in this proceeding. Upon the foregoing facts and the two sections of the ordinance above quoted from, the district court overruled the demurrer and adjudged the appellant guilty of a violation of the ordinance aforesaid, and imposed a fine of \$10 and costs, from which this appeal is prosecuted.

The first alleged error to be noticed relates to the objection that the ordinance is invalid. It is strongly urged by counsel for appellant that the ordinance in question offends against § 3 of article 13 of the Constitution of this state, which, so far as

material here, provides: "The legislature shall provide by law a uniform and equal rate of assessment and taxation of all property in the state, according to its value in money, and shall prescribe by general laws such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property." No doubt the provisions of this section are mandatory, and require that all property taxes shall be equal and uniform in so far as this may be accomplished by the application of general laws. Does this section apply to the license tax in question? If it does, then, perhaps, it may be said that the tax imposed by the ordinance is not as equal and uniform, when limited to a strict money valuation, as it could be made, and hence the tax is not proportioned as required by the section just quoted. We think, however, that the section in question was not intended to have, and, in fact, does not have, any application to the license tax in question. It is quite true, as counsel for appellant suggest, that the tax in question, although called a license tax, is, nevertheless, not within that class of licenses which are imposed under the police power of the state for the purposes of regulation, but that it is in fact a tax imposed for revenue purposes merely. This may be conceded, and still we think the tax in question is not within the constitutional provision above referred to. Section 12 of the same article provides: "Nothing in this Constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax based on income, occupation, licenses, franchises, or mortgages." It is contended that this section must be construed *in pari materia* with that part of § 3 quoted above, and that the different kinds of taxes enumerated in the latter section must be equal and uniform, precisely the same as those must be which are mentioned in § 3. It seems to us, however, that § 12 has nothing whatever to do with § 3. It is too well settled to require more than passing mention that state Constitutions are mere limitations, and not grants of powers. It is equally well settled that the power of taxation is a legislative function, and, unless restrained by the Constitution, the exercise of this power is vested in the legislature and its power over the subject is plenary and supreme. By adopting § 12, as we view it, the framers of the Constitution neither intended to, nor did they, in any way, place a limitation upon the power of the legislature to impose the several kinds of taxes specified in that section. Out of abundant caution, however, the framers of the Constitution said that nothing therein should be so construed as to

prevent the legislature from imposing and enforcing the said taxes.

Having thus eliminated from the Constitution altogether the several kinds of taxes specified in § 12, is it reasonable to suppose that the framers of that instrument nevertheless intended to provide for the conditions upon which such taxes should be imposed by a reference to other parts of the same instrument? The framers of the Constitution imposed certain duties, and with them certain specified restrictions, upon the legislature; but in § 12 neither duties nor restrictions of any kind are mentioned. All that was intended, and all that was there said, was that nothing that had been said on the subject of taxation should be construed so as to in any way curtail the power of the legislature with regard to license or occupation taxes; in other words, the framers of the Constitution desired to impress upon all that no restriction upon the legislature should be implied from what had been before written in that instrument upon the special subject of taxation referred to in § 12. We are of the opinion, therefore, that the right to impose occupation and license taxes and the other subjects of taxation mentioned in § 12 was left, and clearly intended to be left, where it always was, namely, with the legislature, to be applied and controlled as to it might seem just and proper.

Independently of the constitutional exception above discussed, the courts have frequently passed upon and applied the general constitutional provision demanding equality and uniformity of taxation. The decisions are almost, if not quite, unanimous, that the constitutional provision which imposes equality and uniformity of taxation has no application to an occupation or license tax, but is limited to a direct property tax which is assessed and collected in the usual way; and, further, the contention that the tax in question is a direct tax upon property is also very ably and satisfactorily discussed and decided against counsel's contentions by the following, among numerous other, cases: *Newton v. Atchison*, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288; *Banta v. Chicago*, 172 Ill. 204, 40 L.R.A. 611, 50 N. E. 233; *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *Re Watson*, 17 S. D. 486, 97 N. W. 463; *Baker v. Cincinnati*, 11 Ohio St. 534; *Fleetwood v. Read*, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665; *Stull v. DeMatos*, 23 Wash. 71, 51 L.R.A. 892, 62 Pac. 451; *Aurora v. McGannon*, 138 Mo. 38, 39 S. W. 469; *Clark v. Titusville*, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; *Com. use of Titusville v. Clark*, 195 Pa. 634, 57 L.R.A. 348, 86 Am. St. Rep. 604, 46 Atl. 286; *Little Rock v. Prather*, 46 Ark. 471; 17 L.R.A. (N.S.)

Los Angeles v. Los Angeles Independent Gas Co. 152 Cal. 765, 93 Pac. 1006; *Magneau v. Fremont*, 30 Neb. 843, 9 L.R.A. 786, 27 Am. St. Rep. 436, 47 N. W. 280; *Rosenbloom v. State*, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053.

Counsel for appellant, however, contend that the cases decided by the Supreme Court of the United States are not controlling, because that court simply passed upon the question whether such taxes were in conflict with the Federal Constitution. This contention is, no doubt, correct, but, inasmuch as the tax in question does not come within the section of our Constitution which requires it to be based upon a strict money valuation, what is said by the Supreme Court of the United States with regard to the propriety of classification and uniformity is of great, if not controlling, force.

But it is further contended that, if the tax in question is not violative of the Constitution of this state, it still must fail because it is in violation of subdivision 87, § 206. Rev. Stat. 1898, by virtue of which the tax is imposed. Under § 206, the legislature has conferred certain powers upon the cities of this state, and among others, the following: "To raise revenues by levying and collecting a license fee or tax on any private corporation or business within the limits of the city, and regulate the same by ordinance. All such license fees and taxes shall be uniform in respect to the class upon which they are imposed." The foregoing is a verbatim copy of what constituted subdivision 89 of § 1755, Comp. Laws 1888, which was in force at the time the Constitution was adopted, and was re-enacted and incorporated into the Revised Statutes of 1898. This is cumulative evidence that the framers of the Constitution, in adopting § 12 of article 13, above referred to, intended to leave the power and manner of imposing license taxes just as they were. The provision is also, with the exception of three words, namely, "private corporations" and "fees," a transcript of the statute of Nebraska, under which the tax under consideration in the case of *Magneau v. Fremont*, supra, was imposed. The same objection to the tax was made in the Nebraska case as is here made, namely, that the tax is not uniform, and therefore is not in compliance with the foregoing provision. This objection was, however, overruled in the Nebraska case, and this was done notwithstanding the fact that the tax in Nebraska was imposed upon all merchants alike, whether large or small, under what is termed a "flat rate." This will also be found to have been the case in a number of other cases, while in others a classification was upheld similar to the one under which the tax in question was imposed. The authorities, therefore, are against the

contention of appellant that such a classification offends against uniformity. The provision is not that the taxes must be equal as between individuals, but that they "shall be uniform in respect to the class upon which they are imposed." If a flat rate upon all merchants alike is a uniform tax within the provision, why is one where greater equalization is effected by classifying the merchants into groups, so as to bring together those with stocks the value of which are more nearly alike, not also uniform? The classification is for the sole purpose of establishing equality, so far as this can be done.

These questions of uniformity and equality are fully discussed and decided against appellant, and classifications similar to the one applied in this case are sustained, in the cases cited from Kansas, Pennsylvania, the Supreme Court of the United States, Missouri, Arkansas, California, and others. While Mr. Justice Brewer, in the Kansas case, *supra*, suggests that *prima facie* a tax assessed upon the actual value of property is perhaps better calculated to approximate true equality and uniformity than this can be done by any other method, he, nevertheless, concedes that it is but a theory, and that such a method may not in all cases produce equality or uniformity. Where the burden imposed by a tax is alone considered, the foregoing method, as a general rule, may respond to both uniformity and equality; but, where the benefits derived from a city imposing the tax are considered in connection with the burdens thereby imposed, a tax based strictly upon a property valuation worked out by percentages may fall far short of being either equal or uniform. For example: In a city like Salt Lake, where the city provides police and fire protection and lights the streets for all alike, and defrays the expenses incident thereto out of the general funds, it is not unlikely that a merchant with a stock worth \$5,000 may derive fully as much benefit from this source as one with a stock worth \$50,000, and it may cost the city quite as much to protect the lesser as it does the greater. The maintaining of the streets in repair and sprinkling and flushing them applies in the same way. No method of taxation that is absolutely equal and uniform has yet been discovered. If, therefore, a flat rate upon all merchants alike should be imposed, the disparity of the tax as applied to individual cases may be much greater still than it would be by a reasonable classification of the merchants as has been done by the city in this case. It may cost the city more in proportion to provide the appellant with the necessary fire and police protection, say nothing concerning the other matters referred to, than it does to provide the same things to one of the classes above

him which pays a larger tax. The classification adopted by the city, while in one sense arbitrary, cannot be said to be unreasonable as a matter of law. Its purpose is not to oppress, but rather to equalize, the burden of taxation. If a tax were levied strictly according to value, and the amount thereof ascertained by percentages upon such value, may it not, for the same reasons we have stated, perhaps, be less equal and uniform than it is by the present method? This is, we think, well illustrated by the late case cited from California. It is also illustrated by the cases which uphold the flat rate upon all merchants and business men alike. Numerous other illustrations might be made, and some others are given in the cases cited, why the method to be pursued in imposing taxes of the character now under consideration must, to a very large extent, be left to the discretion of those whose duty it is to impose and collect them. Where neither the Constitution, nor the statute, imposes absolute restrictions, the courts may not arbitrarily impose any unless it clearly appears that the tax imposed is oppressive, or clearly and unreasonably discriminatory, and thus is an abuse of the taxing power. Under the very numerous decisions of the courts of this country, emanating, as they do, from the highest Federal and state courts, the questions with regard to the uniformity and equality, as well as the method of classification pursued by the city in this case, are no longer open questions. All of them have been settled adversely to the contention of appellant. *Cache County ex rel. Matthews v. Jensen*, 21 Utah, 207, 61 Pac. 303, does not announce a doctrine contrary to the cases above referred to. In that case the power of imposing the license was involved. What is there said about classification and uniformity was applied to the imposition of the license fee under the police, and not under the taxing, power of the state. That decision, therefore, has no controlling influence upon the question involved in the case at bar.

Finally, it is urged that the ordinance is invalid because it imposes a penalty by fine or imprisonment for a failure to pay a mere property tax, which penalty is not imposed for a failure to pay taxes generally. If we assume that this part of the ordinance was void for the reasons stated, it would still not affect the validity of the tax. *Magneau v. Fremont*, 30 Neb. 854, 9 L.R.A. 786, 27 Am. St. Rep. 436, 47 N. W. 280. In 2 *Cooley on Taxation*, 3d ed. p. 848, the author, after stating that the constitutional provision against imprisonment for debt does not apply, says: "In case of license taxes it is still customary to provide for arrest and imprisonment as a means of enforcing pay-

ment." A large number of cases are cited in support of the text. In *Rosenbloom v. State*, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053, the former decisions of the supreme court of Nebraska holding to the contrary are overruled. The supreme court of Nebraska, in the latter case, brings itself into harmony with the great weight of authority in holding that arrest, fine, and imprisonment may be resorted to for the purpose of enforcing payment of license and occupation taxes. The decisions from a large number of the state courts are cited in the latter Nebraska case, and we shall do no more than to refer the reader to that case for the decisions upon this point.

From what has been said, it follows that the ruling of the District Court was in accordance with the great weight of authority, and the judgment is accordingly affirmed, with costs to respondent.

McCarty, Ch. J., and Straup, J., concur.

WISCONSIN SUPREME COURT.

ALFRED KLOTZ, Resp.,
v.

POWER & MINING MACHINERY COMPANY, Appt.

(— Wis. —, 116 N. W. 770.)

Master — unguarded machinery — contributory negligence.

1. The defense of contributory negligence is not barred by a statutory provision that continuance of a servant in his employment with knowledge that the employer has failed to guard his machinery, as required by law, shall not operate as a defense to an action for injuries due to such omission.

Servant — contributory negligence.

2. It cannot be said to be negligence, as matter of law, for one operating a lathe to lean over near exposed gearing to secure a stick needed in the work, so as to prevent a recovery for the injury in case his clothing is caught in the gearing and his arm drawn into it.

(June 5, 1908.)

APPPEAL by defendant from a judgment of the Circuit Court for Milwaukee

County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

Statement by Siebecker, J.:

This is an action for damages for personal injuries received by the plaintiff at the plant of the defendant in having his arm drawn into an unprotected and exposed gearing on a lathe. The complaint alleges that this gearing was so situated as to be dangerous to employees, that it was wholly unguarded, and that such gearing generally is and can be guarded without interfering with the usefulness and operation of the machine. The negligence assigned is the failure of the defendant to furnish a reasonably safe appliance, and a failure to provide proper guards to prevent an employee being caught in the gearing. The answer denied negligence, alleged contributory negligence on the part of the plaintiff, and denied that the gearing could be guarded without impairing the usefulness of the machine. The evidence showed that the plaintiff knew of the position and condition of the gearing; that his position when operating the lathe was in front of and facing the machine and pieces of steel placed lengthwise of the lathe; that the gearing, composed of several cogwheels, was on the end of the lathe frame at his left; that it was his duty to keep the lathe clear of steel chips which fell from the bolts which he was turning and shaping; and that he reached for a stick which was placed against a steel post located near and a little back of the gearing in order to clean away the chips. It appears that plaintiff stepped to a position near the gearing, and, stooping over, reached with his left arm and picked up the stick with his left hand. While resuming his upright position, the sleeve of his jacket was caught in the teeth of the gearing, and his arm was drawn into them, causing the injuries complained of. It is not controverted but that the stick was appropriate to remove the steel shavings, and that plaintiff was justified in using it for this purpose. The case was tried to a jury, and a general verdict was returned, awarding plaintiff \$300 as

Note. — The question whether contributory negligence as a defense to a servant's action for injuries from a violation of the master's statutory duty is precluded by a provision of the statute excluding the defense of assumption of risk is treated in a case note to *Dumphy v. New York*, N. H. & H. R. Co. 13 L.R.A. (N.S.) 1152; the general question as to the servant's assumption of risk of the master's breach of a statu-

tory duty when that defense is not expressly excluded by the statute, in a case note to *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A. (N.S.) 981; and the question whether the defense of contributory negligence or assumption of risk is available to defeat liability for personal injury to a child under the statutory age of employment, in a case note to *Lenahan v. Pittson Coal Min.* Co. 12 L.R.A. (N.S.) 461.

damages. This is an appeal from a judgment in plaintiff's favor for such damages and costs.

Mr. Charles A. Villas, for appellant:

The plaintiff was guilty of contributory negligence which bars his recovery.

Wis. Rev. Stat. § 1636j; Wis. Laws 1905, chap. 303, § 1636jj; Helmke v. Thilmany, 107 Wis. 216, 83 N. W. 360; Muenchow v. Theo. Zschetzsche & Son Co. 113 Wis. 8, 88 N. W. 909; Buckner v. Richmond & D. R. Co. 72 Miss. 873, 18 So. 449; Norfolk & W. R. Co. v. Cheatwood, 103 Va. 356, 49 S. E. 489; Denver & R. G. R. Co. v. Arrighi, 63 C. A. 649, 129 Fed. 347; Bodie v. Charleston & W. C. R. Co. 61 S. C. 468, 39 S. E. 715; Denver & R. G. R. Co. v. Norgate, 6 L.R.A. (N.S.) 981, and note, 994, 72 C. C. A. 365, 141 Fed. 247; Swick v. Aetna Portland Cement Co. 147 Mich. 454, 111 N. W. 110; Winkler v. Philadelphia & R. R. Co. 4 Penn. (Del.) 80, 53 Atl. 90; Sutton v. Des Moines Bakery Co. 135 Iowa, 390, 112 N. W. 836; Dumphy v. New York, N. H. & H. R. Co. 196 Mass. 471, 13 L.R.A. (N.S.) 1152, 82 N. E. 675; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298.

Assumption of the risk and contributory negligence may both arise from the same state of facts.

Southern P. Co. v. Allen (Tex. Civ. App.) 106 S. W. 441; Sutton v. Des Moines Bakery Co. and Dumphy v. New York, N. H. & H. R. Co. supra; Schulte v. Pfaudler Co. 150 Mich. 427, 113 N. W. 1120.

Plaintiff cannot be said to have acted prudently in doing as he did, but must be held, as a matter of law, to have been guilty of contributory negligence.

Loughran v. Jordan L. Mott Iron Works, 122 App. Div. 595, 107 N. Y. Supp. 434; Upthegrove v. Jones & A. Coal Co. 118 Wis. 673, 96 N. W. 385; Bigelow v. Danielson, 102 Wis. 470, 78 N. W. 599.

Plaintiff was guilty of negligence in selecting an obviously dangerous way in the face of one not dangerous.

Sladky v. Marinette Lumber Co. 107 Wis. 250, 83 N. W. 514; Morris v. Duluth, S. S. & A. R. Co. 47 C. C. A. 661, 108 Fed. 747; Bailey, Personal Injuries Relating to Master & Servant, § 1123; Dawson v. Chicago, R. I. & P. R. Co. 52 C. C. A. 286, 114 Fed. 870; Illinois C. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737; New York, C. & St. L. R. Co. v. Hamlin (Ind.) 10 L.R.A. (N.S.) 881, 79 N. E. 1040; Perry v. Michigan Alkali Co. 150 Mich. 537, 114 N. W. 315; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529.

Messrs. Rubin & Zabel, for respondent: 17 L.R.A. (N.S.)

The question of contributory negligence was for the jury.

Hocking v. Windsor Spring Co. 125 Wis. 575, 104 N. W. 705; Powell v. Ashland Iron & Steel Co. 98 Wis. 35, 73 N. W. 573; Kohler v. West Side R. Co. 99 Wis. 33, 74 N. W. 568; Steinhofel v. Chicago, M. & St. P. R. Co. 92 Wis. 123, 65 N. W. 852; Berg v. United States Leather Co. 125 Wis. 262, 104 N. W. 60; Crites v. New Richmond, 98 Wis. 55, 73 N. W. 322.

Whether or not shafting was so located as to be dangerous to employees in the discharge of their duties is a question for the jury.

Walker v. Simmons Mfg. Co. 131 Wis. 542, 111 N. W. 694; Kreider v. Wisconsin River Paper & Pulp Co. 110 Wis. 645, 86 N. W. 662; Berg v. United States Leather Co. 125 Wis. 264, 104 N. W. 60; Guinard v. Knapp-Stout & Co. Co. 95 Wis. 482, 70 N. W. 671.

Siebeck, J., delivered the opinion of the court:

In the absence of the statutory provision (§ 1636jj, Sanborn & B. Stat. Supp. 1906), under the common-law principle, it is clear that plaintiff would be held to have assumed the risk arising from the absence of a proper guard for the gearing in which he was caught and injured. But this section of the statutes enacts that, "if it appears that the injury was caused by the negligent omission of the employer to guard or protect his machinery . . ." where said employee was injured, as required by law, then continuance in such employment by such employee, "with knowledge of such omission, shall not operate as a defense." Counsel for the respective parties are agreed that this statute abrogates the previously existing rule which barred recovery in cases wherein the injured person had assumed the risk. This change in the law does not, however, affect the employer's right to the defense of other phases of contributory negligence. The effect of such legislation in this respect was considered in Buckner v. Richmond & D. R. Co. 72 Miss. 873, 18 So. 449; and the court states the effect thereof in these terms: "The effect of this is not to destroy the defense of contributory negligence by a railroad company, but merely to abrogate the previously existing rule that knowledge by an employee of the defective or unsafe character or condition of the machinery, ways, or appliances shall of itself bar a recovery. . . . They, like others not employees, must not be guilty of contributory negligence if they would secure a right of action for injuries." Other cases sustaining the position are Norfolk & W. R. Co. v. Cheatwood, 103 Va.

356, 49 S. E. 489; *Narramore v. Cleveland*, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; *Schulte v. Pfaudler Co.* 150 Mich. 427, 113 N. W. 1120. Under the issues raised, the court submitted to the jury, by proper instructions, the inquiry whether the gearing in question was so located as to be dangerous to plaintiff and other employees in the discharge of their duty, whether the defendant ought to have anticipated that some injury would probably result to employees therefrom, and whether plaintiff was guilty of negligence which contributed to produce the accident. The jury, by their general verdict, found the defendant liable, thus necessarily determining that the gearing in its unprotected condition was dangerous to employees in the discharge of their duties; that the injuries were such as defendant ought reasonably to have anticipated, and that plaintiff was free from negligence contributing to cause the injury. The case presented by the evidence amply sustains the finding that the exposed gearing was a menace and danger to employees, and that the injury was one within the field of reasonable anticipation.

Appellant specially assails the verdict as to the finding that plaintiff was free from contributory negligence, and avers that the evidence shows that the plaintiff was negligent *per se* in placing his arm in such close proximity to the gearing in reaching for the stick as to cause his sleeve to be caught in the teeth of the gearing. We cannot hold that this act and the manner of performing it shows a want of ordinary care respecting his personal safety. Though this danger was obvious and readily appreciated, yet it cannot be said that persons undertaking to perform such a service in close proximity to such a machine are shown guilty of contributory negligence if, in the operation, their garments come in contact therewith. Under such circumstances, the inquiry is one of fact as to whether the operator, in the light of such conditions, used "care reasonably commensurate with the risk, to avoid injurious consequences" (*Narramore v. Cleveland*, C. C. & St. L. R. Co. *supra*), and is to be resolved by the jury upon the evidence. The instant case presents a state of facts which is not so clear in its inferences that the question of negligence can be determined as a matter of law. "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." *Richmond* 17 L.R.A. (N.S.)

& *D. R. Co. v. Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748.

We are of opinion that the court properly submitted this question to the jury.

Judgment affirmed.

WISCONSIN SUPREME COURT.

UNITED STATES GYPSUM COMPANY
et al., Appts.,
v.

MICHAEL GLEASON et al., Respts.

(— Wis. —, 116 N. W. 238.)

Evidence — contractor's bond — intention.

1. Parol evidence is not admissible to show the intention of the sureties on the contractor's bond, under a contract to erect a building for a county and pay all claims for labor performed and materials furnished, and give bond to that effect, and the bond conditioned that, if the contractor shall pay all claims for labor performed and material furnished, then the obligation shall be void.

Contractor's bond — suit by laborers.

2. Persons furnishing labor and material to a contractor for a county building who has agreed to pay all claims for material furnished and labor performed, and has given bond conditioned to pay such claims, may maintain actions on the bond.

County — contractor's bond — authority.

3. Statutory authority to contract for the construction of county buildings authorizes a county to bind the contractor to pay the claims of laborers and materialmen, although such contract is for their benefit.

Foreign corporation — suit — foreign contract.

4. A transaction by which a foreign corporation agrees to furnish its product manufactured at its place of business in another state through a contract approved there, free on board cars at the point of consummation within the state, for use in a public building, is interstate commerce, not within the provisions of a local statute denying foreign corporations the right to enforce claims in the local courts without complying with its laws.

(May 8, 1908.)

APPEAL by plaintiffs from a judgment of the Waukesha County Court in defendants' favor in an action brought to hold

Note. — As to implied power to incorporate in a contract for public work, or in a contractor's bond, a requirement that the contractor shall pay laborers and materialmen, see case note to *Denver v. Hindry*, 11 L.R.A. (N.S.) 1028.

a contractor's bond liable for the amounts due laborers and materialmen. Reversed.

Statement by Siebecker, J.:

In 1902 and 1903, the county of Waukesha erected an asylum for the insane. The contract for the mason and brick work was awarded to the defendant Michael Gleason. The work was duly performed, and Gleason was fully paid by the county the amount of the contract and his bill for extras. The plaintiffs severally furnished and supplied Gleason with materials which were used in the erection of the asylum. It also appeared that each furnished Gleason with materials which were used by him on other work. By the findings, the court separated the various items for materials furnished to Gleason and used by him elsewhere from those used in this work and the amounts due from Gleason for materials so furnished him and used in the erection of the asylum. The contract made by the building committee for the county with Gleason provided: "The said M. Gleason, party of the first part, further agrees to pay all claims for labor performed and materials furnished in the construction, erection, and completion of the said works for said buildings. It is further agreed that this contract shall have no force or effect until the said M. Gleason shall give a good and sufficient bond to the said county of Waukesha, approved by the said building committee and conditioned for the completion of said works for said buildings and faithful performance of this contract and the payment of all claims for labor performed and for all materials furnished in the erection, construction, and completion of the said works under this agreement." In conformity with the foregoing provision of the contract, a bond was given by Gleason and the defendants in this action, containing the following: "The condition of this obligation is that, if the said M. Gleason shall pay all legal claims for labor performed and material furnished in and about the erection, construction, and completion of said works for said building and in and about the performance of his said contract, and shall faithfully perform the terms of said contract, on his part to be performed, then this obligation to be void; otherwise to remain in full force and effect." Plaintiffs bring this action on the foregoing provisions of the contract and bond to enforce payment of the unpaid claims for the materials furnished by them and used in the construction of the building. The court admitted parol evidence of the fact that the defendants did not intend to incur any liability by the bond other than to the county, and made a finding to that effect. The court also received parol evidence tending to show that, when plain-

17 L.R.A. (N.S.)

tiffs furnished the materials, they did not rely on the bond, but that they furnished them relying on Gleason's personal good credit. This is an appeal from the judgment dismissing the complaint with costs against the plaintiffs.

Mr. O. L. Aarons, with Messrs. Glicksman & Gold, for appellants.

Messrs. Ryan, Merton, & Newbury and D. J. Hemlock for respondents.

Siebecker, J., delivered the opinion of the court:

The dominant question arising upon the issues and the facts found by the court is: Do the contract and bond, taken together, constitute an obligation whereby the plaintiffs secured the right to demand payment of the sureties for unpaid material furnished by them and used in the buildings constructed by the county? By the contract the principal contractor bound himself to pay "all claims for labor performed and materials furnished" for the portions of the buildings to be constructed by him. It was also agreed that his contract should not be effective and binding on the parties until the contractor had given a bond to the county, to be approved by the building committee, conditioned for the faithful performance of the contract and the "payment of all claims for labor performed and for all materials furnished in the erection, construction, and completion of the said works under this agreement." The contractor, Gleason, and the other defendants, as sureties, gave a bond to the county, pursuant to this agreement, which was approved by the building committee, and which was conditioned in terms that, if the contractor "shall pay all legal claims for labor performed and material furnished in and about the erection, construction, and completion of said works, . . . and shall faithfully perform the terms of said contract, on his part to be performed, then this obligation to be void; otherwise to remain in full force and effect." These stipulations plainly show that the contractor was to pay for the labor and material furnished by him under his agreement to construct a portion of these buildings, and they expressly specify that the bond was to be given to secure faithful performance of the contract and the payment of all claims for material furnished and used in the building. The phraseology of these agreements is clear and unambiguous and free from any uncertainty as to its significance. It must be held to express an intention of the parties to the effect that the bond was given to secure payment for any materials furnished and used in the construction of the buildings by Gleason in case

of his default in this respect. This conclusion is in harmony with all the provisions in the contract and bond. We find no uncertainty or ambiguity in any of their provisions and no conflict between the agreements, when taken together. Since there are no ambiguities in the agreements, they can in no way be explained, modified, or contradicted by parol evidence in order to ascertain what obligation the sureties intended to assume. They must be held to have undertaken the obligations embraced in and expressed by the terms of the instruments. It is obvious and clear that they express an intent of the parties to the effect that, upon default by Gleason to pay for any of the materials furnished and used in the buildings, then the bondsmen secured payment therefor. *R. Connor Co. v. Olson* (Wis.) 115 N. W. 811; *Wussow v. Hase*, 108 Wis. 382, 84 N. W. 433; *Loper v. Sheldon*, 120 Wis. 26, 97 N. W. 524.

Under these circumstances, no occasion is presented for the reception of parol evidence to ascertain what obligation the sureties in the bond intended to assume under these written contracts. They must be held to be bound by their terms as expressed in the writing. *Johnson v. Pugh*, 110 Wis. 167, 85 N. W. 641; *Newell v. New Holstein Canning Co.* 119 Wis. 635, 97 N. W. 487. Nor does the fact that the agreement operated to the benefit of a third party, who did not personally assent to its terms at the time of its inception or before the materials were furnished, alter the rule as to the right to modify written agreements by parol evidence. *Johnston v. Charles Abresch Co.* 123 Wis. 130, 68 L.R.A. 934, 107 Am. St. Rep. 995, 101 N. W. 395. From this it follows that the court erroneously received parol evidence to explain and modify the plain and express terms of these instruments, and all consideration of such evidence must be omitted. We then have an agreement whereby a promise is made for the benefit of a third party or class. Under such circumstances, it is well established by the decisions of this court that, upon consummation of the transaction between the immediate parties, such third party obtains a right which he can enforce, under the contractual terms thus established for his benefit, in the same manner and to the same extent as if he had personally entered into and assented to the engagement. *Tweeddale v. Tweeddale*, 116 Wis. 517, 61 L.R.A. 509, 96 Am. St. Rep. 1003, 93 N. W. 440; *Johnston v. Charles Abresch Co. and R. Connor Co. v. Olson*, supra.

The contention is made that the judgment dismissing the complaint should be affirmed upon the ground that the county had no power in law to make such a contract for

the benefit of a third party as plaintiffs claim was done in this case. It is conceded that the county was granted the power, under § 604, Stat. 1898, to contract for the construction of the building in question; but it is averred that the authority so bestowed on the county includes no authority to make contracts for the benefit of third persons dealing with the immediate contractors of the county. The question of the power of a school district of this state to make such a contract was recently considered in the case of *R. Connor Co. v. Olson*, supra, and it was there held: "The authority of the school district to contract for the protection of third persons furnishing material to the principal contractors to be used in the erection of the [school] building is amply sustained by the adjudications. This authority is one incident to the power given it to erect such a building and to provide for payment therefor." Such agreements are declared to be promotive of a just protection to such third persons, and as operating to protect municipalities by securing more responsible dealers and better materials, and as tending to promote justice and equity between all the parties contributing to the erection of such buildings. In addition to the cases there noted as sustaining this doctrine, we cite the following cases: *State ex rel. Palmer v. Webster*, 20 Mont. 219, 50 Pac. 558; *Philadelphia v. Stewart*, 195 Pa. 309, 45 Atl. 1056; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531; *Gastonia v. McEntee-Peterson Engineering Co.* 131 N. C. 363, 42 S. E. 858; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *American Surety Co. v. Lauber*, 22 Ind. App. 326, 53 N. E. 793.

It is, however, insisted that counties are peculiarly restricted in their powers, and that nothing is implied from a grant of authority to do certain specified things. True, towns and counties exercise no powers except those granted them by law. The same rule applies to municipal corporations. But in ascertaining the extent of a grant authorizing the doing of some specific thing it is to be taken as embracing the authority to do every proper act incident thereto and appropriate in the usual and ordinary course to carry such authority into execution. In the Connor Case the power given school districts to construct school buildings and provide for payment therefor was held to embrace the authority to contract for the protection of third persons furnishing materials to the principal contractor. We are unable to discover wherein such a grant of authority to a county is different in its nature and scope from that to a school district or other similar corporations. The reasons supporting the conclusion that the power given to cities, villages, and school districts to con-

struct buildings and provide payment therefor embraces authority to protect third persons furnishing material apply with equal force to cases of counties; and we discover no grounds why counties should not receive this benefit as an incident to such authority. We are of opinion that the county had power in this case to contract and secure the plaintiffs as provided in the contract and the bond given by defendants. In so far as the adjudications of the state of Minnesota cited to our attention are in conflict with this holding, we must refuse to yield assent to them.

Our attention is also called to the case of *Campbell & C. Co. v. Carnagie*, 98 Wis. 99, 73 N. W. 572, wherein the plaintiff, which had furnished material to the principal contractor for the erection of a state building, sought to impress the fund paid by the state to the contractor's administrator for completion of such building with a trust in its favor, upon the ground that it had an interest in the money paid by the state because it furnished materials used in the building. The court there held that a clause in the contract to the effect that the balance of the contract price should be paid upon the completion of the work, and when its officers were "assured against the existence of any mechanics' liens on the building," was not an agreement intended for the protection and benefit of materialmen, and hence gave them no interest in the money paid to the administrator. The difference in the agreements of that case and the instant one on the subject here involved is so marked that the decision in the former case obviously cannot be treated as an authority for this one. Since, then, the bond here in question secures the persons who furnished materials used in the construction of the county's buildings, it follows that plaintiffs, who furnished material so used and for which the principal contractor has not paid, have the right to enforce payment under the bond by action directly against the bondsmen. This right is well established, though they had no knowledge of the promise when made, or had not expressly assented thereto before bringing the action, and the right to enforce such contract for their benefit continues while the bond is in force. *Tweeddale v. Tweeddale and Johnston v. Charles Abresch Co.* supra; *Fanning v. Murphy*, 126 Wis. 538, 4 L.R.A.(N.S.) 666, 110 Am. St. Rep. 946, 105 N. W. 1056; *Smith v. Pfluger*, 126 Wis. 253, 2 L.R.A.(N.S.) 783, 110 Am. St. Rep. 911, 105 N. W. 476.

It is averred that the Illinois Brick Company, a foreign corporation, cannot maintain an action for its claim because it has not complied with the requirements of § 1770b to entitle it to do business in this state. 17 L.R.A.(N.S.)

This plaintiff asserts that the business pertaining to the matter involved in this action was interstate commerce, and hence not subject to the provisions of this section. As above stated, this is a foreign corporation, having its place of business at Chicago, Illinois. The materials furnished by it were manufactured in Illinois and shipped by it as ordered by the contractor, pursuant to the contract secured by its traveling salesman at Waukesha and approved at the home office in Chicago. This contract provides that it was to furnish the brick at the stipulated price, "f. o. b. cars, . . . Waukesha, Wis." The brick were received by the contractor on the cars at Waukesha, he paying the freight and sending the receipted bill to plaintiff at Chicago. The plaintiff took no part in the actual transfer of the brick other than loading them on the cars in Illinois and shipping them to Waukesha, Wisconsin. The transfer of the brick from the possession and ownership of plaintiff in Illinois to the possession and control of Gleason in Wisconsin was a transaction which constituted interstate commerce under the Federal Constitution. This subject has been so recently considered by the court that further elaboration is not now required. See *Loverin & B. Co. v. Travis* (Wis.) 115 N. W. 829; *Greek-American Sponge Co. v. Richardson Drug Co.* 124 Wis. 469, 109 Am. St. Rep. 961, 102 N. W. 888.

Upon these considerations, it must be held that the court erred in dismissing the complaint and awarding judgment in defendants' favor. The plaintiffs are entitled, upon the findings made by the court, to judgment against defendants for the amount due for materials furnished by plaintiffs to Gleason and used by him in the construction of the asylum buildings, less the payments paid thereon by him, with interest and the costs of this action.

Judgment reversed, and the cause remanded to the County Court for Waukesha County, with directions that the court award judgment to plaintiffs as indicated in this opinion.

CALIFORNIA SUPREME COURT.

BUILDERS' SUPPLY DEPOT et al.,
Respts.,
v.
DENNIS O'CONNOR AND WIFE, Im-
pleaded, etc., Appts.

(150 Cal. 265, 88 Pac. 982.)

Mechanics' liens — personal judgment.

1. Personal judgments against the owners of the property cannot be rendered in actions by subcontractors to enforce mechanics' liens.

Same — deductions — statute.

2. The deduction from the contract price of damages provided by the contract for delay in finishing the building is not prevented in an action to enforce liens of sub-contractors, by a statute providing that as to all liens, except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the reputed owner, and against the contractor.

Attorney's fee — discrimination.

3. A statute allowing an attorney's fee to one who establishes a mechanics' lien which is not allowed to other classes of litigants, violates the constitutional guaranty of equal protection of the laws, uniformity of laws, and equal rights in the acquisition and protection of property.

Mechanics' lien — cost of filing.

4. The legislature may lawfully allow a mechanics' lien claimant the cost of filing his lien, against the property subject to it.

(January 10, 1907.)

Case Note. — Validity of statutory provision for attorney's fee.

An examination of the decisions respecting this question discloses the fact that it is somewhat confused. Much of this confusion, however, may be ascribed to attempts upon the part of other courts to follow the apparent changes of position of the United States Supreme Court on the subject.

That court was first called upon to consider the question in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, which was brought for the killing of a colt by a railroad, and in which it was held that a statute of Texas which allowed an attorney's fee of \$10 to successful plaintiffs in actions upon certain classes of claims against railroad companies, not exceeding \$50 in amount, which the company should omit to pay within a certain time after presentation,—was invalid. This decision reversed 87 Tex. 19, 26 S. W. 985, and in effect overruled (Tex.) 17 L.R.A. 286, 18 S. W. 723, which had previously upheld the statute.

In deference to the authority of the *Ellis* Case, the Missouri court held unconstitutional a statute which authorized an allowance of attorneys' fees to the successful plaintiff in a suit to recover damages from a railroad company for the loss of stock, due to its failure to furnish, for the shipment of stock, cars with trapdoors in the roof, as required by the statute. *Paddock v. Missouri P. R. Co.* 155 Mo. 524, 56 S. W. 453. This overruled *Perkins v. St. Louis, I. M. & S. R. Co.* 103 Mo. 52, 11 L.R.A. 426, 15 S. W. 320, in which a statute allowing an attorney's fee on recovery against a railroad company for injuries to live stock because of a defective fence was held valid. So, too, *Briggs v. St. Louis & S. F. R. Co.* 111 Mo. 168, 20 17 L.R.A. (N.S.)

APPEAL by the defendant property owners from a judgment of the Superior Court for the City and County of San Francisco enforcing certain mechanics' liens. Reversed.

The facts are stated in the opinion.

Messrs Mullany, Grant, & Cushing for appellants.

Messrs. Barna McKinne, Maurice L. Asher, Wal. J. Tuska, and J. E. Crane for respondents.

McFarland, J., delivered the opinion of the court:

Three mechanics' lien cases were consolidated and tried together, and judgment was rendered against Dennis O'Connor and Mary O'Connor, the owners of the land involved, who appeal from the judgment.

The judgment must be reversed for the following reasons:

1. The actions were not brought by the original contractor; they were all brought

S. W. 32, reiterating the rule in the *Perkins* Case, must be regarded as overruled.

Previous to the decision in the *Ellis* Case, a statutory allowance of attorneys' fees in favor of successful plaintiffs in actions for injuries to stock by collision with moving trains was held invalid as an attempt to grant special privileges to one class of litigants. *Jolliffe v. Brown*, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149.

And a statute allowing a successful plaintiff to tax an attorney's fee as part of his costs in an action against a railroad company to recover for the killing of cattle was held an unconstitutional discrimination between litigants. *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *Schut v. Chicago & W. M. R. Co.* 70 Mich. 433, 38 N. W. 291; *Rinear v. Grand Rapids & I. R. Co.* 70 Mich. 620, 38 N. W. 599; *Lafferty v. Chicago & W. M. R. Co.* 71 Mich. 35, 38 N. W. 660.

So, a statute providing that a railroad company should be liable for double the value of stock killed by it, together with reasonable attorneys' fees, if it should fail to pay the appraised value within a prescribed time, was held, in *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177, to be unconstitutional as a whole; although the court said that it was not prepared to say that an attorney's fee could not legally be made a penalty for failure to comply with the law.

On the other hand, a statute allowing attorneys' fees to successful plaintiffs in actions to recover for damages done to stock by railroad trains was held constitutional in *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619, on the ground that such attorneys' fees might be upheld as a penalty for failure to fence.

So, the imposition of an attorney's fee upon a railroad company which should unsuccessfully defend an action to recover the

for material and labor furnished by plaintiffs as subcontractors. Nevertheless personal judgments were rendered against the appellants. This was error, as plaintiffs were entitled only to enforce their claims against the land.

2. There was a written contract between appellants, as owners of the land, and the contractors, Barth & Scarf, for the construction of a certain building thereon. This contract was regular in form, and was recorded as provided by the Code; and it is admitted that the rights of all parties rest on said contract, the contract providing that the building was to be built for \$7,500, and to be finished in five months, and, if not finished within the five months, the owners were to be allowed whatever damages the delay should cause. The building was not finished until about two and one half months after the stipulated time, and appellants averred and offered evidence to prove that they were damaged by the

delay in the sum of \$359.50. Respondents objected to this evidence, and the court sustained the objection upon the ground that appellants could not avail themselves of the damage, even if proved, because of a clause in § 1184 of the Code of Civil Procedure that, "as to all liens, except that of the contractor, the whole contract price . . . shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the reputed owner and against the contractor." But it was definitely settled in *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200, that damages for failure of the contractor to finish the work within the time specified in the written contract may be deducted by the owners as against lienholders, and that "the clause has reference, in the first place, to offsets not arising under the terms of the contract, and as to which, from an inspection of the contract, materialmen and laborers could have no notice." The opinion in

value of stock killed on or near its unfenced tracks was held not to violate the constitutional rule of equality of right, privilege, and exemption, by imposing a burden upon one class of litigants in favor of another, since the legislation was intended to compel the railroad companies to fence in their tracks, and the liability imposed was a consequence of their failure to take such precaution. *Illinois C. R. Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618.

The United States Supreme Court was then called upon to consider a Kansas statute that allowed a reasonable attorney's fee to a successful plaintiff in an action against a railroad company for damages from fire, caused by operating the railroad. The court indulged in a labored differentiation of the *Ellis Case*, and upheld the Kansas statute, saying that its object was protection against fire, which gave it the character of a rule in the nature of a police regulation, while the purpose of the statute in the *Ellis Case* was simply to enforce the payment of small debts, and that enforcing the payment of indebtedness did not come within the purpose of police regulations. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, affirming 58 Kan. 447, 49 Pac. 602. The statute had also been upheld in *Missouri P. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. 793, which was followed in *Clark v. Ellithorpe*, 7 Kan. App. 337, 51 Pac. 940, and in which the court apparently regarded the *Ellis Case* as having decided that "a similar statute of the state of Texas was unconstitutional."

A statute allowing reasonable attorneys' fees to one recovering from a railroad company for injuries by fire through the leaving of combustible material on the right of way is valid. *Cleveland, C. C. & St. L. R. Co. v. Hamilton*, 200 Ill. 633, 66 N. E. 389. To the same effect is *Chicago, R. I. & P. R.* 17 L.R.A. (N.S.)

Co. v. Spring Hill Cemetery Asso. 9 Kan. App. 882, Appx. 57 Pac. 252.

And a statute allowing an attorney's fee to one successfully prosecuting an action for the failure of a carrier safely to transport goods is constitutional. *Missouri, K. & T. R. Co. v. Simonson*, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653.

So, a provision for an attorney's fee as a part of a penalty for an overcharge by a carrier is not partial and unequal legislation. *Dow v. Beidelman*, 49 Ark. 455, 5 S. W. 718.

And the equal protection of the laws is not denied by a statute allowing attorneys' fees upon recovery against a railroad company for violation of a statute regulating rates. *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98.

The Georgia supreme court formerly regarded the *Ellis Case* conclusive as to the invalidity of a statute of that state allowing damages and attorneys' fees to a plaintiff in an action upon an insurance policy, where the insurance company had made a mala fide refusal to pay a loss within sixty days after demand. *Phenix Ins. Co. v. Hart*, 112 Ga. 765, 38 S. E. 67; *Phenix Ins. Co. v. Schwartz*, 115 Ga. 113, 57 L.R.A. 752, 90 Am. St. Rep. 98, 41 S. E. 240.

But, when the question came before the United States Supreme Court in *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, which refused to sanction such interpretation of the *Ellis Case*, it refined away that decision still more by holding that the equal protection of the laws was not denied to life or health insurance companies by a statute imposing upon such companies a liability to the holders of the policy for damages and reasonable attorneys' fees,

that case is quite full on the point, and we need not further discuss it here. The appellants were therefore entitled to deduct from the amount of the money remaining in their hands whatever damages they suffered for the delay in finishing the building, and the court erred in refusing to allow them to introduce evidence of such damage.

3. The court allowed an attorney's fee in each of the cases, and appellants contend that such allowance was erroneous because the statutory provision directing the allowance of such a fee is unconstitutional and void. In our opinion this contention must be sustained. In a few instances this court has affirmed judgments for plaintiffs in mechanics' lien cases which included attor-

neys' fees; but our attention has not been called to any case where the question of the constitutionality of the statute providing for such fees has been raised, or presented to the court for adjudication. In the case at bar the question has been for the first time raised.

The statutory provision in question is found in § 1195, Code Civ. Proc. and is as follows: "The court must also allow, as a part of the costs, . . . reasonable attorneys' fees . . . to be allowed to each lien claimant whose lien is established whether he be plaintiff or defendant." It is to be noticed that this section provides for an attorney's fee to plaintiff, but not to defendant, even though the latter be successful in the action, and that attorneys' fees

where it should fail to pay a loss within a prescribed time after demand, although such obligation was not imposed upon other classes of insurance companies or associations. Rule reiterated in *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 344, 47 L. ed. 209, 23 Sup. Ct. Rep. 126.

So, the equal protection of the laws is not denied insurance companies by the provision of a statute allowing a reasonable attorney's fee to a plaintiff in case of the unsuccessful defense, by an insurance company, of a suit on a policy of insurance covering real property which has been totally destroyed by the causes insured against. *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565, affirming 62 Neb. 213, 97 Am. St. Rep. 624, 86 N. W. 1070. The same legislation had also been sustained by the Nebraska courts in *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313; *Farmers' Mut. Ins. Co. v. Cole*, 4 Neb. (Unof.) 130, 93 N. W. 730.

Feeling itself bound to follow the decisions of the United States Supreme Court in the *Mettler*, *Lewis*, and *Dobney* Cases, the Georgia court held, in *Harp v. Fireman's Fund Ins. Co.* 130 Ga. 726, 61 S. E. 704, that a statute providing for the collection of attorneys' fees against insurance companies did not deprive them of the equal protection of the laws, due process of law, or the right of recourse to the courts. This conclusion was announced in the face of the contrary rulings in the *Hart* and *Schwartz* Cases, which, the court said, need not be expressly overruled, since they were of no effect, being opposed to the United States Supreme Court decisions.

The *Dobney* Case is expressly followed in *Tillis v. Liverpool & L. & G. Ins. Co.* 46 Fla. 268, 110 Am. St. Rep. 89, 35 So. 171, upon which is based *Hartford F. Ins. Co. v. Redding*, 47 Fla. 228, 67 L.R.A. 518, 110 Am. St. Rep. 118, 37 So. 62, which is in turn expressly made the authority for the decision in *L'Engle v. Scottish Union & Nat. F. Ins. Co.* 48 Fla. 82, 67 L.R.A. 581, 37 So. 462.

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But, expressly repudiating any such distinction as is made in the *Matthews* Case, the circuit court, in *Williamson v. Liverpool, L. & G. Ins. Co.* 105 Fed. 31, held that a statute imposing a maximum percentage of damage and reasonable attorneys' fees upon any insurance company vexatiously refusing to pay a loss deprived the insurance company of the equal protection of the laws. However, a contrary conclusion was reached in *Merchants' Life Assn. v. Yoakum*, 39 C. C. A. 56, 98 Fed. 251.

With the exception of a decision on rehearing in *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 684, in which the court said that the *Ellis* Case was conclusive against the validity of the statute, the Texas courts have upheld the validity of such legislation with respect to insurance companies. *Union Cent. L. Ins. Co. v. Chowning*, 86 Tex. 654, 24 L.R.A. 504, 26 S. W. 982, 8 Tex. Civ. App. 455, 28 S. W. 117 (the case being certified to the supreme court of Texas, and the rule of that court applied by the court of civil appeals); *Mutual L. Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286; *Mutual L. Ins. Co. v. Simpson* (Tex. Civ. App.) 28 S. W. 837; *Washington L. Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123; *Sun L. Ins. Co. v. Phillips* (Tex. Civ. App.) 70 S. W. 603; *Fidelity & C. Co. v. Allibone*, 90 Tex. 660, 40 S. W. 399; *Mutual L. Ins. Co. v. Walden* (Tex. Civ. App.) 26 S. W. 1012; *New York L. Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284, 61 S. W. 336.

The Kansas courts have held that the equal protection of the laws was not denied by similar legislation allowing attorneys' fees to plaintiffs in suits upon fire-insurance policies. *British America Assur. Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335; *Shawnee F. Ins. Co. v. Bayha*, 8 Kan. App. 169, 55 Pac. 474.

Neither the equal protection of the laws, nor due process of law, is denied by a statute providing for the collection of a certain percentage of damages, together with reasonable attorneys' fees, from a fire, life, health, or accident insurance company that fails to pay the amount of loss after de-

are allowed, even to plaintiff, only in actions under the mechanic's lien law; the general rule being that "the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." Code Civ. Proc. § 1021. This provision is, in our opinion, violative both of the Federal and the state Constitutions,—of the 14th Amendment of the former, which guarantees to every person "the equal protection of the law," and of the provisions of the state Constitution which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing, and protecting property. A statute which gives an attorney's fee to one party in an action and de-

nies it to the other, and allows such fee in one kind of action, and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed. That said law is violative of the 14th Amendment to the Federal Constitution was established by the Supreme Court of the United States in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. In that case the statute of the state of Texas allowing attorney's fee to any person having a bona fide claim against a railroad company for services, or for damages, or for stock killed, was held to be unconstitutional because violative of the said 14th Amendment.

mand and within the time specified in the policy. *Arkansas Ins. Co. v. McManus* (Ark.) 110 S. W. 797.

In some instances liability for attorneys' fees has been imposed upon unsuccessful appellants in certain kinds of actions, and such statutes have been held invalid as discriminatory legislation.

Thus, a statute allowing attorneys' fees against unsuccessful appellants from the judgment of justices of the peace in suits to enforce the liability of railroads for damages to live stock was held invalid in *South & North Ala. R. Co. v. Morris*, 65 Ala. 193.

So, a statute imposing a reasonable attorney's fee upon unsuccessful appellants from the "judgment of any court in any action for damages brought by any citizen of this state against any corporation" was declared unconstitutional in *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641.

In *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 492, 5 S. W. 883, the court declared invalid a statute which, in effect, provided for the assessment of attorneys' fees as a penalty for refusing to abide by the decision of a board appointed to assess the damages for the killing of stock by railway trains, if the dissatisfied party did not recover in the courts a judgment more favorable to him than the award of the board.

But a statute requiring a railroad company seeking to condemn property to pay an attorney's fee to the landowner in case of his successful appeal from an award of a sheriff's jury does not deny to the railroad company the equal protection of the law, or confer on the landowner an illegal special privilege. *Gano v. Minneapolis & St. L. R. Co.* 114 Iowa, 713, 55 L.R.A. 263, 80 Am. St. Rep. 393, 87 N. W. 714 (affirmed in 190 U. S. 557, 47 L. ed. 1183, 23 Sup. Ct. Rep. 854, without opinion, and upon the authority of the Iowa decision and of former decisions of the United States Supreme Court). The Iowa court rests its decision upon the ground that, since a condemnation proceeding was not a common or natural right, but a remedy created by the legislature, that body might impose conditions on its exercise. To the objection that the 17 L.R.A. (N.S.)

statute did not impose the obligation on corporations other than railway companies exercising the power of eminent domain, the court replied that, because of special privileges granted to railroad companies, they formed a special class upon which peculiar burdens might be imposed as a condition of exercising the power granted; and that, even if the objections were valid, the unconstitutionality of the statute could not be insisted upon by a corporation attempting to exercise rights under it.

Substantially the same reasoning was employed in *Sanitary Dist. v. Bernstein*, 175 Ill. 215, 51 N. E. 720, which upheld a statute imposing liability for attorneys' fees upon any petitioner in eminent domain proceedings that dismissed the petition. And it seems that a provision of the statute that the petitioner shall be liable for attorneys' fees if it fails to make compensation within the time given by the court order is valid. *Chicago & W. I. R. Co. v. Guthrie*, 192 Ill. 579, 61 N. E. 658.

And a statute imposing liability for attorneys' fees upon a drainage district, in an action against it for injury to land, was upheld in *Sanitary Dist. v. Ray*, 199 Ill. 63, 93 Am. St. Rep. 102, 64 N. E. 1048.

The constitutional inhibition against class legislation is not violated by a statute allowing reasonable attorneys' fees in an action to recover the possession of land taken without compensation by a railroad company for its right of way, in cases where the company does not elect to convert the action into condemnation proceedings. *Cameron v. Chicago, M. & St. P. R. Co.* 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652; *Pfaender v. Chicago & N. W. R. Co.* 86 Minn. 218, 90 N. W. 393.

In several jurisdictions the courts have held invalid, statutes allowing attorneys' fees to successful plaintiffs in suits to foreclose mechanics' liens. *Randolph v. Builders' & Painters' Supply Co.* 106 Ala. 501, 17 So. 721; *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983; *Merced Lumber Co. v. Bruschi*, 152 Cal. 372, 92 Pac. 844; *Davidson v. Jennings*, 27 Colo. 187, 48 L.R.A. 340, 83 Am. St. Rep. 49, 60 Pac. 354; *Antlers Park Re-*

The court, speaking of the statute, said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished and no other corporations. The act singles out a certain class of debtors and punishes them when, for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like condi-

tions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong. They do not recover any if right; while their adversaries recover, if right, and

gent Min. Co. v. Cunningham, 29 Colo. 284, 68 Pac. 226; Los Angeles Gold Mine Co. v. Campbell, 13 Colo. App. 1, 56 Pac. 246; Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. 350; Atkinson v. Woodmansee, 68 Kan. 71, 64 L.R.A. 325, 74 Pac. 640; Brubaker v. Bennett, 19 Utah, 401, 57 Pac. 170.

On the contrary, such provisions have been declared valid in *Dell v. Marvin*, 41 Fla. 221, 45 L.R.A. 201, 79 Am. St. Rep. 171, 26 So. 188; *Thompson v. Wise Boy Min. & Mill. Co.* 9 Idaho, 363, 74 Pac. 958; *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Helena Steam-Heating & Supply Co. v. Wells*, 16 Mont. 65, 40 Pac. 78; *Armijo v. Mountain Electric Co.* 11 N. M. 235, 67 Pac. 726; *Genest v. Las Vegas Masonic Bldg. Asso.* 11 N. M. 251, 67 Pac. 743; *Title Guarantee Co. v. Wrenn*, 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271; *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467 (logger's lien); *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571.

A statute requiring the party foreclosing a mortgage to make and file, within ten days after such foreclosure, an affidavit of the amount paid for the disbursements, including attorneys' fees, is valid. *Perkins v. Stewart*, 75 Minn. 21, 77 N. W. 434.

But a statute allowing attorneys' fees to a successful plaintiff in a suit to cancel a mortgage which the mortgagee should fail to release or discharge after it had been fully satisfied, with no provision for a like allowance to the defendant if he should succeed, was held invalid as an unjust discrimination, in *Openshaw v. Halfin*, 24 Utah, 426, 91 Am. St. Rep. 796, 68 Pac. 138.

And a statute authorizing an attorney's fee to be taxed by a justice in entering judgment for personal services in favor of the plaintiff only, violates the inhibition against class legislation. *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006.

So, a statute providing that, in all cases within the jurisdiction of a justice of the peace, where an action is brought by any laborer, clerk, servant, nurse, or other person, for compensation for personal services, the plaintiff, if successful, shall be entitled to recover, as a part of the costs and judgment, for an attorney's fee within prescribed limits as to amount, was held, in *Chicago, R. I. & P. R. Co. v. Mashore* (Okla.) 96 Pac. 630, not to afford to defendant the equal protection of the laws. 17 L.R.A. (N.S.)

And the statutory imposition upon employers, of liability for an attorney's fee to successful plaintiffs in actions for wages, in case the wages have not been paid within three days after a demand in writing, has been held to be a denial of the equal protection of the laws. *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L.R.A. 386, 53 Am. St. Rep. 622, 41 N. E. 263.

Still, a similar statute was upheld, over an objection that it constituted special legislation, in *Vogel v. Pekoc*, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386.

It was held in *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226, that a penalty for the benefit of an individual was not imposed by a provision in a statute to protect wages of laborers, giving them the right to recover the debt as well as costs, expenses, and an attorney's fee, in case the act was violated.

A statute requiring the appointment of an attorney for nonresident defendants, with an allowance of reasonable compensation, to be taxed as costs, was held, in *Williams v. Sapieha* (Tex. Civ. App.) 59 S. W. 947, not to be unconstitutional upon the ground that it imposed on plaintiffs, in suits against nonresidents, a burden not imposed in suits against other persons.

An act conferring on the chancellor the power, in certain cases, to include in taxed costs the fee of an attorney for a successful complainant, is not obnoxious to constitutional restrictions because it makes no such provision for successful defendants. *McMullin v. Doughty*, 68 N. J. Eq. 776, 782, 55 Atl. 115, 284, 64 Atl. 1134.

A statute allowing, by way of costs, a fee to an attorney representing the state in any suit in which a person seeks to defeat a just debt due the state, is valid. *United States Electric Power & Light Co. v. State*, 79 Md. 63, 28 Atl. 768.

And the equal-protection clause is not violated by a statute permitting an attorney, assisting a tax collector, to receive a 10 per cent commission from the one who unsuccessfully resists a tax. *Liquidating Comrs. v. Marrero*, 106 La. 130, 30 So. 305.

To the same effect is *State ex rel. Rosenblatt v. Kerr*, 8 Mo. App. 125.

And a provision for the taxation of \$10 as the fee of an attorney representing the state in a prosecution for being a common seller of intoxicating liquors is valid. *Com. v. Munn*, 14 Gray, 361.

pay nothing, if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In the decisions of several states a statute similar to the one involved has been held unconstitutional. The question is elaborately discussed by the supreme court of Colorado in *Davidson v. Jennings*, 27 Colo. 187, 48 L.R.A. 340, 83 Am. St. Rep. 49, 60 Pac. 354, and a statute of that state similar to ours declared void. The opinion rendered in the case is an exhaustive one, and we will make only a few quotations from it. After stating the statutory provisions, the court says: "It will be seen that this section imposes a penalty upon the defendant for exercising, in this class of cases, the common right of making a defense, which is accorded to every other litigant in the courts, by subjecting him to the payment of the plaintiff's attorneys' fees if he is successful, without giving him (the defendant) a reciprocal right if he is victorious." And the court further says: "We are unable to perceive any reason why, in an action to enforce their claims for merchandise or material furnished in the erection of a house, or for the development of a mining claim, they should be afforded any other or greater rights than are given other merchants who furnish provision or supplies to persons for family consumption, or that their debtors should not have the same right to contest the justice of their claims upon the same terms and conditions as are afforded to other debtors by the general law of the land. It is no answer to say that the debtor may avoid the imposition of this additional cost by paying his honest debts, because the very purpose of the litigation he invokes is to determine whether he owes the debt or not. And it is immaterial whether he successfully defeats the larger part of the claim; he may, nevertheless, be mulcted in a sum which will deprive him of any benefit from the defense which he has legitimately established. It is also equally immaterial whether he interposes a vexatious defense, or makes an honest though unsuccessful one, or allows judgment to be taken against him by default; he is subjected to the same penalty." Many cases are cited which sustain the opinion. This case was afterwards expressly approved by the courts of Colorado. See *Perkins v. Boyd*, 16 Colo. App. 266, 65 Pac. 350, and cases there cited.

In *Atkinson v. Woodmansee*, 68 Kan. 71, 64 L.R.A. 325, 74 Pac. 640, the supreme court of Kansas held unconstitutional a clause of a Kansas statute as follows: "In

any action brought by any artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action." It will be observed that in this statute the special advantage is given only to the "artisan or day laborer," and not to materialmen who constitute the main lien claimants in California; but the provision was, nevertheless, held void. The court says: "Under the Constitution of the state of Kansas, artisan and owner, contractor and laborer, are each one possessed of equal and inalienable rights to life, liberty, and the pursuit of happiness. . . . The burden of the law upon them should be as equal and impartial as the law of gravitation; and yet, in the baldest and most arbitrary manner imaginable, this act 'singles out a certain class of debtors and punishes them, when, for like delinquencies, it punishes no others,'" and then follows a quotation from the case of *Gulf, C. & S. F. R. Co. v. Ellis*, above noticed.

In *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L.R.A. 386, 53 Am. St. Rep. 622, 41 N. E. 263, the supreme court of Ohio held unconstitutional a statute providing that, in an action for wages, the plaintiff should recover an attorney's fee. The court said: "Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulct in an attorney fee, if an honest but unsuccessful defense should be imposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law." And, further, the court says: "Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property."

In *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006, the supreme court of Michigan held that a statute authorizing an attorney's fee to be taxed to the party in a judgment for personal services was unconstitutional, being an attempt to give special advantages to one class at the expense of another. In *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289, the supreme court of Michigan held that an

act authorizing an attorney's fee against a railroad company in an action for injury to stock was unconstitutional and void. In *Openshaw v. Halfin*, 24 Utah, 426, 91 Am. St. Rep. 796, 68 Pac. 138, the supreme court of Utah held that a statute allowing attorneys' fees to plaintiff in an action to compel the release of a mortgage was unconstitutional as special legislation, and violative of the constitutional principle of equal protection to all. See also *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500.

In the opinions rendered in the cases above noticed there are many citations of authorities sustaining the opinions; but we have been unable to verify these citations on account of the difficulty of access to books since the recent destruction here by fire of law libraries. We are satisfied with the reasoning on the point in the cases which we have cited and quoted from, and deem it unnecessary to discuss the matter further. Upon the three grounds above stated, the judgment must be reversed.

Appellants also make the contention that the court erred in allowing plaintiffs as costs the expense of filing their liens, upon the ground that the statute providing therefor is unconstitutional; but in our opinion this contention is not maintainable. The Constitution imposes upon the legislature the duty of providing for these liens, and, as the filing of the liens is part of the legislative method of perfecting them, we think that the small expense of such filing is properly included in the phrase "costs and disbursements."

The judgment is reversed, and the cause remanded for a new trial.

We concur: Henshaw, J.; Lorigan, J.

Petition for rehearing denied February 7, 1907.

COLORADO SUPREME COURT.

PHILIP J. WATSON, Appt.,

v.

MANITOU & PIKES PEAK RAILWAY COMPANY et al.

(41 Colo. 138, 92 Pac. 17.)

Unsafe premises — liability of lessor.

1. The lessor of a hotel, who is to receive a share of the gross receipts as rental, is not liable to a guest of the hotel who leaves the building at midnight for a purpose of his own, and, in wandering about in the darkness, falls over a wall and is injured.

Railroad — unsafe premises — trespasser — liability.

2. A railroad company is not liable to a

guest in a hotel adjoining its property for failure to light or guard a retaining wall between the properties, over which the guest falls while wandering about the hotel grounds in the night on business of his own.

Unsafe premises — contributory negligence.

3. A guest of a hotel on a mountain top, who, for a purpose of his own, leaves the hotel and lighted path in the night, and, without inquiring as to conditions, walks some distance in the dark, is guilty of negligence which will preclude his recovery for injuries caused by falling over a retaining wall.

(October 7, 1907.)

Case Note. — Duty of owner of premises to protect licensee against hidden dangers.

The purpose of this note is merely to show the general principles governing the subject, with illustrative applications; and no attempt has been made at an exhaustive citation of authorities upon particular states of facts or conditions.

The general principle enunciated in the foregoing case, that the owner of land owes a bare licensee no duty except to refrain from wanton or wilful injury, is supported by the great weight of authority. "Mere passive acquiescence on the part of the owner or occupant in the use of real property by others does not involve him in any liability to them for its unfitness for such use. They take all risks upon themselves, and have no right to complain of any defect in the premises." 2 Shearm. & Redf. Neg. § 705. "The general rule supported by the authorities is that the owner or occupant of premises owes no duty to licensees and trespassers, further than to refrain from wilful acts of injury." 2 Cooley, Torts, p. 1268.

Apparently the duty owed to bare licensees is no greater than that owed to trespassers,—the fact that they are on the premises with the passive acquiescence of the owner saving them from the responsibilities of trespassers, but entitling them to no greater consideration than trespassers enjoy.

Thus, in *Vanderbeck v. Hendry*, 34 N. J. L. 467, it was held that mere permission or passive license to enter upon land relieved a person entering premises from the responsibility of being a trespasser; but he assumed the ordinary risks of the nature of the place and the business carried on. To the same effect was the decision in *Gibson v. Leonard*, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182.

And in *Phillips v. Burlington Library Co.* 55 N. J. L. 307, 27 Atl. 478, the court said: "All that may be said in favor of a mere licensee is that he is only not a trespasser; and the general rule of law is that the owner and occupier of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers,

A PPEAL by plaintiff from a judgment of the District Court for El Paso County in defendants' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Mr. Walter Scott for appellant.

No appearance for appellees.

Bailey, J., delivered the opinion of the court:

The defendant corporation was the owner of and operated a railroad extending from the city of Manitou to the summit of Pikes Peak, and was also the owner of certain buildings upon the summit of the Peak. These buildings were leased to the defend-

ant Hiestand, who used them for the purpose of maintaining a hotel and curio store. The rental paid by Hiestand to the corporation was 25 per cent of the gross receipts. Aside from the amount of rents received, it does not appear that the corporation had any interest in the business of the hotel and curio store, or that it had any voice in the management of same. It appears that at the stopping place of the trains operated by defendant corporation there was a platform. The hotel was upon an elevation considerably higher than this platform. The ground was rough and broken and covered with loose and irregular masses of stone. A retaining wall had been constructed, evidently for the purpose of preventing the rock from rolling down upon the platform

bare licensees, and others who come upon the premises for their own convenience or pleasure, however innocent their purpose may be."

The statement of the rule in the Phillips Case is the same as that given in 1 Thomp. Neg. § 946.

So, also, in 2 Thomas, Neg. 2103, bare licensees and trespassers are classed together; and the owner of private property is said to owe no active or affirmative diligence to a person going thereon without invitation, express or implied, nor to one who is upon the premises by mere license.

Numerous cases upholding the same general rule may be noted.

A trespasser injured on dangerous premises cannot recover therefor from the landowner, unless the latter's negligence was so gross as to amount to a wanton injury. Ritz v. Wheeling, 45 W. Va. 262, 43 L.R.A. 148, 31 S. E. 993.

A licensee goes upon the premises of another at his own risk. Stevens v. Nichols, 155 Mass. 472, 15 L.R.A. 459, 29 N. E. 1150.

One who enters the private apartments of another at the mere license of the latter does so subject to all the attendant risks. Schmidt v. Bauer, 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 256.

Active vigilance is not required to see that a mere licensee on one's premises is not injured. Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068.

Owners of premises are not bound to fence dangerous machinery for the protection of a simple licensee. Bolch v. Smith, 7 Hurlst. & N. 736.

Where a person is a mere licensee, he has no cause of action on account of the dangers existing in the place he is permitted to enter. Holmes v. Northeastern R. Co. L. R. 4 Exch. 256.

The maxim that a man must use his property so as not to incommode his neighbor applies only to neighbors who do not interfere with it or enter upon it. Ryan v. Towar, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644. 17 L.R.A. (N.S.)

The general rule has been applied, and recovery denied, in the following cases:

In *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752, where one went onto the property of another to seek employment, and was injured by defective machinery not obviously dangerous.

In *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973, where one of a class of students to whom permission was given upon request, was injured by falling into an uncovered vat of boiling water while making the inspection of the premises.

In *Cowen v. Kirby*, 180 Mass. 504, 62 N. E. 968, where one who had left his horses at a livery stable and received a check therefor was injured upon returning to put a parcel in his wagon.

In *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369, where a licensee going over land fell into a hole not concealed otherwise than by the darkness of night.

In *Victory v. Baker*, 67 N. Y. 366, where a boy went onto the premises to pay a bill which his employer owed to one of the defendants.

In *Fitzpatrick v. Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675, where a boy was injured by the falling of a gate on defendant's premises while he was carrying his father's dinner to him, the latter being an employee of defendant.

In *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028, where one went into the storehouse of another to look for a drayman, and was injured by falling into an open elevator shaft.

In *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761, where the plaintiff's intestate was killed by falling into a tank of hot fat on the premises of the defendant, where he had gone to deliver a gratuitous message to one of defendant's servants, which had no connection with the business conducted there.

In *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800, where the plaintiff went onto the defendant's premises for the purpose of transacting private business with one of the defendant's employees.

In *Woolwine v. Chesapeake & O. R. Co.*

or the railroad track. Steps were made ascending this retaining wall, by which passengers from defendant corporation's trains could reach the buildings. From the top of the steps to the buildings was a distance of 16 feet. Upon the 2d day of July, 1902, the plaintiff walked from Manitou to the summit of Pikes Peak, reaching the latter place about 10 o'clock at night. He applied to the parties in charge of the hotel for a place to sleep, but was informed that the beds were all full, and that he could not be accommodated. After some conversation, one of the employees of Hiestand at the hotel informed plaintiff that he might have the employee's bed upon payment of \$2. This offer was accepted, and plaintiff retired. After he had been in bed for some time, he

concluded that he would be unable to sleep because he had become chilled and could not get warm in bed, and for the further reason that he was annoyed by the presence of two other men who occupied a bed in the same room. Plaintiff finally arose and went into another room, where there was a fire, and in which one of the employees of Hiestand was at work. After plaintiff had been sitting by the fire for something like an hour, he desired to urinate, and was informed by this employee that there was no urinal in the house, and it would be necessary for him to go outside, which he did. The light from the house was so placed that the reflection from it extended from the door some distance outside. Notwithstanding that it was dark, plaintiff did not keep within the line

(*Manning v. Chesapeake & O. R. Co.*) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81, where the plaintiff, while making a friendly call at a telegraph office, was injured by a train running off the track and wrecking the office.

In *Sterger v. Van Sicklen*, 132 N. Y. 499, 16 L.R.A. 640, 28 Am. St. Rep. 594, 30 N. E. 987, where a woman went on the premises in search of a child who customarily played there, and was injured because of a defective step.

This list of cases might be extended almost indefinitely, but, as the cases are so numerous, and the general rule so uniformly followed, it would be impracticable and unnecessary to attempt to exhaust the cases, and those cited above are selected to show the general rule and some of the various conditions of facts to which it is applicable. So, also, throughout the note illustrative cases only have been selected, as the decisions are very numerous and very uniform.

The general rule as above set out would not, of course, include cases where the plaintiff was injured by the wanton or wilful negligence of the owner; for injury due to such a cause, the owner would be liable. *Kellar v. Shippee*, 45 Ill. App. 377; *Illinois C. R. Co. v. Wall*, 53 Ill. App. 588; *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18; *Toomey v. Sanborn*, 146 Mass. 28, 14 N. E. 921; *Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; *Larmore v. Crown Point Iron Co.* supra.

The liability of the owner for wanton or wilful negligence causing injury to a licensee is the same as to trespassers. Upon the question of the liability for killing or injuring trespassers by means of spring guns, traps, and other dangerous instruments, see note to *State v. Barr*, 29 L.R.A. 154.

It is sometimes difficult to determine whether one is a bare licensee only, or whether he is on the premises by reason of an invitation, express or implied. A few cases, although recognizing the distinction, hold that the true test of the liability of the owner is whether the person injured is rightfully on the premises or not; if he is, 17 L.R.A. (N.S.)

although a licensee only, or even a technical trespasser, the owner is liable. These cases will be discussed later.

Many cases fail to note the distinction,—or, at least, it is ignored in the opinion; but the distinction is clearly recognized in the majority of the cases, and the decision frequently turns upon it. In 2 Cooley, Torts, p. 1265, the distinction is stated as follows: "An invitation may be inferred when there is a common interest or mutual advantage; a license, when the object is the mere pleasure or benefit of the person using it." A similar rule is followed in *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235, which is cited in *Watson v. Manitou & P. P. R. Co.*

By the great weight of authority, the owner of land owes a greater duty to one who is on his land by invitation, express or implied, than he does to a mere trespasser.

Thus, in *Archer v. Union P. R. Co.* 110 Mo. App. 349, 85 S. W. 934, the court said: "As a licensee, there would be required of defendant less duty to plaintiff than if she was invited in a sense of benefit to defendant."

And, where a city and an electric light company used each other's poles without any express agreement, it was held, in *Barker v. Boston Electric Light Co.* 178 Mass. 503, 60 N. E. 2, that the jury might find that an employee of the city, injured by the negligence of the electric light company while working on one of the latter's poles so used by the city, was not a mere licensee, but was there by an implied invitation; and, if so, the company would be liable for the injuries.

So, also, in *Mackie v. Heywood & M. Rattan Co.* 88 Ill. App. 119, the court said: "When one visits the place of another upon an errand connected with the joint business of the two, it cannot be said that he is a trespasser, nor that he is there without invitation." And to the same effect were the decisions in *Gordon v. Cummings*, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Byrne v. New York C. & H. R. R. Co.* 104 N. Y. 362, 58 Am. Rep. 512, 10 N. E. 539; *Barry*

of the light, but went diagonally away from it for a distance of about 35 feet, at which point he stepped off the retaining wall, fell a distance of 3 or 4 feet, and was injured. He then brought this action against the defendants to recover damages because of his injury. At the close of the plaintiff's testimony and on the application of defendants, the court ordered a nonsuit, for the reason that the evidence failed to disclose that the defendants were guilty of negligence, and that it did disclose that plaintiff was guilty of contributory negligence, from which judgment the plaintiff appealed.

Plaintiff, in his brief, says: "At the conclusion of the trial, counsel for plaintiff stated to the court that he did not intend to press the liability of the defendant Hie-

stand, because the testimony showed that the accident occurred at a point which Hie-stand did not lease from defendant railway company and over which he had no oversight or control." So that the only question presented to us is as to whether or not the facts present a cause of action against the railway company. The contention of the plaintiff as to the liability of the company is based upon the doctrine as announced by the Supreme Court of the United States in *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235, the syllabus of which is as follows: "The owner or occupant of land who induces or leads others to come upon it for a lawful purpose is liable in damages to them—they using due care—for injuries occasioned by the unsafe condition of the

v. New York C. & H. R. R. Co. 92 N. Y. 289, 44 Am. Rep. 377; *Nicholson v. Erie R. Co.* 41 N. Y. 526.

Under the distinction made in the foregoing cases and in numerous other decisions, it is clear that a person who entered a store for the purpose of purchasing goods would not be a bare licensee; and the storekeeper would owe him a greater degree of care than would be owing to a licensee.

On the other hand, as was noted above, some cases hold that a bare licensee, if on the premises rightfully, and one who is on land by invitation, are entitled to the same degree of care. The rule followed by these cases is thus stated in 1 *Thomp. Neg.* § 969: "Some courts, however, disregarding distinctions relating to trespassers, intruders, bare licensees, etc., place the doctrine on the broad and just ground that the owner or occupier of premises is bound to exercise ordinary care to the end of keeping his premises in such a condition that they will not, by reason of any insecurity or insufficiency, injure any person rightfully in, around, or passing by them,—at the same time holding that such owner or occupier is not an insurer against accidents which may happen from the condition of the premises. The distinction is that the person coming upon the premises, to whom this duty of care is due, must not come as a mere trespasser or wrongdoer, but for some purpose lawful in itself and such as the owner or occupier might reasonably expect to bring him there. This being the rule, if the person injured is rightfully upon the premises, it will make no difference, with reference to his right of action for the injury, whether he is there as a licensee, or by invitation."

So, in *Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 528, 32 L.R.A. 530, 50 Am. St. Rep. 124, 34 Atl. 491, the court said: "We think it makes no difference whether we hold the case at bar to be one of license or invitation; for the duty which the defendant is here charged with violating is not the duty to keep its premises safe for use, but the duty of using due care not to injure by its own act those rightfully on its premises; and that duty is the same wheth-

er those persons are on the premises as licensees, or upon 'invitation' in the technical sense of that word."

And in *Newark Electric Light & P. Co. v. Garden*, 37 L.R.A. 725, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74, it was held that an employee of a railroad company rightfully maintaining wires upon a pole owned by a telephone company and also used by the telephone company and an electric light company is not, while engaged in transferring wires of the railroad company to other poles, a trespasser in setting his foot upon a cross arm bearing the electric-light wires, so as to relieve the electric light company from liability for his death occasioned by the imperfect insulation of its wires. The court said that, though the employee may have been a technical trespasser, yet he was rightfully there, and his case would be an exception to the general rule that the right to keep one's property in such a condition as the owner may see fit is not restricted by any requirement to guard against its causing injury to one who, without invitation, actual or apparent, but as a mere volunteer or mere trespasser, intrudes upon it.

So, also, in *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050, it was held that, if a person who has been injured through the negligence of defendant while committing a trespass shows that he did not know he was trespassing, or that the trespass was purely technical, and only such as he might reasonably suppose the defendant would permit without objection, recovery will not be prevented by reason of such trespass.

The mere fact that the purpose of a licensee in going upon the premises was one beneficial to the owner of the property does not change the rule.

The most noticeable example of this is the case of firemen going onto premises for the purpose of fighting fire. In cases which treat them as licensees, it is held that the owner owes them only such duty as he owes to any bare licensee. *Gibson v. Leonard*, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182; *Woodruff v. Bowen*, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113; *Hamil-*

land or its approaches, if such condition was known to him, and not to them, and he negligently suffered it to exist, without giving timely notice thereof to them or the public." Under no possible view of this case can it be said that plaintiff climbed to the top of Pikes Peak upon the invitation of the defendant company. He was not a passenger, neither did he contemplate becoming one. He visited this place for his own pleasure and gratification, and not for the profit or pleasure of the company. Plaintiff insists that the company did receive profit out of his visit, because, under the terms of the lease, it would be entitled to 50 cents of the \$2 paid by the plaintiff to the employee of defendant Hiestand for the use of the employee's bed. There is no proof as to whether that \$2 was retained by the party who gave up his bed, or whether it went into the hands of the hotel keeper. In any event, the fact that the railroad company was the lessor of the premises

would not tend to make it liable. There is nothing to show that the railroad company was negligent in the maintenance of its grounds, unless it might be said that it should have placed a railing around the retaining wall, or had permanent lights fixed there so that the wayfarer who sought to wander about on the Peak during the mid-night hours might not suffer injury.

A railroad company may not be made to respond in damages to every person who may chance to be injured upon its grounds. "One who goes to the station house of a railroad company, not for the purpose of any business, or to meet expected friends, or to see others depart, but as a mere spectator, for his own pleasure and convenience, is there at his own risk and peril, and cannot recover damages for personal injuries received in consequence of a defective platform or station grounds." 1 Fetter, Carr. Pass. § 239; Poling v. Ohio River R. Co. 38 W. Va. 645, 24 L.R.A. 215, 18 S. E. 782; Pittsburgh, Ft.

ton v. Minneapolis Desk Mfg. Co. 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693; New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89; Kelly v. Henry Muhs Co. 71 N. J. L. 358, 59 Atl. 23; Eckes v. Stetler, 98 App. Div. 76, 90 N. Y. Supp. 473; Baker v. Otis Elevator Co. 78 App. Div. 513, 79 N. Y. Supp. 663; Beehler v. Daniels, 18 R. I. 563, 27 L.R.A. 512, 49 Am. St. Rep. 790, 29 Atl. 6, second trial, 19 R. I. 49, 31 Atl. 582.

So, assuming that a boy who went upon a railroad to watch the burning of some oil tanks, and was injured, was a licensee, he cannot recover, although at the time of the injury he was rendering valuable aid to the company in preventing the spread of the fire. Cleveland, C. C. & St. L. R. Co. v. Ballentine, 28 C. C. A. 572, 56 U. S. App. 266, 84 Fed. 935.

This result, of course, depends upon the assumption or holding that the person in question is a licensee, notwithstanding that he is on the premises for a purpose beneficial to the owner; and, of course, does not follow, even if the facts are the same, if the court takes the view that the person in such circumstances is not a mere licensee. Thus, upon the assumption that police officers who enter premises in the course of their duties are something more than mere licensees, it has been held that the owner owes them a greater duty than to licensees. See, for example, Learoyd v. Godfrey, 138 Mass. 315; Ingalls v. Adams Exp. Co. 44 Minn. 128, 46 N. W. 325.

The same protection which is given to policemen has also been given to customs officers (Low v. Grand Trunk R. Co. 72 Me. 313, 39 Am. Rep. 331), an official inspector of vessels (The City of Naples, 16 C. C. A. 421, 32 U. S. App. 613, 69 Fed. 794), letter carriers (Gordon v. Cummings, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. E. 978), the public water inspectors 17 L.R.A. (N.S.)

(Finnegan v. Fall River Gas Works Co. 159 Mass. 311, 34 N. E. 523).

The question whether or not one who enters upon premises in discharge of a public function is to be regarded as a bare licensee does not fall within the scope of this note, and the above cases are referred to merely for the purpose of illustrating the principle that, unless the fact that the person is on the premises for a purpose beneficial to the owner takes him out of the class of licensees, that fact will not prevent the application to him of the rule applicable to licensees generally.

The rule as to the duty owed to licensees is somewhat modified in cases where the owner of premises has, by his conduct, induced the public to use a way in the belief that it is a public way, and that they have a right to use it. But in these cases the person using the way is generally considered, not a bare licensee, but one who is on the premises because of an implied invitation to use the way. In such cases the liability is generally considered coextensive with the implied invitation. Holmes v. Drew, 151 Mass. 578, 25 N. E. 22; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; Barry v. New York C. & H. R. R. Co. 92 N. Y. 289, 44 Am. Rep. 377; Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; Knight v. Lanier, 69 App. Div. 454, 74 N. Y. Supp. 999.

In the case of railroads, the railroad companies are generally held to be bound to keep their stations, platforms, and approaches thereto in a reasonably safe condition for the benefit of passengers and those who have purchased tickets with a view to taking passage on their cars. Such persons can in no wise be deemed mere licensees. The same rule has been held to apply to those who are on the premises for the purpose of wel-

W. & C. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751; Burbank v. Illinois C. R. Co. 42 La. Ann. 1156, 11 L.R.A. 720, 8 So. 590, and other authorities cited in the foregoing. The case of Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 317, was one in which a large number of people met at the station house on the occasion of the visit of Andrew Johnson, President. Because of the great weight upon it, the platform broke, and the plaintiff was injured. He brought the action to recover for damages suffered on account of the injury. At the close of the testimony the court instructed the jury to return a verdict for the defendant, which was done. Upon appeal, Sharswood, J., said: "It is . . . well settled that the owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a nuisance if it were in a public street or common, where all persons had a legal

right to be without question as to their purpose or business." See also Woolwine v. Chesapeake & O. R. Co. (Manning v. Chesapeake & O. R. Co.) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81. The case of Bennett v. Louisville & N. R. Co. supra, so much relied upon by appellant, practically announces the same doctrine. At page 584 of 102 U. S. it is said: "It cannot be pretended that Bennett, at the time he was injured, was, in any sense, a trespasser upon the premises of the company. Nor is this case, like many cited in the books, of mere passive acquiescence by the owner in the use of his premises by others. Nor is it a case of mere license or permission by the owner, without circumstances showing an invitation extended, or an inducement, or, in the language of some of the cases, an allurements, held out to him as one of the general public. It is sometimes difficult to determine whether the circumstances make a case of 'invitation,' in the technical sense

coming or bidding farewell to friends (Hamilton v. Texas & P. R. Co. 64 Tex. 251, 53 Am. Rep. 756; Sullivan v. Vicksburg, S. & P. R. Co. 39 La. Ann. 800, 4 Am. St. Rep. 239, 2 So. 586; Texas & P. R. Co. v. Best, 66 Tex. 116, 18 S. W. 224); and to a hackman injured while carrying a passenger to the depot for transportation (Tobin v. Portland, S. & P. R. Co. 59 Me. 183, 8 Am. Rep. 415).

And a railroad company is liable for injuries caused by its negligence to a person visiting a station to mail letters upon a mail train. Chicago, K. & N. R. Co. v. Parkinson, 56 Kan. 652, 44 Pac. 615.

But persons taking shelter in a station from a storm enjoy only the license, subject to its perils. Pittsburgh, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751.

And a foot traveler passing over a station platform at night, and injured by falling through an open trapdoor, cannot recover damages from the company. Redigan v. Boston & M. R. Co. 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133.

So, a person intending to take passage upon a train will not be deemed entitled to the privileges of a passenger where he goes to the station an unreasonable length of time previous to the departure of his train. Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337.

And a railroad is not bound to keep its depot platform safe for the keeper of a boarding house, who goes upon the platform to meet a boarder. Post v. Texas & P. R. Co. (Tex. Civ. App.) 23 S. W. 708.

In Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 317, which is cited in WATSON v. MANITOU & P. P. R. Co., it was held that one who was injured by the falling of a station platform upon which he was standing to see the visiting President

of the United States could not recover from the company for his injuries.

The general rule as to licensees is, by some courts, modified as to children. This, however, presents a different question, and one which is in no wise suggested in WATSON v. MANITOU & P. P. R. Co.

Upon liability of railroad company for injuries to children playing on turntables, see case note to Pannill v. Potomac, F. & P. R. Co. 4 L.R.A. (N.S.) 80, and also note to Ft. Worth & D. C. R. Co. v. Robertson. 14 L.R.A. 791.

Upon doctrine of attractive nuisance as applied to injury from hot water or ashes, see case note to Fitzmaurice v. Connecticut R. & Lighting Co. 3 L.R.A. (N.S.) 149.

Upon the general subject of care due to sick, infirm, disabled, and otherwise helpless persons, with whom no contract relation is sustained, see note to Union P. R. Co. v. Cappier, 69 L.R.A. 513.

Upon the question of the right of a servant for injuries received while entering premises as a mere licensee, see note to Cleveland, C. C. & St. L. R. Co. v. Berry, 46 L.R.A. 59.

It appears that, under the general rules cited above, the court, in WATSON v. MANITOU & P. P. R. Co., was clearly right in holding that the plaintiff had no cause of action. As he was without the hotel grounds, of course neither the hotel management, nor the railroad through any possible connection it may have had with the hotel, was liable; and, indeed, this was admitted by the plaintiff. As to the liability of the railroad company as such, the plaintiff was not a passenger, and was not acting under any implied invitation of the railroad company to go upon its premises, but was a trespasser, or, at least, no more than a bare licensee; and the company, in the absence of any wanton or wilful act, owed him no duty to keep its premises safe.

of that word, as used in a large number of adjudged cases, or only a case of mere license. "The principle," says Mr. Campbell, in his treatise on Negligence, "appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

Appellant complains because the defendant company did not warn him of the existence of the retaining wall and of the danger incident to walking around the premises after dark. Plaintiff arrived upon the premises during the night and ascended the stairs which reached from the platform to the ground upon which the building was situate, so he had actual knowledge that the platform was much lower than the building, and that the descent was abrupt; but, in any event, he was not there as the guest of the defendant company. He was not a passenger and had no business with the company. At most, he was there as a licensee, and in such cases it is not the duty of the licensor to give notice of hidden dangers. "It is said that the licensor owes a duty to his licensee to give him notice of hidden dangers or traps. Expressions to this effect are found in some of the decided cases, but we think that they do not accurately state the law. . . . It may be that, if the licensor makes the premises more dangerous after the license is granted, in such a way that the increased danger is not open to observation, it is his duty to notify the licensee; but we do not believe that he is bound to notify him of ordinary dangers incident to the condition and use of the premises at the time the license was granted." 3 Elliott, Railroads, § 1250. "We have endeavored to show in the preceding section that there is, ordinarily, no duty to a licensee except to refrain from wilful or wanton injury to him, and to use reasonable care to prevent injury to him after discovering his danger. If there is no duty to the plaintiff, or no violation of such duty, there is, of course, no liability." Id. § 1251.

As touching upon the contributory negligence of the plaintiff, the case of Reed v. Axtell, 84 Va. 231, 4 S. E. 587, is instructive. It appears that the plaintiff was a passenger who desired to go to Brema. Upon being informed that the train did not stop there, she concluded to stay at Scottsville and take the next train, which would pass through the latter place between daylight and sunrise. She was shown into the depot, and inquiry was made whether she desired to go to a hotel. She stated that she preferred to spend the remainder of the night at the station. She inquired whether there was a ladies' toilet room in the building, and, upon

being informed that there was not, went out on the platform, which was not lighted, and walked to the end of it in the dark, where she fell to the ground, a distance of several feet. So much of the platform as was immediately in front of the waiting room was lighted by the light in the room. Without taking the precaution to inquire or ascertain whether or not she could safely do so, she turned at right angles upon stepping upon the platform from the lighted waiting room, walked off, and was injured. At the trial she obtained a verdict at the hands of the jury, which was set aside by the court, and the action of the court in so doing was sustained; the appellate court saying that, all the circumstances considered, she was not only negligent, but reckless, which clearly defeated her right of recovery. So, in this particular case, where the plaintiff knew that in one direction from the building there was a flight of steps within 16 feet by means of which the retaining wall was ascended, and knew that he was upon the top of a mountain the sides of which were more or less precipitous, and, not having made any inquiry of parties present concerning the conditions surrounding the building, voluntarily left the portion of the ground which was lighted by the reflection of the lamp and walked a distance of some 30 or 35 feet in the dark, as he says, hastily, it would seem that the thing he might reasonably have expected was to fall over a precipice.

The judgment of nonsuit was properly rendered. The defendant company violated none of the obligations which it owed to the plaintiff, whether he was a mere trespasser or a licensee, and, taking the course he did, without making inquiry as to the surrounding conditions, he was reckless concerning his own safety. If the matter had been submitted to a jury, and that body had rendered a verdict in favor of the plaintiff, it would have been necessary to have set it aside. Snyder v. Colorado Springs & C. C. D. R. Co. 36 Colo. 288, 8 L.R.A.(N.S.) 781, 118 Am. St. Rep. 110, 85 Pac. 686; Chivington v. Colorado Springs Co. 9 Colo. 597, 14 Pac. 212; Woolwine v. Chesapeake & O. R. Co. supra; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322.

It appears from the abstract that, before ascending the Peak, plaintiff had read a certain advertisement, a copy of which was handed him. He was asked to state what the advertisement contained, and the question was objected to as being immaterial. Plaintiff was also inquired of concerning the contents of certain other advertisements, and objections to the admission of same were sustained. The action of the court in

this behalf was assigned as error. Copies of these advertisements have not been preserved in the abstract, and consequently we are unable to determine whether they were material or not.

Perceiving no reversible error in the proceedings below, the judgment will be affirmed.

Steele, Ch. J., and Goddard, J., concur.

KENTUCKY COURT OF APPEALS.

CITY OF COVINGTON et al., Appts.,
v.

E. F. RATTERMAN.

(— Ky. —, 108 S. W. 297.)

Water — rents — successor in title.

1. A municipal corporation cannot, without statutory authority, compel the purchaser of property to pay rents for water consumed by his vendor, as a condition to furnishing his building a supply from its water system.

Same — lien.

2. An ordinance authorizing the turning off of water upon failure to pay the rents does not give a lien against the property, so as to permit the city to refuse to turn on the water at the request of a purchaser from the delinquent consumer until the arrears are paid.

(March 10, 1908.)

APPEAL by defendants from a judgment of the Circuit Court for Kenton County in plaintiff's favor in an action brought to compel defendants to furnish to plaintiff a water supply. Affirmed.

The facts are stated in the opinion.

Mr. F. J. Hanlon for appellants.

Mr. A. G. Simrall for appellee.

Steele, J., delivered the opinion of the court:

Appellee, E. F. Ratterman, a resident citizen and taxpayer of the city of Covington, purchased of the Trumpet Milling Company a lot and three-story brick building, situated on Fifth and Craig streets, in that city, and received of the vendor a deed conveying him the property with covenant of general warranty. The city of Covington

Note. — The right of a municipal corporation or water company to compel a property owner to pay for water furnished to a former occupant is discussed in a case note to *Chicago v. Northwestern Mut. L. Ins. Co.* 1 L.R.A.(N.S.) 770; and the validity of a statute holding the property owner liable for water and light furnished the tenant, in a case note to *East Grand Forks v. Luck*, 6 L.R.A.(N.S.) 198. 17 L.R.A.(N.S.)

owns a complete waterworks system from which residents of the city are furnished water at a charge or rental authorized by ordinance and certain rules and regulations of the board of water commissioners, and, at the time of the sale and conveyance of the lot to appellee by the Trumpet Milling Company, there was due the city of Covington from that company or former tenants of the premises \$49.75 for water furnished by the city and consumed by it or them. This indebtedness was not known to appellee when the property was sold and conveyed him. After its conveyance to him, he applied to the city of Covington and its board of water commissioners for a permit to use the water in and for the building on the lot in question as used by other consumers of water, and at the same time tendered to the board of water commissioners in advance the amount of money necessary to pay the water rent for the period covered by the requested permit, but they peremptorily refused to accept the money tendered them by appellee, or to grant him permission to use the water in his building for the time requested, or at all, unless he would first pay the \$49.75 water rent owing by the delinquent former tenants of his vendor. This appellee refused to do, and immediately thereafter brought this action in the Kenton circuit court against the city of Covington and its board of water commissioners to compel it and them to grant him for the time requested, and for which he offered to pay, the use of the water for his building, which would be and is useless without water supplied from the waterworks system of the city. The foregoing facts were properly set forth by the petition and a mandatory injunction prayed to enforce appellee's right to the use of the water as claimed. The petition also made the Trumpet Milling Company, appellee's vendor, a defendant, and asked judgment against it for the \$49.75 due the city of Covington from it or its former tenants, if the circuit court should adjudge that appellee would have to pay that sum to the city in order to obtain water for his own use; it being alleged in the petition that, if appellee should sustain a loss on that account, he would be entitled to recover such loss against the vendor, as for a breach of the warranty contained in the deed of the latter to him. Appellant city of Covington, and its board of water commissioners, filed a general demurrer to the petition, which the circuit court overruled, and, as appellants refused to plead further, and elected to stand upon the demurrer, that court, by the judgment rendered, declared appellee entitled to the use of water, for the time demanded, without regard to the water rents due appellants from

his vendor, or tenants of the property while owned by his vendor, and granted the mandatory injunction requiring appellants to furnish water for the use of his building on Fifth and Craig streets in the city of Covington for the period requested by him, upon such terms and conditions as are customary under the rules and regulations of the board of water commissioners. Appellants complain of the judgment; hence this appeal.

The only question presented by the appeal is whether appellee, in order to obtain water from the city of Covington for use in his building in that city, should be compelled to pay water rents owing the city by his vendor or former occupants of the building, for water furnished them for use therein before the property was purchased by and conveyed to appellee. Covington is a city of the second class, and § 3143, Ky. Stat. 1903, applicable to cities of that class, provides: "In such cities of the second class as now own a waterworks system, there shall be a board to be styled the 'commissioners of waterworks.' . . . Said commissioners shall control and manage the waterworks and water system of the city, subject to such regulations and limitations as the general council may, by ordinance, provide. . . ."

The attempted exercise of authority on the part of the board of waterworks commissioners of which appellee complained was asserted under and by virtue of § 1063, "Hall's Ordinances of the City of Covington," which provides: "All water rents on the assessment plan are due and payable at the waterworks office, semiannually in advance, from the 1st to 15th of April and October of each year. In case the same is not paid when due, the water will be turned off until all back rents are paid and \$1 for turning the water off and on. All water rents by meter measure shall be collected quarterly in advance, viz. January, April, July, and October, of each year. Upon failure to pay the same, after fifteen days from date of notice, water will be turned off and \$1 penalty will be added." Appellee's application was for the use of water by meter measure. As the facts stated in the petition are confessed by the demurrer, it is admitted by appellants that the water rent in arrears accrued while the building on which it is claimed was owned by appellee's vendor; that it is an indebtedness of the vendor or its tenants, former occupants of the building; that appellee's application for water was in due form; and that he tendered payment in advance of the water rent in conformity to the provisions of the ordinance *supra*.

It is contended by appellants that the rule adopted by the water commissioners, viz., that, whenever there is a delinquent

water bill against any property, the water will not again be turned on for the use of such property, even though the title shall have been conveyed to an innocent purchaser, or possession of the property taken by a new tenant, until the water rent in arrears and owing by the former owner or tenant shall have been paid, is permitted by the ordinance in question, and that it is a reasonable rule necessary to the maintenance of the city's waterworks system. In other words, it is asserted that the water rent is a debt or demand against the building to which the water was furnished, for which reason a change of ownership or in the possession of the property cannot interfere with the right of the water commissioners to refuse further use of water to the building until all past-due water rents, no matter by whom owing, are paid. We think the foregoing contention is based upon an erroneous hypothesis. It assumes that the "building" in which water was furnished appellee's vendor or his tenants owes, or is liable for, the water rent in controversy. As a matter of law and of fact, this is not true. The building could not contract for the water. It was contracted for and used by the former owner or occupants of the building. Liability for the water rent, therefore, rests upon the person or persons to whom the water was furnished, and does not attach to the building or lot; indeed, such liability could not attach to, or be placed upon, the building or lot without express authority derived from some legislative enactment, which has not been shown to exist and is not claimed in this case.

The claim for water rent asserted by appellants is not on the footing of a lien for street or alley construction, which attaches to the realty bordering on the street or alley constructed. In such case the lien is expressly given by statute, and, by the same authority, may be enforced by a sale of the realty for such part of the cost of the street or alley improvement as may be apportioned to it. This is allowed because of the enhanced value given such property by the construction of the street or alley. But, in the absence of statutory authority to that effect, no such lien can be asserted by a city or its board of water commissioners against a lot or building whose owner or occupant fails to pay water rent, and, even if statutory authority were not wanting, ordinance 1063 gives no such lien. If the contention of appellants is sound, it would necessarily follow that every delinquent water bill would become an unrecorded lien upon property where the water was used, from the time it should have been paid, and, in the event of a sale of the property, the purchaser, however ignorant of such lien,

could be compelled to pay the water rent in arrears. We cannot give our assent to such a doctrine, as it is not consonant with reason or fair dealing. The ordinance in question confers upon the city the power to turn off the water if not paid for when the water rent is due, and, when once shut off, to refuse to turn it on until the water rent in arrears shall have been paid; but this power must be exercised against the delinquent person or persons to whom the water was furnished and the credit therefor extended, and cannot be employed against an innocent purchaser of property owned or occupied by such delinquent when the debt to the city for water was created. The purchaser of real estate takes title subject to all recorded liens against it, and also subject to any unrecorded valid liens of which he may receive notice before the purchase; but in this case no lien existed upon the property appellee purchased for water rent due the city. Its claim here asserted is owing by the former owner or occupants of the property, and no duty rested upon appellee, before purchasing it or accepting the deed thereto, to ascertain by inquiry at the office of the water commissioners, or elsewhere, whether or not his vendor, or any occupant of the premises, was owing the city water rents.

For the foregoing reasons, we are clearly of opinion that appellant city of Covington had no legal right to claim of appellee, or as against the property in question, the water rent in arrears, or to refuse to furnish him water for the use thereof according to the city's rules and regulations, because of his failure to pay it. It is manifest that the city's failure to collect the water rent from the persons owing it was due to the negligence of its water commissioners, for they had the right to demand and compel its payment in advance of the furnishing of the water. Having failed to avail itself of this sure means of protection afforded by its ordinance, the city cannot now secure itself against loss by forcing appellee to pay the water rent in controversy. The case of *Cox v. Cynthia*, 123 Ky. 363, 96 S. W. 456, cited by counsel, does not sustain appellants' contention. The question considered in that case was as to the validity of § 15 of the ordinance of the city of Cynthia, which provides: "Sec. 15. When water shall be supplied to one or more parties through a single tap, the bill of the whole supply furnished through such tap will be made to the owner of the estate. In case of nonpayment, the water will be shut off, notwithstanding one or more parties may have paid their proportion to such owner, or to any other party." The ordinance was properly held valid by this court, and its provisions declared reasonable. Manifestly 17 L.R.A. (N.S.)

neither the ordinance, nor the opinion construing it, has any bearing upon the question involved in the case before us.

The conclusions of the Circuit Court being in accord with those herein expressed, the judgment is affirmed.

UNITED STATES CIRCUIT COURT
OF APPEALS, FIFTH CIRCUIT.

SEA INSURANCE COMPANY OF LIVER-
POOL, ENGLAND, et al., Plffs. in Err.,
v.

VICKSBURG, SHREVEPORT, & PACIFIC
RAILWAY COMPANY.

(86 C. C. A. 544, 159 Fed. 676.)

Cotton compress — negligence — liability of owner.

An owner of cotton who leaves it with a compress company to be bailed is not chargeable with the latter's negligence which, combined with that of a railroad company, results in the destruction of the cotton by fire, so as to prevent him or the insurer of the cotton, who is subrogated to his rights, from holding the railroad company liable for the loss.

(February 25, 1908.)

Case Note. — Imputing negligence of bailee to bailor in action by the latter against third person for destruction of property.

Since the carriage of goods is generally classed as a contract of bailment different from the ordinary contract of bailment, and having peculiarities and governed by principles characteristic of the relation between carrier and consignor or consignee, cases which involve the recovery of damages for injury to goods while in the hands of a common carrier have been expressly excluded from this note.

The only case found supporting the conclusion reached in *SEA INS. CO. v. VICKSBURG, S. & P. R. CO.* that, in an action by the bailor, who is the owner, against a negligent third party for injury to the property bailed, the negligence of the bailee or his servants or agents is not imputable to such bailor, and will not prevent a recovery, is *New York, L. E. & W. R. CO. v. New Jersey Electric R. Co.* 60 N. J. L. 338, 43 L.R.A. 849, 38 Atl. 828, where it was held that the negligence of the servants of a bailee of a locomotive and cars was not imputable to the bailor, so as to prevent a recovery from an electric railway company whose servants, by the negligent running of one of its cars, contributed to the injury of the locomotive and cars. The court, in this case, said: "The bailee was bound to use reasonable care and diligence in the preservation of the property from injury. The defendant, in the operation of the electric car, was bound to exercise reasonable care

ERROR to the Circuit Court of the United States for the Western District of Louisiana to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent destruction of certain cotton. Reversed.

The facts are stated in the opinion.

Argued before Pardee, McCormick, and Shelby, Circuit Judges.

Messrs. A. A. Armistead and J. D. Wilkinson for plaintiffs in error.

Messrs. Harry H. Hall, E. H. Randolph, Frank P. Stubbs, and Frank P. Stubbs, Jr., for defendant in error.

Shelby, Circuit Judge, delivered the opinion of the court:

The plaintiffs, four insurance companies, sue the defendant railroad company for \$59,871.92, alleging that they had insured certain cotton at Arcadia, Louisiana, and that the insured property had been destroyed by fire resulting from sparks thrown out by defendant's locomotive; that this

in avoiding injury to the property of which the plaintiff was the owner. It would seem that the intervention of the negligence of the bailee could not shield the defendant from the injury caused by its own negligence. Both might have been selected as joint tort feorsors, or the action could be maintained against either. The conclusion reached is that the plaintiff had the right to sue either or both these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defense to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence, and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery."

On the other hand, the majority of cases have held that, if the bailee or his servant, through negligence, contributes to the injury of goods in his hands, such negligence is imputable to the bailor, so as to prevent a recovery by him from a third person whose negligence, combined with that of the bailee, caused, the injury.

Thus, in *Texas & P. R. Co. v. Tankersley*, 63 Tex. 57, where cotton which had been stored with the bailee was destroyed by fire caused by the joint negligence of the bailee and the railroad company, it was held that the negligence of the bailee was imputable to the owner, so as to prevent a recovery against the railroad for damages.

So, in *Illinois C. R. Co. v. Sims*, 77 Miss. 325, 49 L.R.A. 322, 27 So. 527, it was held that the negligence of a gratuitous bailee of a mule, while using the animal for the very purpose for which it was loaned, is imputable to the owner, so as to prevent recovery against a railroad company whose negligence, combined with that of the bailee, caused the mule's injury. The court, in 17 L.R.A. (N.S.)

occurred through the negligence of the defendant; that the plaintiffs had paid the owners of the cotton \$55,501.92, and, by the terms of the several policies, were subrogated to the rights of such owners and entitled to sue the defendant for reimbursement. Each of the policies contained a provision that, if the insurance company should claim that a fire was caused by the act or negligence of any person or corporation, the insurance company shall, on payment of the loss, be subrogated to the extent of such payment to the right to recover, by the assured, for the loss resulting therefrom; and such right shall be assigned to the insurance company on receiving such payment. The plaintiffs became subrogated by such payment to the rights of the owners of the cotton, and, in fact, the right of action was assigned in writing by the assured to the plaintiffs, the insurance companies, pursuant to this provision. The defendant railroad company answered the petition, denying the charge of negligence,

this case, said: "Acting within the scope of his employment, the negligence of the agent is imputed to his principal, that of the servant to his master, and that of a bailee for hire to the bailor. Why the contributory negligence of a gratuitous bailee, while using the property for the very purpose for which it was loaned, should not be imputed to the bailor who intrusted it to the bailee to be thus used, we are unable to see. There is the same privity of contract in all essential features, as in bailment for hire, and as in engagements between principal and agent and between master and servant. This view is re-enforced by the consideration of another question, *viz.*: Could a gratuitous bailee, who was guilty of contributory negligence, recover in his own name against a stranger for an injury to property loaned? Certainly not, for the defense to his complaint would be upon the service. But the bailor and the bailee must recover, if at all, on the same facts, and under the same circumstances. . . . Whatever entitles to a recovery entitles either bailor or bailee to such recovery. *E converso*, whatever forbids a recovery to the bailee will also defeat the bailor's action."

To the same effect is *Welty v. Indianapolis & V. R. Co.* 105 Ind. 55, 4 N. E. 410, where the borrower of a horse, while drunk, rode on a railroad track, which, contrary to a statutory requirement, was unfenced.

This was also recognized in *Forks Twp. v. King*, 84 Pa. 230, where the negligence of a borrower of a horse without hire contributed to an accident on a defective highway, whereby the horse was killed.

For cases on imputed negligence of driver to passenger, see subject note to *Schultz v. Old Colony Street R. Co.* 8 L.R.A. (N.S.) 597.

and further pleaded the contributory negligence of the compress company, alleging that it permitted large quantities of loose cotton to be exposed on the platform where the fire occurred, and that it was guilty of the careless and reckless handling of the cotton.

The assured, to whom the policies issued on the cotton were payable, had placed the cotton in the possession of the compress company to be compressed. It is conceded in the printed arguments of both parties that the compress company held the cotton as bailee for the owners, the assured. Evidence was offered tending to show that the compress company was negligent in leaving quantities of loose or uncovered cotton on the platform, and in failing to put out the fire when it was discovered; and, on the other hand, there was evidence tending to show that the compress company exercised due care and was not negligent.

One of the questions that arose on the trial was whether or not the alleged negligence of the bailee, the compress company, could be imputed to the bailors, the assured, so as to defeat the right of the plaintiffs to recover. On this subject the learned trial judge charged the jury as follows: "As between the parties to this suit, the contributory negligence of a bailee of cotton, whereby it was consumed by fire proceeding from a railway engine, is imputed to the owners of the cotton. If you find that the plaintiff companies, through the fault of the compress company, for which it is chargeable, were guilty of contributory negligence in not with reasonable care looking after and protecting the cotton from such dangers as were known by or to the compress company's servants to be inherent in the physical conditions of the time and place, and you believe such contributory negligence was the proximate cause of the fire loss, you should find for the defendant."

An exception to this charge was duly reserved, and it is assigned as error.

The contention of the learned counsel for the defendant in error is that the compress company was the agent or bailee of the owners of the cotton, having full control of it, and "that the negligence of the compress company, as the agent or bailee, was necessarily to be imputed to the principals, the owners of the cotton." The contention is that the servants of the compress company, who received and handled the cotton, were the servants of the owners of the cotton, or, at least, that such relation exists between a bailee and bailor as to make the negligence of the former imputable to the

latter when the latter sues a third party to recover damages for the destruction of the subject of bailment by the negligence of such third party. This view was sustained by the circuit court, as shown by the charge quoted and several other parts of the judge's charge.

The record shows that the owners of the cotton delivered it to the compress company to have it compressed. The receipts given by the compress company to the owners when it was delivered are omitted from the printed record by agreement; but the record sufficiently shows that the compress company was to be, or was entitled to be, compensated for the work of compressing the cotton. The transaction clearly constituted a bailment, in which the bailee, the compress company, was to do work for the bailors, the owners of the cotton. In such case the obligations and duties of the bailor and bailee are mutual, but several; the obligations of the one being entirely different from those of the other. The obligations of the bailor are to pay the price or the compensation for the work to be done; to pay for new materials, if any are necessarily furnished; to do everything which he has agreed to do on his part to enable the bailee to exclude his engagement; and, finally, to accept the thing when the work is finished. The obligations on the part of the bailee are to do the work; to do it in the time agreed on; to do it well; and to exercise a proper degree of care and diligence about the work and for the safety of the property. Story, Bailments, 8th ed. §§ 425, 428. The bailee would unquestionably be liable to the bailor for injury to, or the destruction of, the property caused by the bailee's negligence. This is true, both under the common law and under the civil law. Id. § 414. Nor can there be any doubt that, in a case where the property held by the bailee was destroyed by the concurrent negligence and wrong of the bailee and a third person, the bailor could sue either or both of the wrongdoers; for it is settled, seemingly without dispute, that, if the concurrent or successive negligence of two persons results in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. 1 Thomp. Neg. § 75, and cases cited. The case at bar can be taken out of the control of this principle only by sustaining the contention that the bailors, the owners of the cotton, stand in the relation of principal or master to the bailee, the compress company. That such relation does not exist

is indicated by the fact that the duties and obligations of the bailor and bailee are totally different, and that the former has no control over the servants of the latter. In this case the bailee, being a corporation, can act only by and through its servants and agents. Clearly the bailor has no control over such servants and agents, and can neither select, employ, nor discharge them. The right of selection and control of the servant is the foundation of the general rule that makes the master liable for the acts of the servant while acting within the scope of his employment.

A plaintiff cannot recover damages for an injury to which he has directly contributed by his own negligence. If the plaintiff's own fault, whether of commission or omission, has materially contributed to the injury, the plaintiff is without remedy against one also in the wrong. The converse of this doctrine ought to follow as a necessary corollary,—that, when one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of someone towards whom he stands in the relation of principal or master has materially contributed to the injury. The bailor, we hold, is not the principal or master of the bailee. In *New York, L. E. & W. R. Co. v. New Jersey Electric R. Co.* 60 N. J. L. 338, 43 L.R.A. 849, 38 Atl. 828, and 61 N. J. L. 287, 43 L.R.A. 854, 41 Atl. 1116, it was held that, in an action by the bailor, who is the owner, against a negligent third party, for injury to the property bailed, the negligence of the bailee or his servants or agents is not imputable to such bailor, and will not prevent a recovery. This view seems to be sustained by reason and authority. 1 *Thomp. Neg.* §§ 499, 512; *Van Zile, Bailments & Carriers*, § 130; *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; *The Bernina*, L. R. 12 Prob. Div. 58, s. c. L. R. 13 App. Cas. 1.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

A petition for rehearing elicited the following *Per Curiam* response, handed down April 3, 1908:

A re-examination of the questions decided in this case, in the light of the exhaustive briefs filed by the defendant in error, satisfies us that our decision is correct.

The petition for rehearing is denied.
17 L.R.A. (N.S.)

MASSACHUSETTS SUPREME JUDICIAL COURT.

CATHERINE MCGOWAN

v.

PATRICK MONAHAN.

(199 Mass. 296, 85 N. E. 105.)

Evidence — implications.

1. That the owner of a tenement building placed, or caused to be placed, a mat at the outer door, may be found from the facts that it was in such place and was owned by him.

Landlord — common passageway — failure to light.

2. The lessee of a room in a tenement building cannot complain that the common passageways are not lighted in the nighttime in the absence of any agreement on the part of the landlord to light them.

Same — placing mats.

3. The placing of an ordinary mat on a narrow landing before the outer door of a tenement house, in a common passageway which is not to be lighted during the night, without warning to the tenants, is not negligence which will render the landlord liable to a tenant falling over it.

(June 16, 1908.)

EXCEPTIONS by plaintiff to a ruling of the Superior Court for Suffolk County directing a verdict in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Overruled.

The facts are stated in the opinion.

Messrs. Noble, Davis, & Stone, for plaintiff:

The fact that the defendant was the landlord, if it affects the rights of parties at all, serves to enlarge his duty rather than diminish it.

Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295.

The defendant, when he placed a movable obstruction within the hallway, took the chances of its being disturbed by others.

Lane v. Atlantic Works, 111 Mass. 136.

The case should have been submitted to the jury.

Toland v. Paine Furniture Co. 179 Mass. 501, 61 N. E. 52.

Messrs. John H. Casey, Nathaniel N. Jones, and Ernest Foss, for defendant:

A landlord must use due care to keep the common approaches and passageways in the same condition in which they were

Note. — As to liability of landlord for injuries sustained in a passageway used in common by the different tenants, see case note to *Siggins v. McGill*, 3 L.R.A. (N.S.) 316.

at the time of letting; but he is not bound to change the mode of construction.

Hall, Land. & T. p. 193; Woods v. Naumkeag Steam Cotton Co. 134 Mass. 357, 45 Am. Rep. 344; Quinn v. Perham, 151 Mass. 162, 23 N. E. 735; Freeman v. Hunnewell, 163 Mass. 210, 39 N. E. 1012; Lynch v. Swan, 167 Mass. 510, 46 N. E. 51; Andrews v. Williamson, 193 Mass. 92, 118 Am. St. Rep. 452, 78 N. E. 737.

So far as the dimness of the light, or the absence of artificial light, in the hallway, contributed to the accident, the defendant is not liable.

Jones, Land. & T. § 619; Gleason v. Boehm, 58 N. J. L. 475, 32 L.R.A. 645, 34 Atl. 886; Dean v. Murphy, 169 Mass. 413, 48 N. E. 283; Jordan v. Sullivan, 181 Mass. 348, 63 N. E. 909.

The plaintiff has failed to sustain her burden of proving either that the defendant placed the mat there, or that he had actual knowledge of its position, or that he was negligent in failing to discover its existence or its displacement, and removing or replacing it.

Watkins v. Goodall, 138 Mass. 533; Handyside v. Powers, 145 Mass. 123, 13 N. E. 462; 18 Am. & Eng. Enc. Law, 2d ed. p. 222; Lindsey v. Leighton, 150 Mass. 285, 15 Am. St. Rep. 199, 22 N. E. 901; Lynch v. Swan, 167 Mass. 510, 46 N. E. 51; Toland v. Paine Furniture Co. 175 Mass. 476, 56 N. E. 608; Henkel v. Murr, 31 Hun, 28; Palmer v. Dearing, 93 N. Y. 7; Peil v. Reinhart, 127 N. Y. 381, 12 L.R.A. 843, 27 N. E. 1077; Dollard v. Roberts, 130 N. Y. 269, 14 L.R.A. 238, 29 N. E. 104; Idel v. Mitchell, 158 N. Y. 134, 52 N. E. 740; Boss v. Jarulowsky, 81 App. Div. 577, 81 N. Y. Supp. 400; Feinstein v. Jacobs, 15 Misc. 474, 37 N. Y. Supp. 345; Neyer v. Miller, 19 Jones & S. 519; Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 481.

Loring, J., delivered the opinion of the court:

The most that the jury were warranted in finding was that the plaintiff tripped and fell over an ordinary mat in front of the defendant's outer door as she was going down stairs in the dark hours of the morning, through the unlighted common passageway of the tenement house in question.

The plaintiff was the lessee of the tenement next above that occupied by the defendant. The defendant was the owner of the building and the plaintiff's landlord, as well as the occupant of the tenement next below that of the plaintiff.

It should be added that it could have been found that the mat had been put in front of the defendant's door the night before, without warning having been given of its pres-

ence, and that the space between the outer side of the mat and the balusters on the edge of the landing was not a wide one. How narrow it was, did not appear. Neither did it appear how the plaintiff happened to trip. All that appeared in addition was that the plaintiff was allowed to testify, without objection, that her daughter examined the mat immediately after the accident and said that it "was turned out of place."

We do not think that the ruling can be justified on the ground that there was no evidence that the defendant placed the mat, or caused it to be placed, in front of his outer door. The mat was spoken of by the plaintiff as the defendant's mat without objection on his part. The fact that it was his mat, coupled with the fact that it was in front of his outer door, warranted the finding that he put it there or caused it to be put there.

There was no evidence of an agreement on the part of the defendant to light the common passageways. In the absence of such an agreement the defendant's duty to the plaintiff consisted in keeping the common passageway in the condition it was in, or apparently in, at the date of the lease of the plaintiff's tenement to her. See, in this connection, Miles v. Janvrin, 196 Mass. 431, 13 L.R.A.(N.S.) 378, 82 N. E. 708; Andrews v. Williamson, 193 Mass. 92, 118 Am. St. Rep. 452, 78 N. E. 737; Miller v. Hancock [1893] 2 Q. B. 177. The plaintiff cannot complain that the passageway was dark at the time of the accident. Jordan v. Sullivan, 181 Mass. 348, 63 N. E. 909; Dean v. Murphy, 169 Mass. 413, 48 N. E. 283.

The case at bar therefore resolves itself into the question whether it is an act of negligence to put an ordinary mat before the outer door of a tenement, on a narrow landing which is part of a common passageway, where, by the terms of the contract under which the plaintiff used that common passageway, it was not to be lighted throughout the night. Placing a mat in a common passageway, before the outer door of a tenement leading out of it, is, as matter of common experience, usual and ordinary, and is a thing which all using the passageway must be taken to expect, and no warning is necessary when it is first done. In principle the question is not unlike that decided in Jennings v. Tompkins, 180 Mass. 302, 62 N. E. 265. The case of Toland v. Paine Furniture Co. 179 Mass. 501, 61 N. E. 52, is much relied on by the plaintiff; but there the plaintiff was invited on the defendant's premises on business. In such a case the defendant was bound to make them safe by lighting them properly, and there was evidence that they were not properly

lighted. Further, there was evidence in that case that the rubber mat over which the plaintiff tripped was curled up on the edge where she tripped, and nailed down on each side, making the place an unsafe one.

Exceptions overruled.

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA EX REL. ELLA
MAY NELSON
v.

LINCOLN MEDICAL COLLEGE et al.,
Appts.

(— Neb. —, 116 N. W. 294.)

Mandamus — student — duty to graduate.

1. A corporation organized under § 15, chap. 16 (§ 1949), Comp. Stat. 1907, is a private eleemosynary institution; and the duty cast by law upon its directors to graduate students who have complied with the regulations of said institution and taken its required course of study is a statutory duty to such an extent as to give the courts jurisdiction, in a proper case, to compel, by mandamus, the exercise of that function.

Medical college — graduation — rules.

2. Under the by-laws of the respondent corporation, the dean of the faculty of the college has the right, and it is his duty, to pass upon the standing of students applying for graduation; and his report to the board that a student has complied with the regulations of the college, and that said scholar has passed in all studies a grade entitling her to graduation, is equivalent to a recommendation of the faculty to the board of directors.

Same — refusal to graduate — mandamus.

3. When the dean has reported to the directors that a student has fulfilled all demands of the institution and has passed all examinations so as to entitle her to a diploma, and the board of directors arbitrarily and capriciously refuses to graduate the student and issue her diploma, it is the duty of the district court, upon proof of said facts, to issue a writ of mandamus to compel the college corporation and its directors to discharge their said duty.

Same — evidence.

4. Evidence in this case examined, and found to be sufficient to sustain the action of the district court.

(April 23, 1908.)

Headnotes by Root, C.

Note. — As to the right to mandamus to compel the issuance of a diploma, see case note to State ex rel. Burg v. Milwaukee Medical College, 3 L.R.A.(N.S.) 1115, 17 L.R.A.(N.S.)

A PPEAL by respondents from a judgment of the District Court for Lancaster County in relator's favor in a mandamus proceeding brought to compel the issuance of a diploma. Affirmed.

The facts are stated in the opinion.

Messrs. Strode & Strode and Tibbets & Anderson for appellants.

Messrs. Charles O. Whedon and James A. Brown, for appellee:

If discretionary power is exercised arbitrarily and with manifest injustice, or such discretion is abused, mandamus will afford a remedy.

Illinois State Dental Examiners v. People, 123 Ill. 227, 13 N. E. 201; People ex rel. Cecil v. Bellevue Hospital Medical College, 60 Hun, 107, 14 N. Y. Supp. 490, affirmed in 128 N. Y. 621, 28 N. E. 253; Keller v. Hewitt, 109 Cal. 146, 41 Pac. 871; Baltimore University v. Colton, 98 Md. 623, 64 L.R.A. 108, 57 Atl. 14; Jackson v. State, 57 Neb. 183, 42 L.R.A. 792, 77 N. W. 662; State ex rel. Sheibley v. School Dist. No. 1, 31 Neb. 552, 48 N. W. 393.

No adequate legal remedy existed, and, in view of the further fact that the writ lies to compel action and enforce the performance of pre-existing duties, mandamus was the proper and only adequate remedy.

State ex rel. Farmer v. Grand Island & W. C. R. Co. 27 Neb. 694, 43 N. W. 419; State ex rel. Lancaster County v. Chicago, B. & Q. R. Co. 29 Neb. 412, 45 N. W. 469.

Root, C., filed the following opinion:

Lincoln Medical College is a corporation organized under §§ 15 et seq., chap. 16, Comp. Stat. 1907. Its purpose is to prepare students for the practice of medicine and surgery, and it is affiliated with Cotner University. Its course of study is four years, and it maintains a faculty of nineteen members. The articles of incorporation provide for nine directors, and that the officers shall be a president, secretary, and treasurer to be chosen by the directors. The articles also state: "The board of directors shall establish such by-laws as they deem necessary for the governing of the business of the corporation, and shall have the power to prescribe the powers and duties of any officer of the corporation." The by-laws provide that a stockholder must be a duly elected member of the faculty, and in active work in the regular course of instruction; and that, upon severing his relation with the faculty, the stockholder shall return his stock to the corporation upon certain terms. The by-laws further provide for an executive board, consisting of the president, secretary, and treasurer, and that this board shall exercise all power of the board of directors, subject to a confirmation of its

acts at next regular monthly meeting thereof. It is further provided, in § 3, art. 8, of the by-laws: "The dean shall have general supervision over the members of the faculty, the methods of teaching, and the discipline of the school. He shall have the power to call the faculty together and, at all such meetings, he shall be the presiding officer. He shall pass on the standing of all students at the time of graduation, and also upon all applicants for advanced standing." Prior to June 7, 1906, the board of directors of the college consisted of but five members, and, during the period covered by the inquiry herein, the respondents Metheny, Ramey, and Wilmeth constituted the executive board. Dr. Keys, of Omaha, was dean of the school.

The relator is a married woman, and, in 1902, matriculated as a student at said college, and from thence continued in the various classes till commencement in 1906, when she insists she had completed the course prescribed for students in said college, and was entitled to be graduated and receive her diploma. The executive board determined, on June 3, 1906, she had not passed with the required grades in some studies, notably those presided over by respondents Wilmeth, Ramey, and Metheny, and that she, with three other students, including her husband, who also studied during the period she was a student at said school, should be "plucked." The five directors met June 5th, whereupon, in a discussion over the unfortunate students, Drs. Carriker and Keys, the latter being dean, suggested those students were qualified and should graduate. There is some difference as to just what was done at that meeting. Dr. Ramey and Dr. Metheny testified they offered to produce the examination papers of the students and argue the matter with the board, whereas Dr. Wilmeth insisted no one other than himself was competent to mark the answers to his questions. Upon taking a vote, four present voted to ratify the act of the executive board, and one, Dr. Carriker, voted against the proposition. The dean says he voted aye so he would be in position to move a reconsideration. Later relator requested her papers be returned to her, so she might know her grading, but this was refused. The faculty was not called together, nor did the dean pass on the standing of the plucked students, except as he insisted in a general way they were worthy and should be graduated. The directors had made a rule that in final examinations students must answer an average of 80 per cent of all questions propounded to them in the aggregate of the examinations, and not fall below 70 per cent in any one subject. This action was brought in mandamus to the district court against 17 L.R.A. (N.S.)

the corporation and Ramey, Metheny, and Wilmeth, praying the individual respondents be compelled to deliver to the relator her examination papers in order that it might be ascertained whether she had properly passed her examinations; and that, if the court should find it necessary to submit said papers to experts for examination, and if, on such examination and report, it should be found she had passed her examinations, and was entitled to be graduated, respondent corporation, by its proper officers, be required to issue to relator a diploma according to the practice in cases where students are graduated from said respondent. It was claimed by relator that she had taken the necessary work and had answered correctly 80 per cent of the questions propounded to her on final examinations. The corporation claimed, in its return to the writ, that relator had not paid her graduation fee nor pursued a four years' course of study; that she had been conditioned in various studies; that she had failed to pass in the subjects taught by at least four of the instructors; and that the board, in the exercise of its discretionary powers, had refused to graduate her. The individual respondents, in addition, in their return, claim they were without power to graduate relator until directed by a vote of the board of directors. A lengthy and patient hearing was given all parties by the learned trial judge, who held the respondents had acted arbitrarily and without authority in deciding relator was not entitled to graduate, and that said question should be determined by the dean, Dr. Keys, and directed him to forthwith pass upon relator's application for graduation and determine her rights in that respect, to report his findings to the board of directors and to the court; that, if he reported in favor of relator's graduation, the respondent corporation forthwith execute and deliver to relator her diploma certifying that she had graduated from said institution. This order was made June 5, 1906. Respondents, evidently anticipating the order of the court, on the 31st day of May, 1906, called a special meeting of the stockholders of the corporation for June 7th, and, at said time, elected respondent Wilmeth dean of the college, elected a board of directors of nine members, and submitted to Wilmeth relator's claim that she was entitled to be graduated. Whereupon Wilmeth found relator had not pursued a four years' course at the college; that she had been conditioned in her studies, and had failed to pass a grade of 70 in eight subjects on her final examinations; and recommended to the directors that she should not be graduated.

At that time Keys was still dean. He had

tendered to Cotner University his resignation as dean of the Medical School, to take effect later than June 7th; but this resignation had not been accepted, and had been recalled before Wilmeth's election. In conformity with the court's order, Dean Keys, June 6th, passed on relator's qualifications for graduation, and found she was entitled to graduate. Dean Keys made report to the court, and respondents filed supplemental answers, setting up their proceedings and the actions of Dr. Wilmeth while acting as dean. The court refused to pass on the regularity of Wilmeth's election, but found that Dr. Keys had been dean during all the time relator had been a student in respondent college, and was peculiarly fitted to pass on her qualifications; that the order of the court was directed to Dean Keys, and his action was conclusive, and thereupon granted a peremptory writ commanding the college and its proper officers to issue a diploma to relator.

1. It is insisted the record affirmatively discloses that relator did not attend the medical school, nor qualify therein, as required to entitle her to a diploma, and reference is made to the announcement of the college that the student must have attended four full courses of medical lectures, no two in any one year, completed three full courses in practical anatomy under direction of the demonstrator, dissected every part of the body, successfully passed the final examination, answering 80 per cent of all questions propounded, oral and written, and pay all fees, before she could be graduated; that the standing of each student will be determined by the professor or instructor in charge of the chair, and the grade made upon marks received during the session in oral quizzes, written quizzes, and final term examinations. It is claimed relator was absent from her classes from the middle of January, in her sophomore year, to the close of that year; that she failed to pass her examinations under Drs. Gray, Jester, Howard, Andrus, Spradling, Ramey, Metheny, and Wilmeth; and that she has not paid all her fees. The record discloses that the relator gave birth to a child during her attendance at college, and of necessity was absent a short time from all classes; that occasionally she would miss a lecture, but her attendance was much more sustained and continuous than other students. It was shown upon the trial that the football squad would not report till after Thanksgiving; that students were graduated who attended but two years; that one student was absent during one year 54 per cent of the time, another 40 per cent, others 50 per cent. Concerning the general scholarship, students had been passed who did not take all final

examinations, some had not taken intermediate examinations of various studies, and, in some instances, the board had marked up the grades from 40 reported to 75, so as to bring the students over the required passing grade to entitle them to graduate under the rules. While there is some question about the scholarship of relator in branches taught by Jester, Howard, and Spradling, much is cleared up, and the rock she encountered was the respondents Metheny, Ramey, and Wilmeth. All those gentlemen refused to permit relator or her attorney to inspect her papers, and refused to produce them in court until ordered to do so by the trial judge. It is claimed there was an unwritten law that a student should not receive back his papers, but, if he failed to grade, would receive that information, and, if he did grade, would be given the percentage. The rule was observed by most of the professors, but not by all of them. Dr. Wilmeth destroyed his papers some time after they were submitted to him, or, at least, they were disposed of in some manner, and therefore were not produced. There is one remarkable feature of his report to the executive board as to the standing of the four plucked students, and that is each one is given a grade of 68 per cent, just 2 per cent below passing, a remarkable coincidence. Ramey and Metheny produced their papers, after an order, by the trial court, and they had given relator 57 per cent and 47 per cent respectively. Physicians were called by relator and respondents, respectively, and, with practical unanimity, testified, according to the sides for which they were subpoenaed, that the markings were far too low, or just about correct. If one would believe the eminent professional gentlemen who testified for relator concerning the papers presented by Metheny and Ramey, she should have been credited thereon with 77 to 90 per cent. Dean Keys testified that on Metheny's examination she was entitled to a credit of 84 per cent, and on Ramey's of 77 per cent. Dr. Robinson testified relator was entitled to 94 per cent on the Metheny papers. Dr. Somers, an eminent practitioner of Omaha and a member of the state medical board, testified he had examined relator's examination papers in Dr. Ramey's department, and that she was not entitled to a grade of over 56½ per cent thereon. One cannot read the record without concluding, as did the trial judge, that a court could not well fix, from the conflicting testimony, the grade earned by relator in taking her examinations before Drs. Ramey and Metheny, nor can one well escape the conviction that the action of respondents was arbitrary and capricious. Respondents dominated the school as absolutely as ever

Caesar did his empire. They constituted the executive board, and a majority of the board of directors, as constituted before June 7, 1906. Neither the statutes, nor the by-laws of the corporation, bound those gentlemen in their conduct.

The board of the college, under § 17, chap. 16, Comp. Stat. 1907, had "power to confer, on the recommendation of the faculty, all such degrees and honors as are conferred by colleges and universities of the United States, and such others, having reference to the course of study and the accomplishment of the student, as they may deem proper." That is, the board could grant degrees upon the recommendation of the faculty. Yet Dr. Metheny admits the faculty had never met as a body; that never, in the history of the college, had the faculty been convened to consider a student's qualifications to graduate. Dr. Ramey objected to members of the faculty coming to the executive board to influence their decision; said that, when they (executive board) made up their minds not to pass a student, the scholar should not be passed. Dr. Metheny says, referring to graduating scholars: "Yes, sir; we claim the right to do that, because it was business in the hands of the executive committee." He further said the members of the faculty were not given a vote on graduating a student. All the respondents claimed that each professor had the autocratic right to fix the grade on his examinations, and that no one had the right to interfere therewith. If respondents are right, a student may pay the college fees, all expense, and devote his entire energies for four years of study in respondent college, and if, upon final examination, he should incur the ill-will of one professor, that man could prevent the student from graduating or receiving his degree, and, if he had passed successfully every examination with a grade of 100 in each study, still this executive committee of three could preclude a graduation. This is neither the law of the land, nor of the institution. Respondents, with all their intellect and determination, while acting as directors, are but creatures of the corporation, exercising delegated power which finds its source in the laws of Nebraska and the articles of incorporation and by-laws of respondent college. The statute authorizes the selection of a board of not less than five, nor to exceed nine, directors, who have power to adopt by-laws and rules for the government of the artificial person. The articles of incorporation authorize the directors to adopt by-laws "for the governing of the business of the corporation," and that the directors should have full power to prescribe the powers and duties of the officers of the 17 L.R.A. (N.S.)

corporation. Acting under this grant of power, the board of directors, in the by-laws, created the office of dean, and gave the incumbent thereof the power to call the faculty together; and "he shall pass on the standing of all students at the time of graduation." Presumably the dean would be a man of superior attainments probably more generally learned than the occupant of any chair in the college, and a man of broad views, of judicial temperament, to whom finally all questions of moment should be submitted for decision. The dean would not come in contact with students in those branches of learning taught by most of the professors. He would not be colored with that prejudice that sometimes instinctively, and without any well-known reasons, is created between some individuals, so that, should any professor so far forget himself and his high calling as to unjustly discredit a student's work, the dean with propriety could pass upon that scholar's standing. The faculty of respondent has never as a body exercised this function of recommendation. Each member thereof has sent in his report, and action by the dean has been taken thereon. In making a recommendation for graduation, the members of the faculty do not exercise a corporate function; and there is nothing in the statute to prevent the adoption of a reasonable and orderly method of collecting the opinions of the professors, and, if necessary, of having those opinions reviewed by some competent and superior member, so that the recommendations may be crystallized into a recommendation upon which it will be the duty of the board of directors, in the name of the college, to act.

2. It is said mandamus is not the proper remedy; that relator has her action in damages or for a specific performance of her contract, and that the court cannot, by its writ of mandamus, control the exercise of a discretion vested in the board of directors. We held in *Moore v. State*, 71 Neb. 522, 115 Am. St. Rep. 605, 99 N. W. 249, that the application for a writ of mandamus is addressed to the sound judicial discretion of the court; that, after its issue, it is only in a clear case of abuse of discretion that the granting of the writ will be reversed. Did the trial court abuse its discretion in issuing the writ? Defendant is a private corporation of an eleemosynary character. *University of Maryland v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 74; *Board of Education v. Bakewell*, 122 Ill. 339, 10 N. E. 378. To encourage the dissemination of learning, individuals are permitted to incorporate under § 15, chap. 16, Comp. Stat. 1907. That corporation is authorized to receive and retain donations of property, and its

assets are exempt from taxation. The directors, upon recommendation of the faculty, are clothed with power to issue diplomas and grant degrees to the student, and, when they do so, they exercise a corporate power and perform a duty cast upon them by statute. The fact that the statute is not mandatory in its terms will not excuse the board from performing its duty to relator. *People ex rel. Otsego County Bank v. Otsego County*, 51 N. Y. 401. *Mandamus* will lie. *Merrill*, *Mandamus*, §§ 157, 158. In *State ex rel. Sheibley v. School Dist. No. 1*, 31 Neb. 553, 48 N. W. 393, we issued a peremptory writ of *mandamus*, after hearing, to compel the reinstatement of a pupil improperly excluded from the public schools. In *Jackson v. State*, 57 Neb. 183, 42 L.R.A. 792, 77 N. W. 662, we issued the writ commanding those in control of the State Normal School at Peru to admit a student to said school. *Vermillion v. State* (Neb.) 110 N. W. 736. In *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 3 L.R.A. (N.S.) 1115, 116 Am. St. Rep. 21, 106 N. W. 118, the court refused to issue the writ to compel the Milwaukee Medical College to make out and deliver to relator his diploma of graduation from said school. Mr. Justice Kerwin says: "The case made is clearly one of breach of contract, and the question arises whether *mandamus* will lie to compel a private corporation to perform its contract." The conclusion in that case was that the relator had ample remedy in an action for damages, or for the specific performance of his contract. We do not take the view of the Wisconsin court, and refuse to accept its judgment as precedent. We are of opinion that there is enough of statutory duty on the part of respondent to comply with relator's demand, to invest the court with jurisdiction to issue the writ. In *Baltimore University v. Colton*, 98 Md. 623, 64 L.R.A. 108, 57 Atl. 14, a *mandamus* was issued to reinstate relator as a student in the law department of the university. Mr. Justice Fowler stated in said case that an action for damages was not an adequate remedy, nor would specific performance lie, for the reason that *mandamus* was an adequate legal remedy. In *People ex rel. Cecil v. Bellevue Hospital Medical College*, 60 Hun, 107, 14 N. Y. Supp. 490, relator had completed his medical course, but had been arbitrarily refused permission to present himself for examination, or to receive the degree to which he was entitled. The general term reversed an order made at circuit denying the writ, and, in the court of appeals, the order of the general term was affirmed. 128 N. Y. 621, 28 N. E. 253. In *Keller v. Hewitt*, 109 Cal. 146, 41 Pac. 871, relator had applied for a gram-

mar-grade certificate entitling her to teach in the public schools. She took the examination, and passed all branches according to the rule established by the board, and was found to be a person of good moral character, yet the board refused her the certificate. The board was compelled by writ of *mandamus* to perform its plain duty. In the instant case the dean has settled relator's standing in respondent college and her scholarship so far as her right to a diploma is concerned, and, in refusing to do what the statute in effect requires it to do, respondent is declining to perform one of the very functions for which it was created.

The action of respondents *Wilmeth*, *Metheny*, and *Ramey* acting in conjunction with the greater number of the stockholders in selecting *Wilmeth* dean, after the interlocutory order directing *Keys* to pass upon relator's scholarship and examinations, is a plain attempt to evade the process and judgment of the court, and emphasizes the bias and prejudice of respondents towards relator, and their contempt for law and its enforcement. However, *Keys* had acted under the court's order and passed on relator's standing one day before the special election, and before the action of *Wilmeth* whereby he sought to embalm and perpetuate the actions of himself and associates. The judgment of the district court was not affected by the special election of June 7th, and the proceeding flowing therefrom. Respondents have been active at every stage of these proceedings in contesting relator's allegation that she had passed the final examinations, and took advantage of the court's order that the dean pass upon her scholarship by procuring *Metheny* to report adversely to her, so that we need not consider any possible misjoinder or nonjoinder of actions or parties at the commencement of this cause. Courts have maintained that a single writ would issue against all officers concerned in separate but co-operative steps taken in the attainment of one result. In *State ex rel. Byers v. Bailey*, 7 Iowa, 393, a writ was approved that commanded election officers to canvass a vote and to abstract and report it to the county judge and to the last-named officer to file the report and declare the result. *Merrill*, *Mandamus*, § 235. We cannot consider the claim that relator's graduation fee has not been paid, because respondents refused to act for the sole alleged reason that relator had not passed her final examinations, and will not be permitted now to shift their ground. *State ex rel. Seth Thomas Clock Co. v. Cass County*, 60 Neb. 566, 83 N. W. 733.

Upon the entire record, we are satisfied the learned trial judge did not abuse the

sound judicial discretion of the court in issuing the peremptory writ of mandamus, and we therefore recommend that his judgment be affirmed.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down November 6, 1908:

Two motions are on file in this case,—one for a rehearing and the other asking us to allow the respondent to open up the case, to appoint a referee, and take additional evidence in support of the defense interposed in the court below.

Treating of the second motion, we do not understand that any such practice as is here sought to be established ever has obtained in this court. It must be borne in mind that this action was commenced in the district court of Lancaster county, and was there tried and decided upon the evidence and under the issues there framed and presented for the consideration of that tribunal. The respondent, not being satisfied with the result of that trial, has brought the case here for review, and, while his appeal entitles him to a trial *de novo*, still such trial must be had upon the pleadings and the evidence presented to the district court and certified in the record brought here on appeal. This rule is well established, and is, without doubt, the correct practice. To allow new issues to be framed and additional evidence introduced in cases brought to this court for review would, in effect, destroy the strictly appellate character of the supreme court.

We are therefore of opinion that the second motion should be overruled. As to the motion for a rehearing, after examining the arguments, we are of the opinion that our former judgment is right, and the motions are therefore overruled.

NORTH CAROLINA SUPREME COURT.

R. L. GODWIN et al., Trustees, etc., of
E. F. Young, Bankrupt,
v.
MURCHISON NATIONAL BANK, Im-
pleaded, etc., Appt.

(145 N. C. 320, 59 S. E. 154.)

Bankruptcy — transfer — prior agreement.

1. The transfer of the proceeds of a sale of property, to be applied on a loan, al-
17 L.R.A.(N.S.)

though within four months of the institution of bankruptcy proceedings against the assignor, is not a voidable transfer if made in accordance with an agreement at the time of the loan, entered into more than four months before such proceedings, to transfer the proceeds when received, where a present equitable assignment was created by the agreement, with nothing but the transfer remaining to be done.

Assignment — in present.

2. An agreement, in consideration of a loan of money, to transfer to the lender the proceeds of a pending sale of real estate when received, constitutes a present equitable assignment of such proceeds.

(October 30, 1907.)

Case Note. — Voidability of transfer within four months' period, pursuant to executory agreement antedating that period.

In pursuing the inquiry presented by the question stated, it is necessary to consider three several questions. The first of these is the sufficiency of the antecedent agreement to establish a title or lien which would be considered valid in equity as between the parties. Unless such sufficiency is affirmatively determined, it is unnecessary to proceed to the consideration of the further questions, since, if the agreement is so imperfect as to be inoperative as a transfer of the property to which it relates, even in equity, there can be no question that the date of the actual transfer is the only one to be considered,—though the fact that the transfer was in pursuance of such an inoperative antecedent agreement may be taken into consideration as bearing upon the question whether the person benefited had, at the time of the actual transfer, reasonable cause to believe that a preference was thereby intended. Among the cases which appear to turn upon the disposition made of such first question, are *Re Sheridan*, 98 Fed. 406, 3 Am. Bankr. Rep. 554; *Re Wolf*, 122 Fed. 127; *Pollock v. Jones*, 61 C. C. A. 555, 124 Fed. 163; *Re Mandel*, 127 Fed. 863; *Vitzthum v. Large*, 162 Fed. 685; *Torrance v. Winfield Nat. Bank*, 66 Kan. 177, 71 Pac. 235; and *First Nat. Bank v. Johnson*, 68 Neb. 641, 94 N. W. 837,—all of which are hereinafter set out at length.

The second question is whether the date of the executory agreement, or the date of the actual transfer, should be considered in determining whether the alleged preferential transaction falls within the period of voidability established by the bankruptcy act. Such question has an intimate connection with one which has already been discussed in a case note in 9 L.R.A.(N.S.) 585, as to whether notice, actual or constructive, of a transfer not required to be recorded or registered, is necessary to start the four months' period relatively to preferences under § 60 of the bankruptcy act,—the necessity of deciding the former being depend-

APPEAL by the defendant bank from a judgment of the Superior Court for Harnett County in plaintiffs' favor in an action brought to reach assets of E. F. Young, bankrupt. Reversed.

Statement by Hoke, J.:

The action was brought by the trustees in the matter of E. F. Young, bankrupt, to recover the interest of the bankrupt's estate in \$4,500 of Norfolk city bonds, said interest amounting to \$3,150, as shown by the verdict, and under claim and allegation on the part of the trustees that the said bonds were transferred to defendant bank, under circumstances which made such transfer a voidable preference under the bankruptcy act, by reason of same having been made within four

months prior to the filing of petition in bankruptcy, etc. Defendant bank, admitting that a written assignment of the bonds and actual delivery of same had been made within the four months as alleged, claimed that such action was not a voidable preference, by reason of the fact that same was in pursuance of a valid and binding agreement entered into prior to the four months, and which gave to defendant an unimpeachable title to the property. It was shown that proceedings of involuntary bankruptcy in Re E. F. Young, followed by adjudication, were instituted on June 4, 1904; that the written assignment was made on February 9, 1904, delivery of bonds being made shortly thereafter, and within the four months as stated, and the alleged agreement was en-

ent upon the disposition made of the latter. As shown in the note referred to, there is a conflict of opinion as to whether or not the four months' period should be deemed to run from the time of notice thereof; and it will readily be observed that where the time of notice is held to mark the date when the transaction becomes effective as to creditors the question whether the fact that the transfer was in pursuance of an executory agreement antedating the four months' period will operate, by relation back to the date of such agreement, to remove such transfer from the zone of voidability, will become immaterial. Such a situation exists in *Re Klingaman*, 101 Fed. 691, 4 Am. Bankr. Rep. 254, and in *Long v. Farmers' State Bank*, 9 L.R.A.(N.S.) 585, 77 C. C. A. 538, 147 Fed. 360. In some instances it is not possible to determine which consideration determined the conclusion arrived at, both being touched upon in the decision. For example, see *Johnston v. Huff, A. & M. Co.* 66 C. C. A. 534, 133 Fed. 704, and *Mathews v. Hardt*, 79 App. Div. 570, 80 N. Y. Supp. 462, 9 Am. Bankr. Rep. 373. The question also, since the amendment of 1903, and prior to such amendment in those jurisdictions where the substance of such amendment had been imported into § 60 by judicial construction, becomes immaterial where the transfer is locally required to be recorded or registered. As to when the local law is deemed to require the registering or recording of a transfer, within the meaning of § 60a of the bankruptcy act of 1898, as amended by the act of 1903, see case note to *First Nat. Bank v. Connett*, 5 L.R.A.(N.S.) 148.

In some cases, of which *Re Ronk*, 111 Fed. 154; *Re Dismal Swamp Contracting Co.* 135 Fed. 415; *Morgan v. First Nat. Bank*, 76 C. C. A. 236, 145 Fed. 466; and *Re Great Western Mfg. Co.* 81 C. C. A. 341, 152 Fed. 123, hereinafter set out at length,—may be cited as examples, the courts, in basing their decisions upon their determination of such second question, seem either to have assumed the existence of other necessary elements of a voidable preferential transfer, or to have overlooked

the necessity of ascertaining their existence. But, even though a transfer made in accordance with an antecedent agreement is to be deemed, by virtue of the express provisions of the statute, or the construction placed thereon, to fall within the four months' period, it is nevertheless not vulnerable unless "the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference" (§ 60b, 30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 344).

This involves the necessity of determining the third question, which is, whether the rights of the transferee shall be determined according to the situation existing at the date of the executory agreement, or according to that existing at the date of the actual transfer. The question being distinct from the one last above referred to, it is conceivable that a transaction may be held to fall within the zone of voidability, and nevertheless be characterized as non-preferential, according to the situation existing at the date of the executory agreement, although it would have been deemed preferential if considered with reference to the creditor's knowledge of conditions acquired prior to the actual transfer. An instance in which such a situation appears to have existed, may be found in the case of *First Nat. Bank v. Haire*, 36 Iowa, 443, hereinafter set out.

The scope of this note is intended to be limited to cases strictly within its title, and does not comprehend cases as to the effect of taking possession under an instrument required to be, but which in fact has not been, recorded or registered. It has, however, been deemed proper to include cases as to the effect of taking possession of after-acquired property covered by an instrument duly registered or recorded, but which does not become operative as to such property, as against third parties, until possession taken. And, since the fundamental element of the question stated is presented wherever the contention that a

tered into on December 9, 1903, prior to four months. At that time the bonds in question had not been obtained or received by the bankrupt, but were to be turned over to him on payment of some real estate which the bankrupt had theretofore sold to Charles W. Priddy, Incorporated, of Norfolk, Virginia.

On the trial, issues were submitted and responded to by the jury, and judgment had thereon as follows:

(1) In what amount, if any, was E. F. Young indebted to defendant bank, February 9, 1904, by reason of indorsement or otherwise?

A. Thirty-four thousand dollars.

(2) Did E. F. Young, within the period of

four months immediately preceding June 4, 1904, transfer by writing to the defendant bank the \$4,500 Norfolk city bonds, and, if so, what was the cash value of same?

A. Yes, \$4,400.

(3) Was the said E. F. Young insolvent on February 9, 1904, and did he so continue up to and including June 4, 1904?

A. Yes.

(4) Did the defendant or its agents, at the time of the transfer of the \$4,500 Norfolk city bonds as alleged in the complaint, have reasonable cause to believe that such transfer was intended as a preference to the defendant bank by said E. F. Young?

A. Yes.

(5) Did the defendant E. F. Young in December, 1903, agree verbally with the de-

transfer is of a preferential character is involved, cases have been included where the ultimate question was whether the transfer was an act of bankruptcy, so as to warrant the institution of insolvency proceedings under § 3, as well as cases where the ultimate question was as to the allowance of the claim of a creditor seeking to establish it without surrendering an alleged preference, as required by § 57.

Decisions under the act of 1898.

While all courts seem to agree that no weight is to be given to an executory agreement which is not sufficient to establish a present equitable lien on the property in controversy as between the parties themselves, there are, in other respects, marked differences of opinion upon the question under discussion, which seem in part attributable to considerations hereinbefore discussed, but which are more often explicable by the influences exerted in each case by the subjacent equities of the creditors. An example of this may be found in *Re J. F. Grandy & Son*, 146 Fed. 318, where stress was laid on the fact that life-insurance policies, the right to which was therein in controversy, were not property actually and visibly in the possession of the bankrupt, tending to give him credit and enabling him to buy goods and obtain loans from other creditors.

The fact that considerations of this sort appear to have influenced the courts has prompted an arrangement of cases with reference to the nature of the transaction, rather than with reference to the disposition made of the question under discussion.

—mortgages and pledges generally.

In *Sabin v. Camp*, 98 Fed. 974, 3 Am. Bankr. Rep. 578, it was held that, where it was agreed that one who furnished money with which certain property was acquired should, upon default in payment, be given the possession of the premises as security, with the option to buy all the property at a specified price, part of the purchase price to be the sums of money so loaned and un-

paid, such person, who had exercised such option, was not liable to the borrower's trustee in bankruptcy for the amount of the purchase price of the property, although the transfer of the property took place within four months preceding the filing of the petition, since what was done was in pursuance of the pre-existing contract.

In *Re Arkonia Fabric Mfg. Co.* 151 Fed. 914, it was said that, if the facts as found had sustained the contention that the bill of sale in question was made in pursuance of an agreement, at the time of the making of a loan, to give security therefor, such an agreement might have been enforced under the ruling of the court in *Sabin v. Camp*, supra.

In *Murray v. Beal*, 23 Utah, 548, 65 Pac. 726, it was held that a conveyance made within four months of the filing of a petition in bankruptcy, in pursuance of a prior agreement, made at the time of obtaining a loan, to execute such deed as a security therefor, was valid.

On the other hand, in *Re Sheridan*, 98 Fed. 406, 3 Am. Bankr. Rep. 554, it was held that where, under the facts proved, a pledge of goods was not completed until a few days before the filing of a petition in bankruptcy, though in pursuance of a prior agreement to pledge, the transfer created a preference in violation of the bankruptcy act.

In *Re Ronk*, 111 Fed. 154, it was held that a verbal agreement at the time a loan was made, to execute a chattel mortgage as security therefor, did not constitute such a claim or lien as to render a mortgage thereafter executed, within four months prior to bankruptcy, a valid preferential security, where, had such mortgage been actually executed at the time the loan was made, it would, by the laws of the state, if unrecorded, have been invalid as against creditors; and that therefore such mortgage could not be recognized, to the extent of sums advanced prior to its execution, as a valid lien.

In *Pollock v. Jones*, 61 C. C. A. 555, 124 Fed. 163, it was held that a chattel mort-

defendant to transfer to said bank the Norfolk city bonds of \$4,500, if said defendant bank would loan the said E. F. Young for Merchants' & Farmers' Bank \$10,000, and the South Dunn Manufacturing Company \$10,000; and did the defendant bank make said loans as agreed?

A. Yes.

(6) Did E. F. Young, in furtherance of the agreement of December, 1903, execute the paper writing of February 9, 1904?

A. Yes.

(7) Did the transfer of the \$4,500 Norfolk city bonds to defendant bank enable the defendant bank to obtain a greater percentage of its debt against E. F. Young than other creditors in the same class as the bank obtain?

A. Yes.

(8) What interest did E. F. Young have

in the \$4,400 received by the defendant bank from a sale of the Norfolk city bonds?

A. Three thousand one hundred and fifty dollars, with interest from March 1, 1904, at 6 per cent.

It having been admitted of record that petition in bankruptcy was duly filed against said E. F. Young on the 4th day of June, 1904, and that subsequently he was duly adjudged a bankrupt, and that the plaintiffs are the duly chosen, qualified, and now acting trustees of said Young in bankruptcy, and that the defendant is a duly chartered, organized, and existing banking institution under the laws of the United States, now, upon motion of the counsel for plaintiffs, it is considered, ordered, and adjudged that the plaintiffs in this action, R. L. Godwin, J. D. Barnes, and J. M. Hodges, trustees, do recover of the defendant in this action, the

gage given within four months prior to bankruptcy did not constitute a valid lien, although made in accordance with a prior promise to give security, which, not expressing in terms the character and subject-matter of the security, could not create either an equitable or legal mortgage.

In *Re Dismal Swamp Contracting Co.* 135 Fed. 415, it was held that an agreement made at the time when a loan was obtained, to give the lender security upon property to be purchased, would not render valid a trust deed given pursuant thereto within four months of bankruptcy, so as to permit its allowance as a valid preferential claim,—especially where the trust deed in question would not, as against creditors, have constituted a lien until duly recorded. The court said: "Once let it be understood that conveyances made within four months of bankruptcy can be successfully attacked, while those made in pursuance of a pre-existing bona fide agreement will be upheld, and the entire policy of the bankrupt law, in so far as it undertakes to specify the time within which preferences can and cannot be assailed, will be frustrated and destroyed. The door for fraud would be left wide open, and creditors would never know when they were safe in dealing with the estates of their debtors. A condition, alike destructive of the interests of creditors and bankrupts, would be brought about, and a harvest for dishonest debtors afforded. The debtors knowing the circumstances under which they make the preferences, their general creditors to be affected thereby would be entirely at their mercy."

In *Morgan v. First Nat. Bank*, 76 C. C. A. 236, 145 Fed. 466, it was held that a trust deed could not be considered as relating back and becoming effective as of the date of the contract providing for its execution, in order to sustain it as against creditors as to whom it would have been ineffectual unless recorded.

In *Re Great Western Mfg. Co.* 81 C. C. A. 341, 152 Fed. 123, it was held that a mort-

gage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise would constitute a voidable preference, is not deprived of that character or made valid by the fact that it was executed in the performance of a contract to do so, made more than four months before the filing of the petition, the court arguing that, since the theory and purpose of the bankruptcy act are to distribute the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy, share and share alike, among his creditors of the same class, a just and fair interpretation and execution of the act demands that a mortgage or transfer within four months, in pursuance of an agreement which of itself does not transfer title, should be adjudged voidable if it is otherwise so, and the mortgagee or transferee remitted to his original agreement. In this case, it should be noted, the state statutes regarding the filing and recording of mortgages and transfers were expressly held not to affect the disposition of the question involved.

—mortgages covering after-acquired property.

Where, by the law of the state, a chattel mortgagee, upon taking possession of after-acquired property, thereby secures a lien thereon which relates back to the date of the mortgage, prior to the claims of general creditors, the enforcement of such inchoate lien by taking possession of after-acquired property covered by the mortgage, with the mortgagor's consent after condition broken, as authorized by the mortgage, without fraud, but with knowledge of the mortgagor's insolvency and contemplated bankruptcy, and with the intent to make the lien available for the payment of the mortgage debt before other complications by way of attachment or bankruptcy should arise, does not amount to a preference voidable by the trustee in bankruptcy, although such action

Murchison National Bank, the sum of \$3,150 and interest on that sum from March 1, 1904, and the cost of this action to be taxed by the clerk of this court. E. B. Jones, Judge Presiding.

Thereupon defendant bank excepted and appealed.

Messrs. E. K. Bryan and Shepherd & Shepherd for appellant.

Messrs. Goodwin & Davis, D. H. McLean, and R. L. Godwin for appellees.

Hoke, J., delivered the opinion of the court:

The verdict of the jury on the fifth and sixth issues was as follows:

(5) Did the defendant E. F. Young, in December, 1903, agree verbally with the defendant bank to transfer to said bank the

was taken within four months of the filing of the petition in bankruptcy, where the mortgage was executed before that time. *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; *Re Rogers*, 132 Fed. 560; *Fisher v. Zollinger*, 79 C. C. A. 76, 149 Fed. 54.

A contrary conclusion, reached in *Re Ball*, 123 Fed. 164, is superseded by the later decisions above cited.

According to *Fisher v. Zollinger*, supra, the force of the decision in *Thompson v. Fairbanks*, supra, as an authority, was not destroyed by the amendment of February 5, 1903, of § 60a, such amendment bearing only upon the matter of liens claimed under unrecorded transfers required by the law of the state where made, to be recorded, and therefore not affecting questions relating to mortgages covering after-acquired property which have been duly recorded.

But where a chattel mortgage purporting in terms to cover after-acquired personal property not in existence is held not to be good at law as against subsequent creditors of the mortgagor, although a court of equity might give effect to it as between the parties thereto, the taking possession of such after-acquired property will not give the mortgagee a right thereto as against the mortgagor's trustee in bankruptcy. *Zartman v. First Nat. Bank*, 189 N. Y. 267, 12 L.R.A. (N.S.) 1083, 82 N. E. 127.

—assignments of policies of insurance.

In *Re Little River Lumber Co.* 92 Fed. 585, it was held that the receipt, within four months, of the proceeds of fire-insurance policies pledged as collateral security more than four months before the date of bankruptcy, was not a preference which must be surrendered as a condition precedent to proving a claim against the bankrupt.

In *McDonald v. Daskam*, 53 C. C. A. 554, 116 Fed. 276, it was held that, where an equitable lien was created by a parol agree-

Norfolk city bonds of \$4,500, if said defendant bank would loan the said E. F. Young for Merchants' and Farmers' Bank \$10,000, and the South Dunn Manufacturing Company \$10,000; and did the defendant bank make said loans as agreed?

A. Yes.

(6) Did E. F. Young, in furtherance of the agreement of December, 1903; execute the paper writing of February 9, 1904?

A. Yes.

And the paper writing referred to and established by the sixth issue and the response thereto contains the following recital as to the agreement between defendant bank and E. F. Young, of date December, 1903, and more than four months prior to the institution of the proceedings in bankruptcy: "Witnesseth, that, whereas, the Merchants' & Farmers' Bank of Dunn, North Carolina,

ment, upon the obtaining by a mortgagor of a loan from a bank for which the mortgagee was to become surety, that the mortgage, together with the insurance on the mortgaged property, would be given as collateral security, the fact that the policies were not actually delivered to the bank until within four months of the borrower's bankruptcy did not render the transfer void as an unlawful preference, actual delivery and possession of the policies not being indispensable to the equitable lien, which dated from the agreement, and not from the delivery of the policies.

In *Wilder v. Watts*, 138 Fed. 426, it was held that the actual assignment of policies of insurance after a loss had occurred, in accordance with an agreement with the lender of many to insure the stock of goods to be purchased therewith, as security for the loan, which thereby created an equitable lien upon the money due on the policies of insurance, was not the giving of a preference which would amount to an act of bankruptcy.

In *Re J. F. Grandy & Son*, 146 Fed. 318, it was held that, where a husband, more than four months before bankruptcy, agreed to assign to his wife certain life-insurance policies in consideration of her relinquishing her dower interest in property which he desired to transfer as security for a loan, the fact that he neglected to execute a formal assignment until shortly before the filing of a petition in voluntary bankruptcy did not render the transfer void as a preference. The court, after reviewing a number of decisions in which a contrary conclusion was reached, and distinguishing them upon the ground of an intent, therein shown, to mislead subsequent creditors, or upon the ground that the agreement in question was not sufficient to create an equitable lien upon specific property, said: "In nearly all of them the lien sought to be established is upon property actually and visibly in the possession of the bankrupt,—a possession which tends to give the bank-

is indebted to the Murchison National Bank of Wilmington, North Carolina, in a large sum of money which was loaned to the Merchants' & Farmers' Bank and the South Dunn Manufacturing Company, at the request of the party of the first part; and, whereas, at the time of said loans, the party of the first part agreed with the said Murchison National Bank that, if it would make said loans, that the party of the first part had sold three brick stores in the town of Dunn, North Carolina, to one Charles W. Priddy, Incorporated, of Norfolk, Virginia, and that the deed of said stores was to be made when the abstracts of title for said stores had been approved by said Priddy (incorporated), and the purchase money was paid, and it was agreed by the said parties

hereto that, if the said Murchison bank would make said loans, the party of the first part would pay over the money derived from said sale, to wit, the sum of \$4,500.00. to the party of the second part on account of the indebtedness then created to the said party of the second part; and, whereas, there has been more delay in consummating said sale than was anticipated, and the said party of the first part is desirous of carrying out said agreement: Now, therefore, in consideration of the premises, the said party of the first part doth hereby transfer and assign, sell, and convey, to the said party of the second part, all his right, title, interest, and estate in the three stores bargained to Priddy Company, Limited, and the purchase price thereof when same is received on the consum-

rupt credit, and enables him to buy goods or obtain loans from other creditors. In some of them the alleged liens are, in terms, declared invalid by the recording laws of the several states. In some, the precise property claimed to be covered by the lien is incapable of identification. They are in the nature of secret liens, which are as obnoxious in equity as in law. If they were allowed, as is well observed by Judge Waddill in the case already cited, 'the door for fraud would be left wide open, and creditors would never know when they were safe in dealing with the estates of their debtors;' and, as is said by Judge Baker, 'it would be a standing invitation to perjury, and would defeat the declared policy and purpose of our state legislation as well as the policy and purpose of the bankrupt act.' I am in entire accord with the views thus expressed, and believe that all of these cases were correctly decided; but it does not seem to me that the facts upon which those decisions rest have any analogy to Grandy's Case. If Grandy had borrowed money from his wife, and agreed to give her a lien upon property of which he was in possession, and, in remaining in possession and treating the property as his own, obtained credit upon the faith of his title to it, such secret lien would be abhorrent to equity, and invalid under the bankrupt act; but such is not the case here. He obtained from Mrs. Grandy her renunciation of dower for valuable consideration, upon the absolute promise that he would assign to her these policies of insurance, the cash value of which, as admitted by the testimony, was about the same as the value of her dower interest. The contract was absolute. He was not insolvent at the time, and there was no question as to the good faith of the transaction. There is no statute which requires the recording of a transfer of this character, nor was a written agreement necessary. A parol agreement, if properly proved, would be enforceable in equity. His interest in these policies was in the nature of a chose in action. There is no proof that any of the creditors knew of the existence of these policies of insurance. They were 17 L.R.A. (N.S.)

not assets or property the possession of which tended to enhance his credit. No creditor can fairly claim that he extended credit to him by reason of his supposed title to, or possession of, these policies, or that the failure to make the formal assignment was with a view of hindering, delaying, or defrauding creditors. Mrs. Grandy's right and title to these policies accrued at the moment when she signed her renunciation of dower, which was the consideration paid. Equity from that date would have compelled the execution of such formal papers as were necessary to enable her to obtain her own, and in such circumstances the date of the formal assignment does not seem to me material."

—miscellaneous.

In *Re Wolf*, 122 Fed. 127, it was held that the note of the bankrupt debtor could not be treated as the giving of a preference, but that the transaction must be predicated as of the date when the payment of the note was made.

In *Re Mandel*, 127 Fed. 863 (affirmed without opinion in 68 C. C. A. 546, 135 Fed. 1021), it was held that, where the bankrupt had assigned accounts receivable to a bank, which made loans thereon to an amount less than their face, under a prior agreement that any surplus collected on such accounts should be applied on any other indebtedness which might at the time be due the bank, the date of the assignment of the various accounts, and not of the agreement, is to be considered in determining the character of the application of such surplus as a preference.

In *Johnston v. Huff, A. & M. Co.* 66 C. C. A. 534, 133 Fed. 704, it was held that, where a contractor had given his creditor an order on his principal for any sums due him, with the understanding that it should not be presented unless the debtor should fail to keep up his payments, and such order was not presented until the day before the filing of a petition in bankruptcy, the transfer was to be regarded as of the date when the order was made effective by being presented.

mation of the sale." There is no allegation of fraud in the transaction between these parties in December, nor that the same was had with any intent to evade the general policy or express provisions of the bankruptcy act. This being true, on the facts established by these two findings, the court is of opinion that, for a present cash consideration then passing, a claim was created in favor of defendant, to these bonds, the purchase price of the property referred to in the agreement, which attached as soon as they passed in consideration for the sale, good against the bankrupt himself, and enforceable in equity against the plaintiffs holding the estate as trustees under the bankruptcy proceedings; and there is nothing in the verdict on the other issues which

destroys or impairs the force and effect of this position, the word "transfer" in the fourth issue evidently having the same significance as in the fifth.

It is accepted doctrine that, as a general proposition, the trustee in bankruptcy is vested with no better right or title to the property than the bankrupt had when the trustee's title accrued; and, unless in contravention of some established principle of law or public policy, or some express provision of the bankruptcy act, a claim valid against the bankrupt will be upheld against his trustee. *York Mfg. Co. v. Cassell*, 201 U. S. 344-352, 50 L. ed. 782-785, 26 Sup. Ct. Rep. 481; *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; *Smith v. Godwin*, 145 N. C. 242, 58 S. E.

In *Re W. W. Mills Co.* 162 Fed. 42, it was held that the character of the assignment of notes and a mortgage by a corporation, within four months of bankruptcy, as a preference, is not affected by the fact that it was a ratification of a prior invalid transfer made by an officer thereof before the four months period.

In *Vitzthum v. Large*, 162 Fed. 685, it was held that the transfer of property within four months immediately preceding the bankruptcy, to apply upon a prior debt of the bankrupt, though in pursuance of an agreement made with him, prior to said four months, that he would do so, was voidable as a preference.

In *Torrance v. Winfield Nat. Bank*, 66 Kan. 177, 71 Pac. 235, it was held that an agreement made when a debt was created, to make payment out of money to be derived from a designated enterprise, did not create a lien on such funds which would affect the character of its application on the debt within four months of bankruptcy, as a preference; the court saying: "The statute makes no exceptions in favor of payment made, or security given, within the four months pursuant to a previous agreement, but declares all preferential transfers made within that time voidable. There is no provision in the statute protecting executory contracts for security." The frequently cited case of *Sabin v. Camp*, 98 Fed. 974, 3 Am. Bankr. Rep. 578, is doubted and distinguished.

In *First Nat. Bank v. Johnson*, 68 Neb. 641, 94 N. W. 837, it was held that, where a chattel mortgage covered a certain number of cattle out of a mass, without separating or identifying them, so that no lien upon any specific chattel was created; but afterward and within four months of bankruptcy, and while the mortgagor was insolvent, they were separated and identified through a seizure made by the mortgagee, the mortgagor acquiescing in such separation and identification,—the lien was created then for the first time, and constituted a preference within the meaning of § 60 of the bankruptcy act.

In *Mathews v. Hardt*, 79 App. Div. 570, 17 L.R.A. (N.S.)

80 N. Y. Supp. 462, it was held that, where a corporation was formed to take over the assets of a debtor who had failed in business, the stock being distributed among his creditors, and one of such creditors agreed to furnish the corporation with working capital to be secured by a general lien upon all of the property acquired by the corporation, the taking possession by such creditor within four months of bankruptcy constituted a preference within the meaning of the bankruptcy act, although in pursuance of such agreement for a lien. The court said: "In the case at bar the effect and result of the possession which the defendants took of the property of the corporation within the four months were to enable them to obtain a greater percentage of their debt, and they had sufficient cause for believing that, by taking possession, they would obtain a preference. They were entirely familiar with the compromise with the creditors of Smith, resulting in the reorganization of the business, the original financial difficulties of the company, the means consisting of the loan from them whereby it was enabled to do business, and the inability of the corporation to repay to them, as promised, any part of the sum which they had advanced, or to continue without further moneys. If the bankruptcy act is susceptible of the construction which, under the decisions, has been given to it, that a transfer is to be regarded as of the date when possession is taken, then, though the taking of possession was merely, as in this case, to effectuate an agreement made in good faith and many months before the prohibited time for giving a preference, the transfer, if the creditor has reasonable cause to believe when such possession is taken that a preference was intended, is nevertheless one which, under the act, is voidable, so that the trustee may maintain an action to recover the property or its proceeds."

The attempt is sometimes made, as in *Re J. F. Grandy & Son*, 146 Fed. 318, to explain the foregoing decision as being really based upon the fact that the creditor was, at the time of the making of the agreement, entirely familiar with the financial

1089; *Loveland*, Bankr. 2d ed. p. 368. As said in this last citation (*Loveland*, supra): "The trustee takes the title of the bankrupt subject to all equities, liens, or encumbrances, whether created by operation of law or by the act of the bankrupt, which existed against the property in the hands of the bankrupt, except in cases of levies, judgments, attachments, or other judicial liens created against the property within four months preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void." It is also established that, unless the bankruptcy act otherwise provides, the validity of an assignment or claim is to be determined in accordance with the principles of local law. *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567. And it will be observed that, under our law, no valid objection can be urged against the defendant's claim by reason of the fact that the bonds, the subject-matter of the contract, and which represented the purchase price of the property, were not in the possession or control of the bankrupt when the agreement of December was entered into. On the contrary, unless inhibited by some principle of public policy, our decisions ex-

pressly uphold and enforce such contracts, both as to tangible property and choses in action, to vested as well as contingent interests. *Brown v. Dail*, 117 N. C. 41, 23 S. E. 45; *Williams v. Chapman*, 118 N. C. 943, 24 S. E. 810; *Virginia-Carolina Chemical Co. v. McNair*, 139 N. C. 326, 51 S. E. 949; *Nelson v. Edwards*, 40 Barb. 233.

Applying these principles, we are of the opinion that the force and effect of the verdict is to establish, for a cash consideration, to wit, the loan, an equitable assignment of these bonds, the purchase price of the property in December, 1903, the date when the contract was made, to be consummated by delivery of the bonds whenever and as soon as they came into the control of E. F. Young, pursuant to the sale which was then being conducted. While the language of the issue, "verbally agreed to transfer," might be construed as constituting an executory agreement, when taken in connection with the pleadings and evidence, and especially in reference to the more explicit ascertainment of the terms of the December trade, made a part of the verdict on the sixth issue, we think that a present equitable assignment was thereby created, and the words "agree to transfer" clearly referred to an agreement to "deliver" the bonds whenever the same came to hand. This meaning of the term "transfer" is recognized in the defini-

affairs of the debtor, and knew that such secret agreement would not prevent the debtor from obtaining credit.

Decisions under earlier acts.

Although the provisions of the bankruptcy act of 1898 here under consideration have no exact parallel in earlier enactments, the acts of 1841 and 1867 both established a time within which the creation of preferences was prohibited. Decisions under these acts, involving the question whether the character of a transfer or lien is to be determined as of the time when it was made or created, or as of the time of an antecedent executory agreement therefor, are properly to be considered in this connection. And since, as hereinbefore pointed out, the fact of creation of a zone of voidability has no necessary connection with the question as to the time at which the character of the transaction is to be determined, those decisions which consider transactions solely with reference to their fraudulent character are also in point.

—act of 1800.

In *Rundle v. Murgatroyd*, 4 Dall. 304, 1 L. ed. 843, it was held that no antecedent contract could make valid, upon the provisions and principles of the bankrupt law, a mortgage given by a bankrupt husband to secure to his wife the amount of a legacy to her which had been placed in his hands, 17 L.R.A. (N.S.)

if the bankrupt actually gave it when he was insolvent, upon the eve of a legal bankruptcy; since the general creditors had then acquired an interest in his estate, and it was too late to perform an engagement for giving preferences and securities, at their expense, to any particular creditor. In *M'Meehan v. Grundy*, 3 Harr. & J. 185, it was held that a conveyance made in lieu of transferring certain bank stock which the bankrupt had agreed to transfer to certain indorsers to secure them against loss was not fraudulent as to the other creditors, under the bankrupt law, not having been spontaneously made in consequence of a formed design to become a bankrupt.

—act of 1841.

In *Tucker v. Daly*, 7 Gratt. 330, it was held that the assignee in bankruptcy of the obligee of a bond could not recover the proceeds from one to whom the bankrupt had assigned it, after the commission of an act of bankruptcy, in pursuance of a previous agreement to do so to indemnify such person for becoming a surety, where no facts or circumstances were found to justify the inference that such agreement was made in contemplation of bankruptcy, the assignee taking the property subject to all the equities which had attached thereto.

—act of 1867.

In *Hauselt v. Harrison*, 105 U. S. 401, 26

tion of the word given by the bankruptcy act July 1, 1898, chap. 541, § 1, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418, has been applied in various decisions rendered in administration of the law (8 Words & Phrases, p. 7066), and is so clearly the significance contemplated by the parties in the transaction as established by the verdict that we have no hesitation in holding, as stated, that the contract amounted to a present equitable assignment in December, more than four months prior to the institution of the bankruptcy proceedings; and the right of defendant to the bankrupt's interest in these bonds is supported by well-established principles of equity and by the great weight of authority. *Walker v. Brown*, 165 U. S. 655, 41 L. ed. 866, 17 Sup. Ct. Rep. 453; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. ed. 1075; *Union Trust Co. v. Bulkeley*, 80 C. C. A. 328, 150 Fed. 510; *Re J. F. Grandy & Son*, (D. C.) 146 Fed. 318; *Wilder v. Watts* (D. C.) 138 Fed. 426; *Sabin v. Camp* (C. C.) 98 Fed. 974; *Smith v. Godwin*, supra; *Brem v. Covington*, 104 N. C. 589, 10 S. E. 706; *Lawson v. Pringle*, 98 N. C. 450, 4 S. E. 188. See also a very full and learned note by the editor to case of *Moody v. Wright*, 46 Am. Dec. 706-717 (the case being from 13 Met. 17). In this last reference, on page 717, it is said: "The ground of these decisions is that the mortgage, though inoperative as a con-

veyance, is operative as an executory contract which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being held as trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done." Per *Durfee*, Ch. J., in *Williams v. Briggs*, 11 R. I. 478, 23 Am. Rep. 518. The case of *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673, is a leading American case upon this subject. A mortgage was given in that case by two manufacturers of cutlery upon all the tools and machinery in their manufactory, and upon all the tools and machinery which they might purchase within four years, and all stock that they might manufacture during the same time. It was held to create a good equitable lien, and was protected as such under the bankruptcy act. At page 644 of 2 Story, Story, J., said: "It seems to me a clear result of all the authorities that, wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting

L. ed. 1075, it was held that a subsequent agreement, if made in good faith for the purpose of securing to one party the benefit of a prior contract in the nature of an equitable mortgage, though made with knowledge of the insolvency of the other party and in contemplation of his bankruptcy, was not an unlawful preference in fraud of the bankrupt law.

In *Steadman v. Caswell*, 2 Haskell, 375, Fed. Cas. No. 13,330a, it was held that a conveyance by a bankrupt, within one month of his bankruptcy proceedings, of property that he had previously sold and the possession of which he had surrendered to the purchaser, but without then conveying the legal title, was valid.

In *First Nat. Bank v. Haire*, 36 Iowa, 443, it was held that the assignment to a bank of a bond and mortgage, which assignment, though made within four months prior to the bankruptcy proceedings and after the bank had, as it was claimed, actual knowledge of acts of bankruptcy, was in pursuance of a previous agreement that, in case of default in payment of a note, to secure the indorser of which the bond and mortgage was made, the security should inure to the bank, was valid, the right of the bank inhering in and arising out of the original transaction.

In *Gage v. Dow*, 59 N. H. 383, it was held that an assignment of funds arising from a sale of property to be delivered, made in good faith and not in contemplation of 17 L.R.A. (N.S.)

bankruptcy, for a sufficient consideration, and more than four months before proceedings in bankruptcy was commenced, was valid even as to payments received within the four months.

In *Burdick v. Jackson*, 7 Hun, 488, it was held that a mortgage given by a bankrupt shortly before the filing of a petition, pursuant to a parol agreement to do so, made fifteen months before, and based upon a good consideration, could not be avoided as a fraudulent preference under the bankruptcy act, the trustee having taken the property subject to the equity created by such parol agreement.

In *Hewitt v. Northup*, 9 Hun, 543, affirmed in 75 N. Y. 506, it was held that a mortgage upon the individual property of a partner, given in pursuance of a parol agreement that one would be given to secure a loan, upon request, could not be avoided by the assignees in bankruptcy of the firm as a fraudulent transfer or encumbrance to defeat or delay the operation of the bankruptcy act within four months before the filing of the petition; such mortgage, in creating a legal lien in place of the equitable lien, giving the mortgagee no preference over the firm creditors which he, as a creditor of the individual partner, did not already possess. The court went on to say, however, that, as between creditors of the same degree, no prevailing equity could arise from such an antecedent promise.

a claim thereto under him, either voluntarily or with notice, or in bankruptcy." And in *Walker v. Brown*, supra, the general doctrine is stated thus, citing with approval 3 Pom. Eq. Jur. p. 1235: "Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey, or assign, or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers, or encumbrancers with notice." By the contract of December, 1903, when these bonds came into his possession and control, E. F. Young had no right to deal with them, except to deliver them to the defendant bank as required by its terms. On the equitable principle which considers that done which the parties are under a binding agreement to do, said Young had no right to make any other disposition of this specific property. This is the principal test by which an equitable assignment may be distinguished from an executory agreement to assign, and a case is presented where the claimant has a right to the specific property against the bankrupt himself, and where, in the absence of some interfering state regulation, or of some adverse provision of the bankruptcy law itself, the defendant's right is enforceable against the trustee. It is this creation of a present interest in the bonds themselves, amounting to an equitable assignment thereof, which differentiates the present case from many of those cited and relied upon by the plaintiffs, trustees. Some of these were cases where, from the very general terms of the agreement, no right in any specific property was acquired at all. In others from the nature of the interest, or by reason of some interfering principle of positive law or public policy, no right in any specific property was created, except within the period when it was avoided by express provisions of the bankruptcy law itself. Thus, in *Sheridan's Case* (D. C.) 98 Fed. 406, there was an executory agreement to pledge property, made prior to the four months, and the property was actually delivered within such period. By the very nature of a pledge, no interest passes until delivery, and this was, on that ground, avoided as a prohibited preference.

In several other decisions an executory agreement to give a chattel mortgage, made prior to the four months, was not allowed to validate the mortgages executed or registered within the prohibited period. *Re Great* 17 L.R.A. (N.S.)

Western Mfg. Co. 81 C. C. A. 341, 152 Fed. 123; *Loesser v. Savings Deposit Bank & T. Co.* 78 C. C. A. 507, 148 Fed. 975; *Re Dismal Swamp Contracting Co.* (D. C.) 135 Fed. 415. These and other like cases, as we apprehend them, were decided either because of some state law which avoided such mortgages against creditors, except from registration, or by reason of the amendment to the bankruptcy act made on February 5, 1903 (32 Stat. at L. 799, chap. 487, § 13, U. S. Comp. Stat. Supp. 1907, p. 1031), to the effect that, "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." And this requirement of registration distinguishes a decision of our own court. *Lance v. Tainter*, 137 N. C. 249, 49 S. E. 211.

Without going into a careful analysis of these decisions, which could serve no good purpose and would unduly lengthen our opinion, we deem it sufficient to say that they do not apply here. This case presents no executory agreement to make a pledge of personal property as security for a past indebtedness, nor is it an executory agreement to give a chattel mortgage or other lien which requires registration either by state law or the bankruptcy act and its amendments. But, as we have endeavored to show, it is a present equitable assignment for a cash consideration of the bonds, to be delivered or "transferred" to the defendant bank whenever they come into possession of the bankrupt, and to be then appropriated to the indebtedness as far as they would pay the same.

Since the opinion was prepared, it has been earnestly contended that, inasmuch as the contract under which the defendant claims the bonds applies also in terms to realty, the case of *Lance v. Tainter*, supra, is direct authority against the defendant's claim. This position might avail the plaintiffs if the sale of the land had not been carried out and the defendant was seeking to establish its claim against the land itself. The sale, however, was completed according to the contract with the Norfolk company, and this litigation is over the proceeds. Our registration laws concerning realty have, therefore, no application to the cause, on the principle established in the decisions of *Bourne v. Sherrill*, 143 N. C. 381, 118 Am. St. Rep. 809, 55 S. E. 799, and the authorities therein cited.

We are of opinion, therefore, and so hold, that there was error in the judgment as rendered, and that, as a conclusion of law on the verdict as it now stands, there should be judgment entered that defendant go

without day. Let this be certified, and judgment entered accordingly.

Reversed.

Brown, J., did not sit.

NORTH CAROLINA SUPREME COURT.

LAKE DRUMMOND CANAL & WATER COMPANY, Appt.,
v.

T. M. BURNHAM et al.

(147 N. C. 41, 60 S. E. 650.)

Limitation of actions — correlative rights.

A canal company which, under statutory authority, has constructed and maintained for more than forty years a channel to feed the waters of a lake into its canal, may abandon and close the channel, thereby causing the water of the lake to seek its former outlet, without liability for consequential injuries to lands not abutting on the channel, but which had been relieved by it from a burden which they formerly bore.

(March 4, 1908.)

APPEAL by plaintiff from a judgment of the Superior Court for Camden County granting affirmative relief to defendants in a proceeding to enjoin interference with plaintiff's canal. Reversed in part.

Statement by Hoke, J.:

The action was instituted by plaintiff to restrain a number of defendants from alleged wrongful injury to plaintiff's canal, and there was evidence offered tending to

show "the plaintiff owns the canal formerly known as the 'Dismal Swamp canal,' extending from the Elizabeth river, in Virginia, to the Pasquotank river, in North Carolina, and is a highway of public travel for steamboats, barges, tugs, and other craft plying between the waters of North Carolina and the waters of Virginia. There is another canal, called the 'cross canal,' which runs at right angles from a point about 30 feet from the other canal westwardly into Gates county about 20 miles. The defendants own in severalty valuable lands, which lie from 3 to 7 miles below the said cross canal, none of which drain in or towards the cross canal. In 1897 the plaintiff company enlarged and deepened the Dismal Swamp canal, and, for the protection and improvement of the same thus enlarged, the plaintiff widened and raised the banks of that canal, and the banks so raised and widened remained as they were from 1897 to June, 1906. In June, 1906, the defendants, claiming to be injured by the raising and broadening of the said banks at the cross canal, cut through the same between the head of the cross canal and the Dismal Swamp canal, a distance of 30 feet or more, and turned the water from the said cross canal, and the swamps which drain into it, into the Dismal Swamp canal, and, as a result of such cutting, turned into it sand, mud, and *débris* to such an extent as, after twelve hours, to so fill it that one could walk out into the canal 43 feet from its banks dry-shod for a distance of about 72 feet along the banks. The plaintiff filled up the cut which had been made, and dredged out the said filling, but the defendants threatened at once to open the same again, and were about to do so when en-

Case Note. — Reciprocal easements as to artificial water rights.

A search has disclosed few cases reported since the preparation of the note appended to *Pewaukee v. Savoy*, 50 L.R.A. 836.

It was held in *Broadwell Special Drainage Dist. No. 1 v. Lawrence*, 231 Ill. 86, 83 N. E. 104, that, where the owners of a dominant heritage established an artificial channel so as to divert water naturally flowing upon the servient tenement, through which channel the water flowed without interruption for more than twenty years, mutual and reciprocal rights were acquired by prescription, which exempted the dominant owner from the duty of restoring the water to its original course, and released the servient estate from the burden of the drainage.

Kray v. Muggli, 84 Minn. 90, 54 L.R.A. 473, 87 Am. St. Rep. 332, 86 N. W. 882, stands for the rule that, where a stream has been obstructed by a dam for the time necessary to establish a prescriptive right 17 L.R.A. (N.S.)

to maintain the same, the owners of lands thereby flooded, who have improved their property with reference to the change and in reliance upon the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed, so that the person who maintains the dam may not, by any affirmative act, restore the stream to its original condition. This case was previously before the court, where it was held, as is shown in the note in 50 L.R.A. 836, that no reciprocal right to the maintenance of the dam could arise, the dam being of a perishable nature, and the owner being liable for the injuries that might be caused to the lower owners by the bursting of the dam. The final decision, holding that there were reciprocal rights, was placed upon the ground that the dam must be taken to be permanent, and that the other property owners relied upon its continuance.

However, it was said in *Burrows v. Lang* [1901] 2 Ch. 508, that the fact that the dam was for the accommodation of a mill

joined by the court." Defendants answered, making denial of some of the material allegations of the plaintiff, and, by way of counterclaim, made further answer, as follows: "(1) That they are the owners and in possession of large quantities of land and growing crops lying on what is known as Corapeake or cross canal, which empties into the Dismal Swamp canal about 5 miles northwest of the town of South Mills, in Camden county; (2) that said cross canal is 12 miles long and between 10 and 20 feet wide, and is the main and only drain for their said lands, and has been for the past seventy-five or one hundred years, long before the plaintiff herein acquired any interest whatever in the Dismal Swamp canal; (3) that, during the latter part of March, or first of April, 1906, the Lake Drummond Canal & Water Company, by its agents and servants, went to the mouth of said cross canal, and with a steam shovel did wilfully and unlawfully fill up the mouth of said cross canal, thereby stopping all flow through said cross canal, and ponding the water on the lands and crops of the defendants herein, utterly and entirely destroying the crops of the defendants, and greatly damaging the lands herein mentioned, paying nothing to the defendants by way of condemnation or otherwise; (4) that defendants herein were preparing to reopen said cross canal when the general superintendent of the plaintiff, one J. B. Baxter, through the captain of plaintiff's dredge, requested that they not reopen said cross canal, that he would have his company do so immediately, and place a culvert there, upon which promise defendants refrained from opening said cross canal, and were later served with a restraining order forbidding them from reopening it at all; (5) that plaintiff has never made any attempt whatever to put in said culvert or otherwise open said cross

showed that it was to be temporary; "that is, it was to be coextensive with the carrying on of the mill."

In his work on water rights, Mr. Farnham points out the error into which the Kray Case seems to have fallen, and his criticism is noted in *LAKE DRUMMOND CANAL & WATER CO. v. BURNHAM*. He says, in part (vol. 3, p. 2406): "From an examination of" the cases cited therein "it will appear that there seems to be no principle upon which *Kray v. Muggli* can be supported, and this conclusion imposes no hardship upon the owner of the servient estate. If he suffers injury it is purely from his own negligence. There is not an instant during the time that the prescriptive period is running when he could not compel the owner of the dam to remove it or to enter into a contract giving the owner of the submerged

canal, and that the lands and crops of the defendants are, and have been for many weeks past, entirely covered with water because of the damming of said cross canal by the plaintiff herein; (6) that, by reason of such unlawful damming of cross canal by the plaintiff, and the consequent ponding of water on defendants' lands, the crops of the defendants have been injured to the extent of \$15,000, that the lands have already been greatly damaged, and that, if said cross canal is not opened immediately, the ponded water on the defendants' lands will cause said lands to sour and to become absolutely worthless for any use whatever, which lands before the ponding of the water thereon by the plaintiff, as herein set out, were worth not less than \$37,000; (7) that the cause of action set out in this answer in the defendants' cross bill arose prior to the bringing of this action." Plaintiff made formal reply denying material allegations of counterclaim. Various issues were submitted as determinative of the rights of the parties, and as to the amount of damages suffered by defendants. The court set aside a verdict for defendants on these issues as to damages, and, on the other issues, gave judgment restraining defendants from further interference with plaintiff's canal, and restraining plaintiff from "maintaining the banks of its canal at the point between said cross canal and the canal of plaintiff at a greater height than in 1897, before same was increased." From this judgment, plaintiff, having duly excepted, appealed.

Messrs. Pruden & Pruden and Aydlott & Ehringhaus, for appellant:

The right of action is barred by the statute of limitations.

Revisal 1905, § 395, subs. 3; *Cherry v. Lake Drummond Canal & Water Co.* 140

land a right to maintain it, which contract might be executed and recorded in such a way as to leave no doubt as to his right to maintain the dam for his own benefit. The law favors diligence and a disposition to protect one's own rights, and is not disposed to permit one to acquire rights against another by passive acquiescence in his transactions."

In *Castle v. Madison*, 113 Wis. 346, 89 N. W. 156, the court relies upon the authority of the *Kray Case* in arriving at the conclusion that an answer in a suit to abate a dam in the outlet of a lake, alleging that owners of lands on the lake had acquired prescriptive rights to the continuance of the artificial level created by the dam, sufficiently set up that such owners were necessary parties to the suit.

N. C. 422, 111 Am. St. Rep. 850, 53 S. E. 138, 6 A. & E. Ann. Cas. 143.

Messrs. Ward & Grimes and W. A. Worth for appellees.

Hoke, J., delivered the opinion of the court:

The fifth issue, and the response of the jury thereto, are as follows: "(5) Have the defendants, or either of them, the right and easement to drain into the canal of plaintiff, or into the cross canal? A. No." There is no fact or finding of the jury which in any way changes or impairs the force and effect of this verdict, and the court is of opinion that it is thereby conclusively determined that the defendants are not entitled to the relief awarded them, and, to this extent the judgment of the court below must be reversed. The company known as the "Dismal Swamp Canal Company" was chartered by act of the legislature at the session of 1790, 2 N. C. Rev. Stat. p. 217. By § 12 of this act it was provided: "And, whereas it is represented that the waters of the lake, in the Dismal swamp, commonly called 'Drummond's pond,' may be useful for a supply of water to the said canal: Be it enacted, that the said lake, so far as the water thereof shall be necessary for the purpose aforesaid, shall be and is hereby vested in the proprietors of said canal; and it shall and may be lawful for the said president and directors, or a majority of them, to open, if they shall find it expedient, a cross canal from the lake to the principal canal, for the purpose of drawing from thence a supply of water; and, for executing this work, they shall have the same powers which they are authorized to exercise in opening the principal canal." It was no doubt under and by virtue of this section, and for the purposes therein indicated, that the cross canal referred to in the present proceedings was constructed. The present owners of the main canal, having ascertained or concluded that the waters of the lake heretofore conveyed by the cross canal are no longer required for purposes of navigation, determined to abandon it, and in widening and deepening the main canal they have thrown the sand and mud produced by their additional excavation on the bank, and so as to stop up the mouth of the cross canal and obstruct the flow of water therein; the result being that the waters of the lake, which, by this canal, have heretofore been drained into the main canal, now flow in their natural direction towards the river, and a portion of them affect the lands of defendants, causing the damage complained of. While, however, the evidence of defendants tends to show that these lands have been

damaged by stopping up this cross canal, and the verdict of the jury seems to have established it, it is an injury for which the law cannot afford redress.

It will be noticed that the canal is an artificial drain, made by the predecessors of plaintiff for their own convenience and advantage, and in the exercise of a right of property and an easement conferred upon them by the statute for a specific purpose. The lands of the defendants do not abut upon this cross canal, and the verdict finds that the defendants had no right or privilege of drainage into either one of the canals. On the contrary, the testimony shows that they are situated several miles from the cross canal, and their natural drainage is in an entirely different direction,—towards the Pasquotank river,—and, while this cross canal has existed for many years (forty or more), and has operated to some extent to protect the lands of defendants by diverting the overflow waters of the lake from their natural direction into the main canal, on the facts presented here there is no principle that requires that the plaintiff should keep this cross canal open for defendant's benefit, or that its conduct concerning it should subject it to an action. As to defendants, it is *damnum absque injuria*. If it should be conceded that defendants, as owners of land which lie in the general direction that the overflow waters of the lake naturally take towards the river, are lower proprietors in reference to such waters,—and this is the strongest position that can be taken in their behalf,—their right to relief on this verdict cannot be sustained. The doctrine is, certainly it is the position supported by the great weight of authority, that, where the proprietor of an upper tenement constructs and maintains on his own premises, and for his own convenience and advantage, an artificial water way, or any artificial structure, affecting the flow of water; and such structure invades no right of the lower proprietor, and gives indication that it is for a temporary purpose or a specific purpose which may at any time be abandoned,—the upper proprietor comes under no obligation to maintain the structure and the conditions produced by it from lapse of time, though the incidental effect has been to confer a benefit on a lower tenant. Nor in such case does the lower proprietor acquire any right which rests only on prescription. An easement arising in that way can only be established by reason of adverse possession, or continuous invasion of another's rights. Gould, Waters, 3d ed. §§ 161-340; 3 Farnham, Waters, pp. 2400-2437; Arkwright v. Gell, 5 Mees. & W. 203; Mason v.

Shrewsbury & H. R. Co. L. R. 6 Q. B. 578-586; *Greatrex v. Hayward*, 8 Exch. 291.

And the decisions of our own court are to like effect. *Felton v. Simpson*, 33 N. C. (11 Ired. L.) 84; *Mebane v. Patrick*, 46 N. C. (1 Jones, L.) 23. In *Felton v. Simpson* the plaintiff owned land on a stream below defendant's dam, and the incidental effect of this dam was to protect the plaintiff's land from "sudden inundations in heavy falls of rain by ponding the water until it could be drained off by ditches." The plaintiff had been in the uninterrupted enjoyment of the benefit of this protection for more than twenty years, when defendant cut through the dam to relieve it from a large body of water collected from recent rains, causing plaintiff's land to overflow and injure the crops. Recovery was denied, and it was held: "In order to raise the presumption of the grant of an easement, two things are necessary: There must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant." And *Pearson, J.*, delivering the opinion of the court, said: "When one continues in the uninterrupted possession of land for thirty years, or enjoys the use of a franchise for twenty years, a grant is presumed. So, if one erects a dam and ponds back water upon the land of another, and is allowed to keep it there for twenty years, a grant of the easement or privilege of doing so is presumed, and so in many similar cases. But to make this doctrine applicable two things are necessary. There must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant; for it is the fact of his being thus exposed to an action, and the neglect of the opposite party to bring suit, that is seized upon as the ground for presuming a grant in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to if there had not been a grant. Where one erects a dam on his own land, and another who owns land below incidentally derives a benefit by availing himself of the protection which the dam enables him, by means of ditches, to give to his land,—which is our case,—neither of these essentials for presuming a grant has an existence."

Speaking to this same question, in *Mason v. Shrewsbury & H. R. Co.* supra, *Cockburn, Ch. J.*, concurring, said: "It is of the essence of such an easement [to divert a stream by an artificial way] that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant

owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right, its exercise may be discontinued if it becomes onerous or ceases to be beneficial to the party entitled." The position is discussed at some length, and very satisfactorily, in *Farnham on Waters*, pp. 2399, 2400, supra, under the doctrine of "reciprocal easements," and the citation, after stating different methods by which such reciprocal easements may be established, continues as follows: "Having established the fact that there may be reciprocal easements existing in favor of adjoining property owners, the question arises as to how far such a condition may be established by prescription. Put in a concrete form, the question may be propounded thus: If the owner of a mill on a stream acquires by prescription the right to flow the water back upon the land of an upper proprietor, does the latter acquire a reciprocal right to have the flowage maintained, and can he compel the mill owner to maintain his dam for that purpose? To the question in this form the answer seems plain that there is no such reciprocal right. The equitable doctrine of prescription depends upon the presumption of a grant, and equity will only presume a grant when certain well-defined conditions are present, one of which is an adverse claim to the property out of which the right is alleged to have arisen. In the case supposed there is no adverse claim on the part of the owner of the submerged land to have the dam maintained, and, therefore, nothing upon which a grant can be presumed." And, further: "The doctrine applicable in case of the damming of the water back on the upper property is equally applicable in case of drainage over lower property. In *Greatrex v. Hayward* the court held that the flow of water from a drain made for the purpose of agriculture for a period of twenty years does not give a right to the lower proprietor to its continued flow so as to prevent the alteration of the drain for the improvement of the upper estate. This is put upon the ground that the character of the water course is temporary merely, depending upon the mode which the upper owner had adopted for draining his land; also that the user by the lower owner had not been adverse." The author then proceeds to criticize a decision of the Minnesota court (*Kray v. Muggli*, 84 Minn. 90, 54 L.R.A. 473, 87 Am. St. Rep. 332, 86 N. W. 882) which asserts a position contrary to that upheld in the text, and also certain expressions of the chancellor to same effect in *Belknap v. Trimble*, 3 Paige, 577, and declares that the Minnesota decision and some others of

like tendency are not in accord with the weight of authority.

In what is here said we do not intend to question the decision of *Belknap v. Trimble*, and other cases of like import, to the effect that, where an upper proprietor, by an artificial structure on his own premises, has caused a change of a stream in which they both have riparian rights from the original to a new channel, under circumstances which give indication that the change is to be a permanent one, and the lower proprietor, accepting the change, has built mills and made improvements dependent on the flow of the stream in its new course, the enjoyment and use of these improvements will, under certain circumstances, be protected by injunctive relief, or other efficient action of the courts. These decisions can well be upheld under the doctrines of dedication and estoppel, as in *Delaney v. Boston*, 2 Harr. (Del.) 489, 3 Farnham, Waters, pp. 2437, 2438.

But this principle has no application here. The former proprietors of the Dismal Swamp canal, acting under a charter from the state in the exercise of proprietary rights and privileges therein granted, constructed this cross canal, an artificial way, as a feeder to the main canal, and as an aid to navigation. And the present owners, having concluded that this additional supply of water is no longer required for the purpose, and that its continued flow into the main canal in its present condition will cause damage to their property, and act as a hindrance to their enterprise, have determined to abandon the cross canal and obstruct its further flow. It was originally constructed for the advantage and convenience of plaintiff's predecessors, and for a definite purpose, and defendants have acquired no right to enforce its maintenance for their protection. The exact case is stated by Gould on Waters, § 340, *supra*, as follows: "Where a canal company was authorized, but not required, by statute, to divert the waters of a stream, which they did for a period of forty years, it was held that the riparian proprietors below on the stream had no right to insist that the diversion should be continued for their benefit."

The court, being of the opinion that, on the facts presented, defendants are not entitled to any redress against the plaintiff, has deemed it best to place the decision on that ground, as it may serve to end the matters at issue. But we must not be understood as deciding that, if it were otherwise, defendants would be entitled to the injunctive relief awarded them by the judgment below. It appears that plaintiff is engaged in carrying on an enterprise for the 17 L.R.A. (N.S.)

benefit of the public under quasi public charter; and it is ordinarily true that, if an adjacent property owner suffers injury in his proprietary rights by reason of such an undertaking, he is restricted to an action for damages or some statutory method of redress.

There is error in the judgment below, in so far as it enjoins plaintiff from obstructing the flow of the cross canal, and to that extent the judgment below is reversed.

NORTH CAROLINA SUPREME COURT.

L. L. STATON, Appt.,
v.

ATLANTIC COAST LINE RAILROAD COMPANY.

(147 N. C. 428, 61 S. E. 455.)

Highway — railroad — right of abutting owner.

1. An abutting owner may maintain an action against a railroad company which lays its tracks in a public street, for the injury to his easements therein, although the tracks are laid under authority of the municipality, and the fee of the street is in the public.

Railroad — injunction — successor.

2. One purchasing property abutting on a street in which a railroad is in operation will not be permitted to enjoin the use of the tracks in a proper manner.

Same — laches.

3. One who delays seeking an injunction against the operation of a railroad in a public street for a period of seventeen years, until its removal would seriously affect public interests, will be denied such relief.

Same — limitation of actions.

4. That the statute prevents the acquisition, by lapse of time, of an exclusive right in a public street against a municipality, does not prevent the running of the statute of limitations against actions for injuries to abutting property by the operation of a railroad therein.

Same — increased use.

5. Mere increase of trains, more cars, and heavier engines making more noise and smoke, upon a railroad track laid in a public street, does not constitute a nuisance giving an abutting property owner a right to damages.

Same — storage of cars.

6. The use of a railroad track laid in a public street for the storage of cars and de-

Note. — The effect of delay by an abutting property owner in seeking an injunction against the construction or operation of a railroad in the street is discussed in a case note to *Wolfard v. Fisher*, 7 L.R.A. (N.S.) 995.

livery of freight from the cars to merchants gives an abutting owner whose property is injured thereby a right to injunction and damages.

Same — excessive speed — damage.

7. An abutting property owner cannot enjoin the running of trains in a public street at a speed prohibited by the municipal ordinance, since his remedy by appeal to the municipal authorities, or to a magistrate, is adequate.

(April 22, 1908.)

A PPEAL by plaintiff from a judgment of the Superior Court for Edgecombe County in defendant's favor in a suit to enjoin the operation of railway tracks in public streets. Reversed in part.

Statement by Connor, J.:

This action is brought and prosecuted for the purposes (1) of enjoining the defendant from using and operating engines and cars over its tracks and spur tracks on certain streets in the town of Tarboro; (2) for damages alleged to have been sustained by the laying of the tracks and spur tracks, and operating locomotive engines and cars over same; (3) for damages alleged to have been sustained by reason of the negligent and unlawful use of the tracks, constituting a private nuisance, to plaintiff's injury. A jury trial in respect to the first cause of action having been waived, the court found the following facts: On September 23, 1760, Joseph Howell conveyed to James Moir and five other persons a tract of land lying and being in Edgecombe county on the south side of Tar river, and described by metes and bounds, containing 150 acres. The consideration named in the deed is £5 proclamation money of the province of North Carolina. On the 24th day of September, 1760, the said James Moir and the other grantees named in said deed executed unto the said Joseph Howell a bond under seal in the penal sum of "£2,000 proclamation money." The condition of the bond recited that the said land was to be laid out for "the building and erecting of a town therein;" that they had received authority to lay out in lots the said land, "excepting one lot where the said Howell house now stands and the graveyard, and 50 acres of commons for the use of said town, and to dispose of the same lots, not exceeding $\frac{1}{2}$ acre to a lot, . . . and to take subscription for the same at £2 proclamation money for each lot." Streets were to be laid off not exceeding 80 feet in width, etc. The said land was laid off into lots and streets, and a portion thereof, at least 50 acres, was reserved for the use of the town as a common for the use of the 17 L.R.A. (N.S.)

public, and a map thereof was made and recorded in the office of the register of deeds, etc. On November 30, 1760, the said land so laid off "was constituted, erected, and established a town to be called 'Tarboro,' by the act of the governor, council, and assembly." The map or plat was declared by act of assembly "to be held and deemed the plan and bounds of said town." The present town of Tarboro has, by successive acts of the general assembly, succeeded to the rights, duties, and liabilities of the said corporation, trustees, etc. The common so reserved was covered with large oak and other trees, used and dedicated to the public for park purposes. By act of the general assembly passed December 27, 1852 (Laws 1852, chap. 219, p. 822), the commissioners of said town were authorized to lay off into lots and streets, in conformity with the plan of said town as then established, the whole or any portion of the common as then existing, lying on the western side thereof, between the inhabited portion thereof and Hendricks creek, the western portion of said town, and to sell such lots at public sale. Pursuant to said act, the commissioners laid off into lots and streets that portion of the common described in said statute. Albemarle avenue runs north and south; Wilson street runs east and west, crossing the avenue; Hendricks street runs west of and parallel with the said avenue,—all of which fully appears by reference to the plat filed in the record. The streets are 70 feet wide, and were duly laid off and dedicated to the use of the public. The lot formed by the intersection of Albemarle avenue and Wilson street, known as "lot 122," was sold by the commissioners pursuant to the provisions of said act. By successive conveyances, the title vested in plaintiff February 1, 1872. It is described in the deed to him as "bounded on the north by Wilson street, on the east by Williamston & Tarboro Railroad, south by St. John street, west by the new street, being lot 122 in the plat of the town." The boundary called "Williamston & Tarboro Railroad" is now Albemarle avenue, and the "new street" is now Hendricks street. "The location of plaintiff's lot was desirable as a residence, the surroundings pleasant, easy of access, and the air in and about said lot pure, wholesome, uncontaminated. The said lot commanded an unobstructed view and use of said street and the common lying directly north and northeast of it on the opposite side of Wilson street." There are large shade trees and a magnolia on the sidewalk. The Williamston & Tarboro Railroad Company was incorporated by the general assembly by chapter 139, p. 156, Laws 1860. By successive acts of the general assembly

the defendant corporation has succeeded to and acquired all of the rights, privileges, etc., of said company. See *Staton v. Atlantic Coast Line R. Co.* 144 N. C. 135, 56 S. E. 794. That the road of the defendant was constructed in 1870 prior to the time plaintiff purchased. That the defendant entered upon the said street and built its track as indicated in said ordinance, and is using it as a railroad under and by virtue of all of its and its predecessors' chartered rights and privileges, and by virtue of the town ordinance passed, as follows: "At a call meeting this day. Present all the commissioners. Ordered that the ordinance of the town on the 3d of December, 1869, be amended so as to allow the Williamston & Tarboro Railroad Company to construct their road track from Tar river along and through Hendricks street to Little creek north of the town commons." That Little creek is the northern terminus of the original Howell deed to the town of Tarboro, and the nearest point is about 85 yards north of and in front of plaintiff's premises. The land on the north side of Little creek was private property, and the railroad was extended across Little creek to make connection with the Rocky Mount branch of the Wilmington & Weldon Railroad. That, in the year 1889, without the consent of the plaintiff, the defendant constructed and has since so maintained and operated a steam railroad spur track leading from Albemarle avenue north of Wilson street, curving diagonally across that portion of the common opposite plaintiff's premises and lying on the opposite side of Wilson street, continuing diagonally across Wilson street in front of plaintiff's premises and down said street to a point west of said premises on Wilson street; and thereafter, in 1902, and without the consent of this plaintiff, it constructed and has since so maintained and operated a steam-railroad spur track, branching from said curved track at a point on Wilson street in front of plaintiff's premises, crossing said street diagonally, crossing plaintiff's sidewalk, and continuing diagonally across and along Hendricks street on the westerly side of plaintiff's premises. The first spur track was to a cotton factory $\frac{1}{4}$ of a mile away, and the other to the electric power house owned by the town. These spur tracks were built and constructed by virtue of and under the same rights as the main line, save in this, that the ordinance for the spur tracks was passed immediately prior to the construction thereof. That, since said road was constructed, and within recent years, there has been a material increase in the traffic on said road. Under the charter of the town of Tarboro as it existed in May

25, 1869, there was no provision authorizing and empowering the town commissioners to make any disposition of public streets other than that provided in the general or public laws and in chapter 9 of an act of the general assembly of North Carolina, passed November 30, 1760 (*Iredell's Laws* 1804, p. 137). The town of Tarboro, under its charter and amendments thereto, had at the time the spur tracks were built no authority to use its streets for railroad purposes, unless such authority was conferred by the general public statute. Revisal 1905, chap. 73. His Honor, upon the foregoing facts, was of the opinion that plaintiff was barred of any relief except for nuisances committed within three years prior to the commencement of the action. Plaintiff excepted.

The plaintiff introduced the following evidence on the issue as to nuisances: "The track on Albemarle avenue is within 25 feet of sidewalk. The spur track is 90 feet from residence,—105 feet from front door. The house fronts east and north; second spur track on west side of house. Railroad runs diagonally across Hendricks street into the waterworks and electric-light plant of the town, on the north, east, and west of plaintiff's residence; no depot there. Prior to September 26, 1906 (date of summons), they were allowing cars of all sorts to remain on that spur track, and unloading theatrical troupes, circuses, and fertilizers. They allowed these people to stay there quite awhile, allowed vacant cars to remain there, which were frequently slept in by negroes. They allowed engines to remain there at night, and the escaping steam made a great noise. Plaintiff would complain, and the engineer would not move the engine. He said he came down there for his meals. It was near his house, and it was for his convenience. Then plaintiff complained to the agent, and used every means he could to get it away. At night steam was up and escaping, and continued to remain there all night long, and all hours of the night. Next morning the fire in the engine would be started from 3 to 5 o'clock. Plaintiff's family were continuously kept awake, but they became accustomed to the noises, etc. . . . Wood, coal, and almost every conceivable thing were kept there; some fertilizers were unloaded and left on the side of the cars; sometimes wood was sawed and left there. Cars were left and remained there; various kinds of tramps slept in them,—sometimes for days. Agent said he would do the best he could. Negro minstrel troupes have been unloaded there; also dog and pony shows. Carnivals would stay there for a week, making noises at night; sometimes being drunk and fighting. Carni-

val paraphernalia would be thrown out, such as old bedding, on the sidewalk. 'They leave a little of everything there,—iron piping, telephone poles, bricks, rocks, and sometimes hay, corn, and oats.' They frequently had cars right on the corner across the sidewalk. Cars sometimes ran off, curve very sharp. There is talking and cursing by the hands trying to get the engine and cars on the track. Cars sometimes stalled there. There are two freight depots in Tarboro,—one north, and the other south, of residences. Sparks and smoke from engine stopping in front of house on spur track, injured shade trees. Plaintiff estimates damage to his property at \$5,000 caused by the 'manner in which the road has been managed.' When circuses were unloaded in front of the house whisky bottles would be on the sidewalk, and dirty bags piled on the sidewalk 'right in front of door.' Plaintiff's family have lost sleep and become nervous from noises," etc.

At the conclusion of plaintiff's testimony, defendant moved for judgment of nonsuit. Motion allowed. Plaintiff excepted and appealed.

Mr. G. M. T. Fountain, for appellant:

The town has no power to grant the defendant the use of its streets or the public commons for the purposes of a railroad track.

Dill. Mun. Corp. § 705; *Moose v. Carson*, 104 N. C. 431, 7 L.R.A. 548, 17 Am. St. Rep. 681, 10 S. E. 689; *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601; 15 Cyc. Law & Proc. pp. 626, 627 (3).

The fact that the municipal corporation owns the fee in the streets and commons does not give it the right to permit railroad tracks to be laid across its commons and lengthwise on its streets.

Moose v. Carson, supra; *White v. Northwestern North Carolina R. Co.* 113 N. C. 610, 22 L.R.A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; Dill. Mun. Corp. 4th. ed. §§ 704 (42) 724; 15 Cyc. Law & Proc. pp. 614 (11), 626 (3); *North Carolina v. Carolina C. R. Co.* 83 N. C. 497; *Theobald v. Louisville, N. O. & T. R. Co.* 60 Miss. 279, 4 L.R.A. 735, 14 Am. St. Rep. 564, 6 So. 230.

The abutting property owner has a property right in the streets and town commons, of which the town, even were it authorized by the legislature, could not deprive him without consideration.

Moose v. Carson, supra; *McQuaid v. Portland & V. R. Co.* 18 Or. 237, 22 Pac. 899; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L.R.A. 493, 12 Am. St. Rep. 644, 39 N. W. 629; note to *Dill v. Board of Education*, 10 L.R.A. 276; *White v. Northwestern North Carolina R. Co.* supra. 17 L.R.A. (N.S.)

One cannot get, by adverse possession, a right to the streets and public squares of the town, as against either the municipality, or the individuals for whom the municipality holds.

Dill. Mun. Corp. 4th ed. §§ 667-671.

If the defendant has acquired a right to Albemarle avenue as against the town, it has not as against the plaintiff, since it requires the same nature and kind of possession to acquire an easement by adverse possession as it does to acquire title to real property.

Clay v. Kennedy, 24 Ky. L. Rep. 2034, 72 S. W. 815.

The appellant has a property right in the street easement which neither the town, nor the railroad, can deprive him of without compensation.

Gaylord v. Respass, 92 N. C. 553; *Sedgw. & W. Trial of Title to Land*, 2d ed. §§ 740, 753.

Possession, under *ultra vires* resolution by a city council, of a portion of the street, is not adverse.

St. Vincent Female Orphan Asylum v. Troy, 76 N. Y. 108, 32 Am. Rep. 286; *Chiles v. Jones*, 4 Dana, 479.

Where no express grant can be allowed, the law will not resort to the fiction of an implied grant, so as to create a prescriptive right.

Staffordshire & W. Canal Navigation v. Birmingham Canal Navigation, L. R. 1 H. L. 254; *Ellwell v. Birmingham Canal Navigation*, 3 H. L. Cas. 812; *Indianapolis, P. & C. R. Co. v. Ross*, 47 Ind. 25.

One may bring an action to abate a public nuisance caused by obstructing a public street on which his property abuts.

Sloss-Sheffield Steel & I. Co. v. Johnson, 147 Ala. 384, 8 L.R.A. (N.S.) 226, 119 Am. St. Rep. 89, 41 So. 907.

The defendant is guilty of negligently committing a public nuisance to plaintiff's special damage, for which he is entitled to his action.

Wilson v. Atlantic Coast Line R. Co. 142 N. C. 338, 55 S. E. 257; *Duval v. Atlantic Coast Line R. Co.* 134 N. C. 332, 65 L.R.A. 722, 101 Am. St. Rep. 830, 46 S. E. 750; *Cleveland, C. C. & St. L. R. Co. v. Pattison*, 67 Ill. App. 351; *Frankle v. Jackson*, 30 Fed. 398; *Harmon v. Louisville, N. O. & T. R. Co.* 87 Tenn. 614, 11 S. W. 703; *Smith v. East End Street R. Co.* 87 Tenn. 626, 11 S. W. 709; *Louisville & N. Terminal Co. v. Lellyett*, 114 Tenn. 368, 1 L.R.A. (N.S.) 49, 85 S. W. 881.

Mr. John L. Bridgers, for appellee:

It is against the policy of the law to restrain public enterprises and utilities.

Roanoke Nav. Co. v. Emry, 108 N. C. 133, 12 S. E. 900; *Lewis v. John L. Roper Lum-*

ber Co. 99 N. C. 15, 5 S. E. 19; *Brown v. Carolina C. R. Co.* 83 N. C. 128; *Wellington & P. R. Co. v. Cashie & C. R. & Lumber Co.* 116 N. C. 925, 20 S. E. 964; *Geer v. Durham Water Co.* 127 N. C. 354, 37 S. E. 474; *Atty. Gen. ex rel. Eason v. Perkins*, 17 N. C. (2 Dev. Eq.) 38; *Daughtry v. Warren*, 85 N. C. 136; *Dorsey v. Allen*, 85 N. C. 358, 39 Am. Rep. 704; *Burwell v. Vance County*, 93 N. C. 73, 53 Am. Rep. 454.

The plaintiff has been guilty of laches in applying for an injunction.

1 High, Inj. §§ 618, 643, 913.

The plaintiff's right of action for damages from construction and maintenance of the track is barred by the statute of limitations.

Bailey v. Carter, 42 N. C. (7 Ired. Eq.) 282; *Ex parte Alexander*, 122 N. C. 730, 30 S. E. 336.

Plaintiff cannot interfere with defendant's operation of its track, for the reason that it has acquired an easement to its right.

Barker v. Southern R. Co. 137 N. C. 214, 49 S. E. 115.

So long as the annoyances and inconveniences alleged to constitute the nuisance consist of effects and results caused by acts that are incidental and necessary to the proper operation of the defendant's trains, the defendant will not be liable for creating and maintaining a nuisance.

Thomason v. Seaboard Air Line R. Co. 142 N. C. 318, 55 S. E. 205.

Connor, J., delivered the opinion of the court:

It will be convenient to dispose of the several phases of this appeal in the order in which they are presented by the well-considered brief of the counsel for plaintiff. It may be conceded that the legal title to the soil over which the streets of the town of Tarboro are laid out is in the municipality. The deed from Howell to Moir and others vested it in them, and, by successive acts of the legislature, it has passed to and remains in the corporation. The corporation holds the title in trust for the citizens and public, to use and enjoy as public highways or streets, subject to the control of the town authorities, as prescribed by the charter and public laws contained in *Revisal 1905*, chap. 73. The title is impressed with a further trust, subject, however, to the rights of the public, for the use and benefit of the owners of lots abutting on said streets. *Moose v. Carson*, 104 N. C. 431, 7 L.R.A. 548, 17 Am. St. Rep. 681, 10 S. E. 689, and other cases. The rights of the original purchaser of the lots attaching by virtue of the trusts declared in the bond executed by Moir and others passed with the title to the lots as

appurtenant thereto, and, in respect to plaintiff's lot, vested in him. Cases may be found in other courts in which the right of an abutting owner to sue for damages sustained by reason of the use of streets is made to depend upon the ownership of the soil over which the street is laid out and established. Whatever distinctions in this respect may have been made by the courts in regard to the rights of abutting owners to redress for special injuries sustained have been generally abandoned. See *White v. Northwestern North Carolina R. Co.* 113 N. C. 610, 22 L.R.A. 627, 37 Am. St. Rep. 639, 18 S. E. 330 (in which the cases and views of eminent authors are stated with clearness and force by *Shepherd, Ch. J.*); *Tate v. Greensboro*, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767; *Brown v. Ashville Electric Co.* 138 N. C. 533, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; 27 Am. & Eng. Enc. Law, 2d ed. p. 181. Of course, we must not be understood as referring to actions for damages or compensation by reason of additional burdens imposed upon property condemned or dedicated by the owner to a public use, as in *Phillips v. Postal Tele. Cable Co.* 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022, and *Hodges v. Western U. Tele. Co.* 133 N. C. 225, 45 S. E. 572. In such cases the owner of the soil maintains an action for compensation for additional burdens imposed for public purposes. In addition to the right of the plaintiff to the use of the streets as a member of the municipality or a citizen of the town, he has, as an abutting owner of the lot, rights peculiar to such ownership. *Burwell, J.*, in *Tate v. Greensboro*, *supra*, says: "It is not to be denied that the abutting proprietor has rights as an individual in the street in his front, as contradistinguished from his rights therein as a member of the corporation or one of the public." For an invasion of his rights as a member of the corporation—that is, to the use of the streets—he must seek redress through the corporate authorities, or, upon their refusal to act, by an action in behalf of himself and all other members or citizens. *Merrimon v. Southern Paving & Constr. Co.* 142 N. C. 539, 8 L.R.A. (N.S.) 574, 55 S. E. 366. If the street is obstructed, he may sue for any special damage sustained by himself, different in character from other citizens, as in *Downs v. High Point*, 115 N. C. 182, 20 S. E. 385, *Farmers' Co-op. Mfg. Co. v. Albemarle & R. R. Co.* 117 N. C. 579, 29 L.R.A. 700, 53 Am. St. Rep. 606, 23 S. E. 43. Plaintiff, in this appeal, sues for an alleged injury, by which he claims to have sustained special damages different in character from such as are sustained by other citizens. That he may maintain the action,

unless barred by the statute of limitations, is clear. 27 Am. & Eng. Enc. Law, 2d ed. p. 183, in which it is said: "If he has suffered special injury from the use of the street by the railroad, his remedy is by an action for damages." Lewis, Em. Dom. 2d ed. 240. Mr. Abbott, in the last edition of his work on Municipal Corporations (vol. 3, § 843), referring to the authorities cited in the first edition, says: "Since then it has become very firmly established that the abutter, though he has not the fee of the street, has certain private rights of access, light, and air, which are as much property as the lot itself; also that any interference with such rights, by a use which is not within the legitimate purposes of a highway, is a taking, within the Constitution." *White v. Northwestern North Carolina R. Co. supra.*

Without multiplying authorities, we may with safety say that with us, and the majority of other courts, the principle is established that, without regard to the ownership of the fee in the soil, an abutting owner may maintain an action for any unlawful interference with or invasion of his rights incident to his ownership. We think it equally well settled that the municipal authorities have no right or power, certainly as against abutting owners, to grant to a railroad company an easement to lay its tracks upon, and operate its trains over, the streets of the town. It is immaterial whether the title of the street is in the municipality or the abutting owner. If in the former, it is a breach of the trust reposed in the authorities; and, if in the latter, it is an additional burden. In either case damages or compensation will be awarded appropriate to the injury sustained. The law, as held by us, and sustained by the weight of authority, is thus stated by Shepherd, Ch. J., in *White v. Northwestern North Carolina R. Co. supra*: "The principle then being established that the use of a street for steam railroads is not a legitimate use of the street for public purposes, it must, of course, follow that the city had no right, in the exercise of its usual and ordinary powers relating to its highways, to authorize the entry and occupation of the same by the defendant, and that the bare license of the city can afford no justification for the infringement of the rights of the plaintiff." Mr. Lewis, Em. Dom. vol. 1, § 111, says: "To us it seems so clear that a railroad is foreign to the legitimate uses of a highway that we never have been able to understand how a court could reach a contrary conclusion." After an exhaustive discussion of the decisions of various courts, he concludes: "It can now be safely said that the weight of authority

is in support of the text." We do not deem it necessary or pertinent to the decision of this appeal to consider or discuss the effect of the action of the municipal authorities in granting an easement to the defendant, or to those to whose rights it has succeeded, in the streets upon the right of the plaintiff as a citizen of the town. He is not suing for an invasion of such rights, or for the occupation of any portion of the street, or its use in the operation of its trains. He sues for special damages to his property abutting upon the street. Conceding that the original entry upon the streets, the construction of the road, and the operation of the trains were with the consent of the municipal authorities, and that, to the extent of the authority to do so, they granted the easement over the street, we do not perceive how this can affect the plaintiff's rights in this action. The authorities are uniform to the effect that neither the municipal authorities nor the legislature can confer an easement or right to use the street, as against the property of the citizen, without providing for compensation. The question was considered by us in *Brown v. Asheville Electric Co. supra*, and the authorities examined. We are content to abide by what was said in that case.

The defendant says that, conceding a cause of action accrued to plaintiff or to those from whom he purchased the property for the interference with their rights as abutting owners, he is barred by the lapse of time and the statute of limitations. It is clear that the Williamston & Tarboro Railroad Company or its successors could, under the grant of the right of eminent domain, have condemned a right of way over Albemarle avenue, and, by paying compensation or permanent damages to the abutting owner, have acquired the right to construct and operate its road, pursuant to the rights, privileges, and franchises conferred in the charter. The owners of the property would not have been entitled to an injunction to restrain such condemnation or use. Whatever may have been the rights of the owner of the property in 1870 when the road was constructed along Albemarle avenue, it is clear that the plaintiff, having purchased the property after the road was constructed, and while it was being operated, will not be allowed to enjoin its use in a proper manner. The spur track was constructed in 1889, and has been in use seventeen years. The map and the statutes put in evidence show that the defendant's road between Tarboro and Plymouth constitutes part of a system of railroads; that to enjoin the use of the track over Albemarle avenue would destroy property of immense value, and seriously interfere with, and, until a new

connection be made involving the construction of a new iron bridge over Tar river, render it impossible for the defendant to perform, its duties to the public. That the public would, in many ways, be seriously injured, is manifest. Courts never enjoin the construction or use of public utilities and improvements at the suit of private individuals unless the damage is both serious in amount and irreparable in character. *Roanoke Nav. Co. v. Emry*, 108 N. C. 133, 12 S. E. 900. It is a sufficient answer to the demand for an injunction that plaintiff has, by his inaction for so long a period, permitted an expenditure of large sums, not only in the construction of the road, but in connections, bridges, and otherwise, both by the defendant and others, rendered it inequitable to destroy the value of the property and impose the immense inconvenience which would result from restraining the use thereof. In regard to the spur track, while the reasons are not so conclusive, we can see from the map and the evidence that to prevent its use in a proper way—that is, as a passage to and from the electric-light plant and waterworks of the town—would seriously affect public interests. If plaintiff regarded the injury to his property, by the construction of the spur track, serious and irreparable, he should have objected to it before, or at the time it was constructed. He may not wait seventeen years and then invoke the equitable power of the court. The plaintiff says that, while he may not have injunctive relief, he is entitled to his action for damages, sustained by reason of the invasion of his rights of access, air, light, shade trees, quiet, and rest of his family and himself; that the construction of the road along Albemarle avenue and the spur tracks and the running of the trains have seriously injured him in these respects. To this demand defendant pleads the statute of limitations. The plaintiff insists that as, by the provisions of § 389, Revisal 1905, no right can be acquired to an exclusive use of the streets, by lapse of time, against the municipality, this defense is not open to defendant.

It is undoubtedly true, as said by Mr. Justice Avery in *Moose v. Carson*, supra: "No one can acquire, as a general rule, by adverse occupation as against the public, the right to a street or square dedicated to the public use." In that case the plaintiffs claimed title to the soil dedicated as a street. It was held that they could not recover. The defendants were claiming as abutting owners by virtue of the dedication. The learned justice says: "The plaintiffs have shown no such title as would warrant the court in granting a writ of possession. If the fee were vested in the town,

which is not conceded, there would still be wanting in the plaintiffs, its grantees, the right to prevent possession and occupancy of a street dedicated to the public." *Conrad v. West End Hotel & Land Co.* 126 N. C. 776, 36 S. E. 282; *Hughes v. Clark*, 134 N. C. 457, 46 S. E. 956, 47 S. E. 462. In *State v. Atlantic & N. C. R. Co.* 141 N. C. 736, 53 S. E. 290, the city of New Bern was enforcing an ordinance, by indictment, for obstructing the street. The court held that, by granting the license to defendant to construct its track on the street, the city did not surrender its power or right to control its use. What effect the action of the municipal authorities, in passing the several ordinances, may have upon its right to maintain actions, or plaintiff's right to sue for injuries sustained by him as a citizen of the town, are not presented, and we express no opinion in regard to them. The plaintiff here sues, not by virtue of any rights claimed under or in privity with the town; but he asserts that, without regard to the action of the town authorities, the defendant, by constructing and operating its road, has committed a trespass upon his property rights. We hold that the ordinances relied upon by defendant to justify its conduct do not affect the plaintiff's rights, and that, notwithstanding such ordinances, whether treated as licenses or grants of easements, he may maintain his action. Having thus successfully asserted his right against both the municipal authorities and the defendant justifying under them, he may not claim immunity from the operation of a statute of limitations, by reason of a statute conferring such immunity upon the town.

It is not necessary for us to discuss the interesting question raised by plaintiff's counsel, whether, by the construction and operation of the road over Albemarle avenue for more than twenty years, the defendant has acquired, as against plaintiff, an easement or right to do so. The origin and extent of the use, as the basis for a presumption of a grant, present interesting questions not free from difficulty. They are indicated in the opinion of Mr. Justice Avery in *Emery v. Raleigh & G. R. Co.* 102 N. C. 209, 232, 11 Am. St. Rep. 727, 9 S. E. 139. It was in consequence of this difficulty, and to prevent railroad companies owing duties to the public from being subjected to successive actions for trespasses of the character charged in this action, that the court found it necessary to treat the cause of action as accruing on the date of the first substantial injury and to require that permanent damages be assessed. Repeated actions for diverting water over lands not condemned for rights of way, by

the construction and repairs of the road, were frequently brought, and it was found impracticable for the companies to protect themselves and keep their roads in safe and proper condition to meet the demands imposed upon them for the public. The question was thoroughly discussed, and the authorities cited and reviewed by Mr. Justice Avery in *Ridley v. Seaboard & R. R. Co.* 118 N. C. 996, 32 L.R.A. 708, 24 S. E. 730. The attention of the legislature having been directed to the subject, an act was passed at the session of 1895 and, with the amendment thereto, constitutes § 394. Revisal 1905, subsec. 2, provides: "No suit, action, or proceeding shall be brought or maintained against any railroad company by any person for damages caused by the construction of said road or the repairs thereto, unless such suit, action, or proceeding shall be commenced within five years after the cause of action accrues," etc. In *Ridley's Case*, supra, it is held that the cause of action accrues, not necessarily at the time the road is constructed, but "when the first injury was sustained." In *Beach v. Wilmington & W. R. Co.* 120 N. C. 493, 26 S. E. 703, the question was carefully considered; and, although the court was divided upon certain aspects of the case, there was no difference of opinion in regard to the following language, used by the present chief justice in a dissenting opinion: "Since the act of 1895, chap. 224, p. 297, all damages accruing from the construction of a railroad must be sued for within five years, and the entire amount of damages must be recovered in one action." In *Lasiter v. Norfolk & C. R. Co.* 126 N. C. 509, 36 S. E. 48, Douglas, J., says: "Railroads are quasi public corporations, charged with important public duties, which in their very nature necessarily invoke the power of eminent domain; and therefore the courts, with practical unanimity, have created a species of legal condemnation by the allowance of so-called 'permanent damages.' . . . The provision in the act of 1895, incidentally providing for a statutory easement rather by implication than direct terms, seems to us to be, in effect, but little more than a legislative affirmation of the rule already enunciated in other jurisdictions, and adopted in *Ridley's Case*, which was decided a year after the act was passed." In *Stack v. Seaboard Air Line R. Co.* 139 N. C. 366, 51 S. E. 1024, it was held that the cause of action was barred after five years from the time that any "substantial injury was done." It is true that in these decisions the damage sued for was ponding water. We can see no reason why the same construction should not be given the statute in all cases where damage is claimed for in-

juries in the nature of a nuisance or invasion of rights of property incidental to the construction of the road. Certainly the same reasons exist. It would be not only productive of great injustice, but it would seriously impair the ability of railroads to discharge their duties to the public, if, whenever they found it necessary to increase the number of daily trains or the size of their engines, or change the kind of fuel used, they should be subjected to actions based upon the suggestion that they had increased the extent of the original user. As we held in *Thomason v. Seaboard Air Line R. Co.* 142 N. C. 318, 55 S. E. 205, when the right to construct a railroad is acquired by any means known to the law, the right to operate the road attaches, and this right is not confined to the needs or necessities at the time of the acquisition, but "to such further demands as may arise from the increase of its business and the proper discharge of its duty to the public." *Seaboard Air Line R. Co. v. Olive*, 142 N. C. 257, 55 S. E. 263; *Beasley v. Aberdeen & R. R. Co.* 147 N. C. 362, 61 S. E. 453. If the plaintiff had sued when he sustained the injury, he would have recovered permanent damages in the same manner as if the right to construct the road was condemned. *Lewis, Em. Dom.* § 653. We concur with his Honor that the plaintiff is barred of his action for damages by reason of the construction and operation of the road, both as to the main track and the spur track constructed in 1889. We do not perceive that any damage is shown by the spur track of 1902. If there be any, it will be open to plaintiff to show on another trial.

We are thus brought to consider the exception to his Honor's ruling upon the issue directed to the alleged nuisance in the manner of using and operating the trains and cars on the track. Assuming that, as against the plaintiff, the defendant has the right to use the tracks in the manner and to the same extent as if acquired by condemnation, or by the payment of permanent damages, does the evidence, which must be regarded for this purpose as true and open to inferences therefrom most favorable to plaintiff, show a nuisance of the right or quasi easement? Was defendant doing a lawful thing in a lawful way? We had occasion to consider the rights and liabilities of railroad companies in using their tracks near to dwelling houses, in *Thomason v. Seaboard Air Line R. Co.* 142 N. C. 300, 55 S. E. 198, 205. The principle which we deduced from our own, and the decisions of other courts, is thus stated: "The powers conferred upon a railroad company by its charter must be exercised 'in a lawful way,' that is, in respect to those who suffer dam-

age, with due regard for their rights. When exercised in an unreasonable or negligent way, so as to injure others in the enjoyment of their property, the injury is actionable." In that case, in the plaintiff's appeal, the tracks and side tracks were altogether on the right of way acquired by defendant. The only question involved, upon the complaint and demurrer, was whether there was an unlawful user. In the defendant's appeal the jury found, upon sufficient allegation, that there was a negligent use of a spur track by the company, amounting to an actionable nuisance. We gave the question careful consideration, and cited in the opinion the best-considered authorities. In the light of those decisions, and the later one of *Taylor v. Seaboard Air Line R. Co.* 145 N. C. 400, 59 S. E. 129, we do not find any evidence of a nuisance in the use and operation of defendant's trains over Albemarle avenue. That is a portion of the main track. The greater increase of trains, more cars, and heavier engines, making more noise and smoke, are incident to the use of the road, and should have been anticipated by plaintiff when he purchased the property, and, for more than thirty years, acquiesced in its use. The case, in this respect, comes clearly within the principle announced in *Thomason's Case* in plaintiff's appeal. In regard to the uses to which the spur track has been put, as described in plaintiff's testimony, we find more difficulty. It is not found why the spur track was constructed, nor are the ordinances under which it was placed as it is set out. The answer alleges that they were constructed for the purpose of permitting heavy goods and freight to be delivered to merchants, and, at the request of the town, for the purpose of reaching its electric-light plant. It is not very material what the purpose was, so far as the plaintiff is concerned. It would seem that, if the town authorities intended to permit the use of the common and the streets for a depot or discharging point, it should clearly appear, so that abutting owners and citizens interested should have opportunity to be heard in opposition thereto. The placing of a spur track from the main line to an electric-light plant in which all the people of the town are interested, and which would involve but limited use, is quite a different matter from placing it on the common, preserved with so much wise foresight by the original donor, more than a century ago, for the uses and purposes testified by plaintiff.

In addition to the authorities cited in *Thomason's Case*, *supra*, the industry of counsel, with additional investigation on our part, has discovered some other decided cases in line with what we there said, and 47 L.R.A. (N.S.)

more directly applicable to the facts in this appeal. In *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432, the plaintiff sought to enjoin defendant company from so using its track, laid along Bridge avenue in the city of Camden, as to create a private nuisance. It appeared that the track was laid by authority conferred by the legislature and the common council of the city. It was shown that the company used the track in front of complainant's dwelling for the purpose of distributing cars, making up freight trains, and keeping locomotives and cars laden with live stock standing thereon, etc. Dixon, J., said: "The fact that these nuisances are continuous, and materially diminish the comfort of complainants in their residence, makes the case one proper for an equitable remedy by injunction, unless defendant can justify its conduct." To the first suggestion that it was authorized to so use its track the court, after noting the language of the acts and ordinances, said: "In our judgment, they indicate that those rights are such as pertain to the use of the avenue for the purposes of a way, not for the purposes of a station yard. The primary privilege given is that of passage; this and its reasonable incidents cover the whole scope of the grant. The right of storing engines and cars, either for a longer or a shorter period, the right of making up or breaking up trains, are not embraced in such a concession. These are strictly station and terminal purposes, and, by providing for station yards, the legislature has indicated its intention that business of that nature should be transacted there. We do not say that the company may not, under any circumstances, do upon its roadway what ought commonly to be done in its yards; for, no doubt, unforeseen occurrences may sometimes render such acts almost indispensable, and then other less urgent rights of the public at large must give way. . . . Having a right of passage there, it used its tracks as though they were within its terminal yard, and so used them constantly in every-day concerns." The judge further said that, if such right was conferred by the legislature and common council, it was invalid as against plaintiff's rights. The injunction, to the extent of the nuisance, was granted. In *Frankle v. Jackson (C. C.)* 30 Fed. 399, Brewer, J., said: "Although a railroad may not be liable in damages for the occupation of a street and the running of its trains thereon in a customary, reasonable, and proper manner, . . . it may still be liable to damages for any unreasonable, improper, illegal, and wrongful use of its tracks. The right to use a street for the running of trains gives no right to establish a repair

shop thereon." In *Chicago G. W. R. Co. v. First M. E. Church*, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85, it was held that a grant to a railroad company to operate and maintain a railroad on a public street does not carry, by implication, the right to erect and maintain a water tank in the street. The general and, we may say, universally accepted doctrine, as announced in the cases cited, is illustrated and discussed. *Louisville & N. Terminal Co. v. Lellyett*, 114 Tenn. 368, 1 L.R.A. (N.S.) 49, 85 S. W. 881. In *Mahady v. Bushwick R. Co.* 91 N. Y. 148, 43 Am. Rep. 661, Andrews, Ch. J., conceding the right of the city authorities to grant a surface railway company the use of its streets, says: "It cannot, however, be questioned that a street cannot be converted into a yard for the storing or deposit of cars, to the injury of adjoining owners. An unreasonable use of the street by a street railway may doubtless afford a right of action to property owners specially injured thereby." *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42, 15 Atl. 833. In *Cleveland, C. C. & St. L. R. Co. v. Pattison*, 67 Ill. App. 351, the plaintiff in error was permitted to recover for improper use of a switch in front of his house.

Without repeating the evidence, we think it sufficient to entitle the plaintiff to have the issue as to the manner in which defendant was using the spur track submitted to the jury under proper instructions. While it is difficult to draw the line with precision, in each case, between the lawful use of the track and its unlawful use constituting an actionable nuisance, we think that in several respects the evidence would warrant a jury in finding that the defendant has used the spur track for other than legitimate purposes. There can be no question upon the evidence, that the rights of the plaintiff and his family are seriously interfered with by such use as is made of the spur track. The nuisance alleged is not permanent. It does not arise from the construction, but the use, of the spur track. The measure of damages would therefore be confined to such as were sustained within three years prior to the institution of the action. As the question is not before us, we forbear discussing it further than to quote from Joyce on the Law of Nuisances, § 259: "In case of a nuisance caused by the operation of a railroad in an unlawful manner the damage should only be for the injury caused by such unlawful operation, and should not include an allowance for any injury caused by the lawful operation of the road, the latter injury being declared to be *damnum absque injuria*." If the defendant violated the town ordinance in regard to the speed of its train, the plaintiff has his remedy by applying to the municipal authorities or to a justice of the peace for a warrant for a misdemeanor. If the use of the spur track in violation of the rights of the plaintiff be continued, he is entitled to injunctive relief.

The judgment of his Honor on the first and second cause of action is affirmed. The judgment of nonsuit on the cause of action for damages for alleged unlawful use of the spur track as a nuisance is set aside, and a new trial awarded. The issue and evidence will be confined to the allegation that defendant has, within three years prior to the commencement of this action, so used the spur track and the street, in violation of its duty, as to constitute a nuisance, by which plaintiff has sustained special damage as an owner of the dwelling and premises abutting on the street. It is so ordered.

Partial new trial.

OKLAHOMA SUPREME COURT.

N. I. McLEOD, Plff. in Err.,
v.

E. B. SPENCER.

(— Okla. — 95 Pac. 754.)

Homestead — unperfected title — injury to premises.

1. A homesteader upon public land, proceeding lawfully to perfect his title, is entitled to compensation for injury done to the premises; but the measure of damages is not the same as if he owned the land in fee simple.

Same — measure of damages.

2. In such a case it is error for the court to instruct the jury that the measure of damages is just the same as if the plaintiff owned the land in fee. The court ought to have defined the rights of the settler in the homestead, and left the question to the jury to determine his interest, and, from such interest, the liability of the defendant.

(May 15, 1908.)

Headnotes by KANE, J.

Case Note. — Right of homesteader on public land, before receiving patent, to recover for injury to premises, and measure of damages therefor.

Right to recover damages.

A homesteader upon public land has, from the date of making a formal entry of his claim at the public land office, and paying the sum required by law, such a vested right of property therein as will permit him, before the issuance of a patent, to recover damages for an

ERROR to the District Court of Comanche County to review a judgment in plaintiff's favor in an action brought to recover damages for an alleged wrongful obstruction of a natural water way, causing a portion of plaintiff's homestead land to be overflowed and injured. Reversed.

The facts are stated in the opinion.

Messrs. Stevens & Myers, for plaintiff in error:

The complaint must show the degree of title which the party has; and then he can recover only according to such estate as he proves to have in the land.

Robbins v. Milwaukee & H. R. Co. 6 Wis. 636; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 66 L.R.A. 897, 72 Pac. 92; *Ellsworth, McP. N. & S. E. R. Co. v. Gates*, 41 Kan. 574, 21 Pac. 633.

Kane, J., delivered the opinion of the court:

This was an action by defendant in error, plaintiff below, for the alleged wrongful filling up by the plaintiff in error, defendant below, of a natural water way, by reason of which the waters were turned over and upon portions of plaintiff's homestead, so overflowing and damaging same as to render such portions worthless. The answer of defendant was a general denial. The petition of plaintiff alleged that the land was a homestead, and that he was occupying it as a homestead entryman under the homestead laws of the United States; and, upon the trial, it was admitted by the parties that such was the case. The trial was had before a jury, and resulted in a verdict and judgment for the plaintiff in the sum of \$100, from which judgment the defendant appealed to this court.

There are several grounds of error argued by counsel for plaintiff in error, in his brief,—only one of which, however, we believe has merit. Instruction No. 5, given by the court, to which exception was duly saved, is to the effect that the proper measure of damages is the difference in value of the land immediately before and immediately after the act complained of. We believe it was error for the court below to give this instruction. It is admitted that the plaintiff's interest in the land was that of a homestead entryman. While it is true that a homesteader

who proceeds lawfully to perfect his title to land entered is entitled to compensation for injury done to the premises, yet we believe the measure of damages is not the same as though he owned the land in fee simple. Mr. Justice Johnston, in *Burlington, K. & S. W. R. Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125, speaking of the nature of a homesteader's title to land occupied under the homestead laws, says: "The interest which the settler has may be appropriated for a right of way by adversary proceedings, as we have already seen that Congress has provided for the condemnation of a right of way through a homestead, as well as for its purchase from the settler. Of course, the settler does not part with the same interest or value that he would if he had the legal title, and he should only receive compensation for the interest taken from him." In the case of *Ellsworth, McP. N. & S. E. R. Co. v. Gates*, 41 Kan. 574, 21 Pac. 632, Clogston, C., who wrote the opinion, uses the following language: "In this case the court instructed the jury, and gave the rule for the measure of damages, just as it would have given it had the plaintiff, instead of having a homestead right, owned the fee. This was error. The court ought to have defined the rights of the settler in such homestead, and left the question to the jury to determine his interest, and, from such interest, the liability of the company. Just what that interest would be is a question of fact, in each case, to be determined by the jury, and depends upon the improved condition and the length of time the homestead has existed, and all other facts that go to make up its value. Its value may be much less than if the settler owned the fee of the land, or it may be substantially the same or a little less than its actual value including the fee. We are therefore of the opinion that the instructions of the court are erroneous, and recommend that the cause be reversed, and a new trial ordered." The above case seems to be in point here, and is, to our mind, supported by sound reason.

It is therefore ordered that the judgment of the court below be reversed, and the cause remanded for a new trial.

All the Justices concur.

injury to the land. *McGuire v. Brown*, 106 Cal. 660, 30 L.R.A. 384, 39 Pac. 1060; *Larsen v. Oregon R. & Nav. Co.* 19 Or. 240, 23 Pac. 974; *Burlington, K. & S. W. R. Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125; *Ellsworth, McP. N. & S. E. R. Co. v. Gates*, 41 Kan. 574, 21 Pac. 632; *Red River & L. of W. R. Co. v. Sture*, 32 Minn. 95, 20 N. W. 229; *Pairier v. Itasca County*, 68 Minn. 297, 71 N. W. 382; *Matthews v. O'Brien*, 84 Minn. 505, 88 N. W. 12; *Hastay v. Bonness*, 84 Minn. 120, 86 N. W. 896, *Nelson v. 17 L.R.A. (N.S.)*

Big Blackfoot Mill Co. 17 Mont. 553, 44 Pac. 81; *Culbertson Irrig. & Water Power Co. v. Olander*, 51 Neb. 539, 71 N. W. 298; *Gulf, C. & S. F. R. Co. v. Clark*, 41 C. C. A. 597, 101 Fed. 678, s. c. 2 Ind. Terr. 319, 51 S. W. 962; *Wendel v. Spokane County*, 27 Wash. 121, 91 Am. St. Rep. 825, 67 Pac. 576.

This doctrine has been applied under the following circumstances:—where a homesteader was deprived of the flow of water in a stream. *McGuire v. Brown*, supra.

—where a railway was constructed across

a homestead. *Larsen v. Oregon R. & Nav. Co.*; *Burlington, K. & S. W. R. Co. v. Johnson*; *Ellsworth, McP. N. & S. E. R. Co. v. Gates*; and *Red River & L. of W. R. Co. v. Sture*,—*supra*.

—where a public road was opened through a homestead. *Pairier v. Itasca County*, *supra*.

—where a county, in constructing a road 7 miles distant from a homestead, turned the waters of a lake so as to flood the homestead. *Wendel v. Spokane County*, *supra*.

—where one wrongfully entered upon and cropped a homestead. *Matthews v. O'Brien*, *supra*.

—where a ditch was cut through a homestead. *Culbertson Irrig. & Water Power Co. v. Olander*, *supra*.

—where standing timber was cut and removed from a homestead. *Hastay v. Bonness and Nelson v. Big Blackfoot Mill. Co.* *supra*.

—even though the timber was cut under a permit from the Secretary of the Interior to cut timber upon public lands; as such right does not attach to lands appropriated for a homestead. *Nelson v. Big Blackfoot Mill Co.* *supra*.

—where a railway company, by the erection of dykes, changed the current of a river so as to erode and wash away the homestead land. *Gulf, C. & S. F. R. Co. v. Clark*, 2 Ind. Terr. 319, 51 S. W. 962.

The decision in the last case was reversed in 41 C. C. A. 597, 101 Fed. 678, but upon the ground that the injury complained of was *damnum absque injuria*, and not upon the ground that a homesteader, before receiving a patent, has no such interest as will sustain an action for damages to the premises.

But it was held in *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 420, 2 N. W. 648, that a homesteader upon public lands makes his entry thereon subject to be defeated, before he earns his patent, by the construction of a railway right of way over it by a company empowered by Congress to construct its tracks across public land; as the homesteader's only right, prior to the issue of his patent, is that of possession.

Measure of damages.

But the homesteader may recover the value of any improvements he has placed on the premises which may be appropriated by a railway company in constructing its right of way. *Flint & P. M. R. Co. v. Gordon*, *supra*.

As the injury sustained by the appropriation and use of a strip of land for railway purposes, through the homestead, affects the entire tract by a division thereof into parts of irregular shape, with deep cuts and high fills, the inconvenience resulting from the construction of the road constitutes an injury to the homesteader which differs only in degree from that sustained by one who owns the legal title; and the extent of that injury is for the jury to determine. *Burlington, K. & S. W. Co. v. Johnson*, *supra*.
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It is error for the court to instruct the jury, in an action to recover for the construction of a railway across the homestead, as to the measure of damages, as though the homesteader owned the fee; as the interest of the homesteader and the liability of the company are questions for the jury. *Ellsworth, McP. N. & S. E. R. Co. v. Gates*, *supra*.

Where no special damages are alleged, the homesteader is only entitled to recover, by reason of the laying of a railroad track across his premises and the operation of the road, as well as the actual damage, such damages as he sustains by the breaking of his close, the correct measure being the difference between the annual rental value of the premises with a railroad track upon and operated over it and what the rental value would have been without the railroad upon it. *Larsen v. Oregon R. & Nav. Co.* *supra*.

And the measure of damages for the construction of a railway across a homestead was held in *Red River & L. of W. R. Co. v. Sture*, *supra*, to be the difference between the value of the homesteader's rights in the land as they would have been without the construction of the road and their value as diminished by such construction.

Where one cutting and removing timber from a homestead is a trespasser, and did not act in good faith or reasonably believe his act was lawful, the measure of damage to the homesteader is the value of the timber at the time of its conversion; otherwise he can recover only the value of the standing timber. *Hastay v. Bonness*, *supra*.

And where timber is cut and removed from the homestead by one holding a permit from the Secretary of the Interior for the cutting of timber upon public lands (which did not include the homestead right), the measure of damages is limited to the value of the timber taken, and does not include the expense of removing the tree tops left upon the land. *Nelson v. Big Blackfoot Mill. Co.* *supra*.

WASHINGTON SUPREME COURT.

SAMUEL SLOAN, Appt.,

v.

D. W. WEST, Admr., etc., of Mary Sloan,
Deceased, et al., Respts.

(— Wash. —, 96 Pac. 684.)

Marriage — presumption — evidence.

1. The presumption attaching to a second marriage of a person is not sufficient to overcome direct testimony of himself and his former wife and disinterested witnesses, that the first marriage was legally solemnized.

Note. — As to presumptions growing from marriage ceremony, see case note to *Smith v. Fuller*, 16 L.R.A. (N.S.) 98.

Same — legality.

2. The authority of the official performing a marriage ceremony and all the prerequisites of a valid marriage will be presumed until the contrary is made to appear.

Same — dissolution — presumption.

3. Testimony of both of the contracting parties to a marriage ceremony, that it was not dissolved until after the death of a person with whom one of the parties went through a subsequent ceremony, overcomes any presumption which the court might otherwise have indulged as to the dissolution of the first marriage before the second was entered into.

Same — estoppel.

4. One who, having a wife living, contracts marriage with another and cohabits with her, is not estopped from denying the validity of the marriage for the purpose of defeating the right of her heirs to share in their estate as community property.

Administration — petition — estoppel.

5. Petitioning for administration on the estate of one with whom petitioner contracted a marriage does not estop him from disputing the validity of the marriage because of the fact that he had a prior wife living.

Husband and wife — community — illegal marriage.

6. The heirs of a woman who entered into meretricious relations with a man having a wife living, because of which relations their property was kept separate and apart, have no right or interest in his property after her death.

Witness — interest — prospective heir.

7. The possible interest of a prospective heir of a living person is not sufficient to disqualify him as a witness in a proceeding to settle the rights of heirs of one claimed to be the wife of such person to share in the community property after her death.

(July 16, 1908.)

APPEAL by petitioner from a judgment of the Superior Court for King County overruling his petition for the distribution to him of property claimed as community property of himself and Mary Sloan, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Frank A. Steele, Walter B. Beals, and Hastings & Steadman, for appellant:

The decree of divorce rendered in 1902 is conclusive of the fact that petitioner was, from 1851 continuously, the husband of Alice Babcock.

Ellison v. Martin, 53 Mo. 575; Bishop, Marr. & Div. 1881, 6th ed. § 754.

The marriage of a man and woman where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void, and not merely voidable. 17 L.R.A. (N.S.)

Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Reeves v. Reeves, 54 Ill. 332; Drummond v. Irish, 52 Iowa, 41, 2 N. W. 622; Blossom v. Barrett, 37 N. Y. 434, 97 Am. Dec. 747; Tefft v. Tefft, 35 Ind. 44; Glass v. Glass, 114 Mass. 563; Martin v. Martin, 22 Ala. 86; 1 Bishop, Marr. & Div. §§ 202, 717-729; Schouler, Dom. Rel. § 21.

Presumption of innocence will not arise if one of the parties is proved to be married to someone else.

Cartwright v. McGown, supra; Weinberg v. State, 25 Wis. 370; Stewart, Marr. & Div. § 125.

There can be no common-law marriage or marriage by agreement in this state.

Re McLaughlin, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651; Stans v. Baitey, 9 Wash. 115, 37 Pac. 316.

A marriage void at the time of its celebration is not validated by removal of the bar, and subsequent cohabitation, whether the bar is removed by divorce or by repeal of the law.

Re Wilbur, 8 Wash. 35, 40 Am. St. Rep. 886, 35 Pac. 407.

A ceremonial marriage having been shown, every presumption prevails in its favor until overcome by convincing evidence.

Re Megginson, 21 Or. 387, 14 L.R.A. 540, 28 Pac. 388.

Appellant is not estopped to assert his title to this property by reason of the fact that he consented to the administration, nor is he estopped to deny that Mary Steves was his wife.

Filey v. Murphy, 30 Wash. 1, 70 Pac. 107; Williams v. Ketcham, 37 Ind. App. 506, 77 N. E. 285; Wade v. McDougale, 59 W. Va. 113, 52 S. E. 1026; 2 Current Law, p. 1492; Pickard v. Sears, 6 Ad. & El. 469; Caldwell v. Auger, 4 Minn. 217, Gil. 156, 77 Am. Dec. 515; Taylor v. Zepp, 14 Mo. 482, 55 Am. Dec. 113; Waters's Appeal, 35 Pa. 523. 78 Am. Dec. 354; Robbins v. Potter, 98 Mass. 532; Gathings v. Williams, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49; 1 Bishop, Marr. & Div. § 300; Miles v. Chilton, 1 Rob. Eccl. Rep. 684; Glass v. Glass, supra; Anonymous, 15 Abb. Pr. N. S. 171; Amory v. Amory, 6 Robt. 514.

Messrs. Charles E. Patterson and James M. Gephart, for respondents:

Where the validity of a marriage is sought to be destroyed by the existence of a prior marriage, the burden to prove the prior marriage, and that it was performed in full compliance with all the laws governing the same, rests upon the party who asserts the invalidity of the second marriage by reason of the validity of the first.

Megginson v. Megginson, 14 L.R.A. 540, note; Goldwater v. Burnside, 22 Wash. 215, 60 Pac. 409; Re Rash, 21 Mont. 170, 69

Am. St. Rep. 649, 53 Pac. 312; Summerville v. Summerville, 31 Wash. 416, 72 Pac. 84.

Petitioner is now estopped from asserting that the land in litigation is not the community property of himself and Mary Sloan.

Donnelly v. Donnelly, 8 B. Mon. 113; Meister v. Birney, 24 Mich. 435; Heyn v. O'Hagen, 60 Mich. 150, 26 N. W. 861; Sadler v. Niesz, 5 Wash. 182, 31 Pac. 630, 1030; Canadian & A. Mortg. & T. Co. v. Bloomer, 14 Wash. 491, 45 Pac. 34.

Mr. W. E. Humphrey also for respondents.

Rudkin, J., delivered the opinion of the court:

Samuel Sloan and Alice Babcock, sometimes known as Elsie Babbirk, intermarried in Albert county, New Brunswick, about the year 1852, and remained husband and wife until the marriage was dissolved by decree of the superior court of Kitsap county on the 14th day of April, 1902, at the suit of the husband. The parties to this marriage lived together in New Brunswick as husband and wife for some years after the consummation of the marriage, and then separated. In the year 1868, the husband came to Washington territory, and has resided in the territory and state ever since. In the year 1873, he returned to New Brunswick, and there married one Mary Steves early in the year 1874, while his former wife was still living and undivorced. Immediately after this marriage, he returned to Washington territory with Mary Sloan or Mary Steves, and the parties continued to live together here, as husband and wife, from that time until the death of the latter, on the 6th day of February, 1899. On the 19th day of April, 1902, D. W. West, a son-in-law of Mary Steves, petitioned the superior court of King county for letters of administration on her estate as the deceased wife of Samuel Sloan, and Samuel Sloan joined in the petition. The prayer of the petition was granted, and the administration proceeded until the 31st day of January, 1905, at which time a final account of the administration was rendered, and a petition for distribution filed. The petition for distribution prayed that one half of the residue of the estate be distributed to Samuel Sloan as surviving husband, and the other half to certain children of Mary Steves by a former husband and to the representatives of certain deceased children. At this juncture, Samuel Sloan filed his petition in the estate matter, setting forth his marriage with Alice Babcock long prior to his marriage with Mary Steves; that his former marriage was not dissolved 17 L.R.A. (N.S.)

until long after the death of Mary Steves; that Mary Steves knew, at all times, that the petitioner had a lawful wife living; that it was agreed between the petitioner and Mary Steves that a fair proportion of all property earned or acquired by them should be given to her as her separate estate; that this agreement was carried out, and that Mary Steves received, for her own use and benefit, one half of all property acquired by them in this state; that the petitioner was absent in Alaska when Mary Steves died, and that, on his return to this state, her son-in-law represented to him that it would be necessary to take out letters of administration on her estate in order to perfect title to the remaining property in the petitioner; that certain false and fraudulent representations were made; that the property sought to be distributed is the sole and separate property of the petitioner, and should be distributed to him, etc. The allegations of this petition were put in issue by answers filed by the administrator and the heirs at law of Mary Steves, deceased, and a trial was had. At the close of the petitioner's case, the court granted a motion for nonsuit; and, from the judgment of nonsuit, this appeal is prosecuted.

The existence of the marriage between the appellant and Alice Babcock is controverted, but that marriage is established by clear and cogent proof. The fact that the parties were married about the date specified, in the presence of witnesses, by a Baptist minister authorized by the laws of the province of New Brunswick to solemnize marriage, and that they thereafter lived together as husband and wife for some years, was testified to by both of the contracting parties and by several disinterested witnesses, and was in no wise contradicted or controverted. "The presumption of marriage, from a cohabitation apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence." Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677. We are not unmindful of the fact that the presumption which ordinarily attaches to the first marriage is now transferred to the second, and that stronger proof of the validity of the first marriage is required than if the second did not exist. The presumption which attaches to the second mar-

riage, however, only overcomes a presumption of marriage arising from reputation and cohabitation, and is not sufficiently strong to overcome such proofs of marriage as are found in this record. The proof here is ample to establish the validity of the first marriage, even in a criminal prosecution for bigamy, much more in a civil action, where property rights alone are involved. *State v. Kean*, 10 N. H. 347, 34 Am. Dec. 162; *Fleming v. People*, 27 N. Y. 329; *People v. Calder*, 30 Mich. 85; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 742; *Damon's Case*, 6 Me. 148.

The respondents contend that there is no proof that banns were published; that a license was obtained; that the officiating clergyman was a British subject; or that the marriage was not dissolved. The authority of the officer or clergyman performing the marriage ceremony and all the prerequisites of a valid marriage will be presumed until the contrary is made to appear. *Meggison v. Megginson*, 14 L.R.A. 540, and note, 21 Or. 387, 28 Pac. 388. Both of the contracting parties testified that the marriage between them was not dissolved until long after the death of Mary Steves; and this proof overcomes any presumption that the court might otherwise indulge.

It is further contended that the appellant is estopped to deny the validity of his marriage to Mary Steves, or the fact that the property in controversy is the community property of himself and Mary Steves. Doubtless parties are sometimes estopped to deny their marriage as to third persons who have been misled to their prejudice; but, as between husband and wife and parent and child, there is no such status known to the law of domestic relations as marriage by estoppel; nor is the appellant estopped by reason of anything contained in the administration proceedings. *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107; *Hatch v. Ferguson* (C. C.) 57 Fed. 966. If there was no lawful marriage between the appellant and Mary Steves, as a matter of course there is and can be no community property. *Hatch v. Ferguson*, supra; *Kelley v. Kitsap County*, 5 Wash. 521, 32 Pac. 554; *Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316; *Routh v. Routh*, 57 Tex. 595; *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. 564; 21 Cyc. Law & Proc. p. 1636; 6 Am. & Eng. Enc. Law, 2d ed. p. 297.

We therefore hold that the proofs in the record amply show that the appellant and Mary Steves were never lawfully married, and that the property involved in this action is not community property. If the re-

spondents have any interest in the property as children or grandchildren of Mary Steves, deceased, the burden is upon them to establish that fact, as it does not arise out of any marriage relation. We cannot anticipate the questions that may arise in the further progress of the trial, and all such questions must be left open for future consideration. We do hold, however, that, if it should appear that there was no lawful marriage between the appellant and the deceased, that the deceased was at all times fully aware of their meretricious relations, and that, in view of such relations, their property was kept separate and apart, the respondents have no right or interest in the property now in controversy. In view of the retrial that must follow a reversal, we will add further that the court was in error in excluding the testimony of Samuel H. Sloan, a son of the appellant, on account of interest in the subject-matter of the action. The only possible interest the witness had or could have, under the facts disclosed by the record, was that of a prospective heir. But the rule is well established that the living have no heirs, and that the interest of the ancestor does not disqualify the heir apparent. "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action. It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent. Thus, the heir apparent to an estate is a competent witness in support of the claim of his ancestor, though one who has a vested interest in remainder is not competent; and, if the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency, for, being always presumed to be competent, the burden of proof is on the objecting party to sustain his exception to the competency; and, if he fails satisfactorily to establish it, the witness is to be sworn." 1 Greenl. Ev. 14th ed. § 390.

For the error in granting the nonsuit, the judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Dunbar, Crow, and Mount, JJ., concur.

Hadley, Ch. J., and Fullerton, J., took no part.

Petition for rehearing denied.

COLORADO SUPREME COURT.

FENICE FERRARA, Plff. in Err.,
v.
AURIC MINING COMPANY.

(—Colo.—, 95 Pac. 952.)

Pleading — judgment.

1. Defendant is not entitled to judgment for failure of plaintiff to reply to a defense set out in the answer, if the defense is not sufficient in law to defeat the action.

Death — action — nonresidence — alien.

2. A statute giving the widow a right of action for the negligent killing of her husband operates in favor of a nonresident alien.

(May 4, 1908.)

ERROR to the District Court for Pueblo County to review a judgment in favor of defendant in an action brought to recover damages for the negligent killing of plaintiff's husband. Reversed.

The facts are stated in the opinion.

Mr. M. J. Galligan, for plaintiff in error:

A nonresident alien, subject of the Kingdom of Italy, can sue for the purpose of recovering on account of the death of the husband of plaintiff by the wrongful act of the defendant.

Vetaloro v. Perkins, 101 Fed. 393; *McMillan v. Spider Lake Saw Mill & Lumber Co.* 115 Wis. 332, 60 L.R.A. 589, 95 Am. St. Rep. 947, 91 N. W. 979; *Mulhall v. Fallon*, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; *Bonthron v. Phoenix Light & Fuel Co.* 8 Ariz. 129, 61 L.R.A. 563, 71 Pac. 941; *Cleveland, C. C. & St. L. R. Co. v. Osgood* (Ind. App.) 70 N. E. 839; *Patek v. American Smelting & Ref. Co.* 83 C. C. A. 284, 154 Fed. 190.

Failure to reply admits only the facts pleaded, and, if those facts constitute no defense, then a reply thereto is wholly unnecessary.

Covart v. Haskins, 39 Kan. 571, 18 Pac. 522; *Forgotson v. Becker*, 39 Misc. 816, 81 N. Y. Supp. 321; *Patek v. American Smelting & Ref. Co.* supra.

Mr. William W. Field, with Messrs. Wolcott, Valle, & Waterman and H. H. Dunham, for defendant in error:

Since the right to maintain an action of this kind is wholly dependent upon stat-

ute, a nonresident alien has no standing in the Colorado courts.

Jefferys v. Boosey, 4 H. L. Cas. 815; *Adam v. British & F. S. S. Co.* [1898] 2 Q. B. 430; *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558; *Branigan v. Union Gold Min. Co.* 93 Fed. 164; *McMillan v. Spider Lake Saw Mill & Lumber Co.* 115 Wis. 332, 60 L.R.A. 589, 95 Am. St. Rep. 947, 91 N. W. 979; *Cleveland, C. C. & St. L. R. Co. v. Osgood* (Ind. App.) 70 N. E. 839.

Every legislative act is presumed to be confined to cases or persons within the reach and scope of its sovereignty, unless the contrary expressly appears, or, by the context, it is irresistibly implied.

Endlich, Interpretation of Statutes, § 176: *Lamson v. Vailes*, 27 Colo. 201, 61 Pac. 231; *Atchison, T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 85, 39 Pac. 985; *Cope v. Doherty*, 4 Kay & J. 367; *Ex parte Blain*, L. R. 12 Ch. Div. 526; *Farnum v. Blackstone Canal Corp.* 1 Sumn. 62, Fed. Cas. No. 4,675; *Merrill v. Boston & L. R. Co.* 63 N. H. 259; *McMillan v. Spider Lake Saw Mill & Lumber Co.* supra; *Beardsley v. New York, L. E. & W. R. Co.* 17 Misc. 256, 40 N. Y. Supp. 1077.

Steele, Ch. J., delivered the opinion of the court:

The complaint alleges, in substance, that the plaintiff is the wife and widow of Pietro Ferrara, deceased; that, on June 26, 1897, the deceased was employed by the defendant as a miner; and that, while so employed and engaged in working in the mine of said defendant, the said deceased was killed by reason of the negligence of the said defendant, and without fault of the said deceased. On January 24, 1899, the answer of the defendant was filed; and, on February 27th following, the plaintiff filed her reply. During the trial the defendant, over plaintiff's objection, was granted leave to file an amendment to its answer, which amendment is as follows: "Defendant is informed and believes, and so alleges, that plaintiff is and at all times heretofore has been a resident of Italy, and that plaintiff is not now and never has been at any time a resident of the state of Colorado or of the United States of America, and is not entitled to bring or prosecute this action in any of the courts of the state of Colorado." On May 6, 1901, on motion of the defendant, judgment was rendered on the pleadings for the reason that no reply had been filed to the said fourth defense. The motion was sustained, and final judgment of dismissal and that the defendant go hence without day was duly entered. Motion for new trial was denied, and the plaintiff took the case by writ of error to the court of appeals.

Note. — As to right of nonresident alien to maintain a statutory action for death, see case note to *Pittsburgh, C. C. & St. L. R. Co. v. Naylor*, 3 L.R.A. (N.S.) 473, 17 L.R.A. (N.S.)

It is insisted by the defendant that, as a demurrer to the fourth defense was overruled, it became the duty of the plaintiff to reply, and, having failed to reply, judgment upon the pleadings was properly entered. The plaintiff not having replied to the fourth defense, the matters stated therein must be taken as true. The defendant was entitled to judgment upon the pleadings if the matters set forth in the fourth defense are sufficient in law to defeat the plaintiff's action. If they are not sufficient, then the judgment must be reversed. The only question, therefore, for our consideration is, Is the plaintiff, being a nonresident alien, entitled to maintain the action?

Counsel contend: "That the overwhelming weight of authority and of all the well-reasoned decisions in this country and in England establish the proposition that, since the right to maintain an action of this kind is wholly dependent upon statute, a nonresident alien has no standing in the Colorado courts. The overwhelming weight of authority is that the laws of a state or country are made for the benefit of its citizens, or those who, by becoming denizens or residents of the state or country, have intrusted themselves to the governmental department of that country, thereby submitting themselves to its jurisdiction and entitling themselves to the benefit of its laws, unless expressly excluded from their operations." The fact is that there are but three cases in this country which sustain the contention of counsel that nonresident aliens may not maintain actions of this character. The first case is that of *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558, in which it is held, under the act of April 26, 1855 (P. L. 309), which gives a right to recover damages for an injury causing death, that a nonresident alien mother has no standing to maintain an action against a citizen of Pennsylvania to recover damages for the death of her son. In the course of the opinion the court said: "Our legislation on this subject is in accord with the English statute of August 26, 1846, and therefore the decisions of the English courts construing this statute are often referred to in cases grounded upon our acts of April 15, 1851 [P. L. 674, § 19], and April 26, 1855. But no case has been brought to our notice in which an English court has held that a nonresident alien is entitled to the benefits conferred by the act of 1846. The same may be said of the decisions of the courts of our sister states having statutes similar to our own. . . . Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for

their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it." The next in point of time is the case *Brannigan v. Union Gold Min. Co.* (C. C.) 93 Fed. 164, decided by Judge Hallett in the year 1899, in which he held that nonresident aliens are not entitled to the benefit of the Colorado statute, and followed the decision of the Pennsylvania court. He says, after quoting from the Pennsylvania case: "Under the circumstances I see no reason for denying the force and effect of this opinion. It appears to be founded upon good reason, and to be as applicable in Colorado as it is in Pennsylvania." The next is the case of *McMillan v. Spider Lake Saw Mill & Lumber Co.* 115 Wis. 332, 60 L.R.A. 589, 95 Am. St. Rep. 947, 91 N. W. 979, wherein it was held that the Wisconsin statutes do not give any right of action for the loss sustained by nonresident alien relatives of a person whose death was caused by a wrongful act, neglect, or default. These are the only cases from the courts of this country which have been cited in support of the proposition that nonresident aliens, heirs or relatives of a person whose death was caused by wrongful act, neglect, or default are not entitled to maintain an action; but there is no dearth of authority sustaining the position of the plaintiff in this case that such action may be maintained. In the states of Iowa, Ohio, Indiana, Minnesota, and New York it is held that an action will lie by the administrator of a deceased person to recover damages for his death, even though the beneficiaries named in the statute be nonresident aliens. In the states of Georgia, Missouri, and Tennessee it is held that an action may be maintained by a nonresident of the state. In Georgia the court, speaking through Chief Justice Bleckley, significantly says: "Whenever a Georgia mother can recover, any other mother can do so under like circumstances. The act is general in its terms, and has no hint of any discrimination in favor of residents or against nonresidents." [92 Ga. 143.] In Virginia the action is maintainable by resident friendly aliens, while in Illinois, Delaware, Kansas, Massachusetts, and Arizona it is held that the action is maintainable by nonresident aliens. Such, also, is the holding by the United States circuit court of appeals for the eighth circuit, and the latest case we have from England holds that the personal representative of a subject of Norway is en-

titled to maintain an action in the English court to recover damages for an injury resulting in death. The cases are as follows: *Romano v. Capital City Brick & Pipe Co.* 125 Iowa, 591, 68 L.R.A. 132, 106 Am. St. Rep. 323, 101 N. W. 437, 2 A. & E. Ann. Cas. 678; *Pittsburgh, C. C. & St. L. R. Co. v. Naylor*, 73 Ohio St. 115, 3 L.R.A. (N.S.) 473, 112 Am. St. Rep. 701, 76 N. E. 505; *Cleveland, C. C. & St. L. R. Co. v. Osgood*, 36 Ind. App. 34, 73 N. E. 285; *Renlund v. Commodore Min. Co.* 89 Minn. 41, 99 Am. St. Rep. 534, 93 N. W. 1057; *Alfson v. Bush Co.* 182 N. Y. 393, 108 Am. St. Rep. 815, 75 N. E. 230; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Philpott v. Missouri P. R. Co.* 85 Mo. 164; *Chesapeake, O. & S. W. R. Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47; *Pocahontas Collieries Co. v. Rukas*, 104 Va. 278, 51 S. E. 449; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; *Szymanski v. Blumenthal*, 3 Penn. (Del.) 558, 52 Atl. 347; *Atchison, T. & S. F. R. Co. v. Fajardo*, 74 Kan. 314, 6 L.R.A. (N.S.) 681, 86 Pac. 301; *Mulhall v. Fallon*, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; *Bonthron v. Phoenix Light & Fuel Co.* 8 Ariz. 129, 61 L.R.A. 563, 71 Pac. 941; *Patek v. American Smelting & Ref. Co.* 83 C. C. A. 284, 154 Fed. 190; *Davidsson v. Hill* [1901] 2 K. B. 606,—and they are cases arising under statutes authorizing a recovery for the benefit of the relatives of a deceased where the death was caused by a wrongful act or through negligence or default. In the case *Luke v. Calhoun County*, 52 Ala. 115, the court held, construing a statute of the state of Alabama entitled "An Act to Suppress Murder, Lynching," etc., that "statutes passed for the security and protection of life, in the absence of clear and unexceptionable language forcing a contrary conclusion, will be held to apply as well to aliens and mere sojourners as to citizens. The fact that the person murdered and the widow or next of kin were aliens is no defense to a recovery under the act." Under the act in question, the husband, or widow, or next of kin of the person murdered is entitled to maintain an action for damages.

The statutes of the states are based upon the English statute known as "Lord Campbell's act," and, while they differ in matters of detail, they are all based upon the English act. In many of the states it is provided that the personal representatives of the deceased may maintain the action for the benefit of the heirs, while in Colorado and other states it is provided that the action may be maintained by the beneficiaries named in the statute. But whether the action is brought by the administrator, or by the heirs, can make no material difference. If brought by

the administrator, the recovery is paid to the heirs named in the statute, and the difference is merely in the form of the action. The purpose of the statute in all jurisdictions is to award indemnity to the heirs of a person who has sustained injuries resulting in death through a wrongful act. In every statute we have examined, whether the action is authorized to be brought by an administrator or by the heirs, the amount recovered is not subject to the payment of the debts of the deceased, but the entire amount is to be paid to the beneficiaries; nor have we seen a statute which is not general in its terms, or which expressly discriminates against aliens and in favor of citizens. In every case we have cited as sustaining plaintiff's contention the decision is grounded upon the proposition that it is within the power of the legislature to grant benefits to aliens, and that, unless the legislature has undertaken in express language to discriminate in favor of citizens and against aliens, the courts will not discriminate in favor of citizens. In the Virginia case cited the beneficiaries happened to be residents, although aliens. The court nevertheless held that the weight of authority in this country maintains the right of non-resident alien relatives of the deceased to receive the benefit of the statute. The latest case to which our attention has been directed is that of *Patek v. American Smelting & Ref. Co.*, decided in June, 1907, by the circuit court of appeals of this circuit, by Judge Van Devanter, wherein he reviews the authorities, and holds that, under our statute, a nonresident alien has the right to maintain an action, and this upon the theory that to deny such a person the benefit of the statute it becomes necessary to interpolate into the statute words discriminating against aliens, and upon the further ground that the policy of Colorado with respect to aliens has been such as to indicate that the legislature did not intend to discriminate in favor of citizens. Judge Van Devanter quotes at length from a decision of Colt, Circuit Judge, in *Vetaloro v. Perkins* (C. C.) 101 Fed. 393, in which Judge Colt says: "To exclude nonresident aliens from the right to maintain an action under § 2 is to incorporate into the act a restriction which it does not contain. It is to refuse compensation to a certain class of persons for a real injury recognized by statute law. It is to relieve employers with respect to some employees from the exercise of due care in the employment of safe and suitable tools and machinery and competent superintendents. It is to offer an inducement to employers to give a preference to aliens and to discriminate against citizens. It is to hold that the legislature of Massachusetts in-

tended by this act to declare that employers should not be liable for the grossest negligence which results in the instant death of an alien employee in cases where his widow or next of kin happen to reside in a foreign country. Our Constitution, § 15, art. 15, provides that "it shall be unlawful for any person, company, or corporation to require of its servants or employees, as a condition of their employment or otherwise, any contract or agreement whereby such person, company, or corporation shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employees while in the service of such person, company, or corporation, by reason of the negligence of such person, company, or corporation, or the agents or employees thereof; and such contracts shall be absolutely null and void." We cannot believe that our legislature, the first under the Constitution, with this provision of the Constitution before it, could have intended to release persons or corporations from liability for damages caused by their negligence by limiting the liability to those persons who happened to be citizens of the United States and residents of Colorado at the time the action was brought. To do so would be to encourage negligence and to enable the employers of labor to select aliens to the discrimination of American citizens, thus relieving themselves of liability. The public policy of this state with reference to aliens seems to be to not discriminate against them, but rather to encourage and protect them in every reasonable way. There is no prohibition against aliens having access to our courts. In fact the treaty between the United States and the Kingdom of Italy expressly grants to the citizens of Italy free access to our courts of justice to maintain and defend their rights. If Ferrara had not died, there is no question but that he might have maintained an action in the courts of this state, and no good reason is apparent why his widow should not be entitled to maintain this action.

It is contended that the general rule that legislative enactments apply only to the citizens within the jurisdiction of the place where the legislature sits, and that the laws of the states and countries have no extraterritorial effect, should control; but the overwhelming weight of authority is that these damage statutes which authorize the maintenance of an action by the relatives of a deceased do not have the effect of giving any extraterritorial effect to the statutes if aliens or nonresidents are permitted to maintain actions under them. In the discussion of the proposition that the laws of the state or country have no extraterritorial

effect, the supreme court of Ohio, in the case of Pittsburgh, C. C. & St. L. R. Co. v. Naylor, 73 Ohio St. 115, 3 L.R.A. (N.S.) 473, 112 Am. St. Rep. 701, 76 N. E. 505, has this to say: "The plaintiffs have not sought to enforce the laws of Ohio in another jurisdiction, but they have come into the courts of Ohio to enforce the laws of Ohio in their own behalf. The objection made to this is that the statute of Ohio does not apply in favor of nonresident aliens. If there had been three men instead of one killed at the same time, and the widow of one was a citizen of Ohio, the widow of another a resident alien, and the widow of the third a nonresident alien, it is admitted that the first and second could recover, and it is contended that the third could not; yet the language of the statute is the same as to the rights of all of these parties. It seems to us, therefore, that it is not a question of territorial jurisdiction, but that, when a nonresident alien comes into the courts of the state for redress under the laws of the state, as he may do, it is merely a question of construction of the statute to determine whether he is excluded from its benefits. We have no disposition to controvert the proposition that a statute of one state cannot impose obligations or liabilities on citizens of another state or country not residing in the state enacting the statute; but we take it to be a self-evident proposition that a state, if there are no constitutional limitations on the general legislative power, may confer rights, privileges, or immunities upon nonresident aliens which they may accept, if not prohibited by the government to which they owe allegiance. Thus, in our own state all disabilities of aliens as to inheritance are removed by statute." And in *Romano v. Capital City Brick & Pipe Co.* 125 Iowa, 591, 68 L.R.A. 132, 106 Am. St. Rep. 323, 101 N. W. 437, 2 A. & E. Ann. Cas. 678, the court says: "The accident happened in Iowa. The person injured, as well as the defendant, is a resident of Iowa, and the wrong done by defendant, if any, was done in Iowa. It is difficult, therefore, to see how it can be urged that any question of extraterritoriality arises."

If, as contended by counsel, statutes must be understood in general to apply to those only who owe obedience to the laws, then no person, unless he be an actual resident of the state of Colorado, can recover under the statutes, because the statute of this state has no greater force in one of the states of the Union than it has in Italy, and it would be contrary to every decision cited to hold that a resident of one of the states could not maintain an action for the negligent killing of a person domiciled in this state, if such nonresident would be entitled to

maintain the action if a resident of this state. This point is discussed in *Romano v. Capital City Brick & Pipe Co.* 125 Iowa, 597, 68 L.R.A. 132, 106 Am. St. Rep. 323, 101 N. W. 439, 2 A. & E. Ann. Cas. 678, and the court says: "It is true"—speaking of cases from Georgia, Missouri, Alabama, and Kentucky,—"that these cases relate to right of recovery by a relative who is a citizen and resident of another state, and counsel in the case before us have urged that the rule as to nonresident aliens may well be different; but, if their contention is correct, that to give force to the statute in favor of a nonresident alien is to give it extraterritorial effect, then these decisions are in point, for a state statute has no more effect or operation in another state of the Union than in a foreign country, and it is no answer to say that, by a provision of the Federal Constitution, citizens of the other states of the Union are not to be denied the privileges and immunities accorded to citizens of the state, for, if the statute is to be applied only for the benefit of those who are subject to state law, then residents of another state are excluded as not among the persons for whose benefit the statute was passed." The language of Chief Justice Kent, of the supreme court of Arizona, is, we think, directly in point when he says: "We do not think that, in order to entitle an alien to maintain this action, specific authority therefor must be granted such alien by the legislature. The act is broad and comprehensive, and, by its terms, includes any surviving husband, wife, child, or parent irrespective of their residence or citizenship; and this includes aliens, in the absence of any restrictive legislation. We know of no rule of law that prohibits the legislature from extending such rights to nonresident aliens, or prevents their accepting the same." [8 Ariz. 136.] Mr. Justice Holmes, when chief justice of the supreme court of Massachusetts, said in the case *Mulhall v. Fallon*, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386, in construing the Massachusetts employers' liability act: "We come, then, to the more difficult question whether the plaintiff can claim the benefit of the act. However this may be decided, it is not to be decided upon any theoretic impossibility of Massachusetts law conferring a right outside her boundary lines. . . . It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered." And, speaking of the purposes of 17 L.R.A. (N.S.)

the statute, he says: "In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in." When the case *Cleveland, C. C. & St. L. R. Co. v. Osgood* was first appealed to the appellate court of Indiana it was held that an administrator could not maintain an action under the Indiana statute, where the next of kin who would be entitled to recover are nonresident aliens, but upon a second appeal (in 1905) the court held that such action could be maintained. 36 Ind. App. 34, 73 N. E. 285. In the course of the opinion the court said: "The essence of the act is found in that part of it which confers a right of action, and not in that part which provides who shall bring it or how the fund recovered shall be distributed. Its tendency is to induce care and make human life more secure,—considerations of policy which are not affected by the alienage of the beneficiary. The right of personal security does not depend upon whether the individual's wife and children happen to live abroad." Although this court mentions the fact that the nonresident next of kin of the deceased was within the jurisdiction of Indiana at the time the fatal accident occurred, there is no difference in principle, it seems to us, between this case and the others cited. If the statute includes non-residents and aliens as beneficiaries, it, of course, cannot be affected by reason of the fact that they happened to be within the jurisdiction of the court at the time the injury causing death occurred. Our treaty provides that citizens of both parties may appear by counsel in all courts for the enforcement of their rights, and it is therefore not essential for the enforcement of any right that the citizens of another nation appear in person before the court. The statute makes no distinction between citizens and aliens, residents and non-residents; and public policy does not require the making of any such discrimination. Indeed, the policy of the state would seem to require that no such discrimination should be made.

As the legislature has not undertaken to limit the benefits accruing under the statute to those who happen to be subjects of this country, for us to do so by the interpolation of words into the statute for the purpose of effecting that result would be nothing short of a crying injustice. The statutes (§§ 1508-1510, Mills's Anno. Stat.) declare, in substance, that whenever the death of a

person shall be caused by the neglect of another, and the neglect is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages, then the person who would have been liable if death had not ensued shall be liable in an action for damages in a sum not exceeding \$5,000, to the wife of such deceased. The plaintiff shows by her complaint that she is the wife of the deceased, and that her husband's death was caused by the negligence of the defendant. She answers the description of the person entitled to the benefit under the statute; and, following the great weight of authority upon the subject, we hold that she is entitled to maintain the action notwithstanding the fact that she is a nonresident of Colorado and is a subject of the King of Italy.

The judgment is reversed.

Goddard and Bailey, JJ., concur.

GEORGIA SUPREME COURT.

MERCHANTS' & FARMERS' BANK, Plff.
in Err.,
v.

KATIE M. JOHNSTON.

(130 Ga. 661, 61 S. E. 543.)

Partnership — note — signature by partner's agent.

1. An act done by an agent at the instance of, and in the presence of, his principal, is, in law, the act of the principal; and if, at the instance and in the presence of a member of a partnership, the name of the partnership is signed by another person to a promissory note under seal, the note thus executed has the same legal effect as if such member had performed the physical act of signing.

Headnotes by HOLDEN, J.

Case Note. — Power of one partner to bind firm by a promissory note or bill of exchange under seal.

This note, as the title indicates, is confined in the main to promissory notes and bills of exchange, although a few cases involving other contracts are referred to incidentally because of their discussion of the general principles applicable to the subject.

At common law, one partner had no implied authority, by virtue of the partnership relation alone, to bind the firm or the other partners by an instrument of contract under seal. It is very generally held, however,—at least as to executed contracts,—that, if the instrument or contract so executed under seal is one to the validity of which a seal is not essential, the seal

Same — note under seal.

2. Under Civil Code 1895, §§ 2643, 2651, one member of a commercial partnership can bind it by the signing its name to a promissory note under seal, in the course of the business of the partnership.

(May 15, 1908.)

ERROR to the Superior Court for Baldwin County to review a judgment in defendant's favor in an action brought to recover on two promissory notes under seal, signed by an agent in the name of the partnership of which defendant was a member. Reversed.

Statement by Holden, J.:

The suit was against Samuel Evans & Company (alleged to be a partnership composed of Samuel Evans and Katie M. Johnston) on two promissory notes under seal, payable to the plaintiff, one dated September 28, 1900, and the other dated January 8, 1901, and upon an account. The notes were signed "Samuel Evans & Company, per M. Johnston." The defendant Katie M. Johnston filed a plea denying that she was ever a member of the partnership, or that she was indebted to the plaintiff, and denying that she ever executed, or authorized anyone else to execute for her, the notes sued on, or ever ratified their execution. The evidence of the plaintiff material to be considered was as follows: The business of the firm of Samuel Evans & Company was trading in stock, and the firm ran an account with the plaintiff. The notes sued upon were given to the plaintiff to cover an overdraft of this account. Samuel Evans authorized the cashier of the plaintiff to open the account. M. Johnston, the husband of Katie M. Johnston, had the management of the trading. Upon the hearing of a claim case, which the witnesses thought was in 1899, Katie M. Johnston testified that a horse, title to which was involved in the claim case,

may be disregarded as surplusage, and the instrument or contract, if otherwise within the scope of the partnership business and the authority of the partner, held binding upon the firm or the other partners as a simple contract. Whether a promissory note or bill of exchange under seal, executed by one partner in the firm name, may be thus held binding upon the firm or the other partners as a simple contract, depends upon the question whether the principle last stated is applicable to all contracts or instruments which would be valid without a seal, or is confined to contracts or instruments of such a nature that the addition of a seal is not only not essential to their validity, but neither adds to, nor detracts from, their legal effect. It will be observed that in the latter view the principle would not apply to a note or bill

was the property of Samuel Evans & Company, and that she was the company in this firm, which was a copartnership composed of Samuel Evans and herself, and that M. Johnston worked for the firm. A part of the testimony of the cashier of the plaintiff was as follows: "Mr. Samuel Evans, after the signing of the notes sued on, by Dr. Johnston as agent, ratified everything that was done in regard to the business of Samuel Evans & Company. He approved the signing of the notes sued on, which are signed 'Samuel Evans & Company, per Mark Johnston.' A heap of times they would be signed in his presence. Samuel Evans approved all of these transactions, including the notes. He always approved all of them when I was cashier. I never would take one of these

notes without his approval. They would come in the bank and fix them up and cover the overdrafts, both being present. I would get after them about the overdrafts, and they would come in and make notes to cover the overdrafts, and I would never take the notes without Samuel Evans's approval. I do not swear positively what Mr. Evans said about these two particular notes, but these notes were taken by Mr. Evans's approval. I don't know that I could state what Mr. Evans said about them. He didn't say anything about their being under seal." John T. Allen, president of the plaintiff, also testified: "I wish to say that Mr. Evans said to me repeatedly that he approved this transaction, and that he authorized Mark Johnston to sign 'Samuel Evans & Company' to these particular

of exchange as an executory contract. This limitation of the principle is well stated in the dissenting opinion of Scholfield, J., in *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75. The decision in *Sibley v. Young*, 26 S. C. 415, 2 S. E. 314, that a single bill, i. e., a sealed note executed by one member of a firm, is not binding on the other members in the absence of precedent authority or subsequent ratification by them, even though a promissory note, i. e., a note not under seal, would have been within the authority of the partner who signed the single bill, apparently rests upon this limitation of the principle.

The doctrine of the last case was applied in *Hull v. Young*, 30 S. C. 121, 3 L.R.A. 521, 8 S. E. 695 (McIver, J., dissenting), notwithstanding the fact that, by the law of Georgia, where the note was made and payable, it was negotiable notwithstanding that it was under seal. This rule had been previously applied in *Lucas v. Sanders*, 1 McMull. L. 311, and is also followed in *Milwee v. Jay*, 47 S. C. 430, 25 S. E. 298, and, upon the authority of these cases, it is declared in *Pollock v. Jones*, 61 C. C. A. 555, 124 Fed. 163, that there can be no doubt that under the law of South Carolina, a sealed note given by one member of a firm creates no obligation against the firm, unless the partner so signing and sealing has authority from his copartner at the time to do the act, or unless, when the act is brought to the knowledge of the other partner, he acknowledges it or ratifies and confirms it.

It is clearly implied in these cases that the note, in such circumstances, is not binding upon the firm or the other partners, either as a specialty, or as a simple contract.

So, it is said in *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677, that there can be no remedy in a court of law upon a note under seal executed by one partner, except against the partner executing it, unless he had express authority for that purpose or the other partners were present at the act of sealing or thereafter ratified the act, thus clearly implying that there can be no re-

covery at law upon the instrument either as a specialty or as a simple contract.

This is also implied in *Clement v. Brush*, 3 Johns. Cas. 180; *Nunnely v. Dougherty*, 1 Yerg. 26; and *Waugh v. Carriger*, 1 Yerg. 31,—holding that, while a note under seal, executed by one of the partners in the firm name without the precedent authority or subsequent ratification by the other partner, is not binding on the firm, it extinguishes the original indebtedness of the firm for which it was given.

So, while *Hoskinson v. Eliot*, 62 Pa. 393, holds that the note in such circumstances, if taken as the note of the firm, does not extinguish the original indebtedness, and will not prevent a recovery against the firm on the original account, it nevertheless clearly implies that the note itself is not binding upon the firm, as either a specialty or a simple contract. In this connection, it may be noted that the court, in *Sibley v. Young*, supra, expressly refrained from passing on the question whether the original indebtedness of the firm was merged in the note.

Notwithstanding the statute of 1812 giving to a promissory note for money all the dignity and effect of a writing under seal, one partner may bind his copartner by such an unsealed note, but not if a seal or scrawl is placed to the instrument. *Montgomery v. Boone*, 2 B. Mon. 244.

In *Palmer v. Taggart*, 1 Chester Co. Rep. 107, it was expressly said that, in such circumstances, the firm could not be bound by a note under seal, and the seal could not be waived, as it was not mere surplusage.

In *Layton v. Hastings*, 2 Harr. (Del.) 147; *Morris v. Jones*, 4 Harr. (Del.) 428; and *Turbeville v. Ryan*, 1 Humph. 113, 34 Am. Dec. 622, declaring the principle that one partner has no implied authority to bind the firm or his copartners by a note under seal, and denying a recovery against the firm or the other partners on such an instrument, the action was debt on a sealed instrument; and it is not entirely clear that the court meant to deny that the firm or other partner would be bound upon the

notes, and approved the transaction." Checks on and receipts to the plaintiff, signed "M. Johnston, Agent," and checks dated in 1899, signed "Samuel Evans & Company, per Mrs. M. Johnston," were introduced in evidence. When the notes sued upon were tendered in evidence by the plaintiff, the court ruled that they were not admissible in evidence against Katie M. Johnston, for the reason that it appeared that they were executed under seal by an agent, and there was no proof of ratification under seal of the execution of such instruments, and, upon motion of defendant's counsel, the court granted a nonsuit in so far as the defendant Katie M. Johnston was concerned, counsel for the plaintiff in error conceding that there could be no recovery upon the

account sued upon. To these rulings the plaintiff excepted.

Messrs. Allen & Pottle, for plaintiff in error:

Both members of a partnership are liable on a note under seal, signed by an agent by the express direction and in the presence of one of the partners.

Straffin v. Newell, T. U. P. Charl. (Ga.) 163, 4 Am. Dec. 705.

Any contract under seal, signed by an agent, is valid and binding if done in the presence and by the direction of the principal.

Reinhart v. Miller, 22 Ga. 402, 68 Am. Dec. 506; *Cunningham v. Lamar*, 51 Ga. 574; *Ellis v. Francis*, 9 Ga. 325.

instrument as a simple contract, but that was probably the case, as there is no suggestion that the seal could be dispensed with as surplusage.

Authority for this position is also to be found in other cases not involving notes or bills of exchange, some of which are here referred to by reason of their analogy to the question under consideration.

Thus, in *Schmertz v. Shreeve*, 62 Pa. 457, 1 Am. Rep. 439, involving a contract to deliver merchandise at a future time, the court said: "It was therefore an executory contract imposing a new and original liability on the firm. It is certainly true that a seal was not essential to its validity. But that is not the test. It rather is, Did it change its nature? This is unquestionable. A seal imports consideration, and a contract under seal requires no consideration to support it. Moreover, there is no limitation prescribed by law to an action on a specialty or a covenant under seal. . . . Executed contracts, such as assignments, stand on another ground. They form but the evidence of the act. The sale and delivery of merchandise, for example, is within the implied power of the partner. That he superadds a transfer or bill of sale under seal is but evidence of the act of disposition, and does not change its nature. When the property has been delivered, it matters not whether the instrument of transfer be under seal or not."

The decision in *Boyd v. Thompson*, 153 refusing to vacate judgments entered Pa. 78, 34 Am. St. Rep. 685, 25 Atl. 769, against a firm under warrants of attorney in notes given for debts owing, but not due, upon the ground that they were executed by one partner under seal without express authority from his copartner, is not opposed to the foregoing cases. Indeed, the opinion professes to base the decision upon the principle declared in *Schmertz v. Shreeve*, supra. Thus, it is said: "But, in the language of Justice Sharswood, the confession of the judgment has imposed no new liability upon the firm. It was liable to the same creditors for the same sums before it was given. The seal was wholly un-

necessary; but, what is of more consequence, it has not changed the nature of the instrument. Whether sealed, or not, the warrant was lost in the judgment. The seal cannot change the remedy, affect the statute of limitations or the order of proof. The addition of it to the confession of judgment was a waste of a very valueless formality without object on the part of the maker and without results to the creditor."

But it is held in *Cowan v. Cunningham*, 146 N. C. 453, 59 S. E. 992, that a note under seal, purporting to be signed in the firm name by one of the partners, is on its face the simple contract of the firm, the seal being regarded as surplusage.

And that position is supported by *Purviance v. Sutherland*, 2 Ohio St. 478, in which the court remarked that the rule that a partner has no implied power to bind his copartner by deed is satisfied when it is said that the agreement is not the "deed" of the firm.

The decision in *Heath v. Gregory*, 40 N. C. (1 Jones, L.) 417, was simply to the effect that, even if the seal to a note signed by one of two partners might be rejected as surplusage, the note would not be admissible in evidence to establish "an account stated" in a suit against the partner who did not sign it.

It was held in *Horton v. Child*, 15 N. C. (4 Dev. L.) 460, that, if a partner executed a bond in the name of the firm, and, upon being informed that it did not bind his partners, took it back, and, with the consent of the obligee, removed the seal and redelivered it with intent to bind the company, it was effectual as their promissory note.

In *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75, the majority of the court were of the opinion that, whatever may be the true rule as to the right to recover against the other partners upon a note executed by one of them under seal, a recovery may be had under the common counts upon an instrument under seal in the form of a note, but admitting on its face the fact of the borrowing of money and a promise to pay therefor.

Messrs. Hines & Vinson, for defendant in error:

The common-law rule is that authority to execute an instrument under seal must be conferred by instrument under seal, and that even written authority will be insufficient.

1 Am. & Eng. Enc. Law, § 2, p. 952.

The question is whether M. Johnston had the authority to sign the name of Samuel Evans & Company to the note, as it is sealed.

Rowe v. Ware, 30 Ga. 280; Pollard v. Gibbs, 55 Ga. 47; McCalla v. American Freehold Land Mortg. Co. 90 Ga. 113, 15 S. E. 687; Overman v. Atkinson, 102 Ga. 750, 29 S. E. 768; Smith v. Farmers' Mut. Ins. Asso. 111 Ga. 737, 36 S. E. 957; Civil Code, 3002; Lenney v. Finley, 118 Ga. 718, 45 S. E. 593.

Messrs. W. B. Wingfield and J. S. Turner also for defendant in error.

Holden, J., delivered the opinion of the court:

1. An agent acting in behalf of a principal, in the latter's presence and at his instance, is for the time being the *alter ego* of the principal, and the agent's act is in law the act of the principal himself. So, if one person, at the request and in the presence of another, execute an instrument in behalf of the latter, the legal effect is the same as though the party authorizing the execution himself held the pen. Ellis v. Francis, 9 Ga. 325; Reinhart v. Miller, 22 Ga. 402, 68 Am. Dec. 506. See also Cunningham v. Lamar, 51 Ga. 574. This rule is not altered by the fact that the instrument executed is one under seal. 2 Bishop, Contr. § 1047. Applying the above rule to the case under consideration, if M. Johnston, at the

Even though a note executed by one of the partners may not be operative as a partnership obligation because of a scrawl, yet, it being alleged and proved that the consideration for which the note was given went to the use and benefit of the firm, and was received and enjoyed by it, a recovery may be had upon the original consideration. Daniel v. Toney, 2 Met. (Ky.) 523.

It is to be noted that there are many cases not involving promissory notes or bills of exchange, *e. g.*, Edwards v. Dillon, 147 Ill. 14, 37 Am. St. Rep. 199, 35 N. E. 135, Tapley v. Butterfield, 1 Met. 515, 35 Am. Dec. 374, which declare, in effect, that, while one partner cannot bind his copartner by deed, yet, if the instrument executed by him, though under seal, would have been valid without a seal and within the scope of the partnership business and within the powers belonging to each partner, the seal may be disregarded and the instrument may be regarded as a simple contract. As already suggested, the principle in this broad form would include promissory notes or bills of exchange, but, as pointed out in the dissenting opinion of Scholfield, J., in Walsh v. Lennon, *supra*, most of those cases involved bills of sale of personal property, chattel mortgages, or other executed contracts, to the validity of which a seal is not only not essential, but, if added, does not affect the legal nature or character of the instrument, being an unmeaning symbol. That at least was true of both of the cases just referred to. This general principle, however, is declared in some cases which, though not within the scope of this note because not involving notes or bills of exchange, cannot be distinguished in the manner suggested, and therefore undoubtedly furnish some support for applying the principle to notes or bills of exchange. Thus, for instance, in Sterling v. Bock, 40 Minn. 11, 41 N. W. 236, involving a contract to pay for services, it is declared that, if a written contract not required to be under seal within the scope of partnership business be executed under seal by one partner in behalf of the firm, the seal may be re-

jected as surplusage, and the instrument treated as the parol contract of the firm.

A partner present and assenting to the signing and sealing of a note by his copartner is as much bound by the instrument as if he had signed and sealed it. Fichthorn v. Boyer, 5 Watts, 159, 30 Am. Dec. 300; Miller v. Royal Flint Glass Works, 172 Pa. 70, 33 Atl. 350; Myers v. Sprenkle, 20 Pa. Super. Ct. 549; Henderson v. Barbee, 6 Blackf. 26; Willey v. Lines, 3 Houst. (Del.) 542; Day v. Lafferty, 4 Ark. 450.

A note under seal, executed by one partner, will be binding on the firm if the copartner assents before its execution, or afterwards ratifies and adopts it, and such assent or adoption may be shown by parol. Bond v. Aitkin, 6 Watts & S. 165, 40 Am. Dec. 550.

Either of these facts—previous authority, or subsequent ratification—may be proved like any other facts in issue in a cause, as well by circumstances from which the existence of the facts to be proved may be legitimately inferred, as by positive and direct testimony. Sibley v. Young, 26 S. C. 415. 2 S. E. 314.

This position is supported by many other cases, *e. g.*, Edwards v. Dillon, *supra*, involving other kinds of contracts under seal; and the doctrine of Turbeville v. Ryan, 1 Humph. 113, 34 Am. Dec. 622, that no previous assent or subsequent ratification, not under seal, will be effectual unless the note is acknowledged and redelivered, is against the great weight of authority in the United States at least.

A sufficient acknowledgment of a note executed under seal by one of the members of a firm, to take it out of the rule that a partner has no implied authority to bind the firm by a deed, is made by setting it out in a deed of dissolution as a debt owing by the firm. Fleming v. Dunbar, 2 Hill, L. 532.

But a partner cannot be held to have ratified the giving of a sealed note by his copartner if, at the time of the acts relied upon as a ratification, he did not know that the note was under seal. Hull v. Young, 30 S. C. 121, 3 L.R.A. 521, 8 S. E. 695.

instance and in the presence of Samuel Evans, signed to the notes sued upon the name of the firm of which Samuel Evans was a member, these notes have the same legal effect as obligations of such partnership as though Samuel Evans himself had affixed the partnership name thereto. Who composed the firm of Samuel Evans & Company, and whether the signature of the partnership name to the notes was made under such circumstances as to make it in law the act of Samuel Evans, are, under the evidence in the case, questions of fact for determination by a jury.

2. The court excluded the notes from evidence when offered by the plaintiff, because they were under seal. There was no evidence that Katie M. Johnston ratified the signing of the notes, or authorized the signing of them, unless the authority came from her relation to the partnership. The main question involved in this case is whether or not one partner can bind the partnership by executing a note under seal in the name of the partnership, without any authority from the other partners, except such as comes from the relation of partners. Under our statutes, a member of any partnership can bind it by giving a negotiable promissory note. *Selman v. Brown*, 78 Ga. 332. It has been held that one partner cannot bind the partnership, in the execution of a deed to land in the name of the firm. *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738. A partner derives his power to bind the partnership by reason of being a general agent of the firm. While generally an agent cannot bind his principal by an instrument in writing under seal, without authority or ratification from the principal under seal; and while it has been held that one partner cannot bind his copartner in the execution of a deed to realty by virtue of the authority he derives from the relation of copartnership,—it was held in the case of *Drumright v. Philpot*, supra, that “a prior authority, or a subsequent ratification, not under seal, either express or implied, verbal or written, is sufficient to establish the deed as the deed of the firm, and binding upon it as such.” It has been held by our court that one partner cannot bind the firm in the execution of a mortgage on real estate in the name of a partnership. *Sutlive v. Jones*, 61 Ga. 676; *Turner v. Printup Bros.* 65 Ga. 71. But it has been held that one partner can bind the firm to a mortgage on personalty. *Phillips v. Trowbridge Furniture Co.* 86 Ga. 699, 13 S. E. 19. While it is true that our court has held that one partner cannot execute a deed binding the firm, it does not necessarily follow from this that, under our statute, one partner cannot bind the firm in the execution of a negotiable promissory note under

seal. In the case of *Straffin v. Newell*, T. U. P. Charl't. (Ga.) 163, 4 Am. Dec. 705, it was held: “A charter party being exclusively a mercantile transaction and always in the course of trade, one partner can therefore bind the other by signature and seal in this species of mercantile contracts.” In delivering the opinion (page 165) Judge Charlton said: “I bottom my decision upon the broad ground that a charter party is exclusively a mercantile transaction, and always in the course of trade. . . . I mean a deed so inseparably incidental, so closely blended with partnerships and mercantile pursuits, as the contract of charter party is.” While this authority is not binding, we think the decision is correct. There are many decisions, based upon the common law and upon statutory enactments, to the effect that one copartner cannot bind his copartner by an instrument under seal; but the question before us is whether or not one partner can bind the firm, in the execution of a negotiable promissory note under seal, under the law as it exists in this state. Civil Code 1895, § 2651, provides: “All the partners are bound by the acts of any one, within the legitimate business of the partnership, until dissolution or the commencement of legal process for that purpose, or express notice of dissent to the person about to be contracted with.” And § 2643 provides: “Every partner has a right . . . to contract or otherwise bind the firm in matters connected with its business, and to execute any writing or bond in the course of the business.” The word “bond” was probably put into this statute because of the special enactment of 1838 (Acts 1838, p. 165), providing that partners could bind the firm by signing the firm name to a bond in any judicial proceeding in which the firm was interested. Whatever may be the reason for the word “bond” appearing in this section, the meaning of the statute is that one partner can bind the firm when he executes in the name of the firm “any writing or bond in the course of the business,” whether under seal or not. No restriction is made as to sealed instruments. In the making of promissory notes printed forms are commonly used, a very large percentage of which are prepared with a view to their execution under seal; the recital that they are given under seal and the device to be used as a seal appearing on the printed form. It is a matter of common practice for such notes to be executed by one partner on behalf of the firm, often with no attention paid to the fact that the notes thus given are under seal, and without any question arising as to the power of the partner to bind the firm in so executing them. Such notes are doubtless regarded by the parties as binding obligations on the firm

in whose behalf they are executed, and we think they are to be so regarded under the law, in view of the broad power given to a partner in the sections of the Code above referred to. In the case of *Hull v. Young*, 30 S. C. 121, 3 L.R.A. 521, 8 S. E. 695, it was held by a majority of the court that a partner has no authority to execute a sealed note which will bind his firm, although, by the statutes of the state where the note is executed, it is a negotiable note. The note referred to in that case was executed in Georgia, and the decision was made under a construction of the law of this state. In a dissenting opinion rendered by Justice McIver he says: "The note in this case was made in Georgia, was payable there, and therefore 'its nature, validity, interpretation, and effect' must be determined by the law of that state. Consequently, under that law it must be regarded as a negotiable paper, just like a bill of exchange or promissory note, notwithstanding the seal attached to it. So regarded, it seems to me that it is such a paper as may be executed by one partner in the name of, and binding upon, the firm, when given for the purposes of the partnership, as this note unquestionably was, for partnership dealings are usually carried on with just such paper." It does not appear that, in deciding this case, the South Carolina court considered the provisions of our law now contained in § 2043, Civil Code 1895, cited above, in view of which we think the dissenting opinion of Justice McIver states the law of this state.

On account of the ruling above made, it necessarily follows that the court below committed error in refusing to admit in evidence the notes offered by the plaintiff, and in awarding a nonsuit as to Katie M. Johnston; and the judgment is reversed.

All the Justices concur.

MARYLAND COURT OF APPEALS.

PHILADELPHIA, BALTIMORE, & WASHINGTON RAILROAD COMPANY, Appt.,
v.

ADERINA S. MITCHELL.

(— Md. —, 69 Atl. 422.)

Master — independent contractor — dangerous work.

1. One who employs an independent contractor to erect a bridge over a public street the work on which will render the street under it dangerous for travel by the public cannot avoid liability for injury to a pedestrian from the fall of a tool in case he takes no precautions to safeguard the

public during the performance of the work, or to see that it is done.

Negligence — personal injury — recovery.

2. The rupture of an artery due to a muscular contraction in attempting to avoid injury from an article which falls upon one's umbrella may be the basis of a recovery against the one responsible for the fall.

Evidence — injury — sufficiency.

3. Whether or not the rupture of an artery was due to a twist of the body in attempting to avoid injury by an object dropped on one's umbrella is for the jury, upon evidence that the twist was accompanied by pain, soon after which the rupture was discovered, and expert testimony that it was caused by the wrench.

(March 31, 1908.)

Note. — Another phase of the much-debated question of the right to recover for physical injury resulting from fright caused by negligence is presented by the case of *PHILADELPHIA, B. & W. R. Co. v. MITCHELL*, where the court, while refusing to decide whether or not recovery may be had where there is no impact whatever at the time of the accident, holds that the impact need not be with the body of the person injured, it being sufficient if his clothing, or, as in this case, his umbrella, is touched. As stated in the opinion, and as shown by the note to the case of *Huston v. Freemansburg*, 3 L.R.A.(N.S.) 49, where the whole subject of the right to recover for physical injuries resulting from fright caused by negligence is reviewed, it had previously been decided that impact with the vehicle in which a person is riding at the time of the accident is sufficient, although the only injury sustained results, not from such impact in itself, but from the fright caused thereby. The case of *PHILADELPHIA, B. & W. R. Co. v. MITCHELL* is distinguishable from the other cases on the subject in that in this case the injury resulted immediately from the involuntary act of the plaintiff in throwing herself back to escape from the danger threatened by the falling hammer, and thus twisting her body in such a way as to rupture an artery, and not from the effect of the impending danger on her mind and nervous system. In this respect the case is analogous to, if not identical with, those in which a person placed in sudden danger by the negligence of another, through a sudden impulse of fear, or from error of judgment, makes a movement to escape the danger, which causes him to receive another and a different injury from that threatened by the danger to which he was negligently subjected. But this class of cases is not referred to in the opinion in the present case, and it seems to have been argued and decided entirely on the theory that it was a case of injury caused by fright or shock.

APPEAL by defendant from a judgment of the Circuit Court for Harford County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Thomas H. Robinson for appellant.
Messrs. William P. Constable and James J. Archer for appellee.

Schmucker, J., delivered the opinion of the court:

The appellee recovered a judgment against the appellant in the circuit court for Harford county for damages for injuries inflicted on her, while walking along a much-used public street in the city of Havre de Grace, by the falling of a hammer from an overhead bridge in course of construction on the appellant's line of railway. From that judgment this appeal was taken. There is but one bill of exceptions in the record, and that presents for our review only the rulings of the court below on the prayers offered at the close of the case.

The declaration contains two counts, both of which aver that the appellant company owned and operated a railroad from Pennsylvania into Maryland, and, at the time of the injury complained of, had acquired a new right of way through the city of Havre de Grace and under the authority of chapter 116, p. 206, of the Acts of 1904, and, with the consent of the city, was engaged in constructing along its new right of way an iron bridge over a much-traveled street, called "Stokes street," in said city; and that the plaintiff, while walking along said street, in the exercise of due care, under the bridge then in course of construction, was struck and severely injured by a hammer or other missile which fell therefrom. The first count avers generally that the fall of the hammer was due to the negligence of the company in constructing the bridge. The second count avers that the nature of the construction of the bridge was such that blocks of wood, iron plates, bolts, rivets, and other things used in connection therewith were continually falling from the bridge to the street beneath it, and endangered travel thereon, and it became and was the duty of the company to guard the work for the protection and safety of persons traveling upon the street; but that it failed to discharge said duty, and the plaintiff was injured by reason of such failure. To this declaration the company, as defendant, pleaded the general issue. The undisputed evidence sustains the allegations of the declaration as to the existence of the defendant company and its authority to construct the bridge, and that the construc-

tion was in progress on September 18, 1905, when the alleged injury occurred to the plaintiff. It also appears without contradiction that Stokes street was a much-traveled public street of the city of Havre de Grace, and that the bridge crossed it at an elevation of about 14 feet by a single span 70 feet long composed of 4 parallel metal girders.

There is evidence in the record tending to show that, in the construction of such bridges, when the workmen are engaged in riveting the ties and braces between the girders composing the span, they are compelled to work with great rapidity in order to put the rivets in place and clinch them while at a white or red heat, and as a result rivets, tools, and other objects handled with such rapidity frequently fall to the ground beneath and render it unsafe for travel unless properly guarded. There is like evidence that, in the construction of the bridge now in question, such objects did in fact frequently fall upon the street below it, and that no precautions were taken to hinder the public from passing under the bridge or to prevent the falling of the objects from it. There is also evidence tending to show that the parties in charge of the construction of the bridge did use suitable means to protect from injury the public passing under it, by the presence of watchmen and by barricading from time to time the particular portion of the street lying under the part of the bridge on which the work then was being done. We do not notice in detail the conflicting evidence of the many witnesses who testified in reference to these facts because the weight of the evidence was a matter for the jury.

The only evidence in reference to the occurrence of the accident by which the appellee claims to have been injured is her own testimony. According to her account she went down Stokes street in the early afternoon on her way to Dr. Crothers's office to pay him a bill. She said that, as she was passing under the bridge in question, she noticed a child there playing with a little wagon, and just then, to use her own language, "I had my umbrella raised over my head, and all at once I heard a crash, and a big hammer, that looked like a blacksmith's sledge hammer to me, fell and struck my umbrella and fell right down at my feet, and I threw myself away from it, and I felt something tear in my side,—just like something teared,—and everything got dark before me for a minute, and I felt faint and sick at my stomach like, and I began to think of the child, and I wondered if he was hurt, for I got the impression there was more fell, and I thought of the child. I looked back and

my mind began to clear, and then I was out from under the bridge and I saw the child was all right." She further said that the umbrella was torn and one of its ribs broken by the impact with the hammer, and that she thought it was the hammer striking her umbrella, and not its striking the walk at her feet, which caused her to throw herself away from it, but that it all happened at almost the same instant. According to her further testimony, she went on to Dr. Crothers's office and paid her bill, mentioning the fact of the accident to him and he congratulated her on her escape. She then returned to her home. By the time she got there she was suffering much pain and was compelled to lie down at once. She continued to suffer greatly, and on the next day spit five or six large mouthfuls of blood. In a few days she was compelled to go to bed and remain there for about three weeks, and has ever since then been in poor health and subject to frequent recurring spells of violent internal throbbing, which incapacitate her from performing her ordinary domestic duties. Her own testimony and that of her acquaintances was that prior to her injury she had been a healthy woman with an unusual degree of physical vigor. She also testified to having been in an early stage of pregnancy when injured, and to have suffered a miscarriage five days thereafter. There was also the testimony of four physicians who had attended or examined her professionally since her injury, tending to show that she had an aneurism of the abdominal aorta of a serious and incurable character, which was first recognized about a week after her injury and might have been caused by it. Defendant proved that the bridge was constructed by Brant & Stewart, a firm of bridge constructors of large experience, under a contract for the construction of all the bridges in connection with the change of the company's line between Principio and Oakington, except the one over the Susquehanna river; and that, by the terms of the contract, the contractors furnished all of the materials and performed all of the labor required for the bridges. There was also evidence produced by the defendant tending to show that the riveting on the portion of the bridge under which the plaintiff was passing when injured had been entirely completed before the 18th of September, and that when she was injured the workmen were engaged in riveting on the portion of the bridge over the opposite side of the street from that along which she was passing.

The plaintiff offered three prayers, all of which were granted. The first states the measure of damages in the form usual in 17 L.R.A. (N.S.)

such cases and is free from objection. The second adopts the theory of the second count of the declaration, and, in substance, directs the jury that, if they find that Stokes street was a public street of the city, and that the defendant, after having obtained authority from the state and the assent of the city for the construction of the bridge, proceeded with the work of construction in such manner as to render the street under it dangerous for travel by the public, it was the duty of the defendant to safeguard the street during the construction for the protection of persons lawfully traveling thereon, or to see that the same was done; and, if they also find that the defendant negligently failed to do so, and, in consequence thereof, the plaintiff was injured by the falling of a heavy iron hammer from the bridge while in the course of construction, and that the injury was caused directly by the said negligence of the defendant, their verdict should be for the plaintiff. The third prayer instructed the jury that, if they found the facts stated in second prayer, it was no defense to the action that the bridge was constructed for the defendant by the firm of Brant & Stewart as independent contractors.

The defendant offered eleven prayers, all of which were refused except the prayer 7½, which was granted. Of the rejected prayers, the first, second, and third prayers sought to have the case taken from the jury for want of legally sufficient evidence to enable the plaintiff to recover. The fourth, ninth, and tenth prayers were based upon the theory that the finding, by the jury, of the employment of an independent contractor to construct the bridge, would discharge the defendant from liability for the injury caused by the falling hammer. The fifth and eighth prayers denied the right of the plaintiff to recover for the reason that the true cause of her disease was a matter of speculation, and was not shown by the evidence to have been the result of the injury from the fall of the hammer. The sixth prayer denied the right of the plaintiff to recover for any injury resulting from shock unaccompanied by physical injury; and the seventh prayer denied the right of recovery if the jury found that the plaintiff's injuries were the result of inevitable accident. The record contains no exceptions to evidence, nor any special exception to any of the prayers for want of evidence to support them. We find no error in the action of the learned judge below on these prayers.

The two substantial grounds of defense presented by the defendant's prayers, and relied on in argument by its counsel at the hearing of the appeal, were, first, that of

the employment of an independent contractor to construct the bridge; and, secondly, the exemption of the defendant from liability for injury suffered by the plaintiff from fright unaccompanied by physical injury. The question of the extent to which the employment of an independent contractor to do work, placed entirely under his control, will relieve the employer from liability for injuries resulting to third persons, has not only been much discussed by other tribunals, but has been fully considered, in the light of the authorities applicable to it, and passed upon by this court in a number of cases, among which are *Deford v. State*, 30 Md. 179, *City & Suburban R. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643, *Bonaparte v. Wiseman*, 89 Md. 12, 44 L.R.A. 482, 42 Atl. 918, and *Samuel v. Novak*, 99 Md. 558, 58 Atl. 19. As a result of these cases, it may now be said to be settled in this state that although, when the work is being done by an independent contractor, the employer will not be liable for an injury caused by negligence in a matter collateral to the contract, he will be liable if the injury be caused by the thing contracted to be done, or if it be such as might have been anticipated by him as a probable consequence of the work let out to the contractor, and he took no precaution to prevent it. The principle thus broadly stated embraces the subordinate proposition, separately discussed in many cases, and especially appropriate to the one now before us, that the duty to refrain from interfering with the right of the public to the safe and unimpeded use of highways and streets is one of which an employer cannot divest himself by committing work to a contractor. In *Bonaparte v. Wiseman*, supra, we further decided that the question whether the injury might reasonably have been anticipated as a probable consequence of the work contracted to be done was one of fact for the jury. The plaintiff's second and third prayers, which were granted, stated the law of the case in accordance with the decisions to which we have referred.

The weight of authority, both of textbooks and decided cases, supports the view that there can be no recovery of damages for mere fright or mental suffering, caused by negligence, unconnected with physical impact or injury. This conclusion has generally been reached in reliance upon the remoteness of the damage as well as the inexpediency of opening the door to claims difficult of precise proof or disproof, and from their nature easy of simulation and liable to exaggeration. Many of the cases hold not only that there can be no recovery of damages for mere fright without impact

or injury, but also that there can be none for actual physical injury resulting from such fright, because such results are merely evidence of the degree of the fright or the extent of the damages resulting from that cause. From the last-mentioned proposition there has been a positive dissent in some recent cases which hold that there can be a recovery for physical injuries which are shown, to be the natural and proximate result of mere fright caused by negligence, provided there be an unbroken connection between the negligent act and the injury without the agency of any intervening and independent cause. And whether the evidence establishes such an unbroken connection has been held to be generally a question for the jury. *Dulieu v. White* [1901] 2 K. B. 669; *Bell v. Great Northern R. Co. Ir. L. R.* 26 Eq. 428; *Chicago & N. W. R. Co. v. Hunerberg*, 16 Ill. App. 387; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034; *Hickey v. Welch*, 91 Mo. App. 4; *Watkins v. Kaolin Mfg. Co.* 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983. We refrain from expressing any opinion upon the adequacy of mere fright or its results, when unaccompanied by physical impact or injury, as a cause of action for damages, because in our judgment there is sufficient evidence in the record before us to go to the jury of such physical impact and injury to the appellee, contemporaneous with her fright, as to take the case out of the classes to which we have just referred. While the physical impact or injury requisite for the purpose under discussion must be actual, it need not be such as to occasion an external wound or bruise. Severe, and even incurable, internal injuries, of which there is no immediate visible or external evidence, may be produced by violence or accident.

The appellee, when testifying, said that, when the hammer struck and broke her umbrella, she threw herself away from it, and also that she was thrown back by the blow of the umbrella. In response to a question from the court she said, "Because the hammer came down and struck my umbrella and the shock or jar threw me back, I don't just know how it was, for it was so sudden, and the accident was over in a minute." In response to the next question she said, "It was right then and there that my side was hurt." A hypothetical question predicated upon the evidence as to the occurrences incident to the fall of the hammer, and the physical condition of the appellee before and after that event, was put, without objection, to each one of four physicians of experience, who testified in the case, asking

him what, in his opinion, was the cause of the aneurism, and the following answers were received: Dr. Woodward replied, "Well, in my judgment, in a case of that kind I would attribute the aneurism to the accident." Dr. Emory replied, "I would say it was due to the violent twist or wrench of the body when she threw herself back. There is no other way I can see to account for it." Dr. Van Bibber replied, "In my opinion, the aneurism was caused by the wrench she sustained at the moment the hammer fell." Dr. Sellman replied, "I should say it was due to the accident through which she passed." This evidence was, we think, legally sufficient to go to the jury for them to determine whether or not the aneurism, which consisted of a rupture of one of the walls of the artery, was produced by the wrench or twist of the appellee's body when the hammer fell, and also whether the blow of the hammer on the umbrella caused the movement of her body. The striking of the umbrella in her hand by the falling hammer constituted a physical impact. It is not necessary that the person of the individual injured in such cases be struck. It is sufficient if the blow fall upon the clothing worn by him, or even the vehicle in which he is riding, as was the case in *Berard v. Boston & A. R. Co.* 177 Mass. 179, 58 N. E. 586, and *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297, 36 Atl. 100.

In *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74, the female plaintiff got up from her seat in a street car while it was in motion, and went onto the platform for the purpose of alighting. The conductor, seeing her movement, stopped the car suddenly before reaching a stopping place, and she was thrown against the railing on the platform and slightly bruised by the jar of the sudden stop. A short time afterwards a cancer developed on the injured part of her person. She sued the railway company for damages, and, medical testimony having been offered pro and con as to whether the cancer was the result of the injury, the court held that it was for the jury to determine as a matter of fact whether the cancer resulted from the injury received on the car, and that it was proper for the jury to consider the medical testimony along with the other evidence in determining the question. It may be added that the medical testimony in that case connecting the cancer with the injury was not so strong as that submitted to the jury in the present case.

Finding no error in the rulings of the learned judge below, we will affirm the judgment appealed from.

Judgment affirmed, with costs.
17 L.R.A. (N.S.)

MARYLAND COURT OF APPEALS.

DORA MILLER, by Next Friend, Appt.,
v.
UNITED RAILWAYS & ELECTRIC COMPANY OF BALTIMORE.

(— Md. —, 69 Atl. 636.)

Street railway — cable slot — injury to carriage.

1. Negligence cannot be imputed to a street car company merely because the wheel of a carriage passing along the street falls into a cable slot.

Same — insurer — injury to traveler.

2. A municipal ordinance requiring street railways to keep the space covered by their tracks in thorough repair does not make them insurers of the safety of passengers using such portion of the street.

(May 13, 1908.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. John Hinkley and Frederick J. Singley, for appellant:

One charged with the duty of keeping a highway in repair is liable for injuries caused by the wheel of a vehicle falling into a hole therein.

Charles County v. Mandanyohl, 93 Md. 150, 48 Atl. 1058; *Knight v. Baltimore*, 97 Md. 647, 55 Atl. 388; *Baltimore v. Pendleton*, 15 Md. 12; *Anne Arundel County v. Duckett*, 20 Md. 468, 83 Am. Dec. 557; *Eyler v. Allegany County*, 49 Md. 257, 33 Am. Rep. 249; *Gunther v. Dranbauer*, 86 Md. 1, 38 Atl. 33; *Campbell v. Elkins*, 58 W. Va. 308, 2 L.R.A. (N.S.) 159, 52 S. E. 220.

Messrs. Joseph C. France and J. Pembroke Thom, for appellee:

The liability of a street railway company for the repair of streets is no greater than that which the law imposes upon a municipality.

Nellis, Street Railroad Acci. Law, 222; *Sanford v. Union Pass. R. Co.* 16 Pa. Super. Ct. 393.

The prayer did not require the jury to find that the father of the plaintiff, who was driving the buggy, used ordinary care and prudence; and this is a serious omission.

Baltimore & O. R. Co. v. State, 30 Md.

Note. — As to liability of street railroad company for defect in track or street, see subject note to *Groves v. Louisville R. Co.* 52 L.R.A. 448, and case note to *Slater v. North Jersey Street R. Co.* 15 L.R.A. (N.S.) 840

47; *Cumberland v. Lottig*, 95 Md. 42, 51 Atl. 841; *Holly v. Boston Gaslight Co.* 8 Gray, 123, 69 Am. Dec. 233; *Waite v. Northeastern R. Co.* El. Bl. & El. 719, affirmed in El. Bl. & El. 728; *Lifschitz v. Dry Dock, E. B. & B. R. Co.* 67 App. Div. 602, 73 N. Y. Supp. 888.

Burke, J., delivered the opinion of the court:

This is a suit for personal injuries, brought by Dora Miller, an infant, by her father and next friend, against the United Railways & Electric Company of Baltimore. The case was tried in the court of common pleas, and resulted in a verdict and judgment for the defendant, and the plaintiff has appealed.

The material facts, briefly stated, are that, on the 28th day of July, 1906, between the hours of 8 and 9 o'clock in the evening, Wolf Miller, the father of the plaintiff, was driving east on Baltimore street in company with the plaintiff and her sister. He was driving one horse attached to a buggy. The father sat on the right side of the buggy, Rebecca Miller, another daughter, sat immediately to his left and in the center of the buggy, and the plaintiff sat on the left side of the buggy. When he approached the intersection of Baltimore and Wolfe streets the horse stopped, and, in order to avoid an obstruction of some kind, Miller turned his horse to the left, and in doing so the left front wheel of the buggy dropped into a cable slot between the tracks of the railroad company. In trying to get the wheel out, the other wheel fell into the slot, and the horse fell in the street. Miller testified that the buggy had no top and the tire of the wheel was about 1 inch wide; that, as the wheel sank into the cable slot, the buggy hung down on one side, and that he and Rebecca fell over on the plaintiff; that both wheels on the right side were off the ground, and were revolving in such a manner that he could not get out on that side, and that he was obliged to get out on the left side of the buggy; that the left wheels sank in the slot up to the hubs; and that it took two men about ten minutes to get them out. There was evidence tending to show that the plaintiff was seriously injured as the result of this occurrence.

The plaintiff offered in evidence § 24 of the Baltimore City Code of 1906, which imposes upon railroad companies using the city streets the duty to keep the streets covered by their tracks and extending 2 feet on the outer limits of either side of the tracks in thorough repair; and the declaration alleges that the injury sued for

was caused by the defendant's breach of this duty. There is no evidence in the record showing when or by whom the cable was constructed, but assuming, as we must, that it was constructed under proper authority, and was so constructed as not to endanger the safety of travel upon the streets, it was necessary for the plaintiff to produce evidence tending to prove that the defendant had negligently suffered or permitted it to be and remain in an unsafe condition for travel, and that this negligence caused the injury complained of. It is not pretended that any other portion of the street covered by the tracks was out of repair, or that there was a failure of duty in any other respect on the part of the defendant. There is not the slightest evidence in the record to show that the cable slot was out of repair at the point where the accident happened, or that it was wider than the authorized width. Negligence cannot be imputed to the defendant from the mere fact that the wheels of the buggy fell into the slot, because that may have been caused by some concealed imperfection, or by some other defect of which the defendant had no actual or implied notice. In the absence of all evidence as to the actual condition of the cable slot at the place of the accident, the case made by the plaintiff is entirely consistent with nonliability on the part of the defendant, and fails to show a case of actionable negligence. The provision of the city Code does not make the railway company an insurer of the safety of travelers using those portions of the public streets therein referred to. It imposed upon the company, in the respect mentioned, the same measure of duty as that devolved by law upon the municipality in the maintenance and care of the public streets. "Under statutes requiring street railway companies to keep in permanent repair that portion of the street between its tracks and 2 feet outside thereof, a street railway company owes the public the duty to keep such portion of the pavement in repair, so that a person injured by its failure to do so may maintain a suit for damages against the company. The company is not, however, liable for defects or imperfections which may be caused by traffic, such, for instance, as rails becoming loose, or spikes projecting, except upon proof that it failed to repair such defects or imperfections after reasonable opportunity for ascertainment thereof had elapsed. The rules governing its duty toward those using the streets, and the evidence necessary to sustain the charge of negligence, are not the same as are applicable to it as a common carrier of pas-

sengers in relation to its duty to its passengers." *Nellis, Street Railroad Acci. Law*, p. 222.

In *Sanford v. Union Pass. R. Co.* 16 Pa. Super. Ct. 393, which was a suit to recover for the death of the plaintiff's horse, it appeared that the plaintiff, about half past 4 in the morning, was driving his horse and wagon on a public street in the city of Philadelphia. While his horse was walking between the rails, it suddenly walked into a large hole in the street and sustained injuries which caused its death. It did not appear at the trial what caused the dangerous condition in the street; nor was it clearly shown that the hole was there previous to the accident, or that the horse was not precipitated into the ground by the unexpected cave in of the street at that point; nor whether it was the result of an inevitable accident, or caused by some default of the city or the railway company. Under an ordinance of the city, the defendant was bound to keep and maintain the street "in good order at all times." Upon the facts, it was held that the plaintiff could not recover. The court said: "The duty of the municipality is to keep its streets in safe condition at all times, but its liability to persons injured on account of the neglect or omission of this duty is always conditional upon, first, a positive misfeasance in doing acts which cause the street to be out of repair, in which case no other notice to the corporation of the street is essential to its liability (because the municipality has all the knowledge of the facts which a notice would give), or, second, the neglect of the corporation to put the streets in repair or remove obstructions therefrom, or remedy causes of danger occasioned by wrongful acts of third parties, in which cases notice of the condition of the streets, or what is equivalent to notice, is necessary. 2 Dill. Mun. Corp. § 1020. The municipality cannot, by a contract, impose any higher or greater liability on its licensees than the law imposes upon the municipality; and the clause in the contract providing 'that the railway company shall keep and maintain the streets in good order at all times' would not make this defendant liable in a case where the city would not be liable provided the duty created by law had been performed by the city in accordance with the requirements of the law." In *Brown v. Mt. Holly*, 69 Vt. 364, 38 Atl. 69, where a horse was injured by stepping into an unsafe place in a culvert, the court said: "When a defect in a highway is latent, and when a sudden and unforeseen defect occurs without fault on the part of the town, the town is not chargeable" 17 L.R.A. (N.S.)

for the damage resulting from such defect, unless it has been in default in respect to getting seasonable knowledge of the defect, or unless, having such knowledge, it was reasonably practicable to have repaired the defect, or put up a warning or barrier before the happening of the accident." The rule stated in these cases has been generally adopted by the courts in the absence of statute, and is the one which obtains in this state. In *Keen v. Havre de Grace*, 93 Md. 39, 48 Atl. 445, which was a suit to recover damages for an injury alleged to have been caused by defects in a sidewalk which the defendant was bound to keep in safe condition, we said: "Before, however, the municipality can be made liable in any case, it must be shown that it had actual or constructive notice of the bad condition of the street. As was well said in the case of *Todd v. Troy*, 61 N. Y. 509: 'By constructive notice is meant such notice as the law imputes from the circumstances of the case. It is the duty of the municipal authorities to exercise an active vigilance over the streets; to see they are kept in a reasonably safe condition for public travel. They cannot fold their arms or shut their eyes and say they have no notice. After a street has been out of repair, so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice, and charges it with negligence.' If the defect be of such a character as not to be readily observable, express notice to the municipality must be shown. *Burns v. Bradford*, 137 Pa. 367, 11 L.R.A. 726, 20 Atl. 997; *Cook v. Anamosa*, 66 Iowa, 430, 23 N. W. 907. But, if it be one which the proper officers either had knowledge of, or, by the exercise of reasonable care and diligence, might have had knowledge of, in time to have remedied it, so as to prevent the injury complained of, then the municipality is liable." The effect of the ordinance offered in evidence in this case was to impose upon the company that portion of the public duty which relates to keeping the parts of the streets mentioned in safe condition; and the liability of the defendant for injuries caused by its failure to discharge this duty must be determined by the same rules applicable in like cases to suits against the municipality. Tested by these principles, the evidence in this case fails to show any failure of duty by the defendant, and therefore the judgment will be affirmed.

Judgment affirmed, with costs.

MINNESOTA SUPREME COURT.

CAROLINA KOPP, Appt.,
v.

GEORGE THELE et al., Respts.

(104 Minn. 287, 116 N. W. 472.)

Mortgage — foreclosure — redemption by mortgagor's wife.

The plaintiff and the defendant K., as husband and wife, executed a mortgage on his land, which was foreclosed. The husband did not redeem from the foreclosure sale, but the plaintiff, as his wife, did, and since then she has been in possession of the land. Thereafter they were divorced, and he conveyed his interest in the land to the defendant T. Held, that the plaintiff had a right to redeem the mortgaged premises from the foreclosure sale; that such redemption annulled the sale; and that T. owns the land, subject to a lien thereon in favor of the plaintiff for the amount she paid to redeem, with interest, less the net value of the use of the land while in her possession.

(May 15, 1908.)

APPPEAL by plaintiff from an order of the District Court for Hennepin County overruling a motion for new trial after judgment in favor of the defendant Thele in an action brought to determine adverse claims to real estate subject, however, to plaintiff's equitable lien for the redemption of the property from foreclosure sale, less the value of the use thereof. Affirmed.

The facts are stated in the opinion.

Mr. Charles E. Bond for appellant.

Mr. G. A. Will for respondents.

Start, Ch. J., delivered the opinion of the court:

Action in the district court of the county of Hennepin to determine adverse claims to the real estate described in the complaint, which alleged that the plaintiff was in the possession of the premises; that the defendants, and each of them, claimed some adverse estate or interest therein or lien thereon. The defendants answered separately, putting in issue the allegations of the complaint. The defendant Thele also alleged title in fee in himself, and prayed judgment accordingly. The issues were tried by the court without a jury, and findings of fact and conclusions of law were made and filed to the effect following: On October 1,

Headnote by START, Ch. J.

Note. — As to right of wife, during husband's lifetime, to redeem from mortgage on his real property, see case note to *MacKenna v. Fidelity Trust Co.* 3 L.R.A. (N.S.) 1068.

17 L.R.A. (N.S.)

1900, as shown by the undisputed evidence, the defendant Louis C. Kopp and the plaintiff were husband and wife, and on that day they executed a mortgage on the premises, which the husband then owned in fee. This mortgage was duly foreclosed and the premises sold to the mortgagee for the amount due thereon. Before the expiration of the time allowed for redemption, and on November 23, 1904, the plaintiff, as the wife of the mortgagor, the defendant Kopp, duly redeemed the premises from the foreclosure sale. She has ever since been in possession of the premises, by her tenants, receiving the rents and profits thereof. On April 24, 1905, the plaintiff and her husband, the defendant Kopp, were duly divorced on her complaint. Thereafter, and on December 28, 1906, the defendant Kopp conveyed all his interest in the premises to the defendant Thele, who is now the owner in fee thereof, subject to the plaintiff's equitable lien thereon for the amount, with interest, paid by her on the redemption from the foreclosure sale, less the value of the use of the land since such redemption. Judgment was directed accordingly. The plaintiff appealed from an order denying her motion for a new trial.

The assignments of error raise this question: What was the legal effect of the plaintiff's redemption of the premises from the foreclosure sale? In considering this question, we assume that the mortgage was given not only upon the husband's land, but also to secure his debt, and not that of the wife. If we understand the contention of counsel for plaintiff, it is to the effect that, when she redeemed her husband's land from the foreclosure sale, in order to protect her statutory rights therein, the sale was annulled, but, by operation of law, his title to the land was assigned or transferred to her. The contention, as stated in his brief, is this: "The law says to the wife, in effect: 'If you take the necessary steps to preserve your rights, your acts will be protected, and you shall have the benefits resulting from the position taken by you.' The law offers to the wife an assignment of the husband's interest in his real property whenever an assignment becomes necessary to protect her inchoate interest. It says to her: 'All that you need do is to act in such a manner as to indicate that you intend to accept that which the law holds out to you for your acceptance.' And, when the wife has availed herself of this privilege offered by the law, her rights become vested to the same extent as though the transfer had been a voluntary one on the part of the husband."

The case of *Law v. Citizens' Bank*, 85 Minn. 411, 89 Am. St. Rep. 566, 89 N. W.

320, is cited in support of this contention. That case is not in point, for it was one where a purchaser at a void foreclosure sale, who thereby paid the mortgage, went into possession of the mortgaged premises, with the consent of the mortgagor, and remained there until the time for redeeming from the mortgage had expired; and it was held that he had a subsisting interest in the premises under the mortgagor's title, and could redeem them from a subsequent foreclosure sale of a senior lien. Counsel also cites the case of *Mackenna v. Fidelity Trust Co.* 184 N. Y. 411, 3 L.R.A.(N.S.) 1068, 112 Am. St. Rep. 620, 77 N. E. 721, 6 A. & E. Ann. Cas. 471. The language used in the opinion of the court seems to support to some extent the contention of the plaintiff, but, however this may be, the question under consideration must be determined by our statute, as construed by this court, which provides that the mortgagor, his personal representatives or assigns, may, within twelve months, redeem the land sold on foreclosure sale; and that, if any of them do, the redemption annuls the sale. Rev. Laws 1905, §§ 4480-4484. Construing these provisions of the statute, this court has held that the wife has, by virtue of the statute, such an interest in the lands of her husband that she is entitled to redeem them from a foreclosure sale thereof in order to protect her interests; and, if she does, the redemption annuls the sale. *Williams v. Stewart*, 25 Minn. 516; *Herber v. Christopherson*, 30 Minn. 395, 15 N. W. 676; *Roberts v. Meighen*, 74 Minn. 273, 77 N. W. 139. It follows that, when the plaintiff redeemed in this case, the foreclosure sale was annulled, leaving the legal title to the land the same as if the mortgage had never been given. Therefore her redemption could not have the effect, either in law or equity, of transferring the husband's title to the land to her. But, she having redeemed for the protection of her own interest in the premises, which necessarily resulted in protecting her husband's title, she was not a mere volunteer. Hence she is entitled, by subrogation, to an equitable lien upon the land for the amount paid on the redemption.

This brings us to the last question in the case. The plaintiff urges that it was error for the trial court to receive evidence as to the rental value of the premises and in holding that she must account for the use of the premises, for the reason that no such issue was made by the pleadings. If error was committed, it was not prejudicial to the plaintiff, for she made no claim that, in the event the title should be held to be in the defendant Thele, it be adjudged that she had a lien on the premises for the amount she paid on the redemption. But the trial 17 L.R.A.(N.S.)

court, having determined that such defendant was the owner in fee of the premises, justly and properly made the order for judgment which it did make, to the end that the judgment should not be a bar against the enforcement of the lien. The net value of the use of the premises, to be deducted from the amount paid on the redemption, was not determined by the court; but, upon the remand of the case to the district court, either party has a right to apply to that court, on notice and further proof, to determine definitely the amount of the plaintiff's lien, to the end that it may be inserted in the judgment to be entered and the litigation ended.

Order affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

C. CRAWFORD HOLLIDGE

v.

CHARLES DUNCAN.

(199 Mass. 121, 85 N. E. 186.)

Master — servant's assistant — liability for act of.

1. The owner of a cart which the driver is trying to repair in a public street, after raising the pole into the air, is liable for the act of a stranger whom the driver calls to his assistance, in negligently causing the pole to fall on one looking into a shop window near by.

Negligence — evidence — inferences.

2. In the absence of evidence as to how long a cart which the driver was attempting to repair in a public street had been out of repair, or what caused it to be so, it may be found that it would not have been out of repair but for the negligence of the owner.

Same — defective wagon — injury to person on street.

3. The owner of a cart who permits it to be out of repair is liable for injury to a person on the street, by the fall of the pole while the driver is attempting to repair it, which would not have happened but for the condition of the cart.

(May 21, 1908.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought

Note. — As to liability of master for injury to one to whom he owes no contractual duty, by acts of volunteer whom servant permits to assist in performance of master's service, see case note to *Thyssen v. Davenport Ice & Cold Storage Co.* 13 L.R.A.(N.S.) 572.

to recover damages for personal injuries for which defendant was alleged to be responsible, which resulted in a verdict in plaintiff's favor. Overruled.

The facts are stated in the opinion.

Messrs. John Lowell and James A. Lowell, for defendant:

In the absence of authority to do so, the defendant is not bound by the driver's act in seeking assistance of outsiders.

2 Cooley, Torts, 3d ed. p. 1009; Gwilliam v. Twist [1895] 2 Q. B. 84; Jewell v. Grand Trunk R. Co. 55 N. H. 84; Mangan v. Foley, 33 Mo. App. 250; Haluptzok v. Great Northern R. Co. 55 Minn. 446, 28 L.R.A. 739, 57 N. W. 144; Thorp v. Minor, 109 N. C. 152, 13 S. E. 702; Langan v. Tyler, 51 C. C. A. 603, 114 Fed. 716; Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540.

Assuming that the defendant is responsible for the acts of the outsider, he is liable only for the consequences of such act which could reasonably be expected.

Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; Glassey v. Worcester Consol. Street R. Co. 185 Mass. 315, 70 N. E. 199; Bellino v. Columbus Constr. Co. 188 Mass. 430, 74 N. E. 684.

Messrs. Edward F. McClennen and Brandeis, Dunbar, & Nutter for plaintiff.

Morton, J., delivered the opinion of the court:

While the plaintiff was looking into a shop window on Washington street he was struck by the pole or tongue of a dump cart owned by the defendant, and loaded with gravel, and standing in the street parallel with the sidewalk, or by the plate glass falling from the window broken by the pole, and received the injuries complained of. The horses had been unhitched from the cart, and the pole "was sticking up in the air," as a witness described it. In answer to written interrogatories from the plaintiff, the defendant stated that the cart was out of order, and that the driver was trying to fix it, and asked a bystander to assist him; that "the bystander took hold of a blanket which was caught between the seat and the sweep of the cart and jerked it to get it free, and, as he did so, the perch broke, and the pole swung around over the sidewalk and hit a window, breaking the glass, some of which fell on a person standing near." The accident was described in substance as follows, by a person who was passing along the street and saw it: "He noticed that the robe was caught under the sweep, and that somebody came along and pulled it; that the cart lurched, and the pole went a little higher and then suddenly swung around over the sidewalk and fell

against the window, smashing it. He saw the plaintiff struck, and fall. As the pole swung around, the body of the cart fell down and appeared to be wholly disconnected." On cross-examination, this witness said that he was not sure whether the pole struck the plaintiff, or the chains on it, or the falling glass, but he thought that it was the falling glass. There was nothing to show how long the cart had been out of order, or what caused it to be out of order. The defendant did not call the driver as a witness, and did not testify himself, and introduced no evidence. There was a finding for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give certain rulings which he requested.

The defendant contends, in substance, that the accident was caused by the jerking or pulling of the blanket by the bystander, and that he is not liable therefor because the driver had no authority to procure assistance from the bystander. But we think that the act of the bystander must be regarded as the act of the driver. The cart was out of order, and the driver was trying to fix it, as he was bound to do. For that purpose he asked the bystander to assist him; and, in doing so, he used the assistance of the bystander as he would have used a tool or appliance which he had procured, and which he must be regarded as having implied authority to procure, under the circumstances. The fact that the tool or appliance was an intelligent human being does not affect the matter any more than the fact that another person held the reins did in Booth v. Mister, 7 Car. & P. 66. The case is not one where the servant attempted to delegate his duty to another, as in Gwilliam v. Twist [1895] 2 Q. B. 84; but a case where the driver needed, for a moment, in the performance of his duty in a sudden emergency, another hand, and found it in the assistance given at his request by a stranger; and what was done by the stranger was as if done by himself. See Althorf v. Wolfe, 22 N. Y. 355; Campbell v. Trimble, 75 Tex. 270, 12 S. W. 863; Bucki v. Cone, 25 Fla. 1, 6 So. 160; Pennsylvania Co. v. Gallagher, 40 Ohio St. 637, 48 Am. Rep. 689; James v. Muehlebach, 34 Mo. App. 512. Moreover, the cart was out of order, and the defendant offered no explanation as to how long it had been out of order or what caused it to be so. In the absence of such explanation, the judge was warranted in finding that the cart would not have been out of order but for the defendant's negligence; and he could also find that its condition was a contributing cause of the accident. Lane v. Atlantic Works, 107 Mass. 104. In other words, he could

find that, if it had not been for the condition of the cart, the action of the bystander, in pulling out the blanket, would not have caused the body of the cart to fall,—as one of the witnesses testified that it did,—and the pole to swing around over the sidewalk, thereby striking the plaintiff or breaking the window so that he was injured by the falling glass. It is not necessary, to render the defendant liable, that he should have been able to foresee the precise manner in which the accident happened. It is enough if injury to another was reasonably to be apprehended as a result of his negligent conduct. *Lane v. Atlantic Works*, supra; *Feely v. Pearson Cordage Co.* 161 Mass. 426, 37 N. E. 368. We see no error in the manner in which the judge dealt with the case.

Exceptions overruled.

MINNESOTA SUPREME COURT.

SILAS W. LEAVITT et al., State Board of Control, Respts.,

v.

CITY OF MORRIS, Appt.

(— Minn. —, 117 N. W. 393.)

Statute — inebriates' home — constitutionality.

Chapter 288, p. 387, Laws 1907, entitled "An Act Creating and Establishing a Hospital Farm for Inebriates, and Authorizing the State Board of Control to Purchase Lands Therefor and to Provide Means for the Building and Maintenance of Such Institution," is constitutional.

(July 24, 1908.)

A PPEAL by defendant from an order of the District Court for Stevens County

Headnote by START, Ch. J.

Case Note. — Validity of statute providing for commitment of inebriates, without their consent, to a public or private institution.

In *Re Simmons*, 76 Neb. 639, 107 N. W. 803, it was intimated that a statute providing for the commitment of inebriates to a state hospital for the insane, not providing at some stage of the proceeding for a trial by jury, might be unconstitutional, although, by reason of irregularity in the proceeding for commitment under such statute, it was deemed unnecessary to decide the question.

However, in *Re Schwarting*, 76 Neb. 773, 108 N. W. 125, the statute above referred to (Laws 1905, chap. 82, p. 387, known as the "dipsomaniac law") was held to be construable in connection with other laws providing for the detention, care, and discharge

of persons committed to the hospital for the insane, being in *pari materia* therewith, and therefore valid as sufficiently safeguarding the constitutional rights of the inebriate, with the exception of the 7th section, which provides, in substance, that any patient whom the superintendent of said hospital believes to be cured may be paroled upon certain conditions, among which are that the patient sign a written pledge agreeing to refrain from the use of all intoxicating liquors as a beverage, and from the use of morphine, cocaine, and narcotic drugs during the period of his commitment, and to avoid frequenting places and the association with people tending to lead him to the same, and which require him to make written reports as to his observance of the terms of his parole, for failure to make which report or to fulfil all the conditions of his parole,

overruling a demurrer to the complaint in an action brought to recover from the defendant 2 per cent of the money received by it on account of licenses issued for the sale of intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Messrs. James B. Ormond and Henry T. Ronning, for appellant:

Chapter 288 of the Laws of 1907 is unconstitutional and void for the reason that a tax is attempted to be levied on nontaxable property.

Minn. Const. art. 9, § 1; Rev. Laws 1905, § 1539; Minn. Laws 1907, chap. 433; 1895, chap. 8, § 88; Dunnell, Minn. Tax Laws, § 210; Sanborn v. Minneapolis, 35 Minn. 314, 29 N. W. 126; Smith v. St. Paul, 72 Minn. 472, 75 N. W. 708; Mankato v. Meagher, 17 Minn. 265, Gil. 243; State v. Bishop Seabury Mission, 90 Minn. 92, 95 N. W. 882.

The 2 per cent sought to be recovered in this suit, under §§ 19 and 20, chap. 288, Minn. Gen. Laws for the year 1907, is a tax.

United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Opinion of Justices, 58 Me. 591; Cooley, Taxn. 1, 2; Perry v. Washburn, 20 Cal. 318; Deal v. Mississippi County, 107 Mo. 464, 14 L.R.A. 622, 18 S. W. 24.

The law abridges the privileges and immunities of a certain class of citizens of the United States, deprives them of liberty without due process of law, and denies them the equal protection of the laws.

Van Deusen v. Newcomer, 40 Mich. 141.

The act is an improper use and exercise of the police power of the state.

Tiedeman, State & Federal Control of Persons & Property, § 48; Rockwell v. Nearing, 35 N. Y. 302; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636; Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 62 Am. Dec. 625; St. Louis v. Fitz, 53 Mo. 582; Wynehamer v.

of persons committed to the hospital for the insane, being in *pari materia* therewith, and therefore valid as sufficiently safeguarding the constitutional rights of the inebriate, with the exception of the 7th section, which provides, in substance, that any patient whom the superintendent of said hospital believes to be cured may be paroled upon certain conditions, among which are that the patient sign a written pledge agreeing to refrain from the use of all intoxicating liquors as a beverage, and from the use of morphine, cocaine, and narcotic drugs during the period of his commitment, and to avoid frequenting places and the association with people tending to lead him to the same, and which require him to make written reports as to his observance of the terms of his parole, for failure to make which report or to fulfil all the conditions of his parole,

People, 13 N. Y. 378; *Coe v. Schultz*, 47 Barb. 64; *Herdic v. Young*, 55 Pa. 176, 93 Am. Dec. 739; *Austin v. Murray*, 16 Pick. 126; *Green v. Savannah*, 6 Ga. 1; *People v. Hawley*, 3 Mich. 330; *Ames v. Port Huron Log Driving & Boom Co.* 11 Mich. 139, 83 Am. Dec. 731; *Vanderbilt v. Adams*, 7 Cow. 349; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

If the sections providing for the commitment, detention, treatment, and discharge of the convicted inebriate are unconstitutional and void, the entire act falls, regardless of the view the court may take of the validity of the 2 per cent tax feature.

O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458; *Meyer v. Berlandi*, 39 Minn. 438, 1

L.R.A. 777, 12 Am. St. Rep. 603, 40 N. W. 513; *Davis v. St. Louis County*, 65 Minn. 310, 33 L.R.A. 432, 60 Am. St. Rep. 475, 67 N. W. 997; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Cooley, Const. Lim.* §§ 176-178, 212; 3 Am. & Eng. Enc. Law, p. 377; *State ex rel. Hahn v. Hardy*, 7 Neb. 380; *State ex rel. Wheeler v. Stuht*, 52 Neb. 209, 71 N. W. 941; *State ex rel. Miller v. Lancaster County*, 17 Neb. 85, 22 N. W. 228; *State v. Hurds*, 19 Neb. 316, 27 N. W. 139; *Re Groff*, 21 Neb. 647, 59 Am. Rep. 859, 33 N. W. 426; *State ex rel. Singleton v. Van Duyn*, 24 Neb. 586, 39 N. W. 612; *Muldoon v. Levi*, 25 Neb. 457, 41 N. W. 280; *Messenger v. State*, 25 Neb. 674, 41 N. W. 638; *Magneau v. Fremont*, 30 Neb. 843, 9 L.R.A. 786, 27 Am. St. Rep. 436, 47 N. W. 280;

he may, without any further proceeding whatever, and on the written order of the superintendent of the hospital, be taken and returned to the hospital, there to be detained and treated as before. Such provision was held to violate the right to personal liberty, the court saying: "The law was not enacted to punish crime, and is by no means penal in its nature. While a period is fixed beyond which the detention may not go, this term is fixed with the idea that, if the patient cannot be cured within the space of three years, his case is not capable of remedy by such treatment, and he should not be further detained. The time of detention is fixed in the interests of liberty, and not as a term of imprisonment or confinement, as a punishment. But, while this is true, we know of no power residing in the legislature to impose restraint upon the personal liberty of an individual after he has been restored to health and to the control of his appetites by the treatment afforded him under the provisions of the act. When he is cured he stands upon an equality with all other citizens. The legislature, however beneficent its motives may be, is restrained by the provisions of the Constitution from interfering with his personal liberty, and, in so far as these provisions of § 7 provide for the restraint of persons who have been cured, they are in conflict with the Constitution, and must fall."

In *Re Janes*, 30 How. Pr. 446, it was held that an act authorizing commitment, for the term of one year, of persons as inebriates and lost to self-control, to the New York State Inebriate Asylum, upon *ex parte* affidavits, without any provision for an examination, on their own motion, as to whether they were or are such inebriates, before some court or officer and a jury, where they could be heard in opposition to the charge that they were or are such inebriates, was violative of the provisions of the national and state Constitutions which declare that no person shall be deprived of liberty without due process of law.

In *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 App. Div. 363, 56 N. Y. Supp. 431, a statute delegating to a private

corporation the power to retain in its custody inebriate women committed to it, either for a fixed term, or for such less period as, in the discretion of the trustees, may be necessary for the treatment and reformation of a person committed; and providing that any judge of a court of record in the county or district where an alleged inebriate female resides may commit her to the custody of such constitution on consent of the trustees, and upon a certificate in writing of two physicians under oath, showing that such female is incapable or unfit properly to conduct herself or her own affairs, or is dangerous to herself or others, by reason of habits of periodical, frequent, or constant drunkenness, the justice to whom such consent and certificates are presented being empowered to require affidavits to be submitted in support of the allegations, or to institute an inquiry and take proof as to such facts, before making a commitment; and concluding with the provision that nothing therein contained shall be construed to limit the right of the courts to review by habeas corpus the detention of any person committed under the act,—was held unconstitutional as failing to provide due process of law. The court said: "We are of opinion that the commitment under which this relator is held is not due process of law, and that proceedings under the act, so far as they result in restraint for a year or a less period, depending upon discretion of those who detain the relator, are invalid, for the reason that no notice was given by which she might, in the proceeding itself, by immediate intervention or subsequent opportunity to intervene, be heard in resistance of the accusation made against her. Had there been a hearing or notice, the question would not arise. The situation is not saved by that section of the statute which declares that nothing contained in the act shall be construed to limit the power of the courts on habeas corpus; that is a remedy which the relator would have in any event. The statute gave her, in that regard, no right she did not possess in common with every other person within the boundaries of the state of New York. Due process of law means pro-

Singer Mfg. Co. v. Fleming, 39 Neb. 685, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226; State ex rel. Farmers' Mut. Ins. Co. v. Moore, 48 Neb. 870, 67 N. W. 876; Trumble v. Trumble, 37 Neb. 340, 55 N. W. 869; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Warren v. Charlestown, 2 Gray, 84; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Randolph v. Builders' & Painters' Supply Co. 106 Ala. 501, 17 So. 721; State ex rel. Selliger v. O'Connor, 5 N. D. 629, 67 N. W. 824; Sprague v. Thompson, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988; Allen v. Louisiana, 103 U. S. 80, 26 L. ed. 318; Huntington v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; People ex rel. Twenty-third Street R. Co. v. Tax Comrs. 95 N. Y. 558; Burch v. Newbury, 10 N. Y. 389; Oswego Starch Factory v. Dolloway, 21 N. Y. 461; People v. New York C. R. Co. 13 N. Y. 78; Donaldson v. Wood, 22 Wend. 397; Watervliet Turnp. Co. v. McKean, 6 Hill, 619; Re East India Interest, 3 Bing. 193; Com. v. Kimball, 24 Pick. 370; People ex rel. Wood v. Lacombe, 99 N. Y. 43, 1 N. E. 599; Taylor v. Washington County, 67 Ind. 383; Evansville v. Summers, 108 Ind. 189, 9 N. E. 81; Griffin v. State, 119 Ind. 520, 22 N. E. 7; Meshmeier v. State, 11 Ind. 482; State ex rel. Holt v. Denny, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Dundee Mortg. & Trust Invest. Co. v. School Dist. No. 1, 10 Sawy. 52, 21 Fed. 151; United States v. Steffens, 100 U. S. 82, 25 L. ed. 550; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep.

656, 763; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; The Alameda, 31 Fed. 366; Wynehamer v. People, supra; State v. Sinks, 42 Ohio St. 345; State v. Pugh, 43 Ohio St. 98, 1 N. E. 439; People ex rel. Miller v. Cooper, 83 Ill. 585; Slauson v. Racine, 13 Wis. 399; State ex rel. La Valle v. Sauk County, 62 Wis. 376, 22 N. W. 572; Central Branch Union P. R. Co. v. Atchison, T. & S. F. R. Co. 28 Kan. 453; Vines v. State, 67 Ala. 73; Eckhart v. State, 5 W. Va. 515; State ex rel. Huston v. Perry County, 5 Ohio St. 497; Daggett v. Hudson, 43 Ohio St. 548, 54 Am. Rep. 832, 3 N. E. 538; Hinze v. People, 92 Ill. 406; French v. Teschemaker, 24 Cal. 518; Wills v. Austin, 53 Cal. 152; Darby v. Wilmington, 76 N. C. 133; Washington v. State, 13 Ark. 752.

It is quite apparent that the legislature would not have enacted the other portions of the act had they foreseen that the courts would declare such commitment features unconstitutional and void:

Dells v. Kennedy, 49 Wis. 555, 35 Am. Rep. 786, 6 N. W. 246, 381; Slauson v. Racine, supra; State ex rel. Walsh v. Dousman, 28 Wis. 541; Slinger v. Henneman, 38 Wis. 504; State ex rel. Cornish v. Tuttle, 53 Wis. 45, 9 N. W. 791; O'Brien v. Krenz; Meyer v. Berlandi; and Davis v. St. Louis County,—supra.

Messrs. Edward T. Young, Attorney General, and George W. Peterson, for respondents:

The 2 per cent provision is an apportionment of the license money, not a tax.

Ashley v. Ryan, 49 Ohio St. 504, 31 N. E. 721; Littlefield v. State, 42 Neb. 223, 28 L.R.A. 588, 47 Am. St. Rep. 697, 60 N. W. 724; East Feliciana Parish v. Levy, 40 La. Ann. 332, 4 So. 309; Words & Phrases, pp. 6882, 6883.

The doctrine of a hospital for inebriates

cess in the proceeding in which judgment is rendered against a person. It is in that proceeding, at some stage before final judgment, that she must have notice or, at all events, a hearing, before she is condemned to long imprisonment or restraint. The writ of habeas corpus is not a writ of error (People v. Cassels, 5 Hill, 164), and § 3 of the act under consideration does not enlarge the scope or office of that writ."

In State ex rel. Larkin v. Ryan, 70 Wis. 676, 36 N. W. 823, a statute providing that any person charged with being an inebriate, habitual or common drunkard, shall be arrested and brought before a judge of court of record for trial, in the same manner that offenders may be arrested and brought to trial before a justice of the peace; and, if he shall be convicted of being an inebriate, habitual or common drunkard, he shall be sentenced to imprisonment or confinement in any inebriate or insane asylum in the 17 L.R.A. (N.S.)

state for a period not exceeding two years nor less than three months, provided, however, that, before such sentence, some relative or friend shall execute a bond to the state, conditioned for the payment for the support and treatment of such inebriate, habitual or common drunkard, during his imprisonment and confinement,—such conviction not being made dependent upon his inability to attend to business, nor upon any want of self-control, nor upon his being dangerous to himself or others, but solely upon his "being an inebriate, habitual or common drunkard,"—was held unconstitutional as depriving the alleged inebriate of his liberty without due process of law, and as denying the equal protection of the law, the act in question not proceeding upon the theory of protecting the public health, or the public morals, or the public safety, or the personal safety of the victim, nor as a punishment for crime.

supported out of liquor-license fees has been sustained by the court.

State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765.

The commitment provisions of chap. 288, Laws 1907, are valid.

State ex rel. Blaisdell v. Billings, 55 Minn. 473, 43 Am. St. Rep. 525, 57 N. W. 206, 794; *Com. v. Lambert*, 4 Pa. Co. Ct. 439; *Re Hoyt*, 20 Abb. N. C. 162; *Re Single*, 2 Lanc. L. Rev. 217; *Re Coffin*, 41 Misc. 131, 83 N. Y. Supp. 941; *Re Bennett*, 5 N. Y. Supp. 373; *Baker v. Woodward*, 12 Or. 3, 6 Pac. 173; *Nash v. Hoxie*, 59 Wis. 384, 18 N. W. 408; *McGinnis v. Com.* 74 Pa. 245; *Ludwick v. Com.* 18 Pa. 172; 14 Cyc. Law & Proc. pp. 1096-1098; 15 Am. & Eng. Enc. Law, pp. 229, 230, 238; *Tone v. Stump*, 89 Md. 264, 42 Atl. 902.

Start, Ch. J., delivered the opinion of the court:

Action by the state board of control, commenced in the district court of the county of Stevens, to recover from the city of Morris 2 per cent of the money received by it on account of licenses issued for the sale of intoxicating liquors. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and appealed from an order overruling the demurrer. The action is based upon chap. 288, p. 387, Laws 1907, which the defendant contends is unconstitutional. If it be so, the order overruling the demurrer is erroneous; otherwise, it is correct.

1. The first contention of the defendant is that the act is unconstitutional for the reason that a tax is attempted to be levied upon nontaxable property. The act is entitled "An Act Creating and Establishing a Hospital Farm for Inebriates, and Authorizing the State Board of Control to Purchase Lands Therefor and to Provide Means for the Building and Maintenance of Such Institution." This act, after authorizing the purchase of a tract of land and the erection of suitable buildings thereon to be used as a hospital farm for inebriates, then provides the means for the erection and maintenance of such hospital. This is done by § 19 of the act, which is to the effect following: For the building and maintenance of such hospital a tax of 2 per cent is hereby levied upon all license fees for the sale of intoxicating liquors under the laws of this state, and, whenever a license is granted by any municipality for the sale of intoxicating liquors, 2 per cent of the amount charged for such license shall be set aside by such municipality for the payment of the tax herein specified, and shall be immediately remitted to the state treasurer, 17 L.R.A. (N.S.)

who shall credit the same to a fund known as the "Inebriate fund." The cost and expenses of the maintenance of the hospital shall be paid from such fund, if sufficient, and any deficit shall be paid from the appropriations made by the legislature. Section 20 reads as follows: "If any city, village, county, or other municipality shall fail or neglect to comply with the provisions of the last section, the board of control is hereby authorized to recover said taxes in a civil action brought in the name of said board, against such city, village, county, or other municipality making default in the payment of said tax."

It is urged that the provisions of § 19 violate § 3, art. 9, of our state Constitution, which provides that "public property used exclusively for any public purpose shall be exempt from taxation," in that license fees, when paid, are public property, and that § 19 levies a tax on such public property. It is obvious that, if the act in question levies a tax on money belonging to a municipality, held by it for a public purpose, it is a violation of the provision of the Constitution quoted. The question, then, is whether the act does levy a tax on the money of the municipalities of the state. It is true that, prior to the passage of the act in question, all money received by a municipality as fees for liquor licenses belonged to the municipality issuing the license; but this right was conferred by the legislature, which has the power to take away the right in whole or in part as to license fees in the future. The whole subject of the licensing of the sale of intoxicating liquors is within the control of the legislature, which may, in its discretion, forbid the sale of such liquors, or provide the terms and conditions upon which sales may be made when licensed, and the disposition to be made of the money received for licenses. The act does not purport to deal with fees for liquor licenses received by municipalities before the date of its enactment. Therefore, if the legal effect of the act is an apportionment of the license fees received by municipalities in the future, between them and the state, it is a valid law. It is the settled law of this state that license fees are not taxes within the meaning of our Constitution, and that the legislature may appropriate money received for liquor licenses for the erection and maintenance of an asylum or hospital for inebriates. *Rochester v. Upman*, 19 Minn. 108, Gil. 78; *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765.

It is clear, then, that the defendant's claim that the act in question levies a tax upon public property cannot be sustained, unless it must be construed as levying a tax

on money belonging to and in possession of the municipalities of the state. The fact that § 19 uses the words "tax" and "levied" does not necessarily determine the question; for we must construe the section as a whole and ascertain just what the effect is of its provisions. Now, the section does not purport to levy a tax upon any money belonging to any municipality, but upon license fees for the sale of intoxicating liquors. It also provides that, whenever a license is granted, 2 per cent of the amount charged (received) for such license shall be set aside and immediately remitted to the state treasurer. It is manifest that the 2 per cent is to be set aside—that is, segregated—and at once sent to the state treasurer when received; hence, 2 per cent of every license fee received by a municipality is not its property, but it belongs to the state, and that the so-called tax is not levied upon the property of the municipality. We accordingly hold that the legal effect of the act is to appropriate 2 per cent of all liquor-license fees to the state for the erection and maintenance of a hospital farm for inebriates, and that it is not unconstitutional for the alleged reason that it levies a tax upon property exempt from taxation by our Constitution.

2. It is the further contention of counsel for the defendant that the general provisions of the act relating to the arrest, examination, commitment, detention, and treatment of an inebriate at the hospital are unconstitutional, because they deprive him of his liberty without due process of law, and that, such being the case, the whole act is void, for the reason that the legislature would not have provided for the acquisition and maintenance of a hospital farm for inebriates if it had been advised that the commitment features of the act were void. Counsel has submitted an exhaustive brief and argument in support of this contention. If the act had made no provisions for the commitment of inebriates to the hospital, and their detention and treatment therein, it would not, for that reason, have been unconstitutional. Chap. 10, p. 119, Gen. Laws 1873, entitled "An Act to Establish a Fund for the Foundation and Maintenance of an Asylum for Inebriates," contained no provisions as to the commitment and detention of inebriates therein. In this respect it simply provided for commissioners, to be appointed by the governor, to locate and erect a state asylum for inebriates, the same to be conducted under the guardianship of the state and upon the same general plan as other charitable institutions of the state. The law was held constitutional. *State v. Cassidy*, *supra*. The legislature, however, in the act here in question, 17 L.R.A. (N.S.)

undertook to, and did, provide a general scheme for the commitment of inebriates to, and their treatment in, the proposed hospital; and it may be conceded that, if the legislature had been advised that such general scheme was unconstitutional, it would not have enacted the other provisions of the statute for establishing the hospital and its maintenance. This concession, however, does not apply to incidental details, as to the treatment and parole of patients after commitment, which, perchance, may be found to be invalid in proceedings taken on behalf of any patient, and which, if invalid, the legislature may remedy. Therefore, if the general scheme for the compulsory commitment of inebriates to the proposed hospital for treatment without their consent, provided for in this act, is not constitutional, the whole act is void. But it is otherwise if such scheme is constitutional; and, if such be the case, the provisions of the act upon which this action is based, providing for the appropriation of 2 per cent of liquor license fees to establish and maintain the hospital, are valid.

We express no opinion as to the validity of the incidental details of the act, to which reference has been made, and only decide the question of the validity of the provisions of the act relating to the commitment of inebriates, without their consent, to a public hospital for the treatment of inebriates, to be provided and conducted by the state. The provisions of the act relevant to such question are to the effect following: Section 2 declares that the term "inebriate" shall include every species of chronic inebriety, whether caused by the excessive use of intoxicating liquors, morphine, or other narcotics. Section 4 provides that, upon the filing with the probate court of a verified petition that any person in the county is an inebriate and in need of care and treatment, or that it is dangerous for him to remain at large, stating therein the petitioner's relationship, if any, to the inebriate, and the indications of his lack of self-control in the use of liquors or narcotics, the court shall issue its warrant to bring the inebriate before it for examination as to his alleged inebriety. Section 5 provides for the appointment of two reputable persons, one of whom, at least, must be a qualified physician; and that such persons, with the judge of the court, shall constitute a board to examine the alleged inebriate and determine his inebriety. Section 21 provides that the county attorney shall be notified, and shall appear and take such action as may be necessary to protect the rights of such inebriate and the interests of the county. Section 6 requires the board to hear all proper testimony; and the court may

cause witnesses to be subpoenaed. When the examination is completed the board shall determine whether the person charged is an inebriate, and make and file a report of their proceedings, including their findings. Section 9 provides that, if the board determine that such person is an inebriate, he shall be committed to the hospital farm for treatment for an indeterminate period, but not for more than two years without being released on parole; and, further, that such person shall have a right to appeal from the decision of the probate court to the district court, and that, on such appeal, all questions involved in such examination shall be tried *de novo*. Section 11 requires that, whenever a person is discharged from the hospital, a certificate of such fact shall be sent to the judge of probate.

The provisions of the act relating to the examination and commitment of an alleged inebriate carefully safeguard his rights, providing, as they do, for full notice and opportunity to be heard, and a trial of all questions by a jury in case he appeals to the district court. They are substantially the same, with the exception of the right of appeal, as those relating to the examination and commitment of insane persons. Rev. Laws 1905, §§ 3852-3861. There is, however, a clear distinction between a person who gets drunk and an insane person; and it may be conceded that one who is simply a drunkard, but is able properly to take care of himself, his family, and his property, and is not a menace to the public, cannot be committed to and detained in a hospital for inebriates without his consent, for the personal rights and liberties of such a person are guaranteed by the Constitution. 15 Am. & Eng. Enc. Law, p. 243. But the state, in the exercise of its police power, has the undoubted right to punish drunkenness, and to provide for the detention and treatment, in hospitals controlled by it, of those who are habitual drunkards, and have so far lost the power of self-control that they are either incapable of properly caring for themselves, or are a menace to the public weal. The state has the power to reclaim submerged lands which are a menace to the public health, and make them fruitful. Has it not, also, the power to reclaim submerged men, overthrown by strong drink, and help them to regain self-control?

The state, for many years, has punished drunkenness, as a crime, by a fine or imprisonment, and, for the third and all subsequent offenses, by imprisonment alone. Laws 1907, chap. 208, p. 235. The necessary effect of the enforcement of the statute against drunkenness is to deprive the person guilty of the offense of his property and his liberty for a time; but no question

has ever been made in the courts of this state as to the validity of such a statute. The trend, however, of legislation, is to treat habitual drunkenness as a disease of mind and body, analogous to insanity, and to put in motion the power of the state, as the guardian of all of its citizens, to save the inebriate, his family, and society from the dire consequences of his pernicious habit. 15 Am. & Eng. Enc. Law, p. 229. The statute here under consideration is of such a character. It is not a penal, but a paternal, statute, seeking, not the punishment of the inebriate, but the safeguarding of his interests and the safety of the public, by treating him as, what he is in fact, a man of unsound mind, and placing him under the guardianship of the state, to the end that he may be healed of his infirmity. The act provides that such guardianship shall be administered by the probate court; and there can be no question of the jurisdiction of such court; for the Constitution (§ 7, art. 6) confers upon it jurisdiction over the general subject of guardianship of persons. State ex rel. Chesley v. Wilcox, 24 Minn. 143.

Again, the statute does not seek to place under the guardianship of the state hospital for inebriates persons who are guilty of occasional acts of drunkenness and who are capable of controlling themselves and their property. It is limited to habitual drunkards,—that is, to persons who have lost the power or will to control their appetite for intoxicating liquors or narcotics, and have the fixed habit of drunkenness (4 Words & Phrases, 3202),—who are in need of care and treatment, and to those it would be dangerous to leave at large. The difference between such persons and insane persons is one of degree only; and they lawfully may be so treated by the state without any impairment of their constitutional rights. That the act in question is limited to such inebriates is quite obvious from the reading of §§ 2 and 4 thereof. The term "inebriate," as used in the act, "includes every species of chronic inebriety," that is, habitual drunkenness. See the words "chronic" and "inebriety," Webster's International Dict. Hence an inebriate, as defined by the act, is an habitual drunkard.

The decision of this court in the case of Foreman v. Hennepin County, 64 Minn. 371, 67 N. W. 207, cited by the defendant, is not opposed to, but is in accord with, the views herein expressed. The act under consideration in that case was held invalid because it did not contain any of the elements of guardianship, and assigned powers and duties to probate judges beyond those authorized by the Constitution. It was, however, stated in the opinion, by Mitchell,

J., that, "if the act under consideration provided for committing habitual drunkards to the guardianship of the officers of an institute for the treatment of drunkenness, as the statutes considered in *State ex rel. Chesley v. Wilcox*, supra, provided for the committing insane persons to the hospitals for the insane, the jurisdiction of the probate judge could be sustained, and on the same grounds." In the case of *Murray v. Ramsey County*, 81 Minn. 359, 51 L.R.A. 828, 83 Am. St. Rep. 379, 84 N. W. 103, the law under consideration was held unconstitutional as class legislation. The case of *State ex rel. Larkin v. Ryan*, 70 Wis. 676, 36 N. W. 823, also cited by counsel, is not here in point, for the reason that the statute considered in that case proceeded, as stated in the opinion of the court, "upon the sole theory that the victim may be arrested, brought before a judge of record at chambers, and, if found to be 'an inebriate, habitual or common drunkard,' he may, without the existence of any other fact or condition, and without any trial in any court of law, imprison him for two years, without any provision for his release. We are forced to the conclusion that the relator has been deprived of his liberty without due process of law, and denied the equal protection of the law."

We hold, for the reasons we have stated, that the general scheme provided by the act here under consideration, for the commitment to and detention at a hospital farm, maintained and controlled by that state, of the class of inebriates designated in the act, is constitutional. It follows that the provision of the act relating to the payment to the state by all municipalities of 2 per cent of the amount received by them for liquor licenses is valid and enforceable.

Order affirmed.

MINNESOTA SUPREME COURT.

LOUIS GRIMESTAD, Resp't.,
v.

L. LOFGREN et al., Appts.

(— Minn. —, 117 N. W. 515.)

Exemption — residence — departing debtor.

1. A debtor sold all his nonexempt property and started to remove to another state, with the intention of establishing a residence there. While on the way, and yet

Headnotes by ELLIOTT, J.

Note. — As to when nonresidence begins, so as to forfeit exemptions, see case note to *Brown v. Beckwith*, 1 L.R.A. (N.S.) 778. 17 L.R.A. (N.S.)

within this state, an attachment was levied on his horse. Held, that he was still a "resident of the state," within the meaning of the exemption law, and entitled to claim his exemptions.

Process — abuse — advice of counsel.

2. This action for damages for wrongful and malicious levying on exempt property is an action for the abuse of process, and not for malicious prosecution. That the defendant acted under the advice of counsel is not a defense to such an action, but the fact may be shown in mitigation of damages.

Appeal — excluded evidence — insufficient offer.

3. The error of the court in excluding evidence held not available to appellant, because no sufficient offer to prove was made.

(August 7, 1908.)

APPEAL by defendants from an order of the District Court for Clay County denying a new trial or a judgment notwithstanding verdict in plaintiff's favor in an action brought to recover damages for malicious abuse of process. Affirmed.

The facts are stated in the opinion.

Messrs. Peter C. Helmark, C. A. Nye, and C. G. Dosland, for appellants:

If the defendants acted in good faith upon the advice of counsel, probable cause is made out, and constitutes a complete defense to the action.

Farmers' & T. Tobacco Warehouse Co. v. Gibbons, 107 Ky. 611, 55 S. W. 2; *Anderson v. Columbia Finance & T. Co.* 20 Ky. L. Rep. 1790, 50 S. W. 40; *Stone v. Swift*, 4 Pick. 389, 16 Am. Dec. 349; *Kompass v. Light*, 122 Mich. 86, 80 N. W. 1008; *Wiesinger v. First Nat. Bank*, 106 Mich. 291, 64 N. W. 59; *LeClear v. Perkins*, 103 Mich. 131, 26 L.R.A. 627, 61 N. W. 357; *Brand v. Hinchman*, 68 Mich. 601, 13 Am. St. Rep. 362, 36 N. W. 664; *Stewart v. Sonneborn*, 98 U. S. 192, 25 L. ed. 118; *Williams v. Hunter*, 10 N. C. (3 Hawks) 545, 14 Am. Dec. 597; *O'Grady v. Julian*, 34 Ala. 91; *McCracken v. Covington City Nat. Bank*, 4 Fed. 602; *Brewer v. Jacobs*, 22 Fed. 222; *Emerson v. Cochran*, 111 Pa. 619, 4 Atl. 498; *Sledge v. McLaren*, 29 Ga. 64; *Spengler v. Davy*, 15 Gratt. 381; *Allen v. Codman*, 139 Mass. 136, 29 N. E. 537; *Walter v. Sample*, 25 Pa. 275; *Lemay v. Williams*, 32 Ark. 166; 26 Cyc. Law & Proc. pp. 44, 54; *Sharpe v. Johnston*, 76 Mo. 660; *Stanton v. Hart*, 27 Mich. 539; *Wilkinson v. Arnold*, 11 Ind. 45; *Turner v. Walker*, 3 Gill & J. 380, 22 Am. Dec. 329; *Wicker v. Hotchkiss*, 62 Ill. 107, 14 Am. Rep. 75; *Soule v. Winslow*, 66 Me. 447.

The plaintiff was not, as a matter of law, a resident and citizen of the state of Minne-

sota at the time of the levy of the attachment.

State use of Burt v. Allen, 48 W. Va. 154, 50 L.R.A. 284, 86 Am. St. Rep. 29, 35 S. E. 990; Clark v. Ward, 12 Gratt. 440; Spalding v. Simms, 4 Met. (Ky.) 285; Moore v. Holt, 10 Gratt. 284.

The plaintiff could not recover punitive damages.

Seeman v. Feeney, 19 Minn. 79, Gil. 54; Du Laurans v. First Div. St. Paul & P. R. Co. 15 Minn. 49, Gil. 29, 2 Am. Rep. 102; Carli v. Union Depot Street R. & Transfer Co. 32 Minn. 101, 20 N. W. 89; Carsten v. Northern P. R. Co. 44 Minn. 454, 9 L.R.A. 688, 20 Am. St. Rep. 589, 47 N. W. 49; Finch v. Northern P. R. Co. 47 Minn. 36, 49 N. W. 329; Serwe v. Northern P. R. Co. 48 Minn. 78, 50 N. W. 1021; Vine v. Casmey, 86 Minn. 74, 90 N. W. 158; 13 Cyc. Law & Proc. p. 120.

Mr. Charles S. Marden, for respondent:

The plaintiff was, at the time of the seizure of his exempt property, a resident of Minnesota.

Brown v. Beckwith, 58 W. Va. 140, 1 L.R.A.(N.S.) 778, 112 Am. St. Rep. 955, 51 S. E. 977; Springer v. Lewis, 22 Pa. 191; Urquhart v. Smith, 5 Kan. 447; Winslow v. Benedit, 70 Ill. 120; Wood v. Bresnahan, 63 Mich. 614, 30 N. W. 206; Herzfeld v. Beasley, 106 Ala. 447, 17 So. 623; Stirman v. Smith, 8 Ky. L. Rep. 781; Anthony v. Wade, 1 Bush, 110.

A mere intention to remove from the state, unaccompanied by any act, does not make a person a nonresident, within the meaning of the attachment law.

Mann v. Taylor, 78 Iowa, 355, 43 N. W. 220; Lyle v. Foreman, 1 Dall. 480, 1 L. ed. 232; Degnans v. Wheeler, 2 Nott & M'C. 323.

Nor will preparation to send household goods away.

State, Stafford, Prosecutor, v. Mills, 57 N. J. L. 570, 31 Atl. 1023.

Nor surrender of the premises occupied by him, although he leaves the following day.

Kugler v. Shreve, 28 N. J. L. 129.

If a debtor was a resident when the lien of the execution attached, his subsequent removal to and residence in another state does not defeat his right to exemption.

McCrory v. Chase, 71 Ala. 540; Caldwell v. Renfro, 99 Mo. App. 376, 73 S. W. 340.

In the absence of statutory provision to that effect, an intention on the part of the debtor to leave the jurisdiction, or any preparation to leave, does not deprive the debtor of his exemption.

18 Cyc. Law & Proc. p. 1408; Stirman v. Smith, supra; Bonnel v. Dunn, 28 N. J. L. 153; Ballinger v. Lantier, 15 Kan. 608. 17 L.R.A. (N.S.)

The evidence was ample to warrant the submission of the question of exemplary damages to the jury.

Lynd v. Pickett, 7 Minn. 184, Gil. 128, 82 Am. Dec. 79; Gardner v. Minea, 47 Minn. 295, 50 N. W. 199; Cronfeldt v. Arrol, 50 Minn. 327, 36 Am. St. Rep. 648, 52 N. W. 857; Matteson v. Munro, 80 Minn. 340, 83 N. W. 153.

Elliott, J., delivered the opinion of the court:

For about five years prior to the events herein narrated, Louis Grimestad resided with his family upon a farm in Becker county, Minnesota, known as the "Showalter farm." Intending to remove with his family to North Dakota, where he had made arrangements for establishing a new home, Grimestad, on April 8, 1907, held an auction sale of his personal property, at which he disposed of all his horses but one gray team. Showalter had a mortgage upon this team, and Grimestad informed him that he intended to remove to Dakota, and Showalter thereupon filed his mortgage in Dakota. Grimestad was indebted to Lofgren, and some time before this auction sale, Lofgren and his attorney, Hiemark, went to the farm for the purpose of collecting the debt. While there, Hiemark, in the presence and hearing of Lofgren, threatened to attach the gray team if Grimestad attempted to move from the state. Immediately after the sale, Grimestad and his family started for North Dakota across country with the team and his household goods. On April 17, 1907, Lofgren went before a justice of the peace and made an affidavit that Grimestad was "about to remove his property out of the state with the intent to defraud his creditors." A writ of attachment was then issued and placed in the hands of a constable, the appellant McDonald, with instructions to seize a certain gray horse belonging to defendant. Grimestad and his family had traveled 15 miles on their journey toward North Dakota, and, while they were yet within the state of Minnesota, were overtaken by the constable, who followed them to the village of Felton and there made the levy on one of the horses of the team. The result was to leave Grimestad stranded and without the means to proceed on his journey. His family was without shelter, and he had no money. The levy was made on April 17th, and on the following day Grimestad made an oral demand for the possession of the horse on the ground that it was exempt. On April 20th a similar demand was made in writing, accompanied by an affidavit in which Grimestad swore that the horse was exempt. When the case was called for trial

in the justice court the plaintiff, Lofgren, moved that the levy be released on the ground that Showalter had made and served a verified statement of the amount due on the mortgage and demanded the property. in accordance with § 3474, Rev. Laws 1905. At the same time the defendant, Grimestad, moved that the levy be discharged on the ground that the horse was exempt. The plaintiff's motion was granted, and the levy was discharged, and the horse was delivered to Grimestad at Felton, where it had been taken from him.

This action in the district court was commenced on April 18th, before the levy was released, and in the complaint the plaintiff alleged his ownership of the horse, its exemption from attachment or levy under execution, the defendant's knowledge of that fact, the wilful, wrongful, and malicious causing of an attachment to issue, and that the defendant, "wilfully, wrongfully, maliciously, and knowingly, and with intent to harass, injure, and oppress this plaintiff, did . . . cause to be made a pretended levy under said attachment upon said horse, and the defendant as aforesaid did then and there wilfully, wrongfully, maliciously, knowingly, and with intent to harass and oppress this plaintiff, seize, take, and carry away the horse against the objections of the plaintiff." It was also alleged that "such wrongful taking caused the plaintiff and his family great inconvenience, discomfort, hardship, and disgrace, injured the health of his children, and caused the plaintiff great mental and bodily suffering, and necessitated the incurring of extra expense, and that, by reason of the wilful and wrongful taking, carrying away, holding, detention, and conversion of said gray horse by the defendant, and of all the facts and circumstances herein stated, the plaintiff has suffered damage in the sum of \$1,000." The answer admitted the levy of the attachment, alleged that it was in good faith, that the defendant had then ceased to be a resident of the state, that the horse was not exempt, and that the levy had been released and the horse returned to the plaintiff because of the existence of a mortgage upon it. The reply admitted the return of the horse after the commencement of the action, and demanded judgment for damages. The plaintiff recovered a verdict for \$100, and the appeal is by the defendant from an order denying a motion for judgment notwithstanding the verdict or for a new trial. The record presents the questions: Did the court err (1) in instructing the jury that the horse was exempt; (2) in excluding evidence offered by the defendant to show that, in instituting the attachment proceedings,

he acted under the advice of counsel; and (3) in instructing the jury that the case was one in which exemplary damages might be awarded? It is also contended that the verdict is not justified by the evidence and that the damages are excessive.

1. The vital question is, Was the horse exempt at the time of the attachment? The trial court instructed the jury that it was, and this was correct, unless Grimestad had lost his right to claim the exemption because he had abandoned his residence in Minnesota and in legal effect removed to another state. Grimestad had sold all his personal property, except one team and his household goods, at public sale, and at the time of the levy was, with his family, on his way toward the state line, with the intention of crossing into North Dakota and there making a new home for himself and family. But he and all his belongings were still within the state of Minnesota and subject to the jurisdiction of its courts. He had not in fact left the state, and had not established a residence in North Dakota. The trial court instructed the jury that "he had all the rights of a citizen of Minnesota, not having departed from the state. His family were here, and had been here, and until a party brings his family out of the state, and as long as they are here, although he may start for that purpose, he is protected by the exemption laws of the state. Had they moved across the river, and he come back here with his team, it would be another thing. He was either a resident here, or, according to the testimony, a resident of North Dakota. A man's residence does not cease in this state so long as it is his abiding place, and there is no evidence here that a change had taken place which would rob him of his right as a citizen of Minnesota. On that point I instruct you as a matter of law."

There is some confusion in the cases as to whether a person, under such circumstances, has ceased to be a resident of the state, within the meaning of the exemption statutes. This is due in a measure to the failure to distinguish between attachment and exemption laws, and thus lose sight of the liberal and humane spirit which should characterize the construction of the latter class of statutes. The cases are not uniform, even when construing attachment laws. Within the meaning of such statutes, a person becomes a nonresident by actually leaving the state with the intention of becoming a nonresident (4 Cyc. Law & Proc. p. 434): but a person's mere intention to remove (*Mann v. Taylor*, 78 Iowa, 355, 43 N. W. 220; *Lyle v. Foreman*, 1 Dall. 480, 1 L. ed. 232; *Degnan v. Wheeler*, 2 Nott & M'C. 323), or preparations to send his

family away (State, Stafford, Prosecutor, v. Mills, 57 N. J. L. 570, 31 Atl. 1023), or surrender of the premises where he has been living (Kugler v. Shreve, 28 N. J. L. 129), without an actual removal, does not change his status as a resident. In Ballinger v. Lantier, 15 Kan. 608, it was held that a person who leaves his home with the intention of leaving the state does not become a nonresident until he gets outside of the state. In Shipman v. Woodbury, 2 Miles (Pa.) 67, it was held that the property of a person who disappeared after having made statements that he intended to remove from the state, but who in fact went only to another part of the state and returned within ten days, was not subject to attachment. There are cases which hold that a person becomes a nonresident as soon as he begins to remove his person from the place of residence, and before he has crossed the state line. Moore v. Holt, 10 Gratt. 284; Clark v. Ward, 12 Gratt. 440; Spaulding v. Simms, 4 Met. (Ky.) 285; State use of Burt v. Allen, 48 W. Va. 154, 50 L.R.A. 284, 86 Am. St. Rep. 29, 35 S. E. 990; Brown v. Beckwith, 1 L.R.A.(N.S.) 778, annotated [58 W. Va. 140, 112 Am. St. Rep. 955, 51 S. E. 977]. In Iowa and Missouri the statutes take away the exemption of a debtor who starts to leave the state, or is about to take up his abode in another state. See Graw v. Manning, 54 Iowa, 719, 7 N. W. 150; Hackett v. Gihl, 63 Mo. App. 447. The West Virginia cases which hold that nonresidence has the same meaning in the exemption as in the attachment laws do not seem to rest on very satisfactory reasons.

Our statute authorizes the levy of an attachment when the defendant is not a resident of the state, or when he has departed from the state with intent to delay or defraud his creditors. Rev. Laws 1905, § 4216. The justification of such statutes is found in the inability to serve process upon the defendant in the ordinary manner. In the case of a nonresident, personal service cannot be had; and this is also true when the debtor has left the state with the intent to defraud his creditors. Having left his property behind, the question arises as to the right of a creditor to take that property and apply it to the payment of his debt. The right to attach is given because the fraudulent disappearance of the debtor from the jurisdiction has made it impossible to serve process in the ordinary way. This may be a good reason for holding that the attachment may be levied as soon as the debtor has abandoned his residence and started for another state; but we do not determine that question, as no attempt is here made to justify the levy upon the ground that Grimestad had left the state 17 L.R.A.(N.S.)

with intent to delay and defraud his creditors. It is true that the attachment was issued upon an affidavit in which this was stated as the ground for claiming the right; but the case, as presented to us, has resolved itself into the simple question whether or not the property levied on was exempt from execution by reason of the fact that Grimestad was a resident of the state at the time of the levy.

This question of exemption presents a different phase of the matter of residence. The benefit of the exemption laws of this state is granted only to debtors who have an actual residence in the state (Rev. Laws 1905, § 4317), and an absconding debtor who has left the state without any intention of returning, and become a resident of another state, cannot avail himself of the benefits of the exemption laws in respect to personal property left behind him and subsequently seized upon execution. Orr v. Box, 22 Minn. 485. In favor of residents of the state, the exemption laws should be liberally construed, in order to advance the humane purpose of preserving to the unfortunate or improvident debtor and his family the means of obtaining a livelihood and thus prevent him from becoming a charge upon the public. Rothschild v. Boelter, 18 Minn. 361, Gil. 331; Berg v. Baldwin, 31 Minn. 541, 18 N. W. 821; Boelter v. Klossner, 74 Minn. 272, 73 Am. St. Rep. 347, 77 N. W. 4; Olin v. Fox, 79 Minn. 459, 82 N. W. 858. It is conceded, of course, that Grimestad had formed the intention of abandoning his residence and removing from the state; but the rule is well established that to effect a change of residence there must be both intention and act, and that an intention to remove is not alone sufficient to defeat a claim to an exemption. Springer v. Lewis, 22 Pa. 191; Urquhart v. Smith, 5 Kan. 447; Winslow v. Benedict, 70 Ill. 120. Preparations to leave (Herzfeld v. Beasley, 106 Ala. 447, 17 So. 623; Anthony v. Wade, 1 Bush, 110; Rasco v. Sheet, 8 Ky. L. Rep. 703), such as the delivery of one's furniture to the railroad for shipment (Wood v. Bresnahan, 63 Mich. 614, 30 N. W. 206; Herzfeld v. Beasley, supra), or even sending one's family to another state with the intention of following them after disposing of certain property (Stirman v. Smith, 10 Ky. L. Rep. 665, 10 S. W. 131); is not sufficient to deprive the owner of the benefit of exemptions secured to residents of the state. See also Bonnel v. Dunn, 28 N. J. L. 153.

Taking into consideration the nature of the exemption laws, the purposes for which they were enacted, and the liberal spirit in which they should be construed, we are satisfied that the trial court properly ruled

that Grimestad was an actual resident of the state so long as he was within the jurisdiction of the state and had not actually established a residence elsewhere. He was not engaged in the perpetration of a fraud or attempting to avoid service of process. He was exercising his right to pass through the state while on his journey to another state, where he intended to establish a new residence. He was still within the jurisdiction and entitled to the protection of the laws of Minnesota. The property which he was taking with him was exempt under those laws. He was entitled to carry that property with him to the state line, and immediately upon taking it into the other state and establishing a residence there to claim such exemptions therein as were authorized by the laws of that state. The instruction was therefore correct.

2. The affidavit for attachment alleged that the defendant was about to leave the state with intent to defraud his creditors. The question whether Lofgren had probable cause to believe that this statement was true is not here involved. This action was brought to recover damages for the malicious abuse of the process of the court. It was brought while the attachment action was still pending and undetermined, and this alone would have been fatal to an action for malicious prosecution. *Luby v. Bennett*, 111 Wis. 613, 56 L.R.A. 261, 87 Am. St. Rep. 897, 87 N. W. 804; 26 Cyc. Law & Proc. p. 57, and other cases there cited. An action based on the abuse of process differs from an action for malicious prosecution "in at least two respects: First, in that want of probable cause is not an essential element; and, second, that it is not essential that the original proceeding shall have terminated." 1 *Jaggard*, Torts, p. 634; 26 Cyc. Law & Proc. p. 6; *Paul v. Fargo*, 84 App. Div. 9, 15, 82 N. Y. Supp. 369. This action proceeds upon the theory that the attachment was maliciously levied on exempt property for the purpose of forcing Grimestad to do something that he could not legally be compelled to do. *Docter v. Riedel*, 96 Wis. 158, 37 L.R.A. 580, 65 Am. St. Rep. 40, 71 N. W. 119.

We are not required to determine whether the good-faith acceptance of the advice of counsel is a defense in an action for malicious prosecution. The gist of the present action is the malicious levy upon exempt property, and, although the fact that counsel advised that the property was not exempt may not have constituted a defense, it was admissible for the purpose of reducing the amount of punitive damages which the jury might have awarded. *Chambers v. Upton* (C. C.) 34 Fed. 473, 17 L.R.A. (N.S.)

The trial court excluded evidence of this character; but the appellant has not made a record which entitles him to predicate error upon the rulings. When the case was called for trial, the defendant asked leave to amend the answer by inserting an allegation to the effect that, in making the levy, he acted in good faith upon the advice of counsel. When it became apparent that the allowance of the amendment would result in a continuance of the case, he withdrew his application and went to trial upon the original pleadings. But the evidence was admissible in mitigation of damages under the original answer, and an unsuccessful effort was made to introduce it. The defendant Campbell was asked whether he acted under the advice of counsel, and, after the objection to the evidence was sustained, no offer to prove was made. Similar questions were asked the defendant Lofgren, and the attorney, Mr. Hiemark, and an offer was made to prove by Lofgren that he acted in good faith upon the advice of counsel that Grimestad had abandoned his residence and ceased to be a resident of Minnesota, and that the horse was subject to levy. The offer was insufficient, as it contained only a part of the necessary elements; for instance, it did not state that a full and fair statement of the facts within the knowledge of the defendant, or which, with due diligence, he might have known, had been made to his counsel. See 26 Cyc. Law & Proc. p. 54.

3. The other assignments of error have been considered, but they do not require especial consideration. The jury returned a verdict in favor of the plaintiff for \$100, and, in view of this small verdict, it is apparent that the jury were not greatly affected by what was said by the court with reference to punitive damages. Upon the evidence, it was proper to submit the question of punitive damages to the jury (*Matteson v. Munro*, 80 Minn. 341, 83 N. W. 153), and there were no errors in the charge which can be considered as prejudicial to the appellant.

Order affirmed.

MISSOURI SUPREME COURT. (Division No. 1.)

MISSOURI PACIFIC RAILWAY COMPANY,
NY, Resp.,
v.

CONTINENTAL NATIONAL BANK in St.
Louis et al., Appts.

(212 Mo. 505, 111 S. W. 574.)

Appeal — departure.

1. The appellate court cannot consider

the original petition in aid of a contention of abandonment of a particular theory of the case, where there was no motion to strike out an amended petition on the ground of departure, and the original petition was not preserved in the record.

Bank — conditional deposit.

2. The creation of a bank account subject to another's check is not prevented from constituting the relation of bank and depositor between the bank and such person by the fact that his right to the fund is subject to a condition, if it is duly performed.

Same — credit.

3. The relation of bank and depositor exists between a bank and a railroad company where the former purchases county aid bonds and places the amount of the bid to the credit of the railroad company payable on its order.

Limitation of action — bank account.

4. The statute of limitations does not run against liability on an open bank account before demand of payment by the depositor, or refusal to pay on his order.

Appeal — weight of evidence.

5. The question of the effect of the facts that a witness has a pecuniary interest in the result of the suit and that books containing evidence bearing upon the question in controversy had been destroyed, affecting, as it does, the weight and quality of the proofs, is for the trial court.

(May 30, 1908.)

APPEAL by defendants from a judgment of the Circuit Court for the City of St. Louis in plaintiff's favor in an action brought to recover the balance of a bank deposit. Affirmed.

The facts are stated in the opinion.

Messrs. Seneca N. Taylor and S. O. Taylor, for appellants:

The agreement by the bank was not in writing, and therefore was affected by the five-year statute of limitations.

Rev. Stat. 1899, § 273; State ex rel. Fagan v. Grigsby, 92 Mo. 419, 5 S. W. 39; Landis v. Saxton, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912; Shelby County v. Bragg, 135 Mo. 295, 36 S. W. 600; Menefee v. Arnold, 51 Mo. 536; Reyburn v. Casey, 29 Mo. 129; Moorman v. Sharp, 35 Mo. 233; Curtis v. Sexton, 201 Mo. 230, 100 S. W. 17; Stark v. Zehnder, 204 Mo. 443, 102 S. W. 992.

When an obligation to pay is complete, the cause of action has matured, and formal demand is unnecessary as a condition prece-

Note. — As to necessity of demand in order to start statute of limitations against action for bank deposit, see case note to Koelzer v. First Nat. Bank, 2 L.R.A. (N.S.) 571.

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dent to bringing suit, and the statute then begins to run.

Clarke v. Sinks, 144 Mo. 453, 46 S. W. 199; Landis v. Saxton, 105 Mo. 490, 24 Am. St. Rep. 403, 16 S. W. 912; State ex rel. Fagan v. Grigsby, supra; State ex rel. McGeever v. Shires, 39 Mo. App. 567; Easton v. McAllister, 1 Mo. 662.

The election of one to perfect a demand must be exercised within a reasonable time, and it cannot be extended beyond the period of the statute of limitations.

Landis v. Saxton, supra; Jameson v. Jameson, 72 Mo. 642; O'Fallon v. Kerr, 10 Mo. 554; Easton v. McAllister, supra; Kraft v. Thomas, 123 Ind. 513, 18 Am. St. Rep. 345, 24 N. E. 346; Atchison, T. & S. F. R. Co. v. Burlingame Twp. 36 Kan. 628, 59 Am. Rep. 578, 14 Pac. 271; Palmer v. Palmer, 36 Mich. 488, 24 Am. Rep. 606.

Where a demand is a condition precedent to a right to sue, such demand must be made within the period of limitation, else the action is barred.

Landis v. Saxton, 105 Mo. 491, 24 Am. St. Rep. 403, 16 S. W. 912; Easton v. McAllister and Kraft v. Thomas, supra; Newsum v. Bartholomew County, 103 Ind. 526, 3 N. E. 163; High v. Shelby County, 92 Ind. 580; Codman v. Rogers, 10 Pick. 112; Morrison v. Mullin, 34 Pa. 12; Atchison, T. & S. F. R. Co. v. Burlingame Twp. supra; Ball v. Keokuk & N. W. R. Co. 62 Iowa, 753, 16 N. W. 592; Palmer v. Palmer, 36 Mich. 488, 24 Am. Rep. 606; Sanford v. Lancaster, 81 Me. 434, 17 Atl. 402; Wood, Limitation of Actions, 3d ed. § 125, p. 323.

An action for money had and received is barred by the five-years limitation, and plaintiff's ignorance of his cause of action will not affect the running of the statute in the absence of concealment.

Shortridge v. Harding, 34 Mo. App. 354; Garrett v. Conklin, 52 Mo. App. 654; Buckner v. Patterson, Litt. Sel. Cas. 234; Webster v. American Bible Soc. 50 Ohio St. 1, 33 N. E. 297; Douglas v. Corry, 46 Ohio St. 349, 15 Am. St. Rep. 604, 21 N. E. 440.

Where a debt is payable on demand, the statute of limitations begins to run immediately after the debt is incurred.

Collins v. Trotter, 81 Mo. 275; O'Neil v. Magner, 81 Cal. 631, 15 Am. St. Rep. 88, 22 Pac. 876; Seward v. Hayden, 150 Mass. 158, 5 L.R.A. 844, 15 Am. St. Rep. 183, 22 N. E. 629; Citizens' Sav. Bank v. Vaughan, 115 Mich. 156, 73 N. W. 143; 7 Cyc. Law & Proc. p. 848; Wood, Limitation of Actions, 3d ed. § 124; 2 Dan. Neg. Inst. 5th ed. 1698; Fennq v. Gay, 146 Mass. 118, 15 N. E. 87; Hitchings v. Edmands, 132 Mass. 338; Eliott v. Capital City State Bank, 128 Iowa. 275, 1 L.R.A. (N.S.) 1133, 111 Am. St. Rep. 198, 103 N. W. 777; Cousins v. Partridge,

79 Cal. 224, 21 Pac. 745; Henry v. Roe, 83 Tex. 446, 18 S. W. 806; Swift v. Trotti, 52 Tex. 498; Bartholomew v. Seaman, 25 Hun, 619; Ervin v. Brooks, 111 N. C. 358, 16 S. E. 240.

Every trust which admits of an action at law for its enforcement is subject to the statute of limitations.

Keeton v. Keeton, 20 Mo. 538; Johnson v. Smith, 27 Mo. 502; Hunter v. Hunter, 50 Mo. 450; Ricords v. Watkins, 56 Mo. 554; Landis v. Saxton, 105 Mo. 489, 24 Am. St. Rep. 403, 16 S. W. 912; Shelby County v. Bragg, 135 Mo. 296, 36 S. W. 600; Dexter v. MacDonald, 196 Mo. 389, 95 S. W. 359; Garrett v. Conklin, 52 Mo. App. 659; Zacharias v. Zacharias, 23 Pa. 452; Hosteeter v. Hollinger, 117 Pa. 606, 12 Atl. 741; Lexington & O. R. Co. v. Bridges, 7 B. Mon. 556, 46 Am. Dec. 528; Hayward v. Gunn, 82 Ill. 385; Governor use of Thomas v. Woodworth, 63 Ill. 254; People v. Ochiltree, 48 Ill. App. 220; Jewell v. Jewell, 139 Mich. 586, 102 N. W. 1059; Harlow v. Dehon, 111 Mass. 195; Farnam v. Brooks, 9 Pick. 243; Parks v. Satterthwaite, 132 Ind. 411, 32 N. E. 82; Buttle v. De Baun, 116 Wis. 326, 93 N. W. 5; Kennedy v. Baker, 59 Tex. 150; Wingate v. Wingate, 11 Tex. 434; Tinnen v. Mebane, 10 Tex. 252, 60 Am. Dec. 205; Hightower v. Hester, 4 Tex. App. Civ. Cas. 85, 15 S. W. 415; Mills v. Mills, 115 N. Y. 80, 21 N. E. 714; Dunn v. Dunn, 137 N. C. 533, 50 S. E. 212; Angell, Limitations of Actions, 6th ed. § 166; Kane v. Bloodgood, 7 Johns. Ch. 110, 11 Am. Dec. 417; Mt. Calvary Church v. Albers, 174 Mo. 340, 73 S. W. 508; State ex rel. Rife v. Hawes, 177 Mo. 381, 76 S. W. 653.

Messrs. H. G. Herbel and Brownrigg, O'Brien, & Mason, for respondent:

The statute of limitations does not run against an open bank account until after a demand by the customer of the bank for payment and the refusal thereof by the bank.

Koelzer v. First Nat. Bank, 125 Wis. 595, 2 L.R.A. (N.S.) 571, 110 Am. St. Rep. 870, 104 N. W. 838, 4 A. & E. Ann. Cas. 1144; 3 Am. & Eng. Enc. Law, 2d ed. p. 838; Branch v. Dawson, 33 Minn. 400, 23 N. W. 552; Goodell v. Brandon Nat. Bank, 63 Vt. 305, 25 Am. St. Rep. 766, 21 Atl. 956; Girard Bank v. Bank of Penn Twp. 39 Pa. 98, 80 Am. Dec. 507; Bolles, Banks & Their Depositors, §§ 1c, 360; Morse, Banks & Banking, 4th ed. §§ 186, 322; Landis v. Saxton, 105 Mo. 491, 24 Am. St. Rep. 403, 16 S. W. 912; Newmark, Bank Deposits, § 11.

The statute of limitations does not begin to run against an express trust until there has been a repudiation of the trust clearly and unequivocally brought home to the knowledge of the *cestui que trust*.

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Zeideman v. Molasky, 118 Mo. App. 119, 94 S. W. 754; Prewitt v. Prewitt, 183 Mo. 675, 87 S. W. 1000; Frank v. Morley, 106 Mich. 635, 64 N. W. 577; Walden v. Karr, 88 Ill. 49; Davis v. Davis, 86 Hun, 400, 33 N. Y. Supp. 477; Post v. Benchley, 48 Hun, 83; Purdy v. Sistare, 2 Hun, 126; Heil v. Heil, 184 Mo. 665, 84 S. W. 45; Hillman v. Allen, 145 Mo. 638, 47 S. W. 509; Foster v. Friede, 37 Mo. 36; Goodwin v. Goodwin, 69 Mo. 617; Rubey v. Barnett, 12 Mo. 3. 49 Am. Dec. 112; Picot v. Bates, 39 Mo. 292; Fox v. Cash, 11 Pa. 207; Marshall's Estate, 138 Pa. 285, 22 Atl. 24; Pepper v. Robinson, 32 W. N. C. 203; Jones v. Henderson, 149 Ind. 458, 49 N. E. 443; Stanley v. Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; Jones v. Home Sav. Bank, 118 Mich. 155, 74 Am. St. Rep. 377, 76 N. W. 322; Seymour v. Freer, 8 Wall. 202, 19 L. ed. 306; Perry, Tr. § 283.

Lanum, J., delivered the opinion of the court:

In 1897 plaintiff brought suit against the Continental National Bank to recover \$5,406.50, with interest from the date of demand and refusal to pay, to wit, July 2, 1894. Subsequently said bank was absorbed by its codefendant, the National Bank of Commerce, and the latter was made a party. At the trial, after the evidence was in, an amended petition was filed to conform to the legal effect of the facts proved. The answer was a general denial and a plea that the cause of action "did not accrue within five, nor within ten, years, before the commencement of this action." Plaintiff recovered \$9,091 below, and defendants appeal.

The amended petition was broad enough to make competent the testimony put in on both sides. It substantially appears therefrom: That, in June, 1871, the National Loan Bank was a banking corporation doing a general banking business in the city of St. Louis. That in that year it bought certain bonds issued by certain counties in aid of a railroad from Sedalia to Lexington then building as a branch of the Pacific Railroad, the particulars of which will more fully appear when the evidence is reached. That said bank, by an agreement between the parties in interest (the vendors, the bank, and the Pacific Railroad), agreed to hold, and did hold, \$48,813 of the proceeds for the benefit of the Pacific Railroad, payable to its order when certain conditions as to track laying were complied with, and thereupon entered a credit upon its books in said sum in favor of said Pacific Railroad, reciting the conditions precedent to payment. That thereafter, on part compliance, it paid to the Pacific Railroad one half said sum and held the re-

mainder. That thereafter, on full compliance with the conditions, it paid \$19,000 of said remainder to the Pacific Railroad on its order, and thereafter it and its successors have held the balance of \$5,406.50, subject to the order of its owner. That, in 1873, said bank changed its name to the Continental Bank, the latter taking over the funds and business of the former, burdened with all its liabilities. That, in 1889, defendant the Continental National Bank was organized under the national banking act, becoming the successor to the Continental Bank as owner of its assets, burdened with all its liabilities, and thereafter continued said general banking business until 1902. That, in 1902, defendant the National Bank of Commerce, then doing a general banking business, absorbed the Continental National Bank, coming into possession of all its assets, burdened with all its liabilities. That, in 1849, there was organized a domestic railroad corporation, known as the Pacific Railroad (spoken of in commercial circles colloquially for business ends, while a going concern, as the "Missouri Pacific," possibly to distinguish it from other Pacific railroads), said Pacific Railroad, as a matter of history, owning and operating a road from St. Louis to Kansas City through Sedalia. Afterwards, in 1876 and at subsequent dates, because of sundry acts of incorporation, consolidation, reorganization, leasing, foreclosure, and succession, the plaintiff corporation, springing into existence in 1880, became owner of all the properties, assets, and franchises of said railroad corporations, including the fund in dispute. We purposely omit details going to the chains of title aforesaid (as pleaded in sundry incidents of corporate swallowing and digestion) because the case is submitted to us on the theory that not only the deposit or fund in dispute, but that said several successorships, etc., existed, and that the only substantial defense is limitation, not title.

Attending to the facts, it will serve no good purpose to set forth the testimony in detail. Its outline is as follows:

(a) There is no discord in the testimony on the following facts: That, in 1871, the counties of Pettis and Lafayette issued bonds in aid of the building of what was then commonly known as the "Lexington Branch of the Pacific Railroad," running from Sedalia to Lexington. That, in June, 1871, said National Loan Bank purchased those bonds. That of the proceeds \$48,813 were held as a fund by said bank under the following tripartite agreement set forth in its books between it, the Pacific Railroad, and the vendors of said bonds, viz.: In effect, that one half of said sum should be

paid by said bank to the Pacific Railroad when the track of said Lexington Branch was completed from Sedalia to the town of Concordia, and the other half when it was completely laid from Sedalia to Lexington, Concordia being about equidistant between Lexington and Sedalia. It appears that said fund or deposit was entered on the bank's books as a credit in favor of the Pacific Railroad, payable in accordance with the said deposit agreement. It appears that, in December, 1871, the track was laid from Sedalia to Concordia, whereupon the bank ascertained and recognized its liability to pay in part and did pay one half of said fund, to wit, \$24,406.50, to the Pacific Railroad on its demand in conformity with the agreement; and that an entry on its books was made taking credit in favor of the bank for that payment. That, in January, 1872, said track was completely laid from Sedalia to Lexington, whereupon the liability to pay ripened *in toto*, and the bank paid, in the following March, \$19,000 of said fund to the said Pacific Railroad on its demand, and an entry was made taking credit to the bank for that amount, leaving as a balance the principal sum sued for. It stands admitted that, on the 2d day of July, 1894, plaintiff drew its check or draft on the Continental National Bank for said balance, which said bank refused to honor, and from that day to this has uniformly denied liability. There is no dispute as to the amount due, if aught be due; that is, defendants do not claim that they or their predecessor, the Continental Bank, nor the predecessor of that bank, the National Loan Bank, ever paid that balance or any part of it, or that the interest accruing after demand and refusal to pay is computed incorrectly. To the contrary, the uncontradicted testimony tends to show that by some twist in bookkeeping the Continental Bank absorbed that balance into an account pertaining to its bond transactions, and thereby diverted and appropriated it to its own use. No consent, express or implied, is shown for this appropriation, nor is there any attempt to show that notice of it was ever brought home to the owner of the fund before the demand and refusal to pay in 1894. Neither is there any dispute over the fact that the transactions in question appeared on the books of the National Loan Bank and the Continental Bank. In fact, defendants rely on the contents of those books (as shown by secondary evidence), and plaintiff relies on their contents (as shown by secondary evidence). It stands admitted the books in question came in due course into the keeping of defendant the Continental National Bank, and were in its vaults after suit began; that plaintiff,

through counsel, requested their careful preservation as evidence, but that the books thereafter were, by inadvertence, in part mutilated and in part destroyed.

(b) The record does not disclose whether the first payment of \$24,406.50 was made by check drawn by the Pacific Railroad, or by other form of demand and receipt given, or how the money passed out of the bank's coffers. The testimony is not in accord on the showing made by the books as to how the \$19,000 were paid. Plaintiff introduced secondary evidence tending to show that the books disclosed a payment by check as if on an account subject to check. It put in other evidence from the former cashier and the former bookkeeper of the National Loan Bank and the Continental Bank tending to show that, under the method of bookkeeping in vogue in those banks, the fund stood in an account kept in such a way as to be subject to check in due course of banking when once the track was laid from Sedalia to Lexington. Much of the testimony related to the technique of bank bookkeeping; but, since the method adopted by these banks appears to have been selected as a convenience to themselves without consultation with the beneficial owner of the fund, the details of this testimony would seem immaterial,—the ultimate question to be got at being its legal effect. Defendant introduced testimony tending to show that the account, deposit, or fund, however designated, at no time was in a form subject to check, and was never treated as a live, current account. It introduced testimony tending to show that the books did not disclose that any check had been drawn at any time against the account. The clear weight of the testimony indicates that the account or fund appears to have been kept under the title of "Bills Payable," and was carried on from day to day and from book to book as a balance earmarked as due the "Pacific Railroad" or "Missouri Pacific Railroad," until at a certain time it disappeared in that form, reappearing as absorbed in the bond account, and not as a daily balance due. There was testimony tending to show there was a divergence of opinion between the officers of these banks as to the method of bookkeeping adopted with relation to the fund in dispute. As we gather it, when the fact was recognized by the bank that the railroad was completed to Lexington, and that the agreement under which the money was held was ready for full execution, the cashier was of opinion it should be transferred to a current account of the proper railroad company under an appropriate head, but the president of the bank required it to be kept and carried as formerly. It is suggested by counsel that 17 L.R.A. (N.S.)

the Pacific Railroad, about the time in hand, passed into the hands of the Atlantic & Pacific, and that in the transfer of properties between the railroad companies, with the corporate deaths and changes of officers disclosed, the fund was lost to railroad sight and memory for some time.

On this record, counsel for plaintiff contended the judgment should be affirmed on either of two allowable theories: First. That plaintiff bore the relation of depositor in the Continental National Bank and subsequently in the Bank of Commerce; that, if such relation is held to exist, then the statute of limitations did not begin to run until demand was made by check or draft and payment was refused; that, in this case, demand was made in 1894 and suit was instituted in 1897; that, therefore, the statute is not a defense. Second. They argue that, under the amended petition and the facts in proof, there is another allowable theory on which the judgment should be affirmed, *viz.*, that the fund in question, by virtue of the express agreement in evidence, was held as a trust fund by the trustee for a certain purpose for the benefit of the *cestui que trust*, and therefore the statute of limitations did not run until there was an explicit and palpable repudiation of the trust unequivocally brought home to the *cestui que trust*, and such repudiation, they say, did not arise until demand of payment and refusal as aforesaid. On the other hand, appellant's counsel contend that the trust created, if any, was merely an implied trust, and hence, under the facts of the record, the statute of limitations is a bar; and, second, they argue, in substance, that there was no relation of depositor and banker, but that the bank was a mere debtor who owed a debt in the nature of a bill payable, and therefore any exception in favor of a bank depositor in applying the law of limitations does not apply in this case. They argue, too, that plaintiff, by its amended petition, abandoned the theory of depositor and depository,—that limitation is a full defense.

1. The record discloses no exception save to the filing of the amended petition, and no motion to strike out on the ground of departure. Neither was the original petition introduced in evidence and preserved in the bill of exceptions. In this condition of things it became *functus officio*, and, though printed and brought here by defendants, and though we are pressingly invited to look at it in aid of defendants' point of abandonment of the theory of banker and depositor, yet to do so would be to go outside of the record, which we may not do. Hence the amended petition must speak for itself without aid of any interpreting side light from

abandoned petitions. Looking to it and construing its averments liberally, as we are bound to do (Rev. Stat. 1899, § 629 [Anno. Stat. 1906, p. 652]), we find the constitutive elements of a bank deposit are pleaded, to wit, a bank doing a general banking business and a fund coming into its possession belonging to a corporation in effect standing in the relation of a depositor; i. e., payable to the latter's order and credited to it on the bank books. We cannot hold, as a matter of law, that this condition did not initiate and establish the relation of a banker and depositor between the two as that relation is defined in the books. The mere fact that payment at the start was subject to a condition should not be held conclusive, we think. This is so because there came a time when it stands conceded that the condition precedent to payment had been performed and was out of the way. There came a time, also, if plaintiff's evidence controls, when the bank recognized that it held this very money subject to check and honored checks drawn against it by its owner as a depositor in due course of banking. In answer to the charge of abandonment of the theory of the existence of the relation of banker and depositor, plaintiff's counsel point to the amended petition alleging, and to the proof establishing, that relation, and they deny it is abandoned. Justice is not to be entangled and strangled in and by the refinements of bookkeeping,—refinements, in this instance, adopted by the banks without consulting the owner of the fund. The thing to be got at is the legal effect of what was done. The thing done, according to plaintiff's evidence, was that the bank assumed the relation of banker; that plaintiff's predecessor assumed the relation of depositor; and that the fund assumed the form of a deposit payable on the order of the depositor. There being evidence that the thing done established the relation of banker and depositor, and the petition being broad enough to admit that proof, the point is ruled against defendants,—this in spite of the contention made by counsel that the trial court put its finding on the trust theory alone. If this were so the *ratio decidendi* below is of no consequence on appeal so long as the judgment is within the pleadings and is supported by the proof. We hold there was no abandonment of the theory of the existence of the relation of banker and depositor, and that there was substantial testimony sustaining that theory.

2. We now come to consider the question of limitation from the standpoint of banker and depositor. To avoid misinterpreting what is said on the point of limitation, it 17 L.R.A. (N.S.)

is well to announce at the outset that whatever is said must be construed as strictly confined to the particular facts held in judgment. This is not a case where a bank owes a bill payable,—an I. O. U., a note or duebill; nor is it a case of a certificate of time deposit not subject to check; nor is it a case where a bank comes into possession of a fund as a mere collecting agent and nothing more; nor is it a case (which we cite without approving or disapproving) like *Quattrochi Bros. v. Farmers' & M. Bank*, 89 Mo. App. App. 500, where a pass book was balanced, a credit item wrongfully altered, and a cause of action apparently predicated of the wrongful alteration of the pass book. The law of limitations of actions applied to such or like cases, or to cases where pass books are balanced, accounts rendered, and (after notice) acquiesced in, or where questions of estoppel might arise, does not concern us.

The naked question here is: Does the statute of limitations run in favor of a bank, or as against the depositor, before demand of payment by, and a refusal to pay on, the depositor's order? Neither diligence of counsel, nor our own, has discovered a case directly in point in the appellate courts of this state. The question, then, is *res integra*, and must be decided on the inherent reason of the thing and the persuasive authority of precedents in other jurisdictions establishing the general law. Courts are fond of saying that the relation between depositor and banker is merely that of debtor and creditor. *Henry County v. Salmon*, 201 Mo., loc. cit. 163, 100 S. W. 20. If that formula precisely expressed all there was of the truth, then the statute of limitations would be applied to the relation of depositor and banker precisely as it is between debtor and creditor. But the formula may be said to be somewhat of a fiction of the law,—a formula used for want of a better, and springing from the poverty of our language in expressing nice shades of thought. It is the truth, but not all there is of it. *Clifford Bkg. Co. v. Donovan Commission Co.* 195 Mo., loc. cit. 287, 94 S. W. 527. For example, a bank is sometimes viewed as a mere custodian of the depositor's fund (*Girard Bank v. Bank of Penn Twp.* 39 Pa. 92, 80 Am. Dec. 507); so it is trite learning that a bank is under no obligation to pay until demand made. It need not, like a common debtor, run about and hunt up its creditor, and pay him whenever and wherever found. To the contrary (*Ma-homet going to the mountain*), it pays only over its counter. See authorities, *infra*. The deposit, then, not being due till demand is made, the demand and refusal to

lated to most of the facts. Remonstrant denied that applicant was a man of respectable character, "under the general proposition that any man who will engage in the sale of malt, spirituous, and vinous liquors is not such a man of respectable character and standing." Remonstrant further urged, in effect, that it was not within the power of the legislature to license said traffic, or to authorize any individual, board, or official to issue a license for that purpose, because said business was vicious and demoralizing and opposed to the laws of God and to the letter and spirit of the fundamental law of the land.

1. On the issue of applicant's character the only evidence offered was the testimony of one witness, who stated that the applicant's reputation in the neighborhood where he resided was good, and that he was a man of respectable character and standing in the community. The city council properly held with applicant upon said issue. To adopt remonstrant's theory would invalidate the law, and we do not feel at liberty to so construe the statute.

2. In our judgment remonstrant has not sustained his contention that the legislature is without power to regulate the traffic in intoxicating liquors. That regulation, or its prohibition, is peculiarly within the police power. It is entirely competent for the people, by constitutional enactment, to restrict or render unlawful that business; but, if they fail to do so, the legislature is the exclusive depository of that power. Neither the Constitution of 1866, nor that of the present day, will warrant the strained construction placed thereon by remonstrant. The language of the fundamental law and the interpretation given thereto by the legislative, executive, and judicial branches of this government repel any such construction by the court. The legislature, since early territorial days, has exercised its function in attempting to minimize the evil inherent in and flowing from the trade in and the use of intoxicating liquors. Act March 16, 1855 (page 158, Neb. Laws 1855-57), prohibited the manufacture of intoxicants, and § 172 of chapter 11 of the Criminal Code then in force made it unlawful to furnish any liquor to an Indian or to an intoxicated person. Chapter 29, §§ 336, 354, Crim. Code 1866; pages 671 et seq., Neb. Rev. Stat. 1866, minutely regulated said traffic, and provided both civil remedies and severe penalties for the violation thereof. That part of the Criminal Code was carried into the General Statutes of 1873, as chapter 53, §§ 572-590, thereof, and was continued in force with little amendment till the enactment of the "Slocumb Law" of 1881 (page 270, chap. 17 L.R.A. (N.S.))

61). Nor was the legislature invading an unknown field, or encroaching upon any other department of the government, when it sought to control said traffic. Since the days of Edward the Sixth, the Parliament of Great Britain has taken jurisdiction of this subject, and restricted and regulated the keeping of alehouses and tippling houses. The legislatures of the various states of the Union have also given this subject attention, and exercised the police power to partially or totally restrain said business. *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 662; *Com. v. Kimball*, 24 Pick. 359, 35 Am. Dec. 326; *Schwuchow v. Chicago*, 68 Ill. 444; *New Orleans v. Smythe*, 116 La. 685, 6 L.R.A. (N.S.) 722, 114 Am. St. Rep. 566, 41 So. 33; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. We cannot invade the province of the legislature, and, by our judgment, prohibit the traffic that it has, in the exercise of its constitutional powers, said may be licensed. We so declared in *State ex rel. Hahn v. Hardy*, 7 Neb. 377, 381, and our powers have not enlarged since that day. The entire field covered by remonstrant's argument has been exhaustively considered, and the point settled adversely to him, in *Sopher v. State*, 169 Ind. 177, 14 L.R.A. (N.S.) 172, 81 N. E. 913. There does not seem to be any error in the record, and for that reason we recommend that the judgment of the district court be affirmed.

Fawcett and Calkins, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion the judgment of the District Court is affirmed.

SOUTH CAROLINA SUPREME COURT.

MARY JOHNSON, Resp't.,
v.

WESTERN UNION TELEGRAPH COMPANY, Appt.

(— S. C. —, 62 S. E. 244.)

Damages — mental suffering — funeral — collateral relative.

Mental suffering will not be presumed to

Note. — The degree of relationship essential to recovery for mental anguish from failure to deliver telegram announcing death or illness is treated in the case note to *Randall v. Western U. Tele. Co.* 15 L.R.A. (N.S.) 277.

exist for deprivation of opportunity to attend the funeral of one's first cousin.

(Gary, A. J., dissents.)

(September 2, 1908.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Chester County in plaintiff's favor in an action brought to recover damages for mental suffering alleged to have been inflicted upon plaintiff by defendant's neglect to deliver a telegram. Reversed.

The facts are stated in the opinion.

Messrs. George H. Fearons, J. H. Marion, and Evans & Finley, for appellant:

The mental-anguish statute does not mean that a telegraph company is liable in damages for mental anguish in every case where there has been a failure to exercise due care, and where mental anguish has resulted.

Arial v. Western U. Teleg. Co. 70 S. C. 418, 50 S. E. 6; *Broom v. Western U. Teleg. Co.* 71 S. C. 511, 51 S. E. 250, 4 A. & E. Ann. Cas. 611; *Lewis v. Western U. Teleg. Co.* 57 S. C. 325, 35 S. E. 556; *Capers v. Western U. Teleg. Co.* 71 S. C. 33, 50 S. E. 537; *Aiken v. Western U. Teleg. Co.* 5 S. C. N. S. 358; *Mood v. Western U. Teleg. Co.* 40 S. C. 524, 19 S. E. 67.

The relationship of first cousins does not raise the necessary presumption of mental anguish.

Butler v. Western U. Teleg. Co. 77 S. C. 148, 57 S. E. 757; *Western U. Teleg. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Cashion v. Western U. Teleg. Co.* 123 N. C. 267, 31 S. E. 493, 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746; *Western U. Teleg. Co. v. Ayers*, 131 Ala. 391, 90 Am. St. Rep. 92, 31 So. 78; 27 Am. & Eng. Enc. Law, p. 1077; *Western U. Teleg. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829; *Western U. Teleg. Co. v. McMillan* (Tex. Civ. App.) 30 S. W. 298; *Western U. Teleg. Co. v. Gibson* (Tex. Civ. App.) 39 S. W. 198; *Western U. Teleg. Co. v. Garrett* (Tex. Civ. App.) 34 S. W. 649; *Davidson v. Western U. Teleg. Co.* 21 Ky. L. Rep. 1292, 54 S. W. 830; *Western U. Teleg. Co. v. Long*, 148 Ala. 202, 41 So. 965; *Western U. Teleg. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482; *Denham v. Western U. Teleg. Co.* 27 Ky. L. Rep. 999, 87 S. W. 788; *Western U. Teleg. Co. v. Crocker*, 135 Ala. 492, 59 L.R.A. 398, 33 So. 45; *Western U. Teleg. Co. v. Porterfield* (Tex. Civ. App.) 84 S. W. 850; *Poulnot v. Western U. Teleg. Co.* 69 S. C. 545, 48 S. E. 622; *Hancock v. Western U. Teleg. Co.* 137 N. C. 497, 69 L.R.A. 403, 49 S. E. 953.

17 L.R.A. (N.S.)

Mr. A. L. Gaston, for respondent:

The just rule is to exclude evidence of claimant's peculiar fears, apprehensions, and conclusions, and leave it to the jury to say what mental anguish or suffering, if any, would result under all the circumstances, and the amount that should be allowed for it.

Willis v. Western U. Teleg. Co. 69 S. C. 536, 104 Am. St. Rep. 828, 48 S. E. 538, 2 A. & E. Ann. Cas. 52; *Roberts v. Western U. Teleg. Co.* 73 S. C. 524, 114 Am. St. Rep. 100, 53 S. E. 985.

Woods, J., delivered the opinion of the court:

The following telegram, intended for the plaintiff, was delivered to the defendant's agent on 3d August, 1906, at Hudson, North Carolina:

Miss Mary Johnson,

Near Sou. Dept., Chester, S. C.

Allie dead. Bring here to-morrow. Answer whether you can come. S. J. Smith.

Allie was the wife of the sender and the first cousin of the plaintiff. The telegram was not delivered till August 6th, and negligence on the part of the agent at Chester in not making proper efforts to find the addressee was admitted. The plaintiff recovered judgment for \$150 for mental anguish and suffering in being deprived of the privilege of attending the funeral of which the telegram was intended to give notice.

The single question made by the appeal arises from the refusal of the circuit judge to charge the following requests: "The court charges that, where a party is deprived of attending a funeral by reason of delay in the delivery of the telegram, and the relationship between such party and the deceased to whom the telegram relates is that of first cousin, proof of such relationship is not of itself sufficient to raise a presumption of mental anguish; and, in order to enable such party to recover damages for mental anguish on account of such deprivation, it must affirmatively appear from the evidence that special relations of tenderness and affection existed between the plaintiff and the deceased, and that at the time the message was accepted by the telegraph company for transmission and delivery adequate notice was given the company of such special relations." In *Butler v. Western U. Teleg. Co.* 77 S. C. 148, 57 S. E. 757, the question being as to the presumption of mental anguish or suffering of one who, upon the occasion of the death of his wife, was deprived of the presence of his brother-in-law in his hours of sorrow,

the court laid down these propositions: "(1st) That a plaintiff can only recover such damages as are the direct and proximate result of a wrongful act on the part of the defendant; (2d) That mental anguish by a brother-in-law may be the result naturally and reasonably to be anticipated from the failure to deliver a telegram, but there is no presumption that such injury has been sustained; (3d) That, if, in the particular case, one related merely by affinity sustains damages, they are special, and the defendant must have notice of the facts from which it may be reasonably expected they would arise at the time the message is delivered for transmission." We are now called on to decide whether the same rule applies to first cousins. If the reasoning of the court in that case is to be regarded, it is perfectly clear there must be some line drawn in degrees of consanguinity where the presumption of suffering and anguish for such disappointments cannot be indulged; for it is within the knowledge of all that the relationship of father-in-law, mother-in-law, brother-in-law, or sister-in-law is usually closer by intercourse and affection than that of the remoter blood relations. The reasoning and conclusion in *Butler v. Western U. Tele. Co.* are thoroughly sound, but the principle of that case would lead to absurdity, unless the court fixes some degree of blood relationship beyond which suffering and anguish will not be presumed as the results of delay in the transmission and delivery of telegrams. Our statute provides for damages for "mental anguish or suffering." It will not be doubted these words were intended to have their usual strong meaning. They do not give the slightest ground to impute to the general assembly an intention to encumber the administration of justice, and open the floodgates of speculative litigation by allowing suits to be brought for any unpleasant feeling or sensation, however slight. Mental suffering means distress or serious pain as distinguished from annoyance, regret, or vexation. Mental anguish is intense mental suffering. Being deprived of receiving or bestowing the ministrations of husband or wife, father, mother, brother, sister, grandparent, and grandchild in the great sorrows of life, and being deprived of attending their funeral rites, produces, in every man and woman with normal affections for these near kindred, distress and serious pain; that is, mental suffering or anguish within the meaning of the statute. When we leave these close family ties and reach the relation of uncle and aunt, niece and nephew, and that still further removed relation of cousin, the 17 L.R.A. (N.S.)

deprivation ordinarily produces annoyance, regret, or vexation, but not a state of mind attaining to distress or mental suffering. This, we think, is the common-sense interpretation of the statute, viewed in the light of the general experience of men; and it is in accord with authority.

The following authorities support the case of *Butler v. Western U. Tele. Co.* supra, holding there is no presumption of mental anguish arising from delay in telegrams affecting the feelings of those related by affinity: *Western U. Tele. Co. v. Steenberg*, 107 Ky. 469, 54 S. W. 829; *Western U. Tele. Co. v. McMillan* (Tex. Civ. App.) 30 S. W. 298; *Western U. Tele. Co. v. Garrett* (Tex. Civ. App.) 34 S. W. 649; *Davidson v. Western U. Tele. Co.* 21 Ky. L. Rep. 1292, 54 S. W. 830; *Western U. Tele. Co. v. Long*, 148 Ala. 202, 41 So. 965; *Western U. Tele. Co. v. Gibson* (Tex. Civ. App.) 39 S. W. 198. In *Denham v. Western U. Tele. Co.* 27 Ky. L. Rep. 999, 87 S. W. 788, recovery was denied to an aunt in a suit for damages for delay in a telegram announcing the death of a nephew. In *Western U. Tele. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482, it was likewise held there was no presumption that an uncle will suffer mental anguish from failure to attend his niece's funeral. In North Carolina the view is taken that any telegram announcing sickness or death is sufficient notice to the company to warrant a recovery in any case where mental anguish is shown to have resulted without respect to the relationship of the parties; but, on the trial, where the relationship does not raise the presumption of mental anguish, the damages must be affirmatively proved. The rule established in this state by *Butler's Case* is that there is no presumption that telegrams announcing sickness or death involve mental anguish or suffering, rather annoyance, regret, or vexation, unless they are sent by or intended for near relations. The defendant, therefore, had a right to the instruction asked for.

The judgment of this court is that the judgment of the Circuit Court be reversed, and the cause remanded to that court for a new trial.

Gary, A. J., dissenting:

Conceding that there are degrees of relationship beyond which it will not be presumed that mental anguish was suffered as the result of failure on the part of the telegraph company to deliver a message promptly, nevertheless the relation of first cousin comes within the degrees giving rise to such presumption. I therefore dissent.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON EX REL. O. P.
BURROWS et al.

v.

SUPERIOR COURT OF CHEHALIS COUN-
TY et al.STATE OF WASHINGTON EX REL. O. P.
LOWNSDALE

v.

SAME.

STATE OF WASHINGTON EX REL. F. K.
HISCOCK

v.

SAME.

(48 Wash. 277, 93 Pac. 423.)

Eminent domain — objection — insufficiency of claim.

1. A property owner cannot defeat a proceeding to condemn for public use certain rights in the property, on the ground that the rights sought will be insufficient to enable petitioner to transact its business without using additional property of objector, not sought to be appropriated.

Same — incorporeal rights.

2. The rights of an owner of riparian land, such as access to the navigable por-

Case Note. — Power to condemn riparian rights apart from the land to which they are appurtenant.

The contention that riparian rights cannot be condemned apart from the land has been made in but very few cases. In *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570, a railroad sought to condemn the riparian rights of parties through whose land a stream flowed, in order that they might straighten the stream. It was contended that the statutes did not authorize condemnation of the riparian rights apart from the realty. The statute in question provided that all classes of private property not enumerated might be taken for public use, and also that the railroad might condemn all such real estate and other property as might be necessary for the construction, maintenance, and operation of its road. The court, in construing this statute, said: "It was not necessary to condemn the land through which flows the portion of the river to be diverted from its channel. There appears to be no necessity for the taking of the real estate itself; and it is a familiar principle of law that the wresting of private property from the hands of its owner for a public use should never be permitted to extend beyond such property, or such interest in property, as is reasonably required to subserve the public interests. It would be unnecessarily burdensome to the company, and inexcessively oppressive against these defendants, to compel or even allow the company to take the fee of the lands involved, when the public use requires merely that

tion of the stream, light and air and other kindred intangible rights appurtenant to real estate, are subject to condemnation for public use without an appropriation of the land itself.

Same — description — insufficiency — plat.

3. That a slough sought to be condemned for public use is not shown by the government plat from which the plat for condemnation is made, as required by statute, does not make the proceeding insufficient if it is part of the contiguous land which is shown in the condemnation plat, and is therefore subject to condemnation.

Same — attempt to purchase.

4. One who has enjoined a public service corporation from interfering with his property cannot, in the condemnation proceeding, raise the objection that, prior to the proceeding, no endeavor was made to obtain the rights by purchase.

(January 15, 1908.)

CERTIORARI to the Superior Court for Chehalis County to review decrees in favor of petitioner in proceedings to condemn certain rights in a navigable stream. Affirmed.

The facts are stated in the opinion.

they should be damaged, and not that they should be taken wholly from their owners. That the company could, under our statute, condemn the riparian rights without also taking the fee of these lands, does not admit of doubt."

The city of Boston was given authority by statute to take the water of Long Pond and tributaries, and also to take the land necessary for reservoirs on or around the pond, and such land around the ponds and along the tributaries as necessary to maintain the purity of the water. This power was put into effect by an instrument filed by the commissioners, as required by law; and, in *Martin v. Gleason*, 139 Mass. 183, 29 N. E. 664, the commissioners sought to restrain defendant, who owned a hotel on one of the tributaries, and claimed the prescriptive right to deposit sewage therein, from polluting the waters of the stream. Defendant contended that the city could not take the water rights separately from the land, and the court said: "But it does not appear to us to be necessary, even if it was competent, for the city to take the land on the sides of the brook in order to extinguish any prescriptive right to foul the water of it."

In Maine, under a similar statute, a suit for injunction was brought to restrain a water company from maintaining a dam and diverting the waters from a stream below, the objection being made that no real estate other than water was taken by the terms of the certificate. The court held that no land need be taken, inasmuch as the com-

reaches and passes the lands of relators. Within the Lownsdale lands is a navigable tide-water slough, known as "Jessie's slough," connecting with the river, which the respondent has used, and is now using, in its booming operations. It alleges that its boom commences about the middle of the river, near the southern boundary of Lownsdale's land, and extends northerly, occupying that portion of the stream lying between its center and the west bank; that the Jessie slough, which is not meandered, connects with the west side of the river, and is practically included in the boom; that the occupancy and use of the slough is necessary for receiving, storing, and sorting logs, which will interfere with its navigation; that, in so using the slough, it will be necessary for servants of the boom company to also use 10 feet of its westerly bank by walking thereon when handling, driving, booming, and sorting logs, such use of the west bank not to be exclusive, but concurrent with that of the owners of the land.

The evidence shows that, at the time of the hearing, the upper end of the boom as then constructed was immediately below the land of the relators Burrows and wife; that the United States government had granted the respondent permission to extend its boom further up the river, past the Burrows land, leaving for navigation an open channel of 50 feet in width on the Hiscock or easterly side of the river; that the respondent was at the time perfecting arrangements to so extend its boom; that the purpose of such extension is to aid navigation; that heretofore logs coming down the river on freshets, in great quantities, not controlled by the respondent, would first fill the boom, and then back up and fill the

upper channel of the river opposite the lands of Burrows on the west and Hiscock on the east, and that the boom, when extended and enlarged, will avoid this difficulty by receiving all logs and timber products, and permitting the eastern channel of the river to remain open for navigation to the width of 50 feet. By these proposed extensions and improvements respondent is endeavoring to avoid any continuance of the acts enjoined in *Burrows v. Grays Harbor Boom Co.* and the other cases above mentioned, and it contends that such riparian and property rights of the relators as it will hereafter need it is now seeking to condemn.

As against the relators Lownsdale and wife and Ladd & Tilton, respondent asks that it be permitted to condemn and appropriate the right to occupy with saw logs and other timber products that portion of the river which is between its westerly bank and the boom, also to interfere with the relator's shore rights and right of access to and from their lands, and to appropriate the right to occupy the whole of the waters of the slough within their lands, together with a right of way along its westerly bank as above mentioned. As against the relators Burrows and wife, respondent asks that it be permitted to appropriate and condemn the right to occupy with saw logs and other timber products that portion of the Hump-tulips river opposite their lands, and the right to interfere by so doing with their right of navigation of that portion of the river so occupied, with their right of access to and from their lands, and with their appurtenant shore rights and privileges. As against the relator Hiscock it asks that it be permitted to appropriate and condemn

in which the city of Paterson sought, as riparian owner, to enjoin defendant from diverting water above complainant's land, and the court held that this rule (permitting compensation to be made instead of granting an injunction,) could only be applied when the one sought to be enjoined possessed the power of eminent domain to condemn the rights involved.

For cases in which it appears that riparian rights were taken apart from the realty without the right to do so being questioned, see: *Umatilla Irrig. Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *Re Malone Waterworks Co.* 38 N. Y. S. R. 95, 15 N. Y. Supp. 649; *Bridgeman v. Hardwick*, 67 Vt. 653, 32 Atl. 502; *Lee v. Springfield Water Co.* 178 Pa. 223, 35 Atl. 184; *Heilmann v. Union Canal Co.* 50 Pa. 268; *Cooper v. Williams*, 4 Ohio, 253, 22 Am. Dec. 745, affirmed on rehearing in 5 Ohio, 391, 24 Am. Dec. 299; *Hamor v. Bar Harbor Water Co.* 78 Me. 127, 3 Atl. 40; *Butler Hard Rubber Co. v. Newark*, 61 N. J. L. 32, 40 Atl. 224; *State, Olmsted, Prosecutor, v. Morris Aqueduct*, 17 L.R.A. (N.S.)

46 N. J. L. 495; *Syracuse v. Stacey*, 169 N. Y. 231, 62 N. E. 354; *Re Tracy*, 42 N. Y. S. R. 62, 16 N. Y. Supp. 606; *Re Daly*, 123 App. Div. 709, 108 N. Y. Supp. 635; *Ætna Mills v. Brookline*, 127 Mass. 69; *Fay v. Salem & D. Aqueduct*, 9 Allen, 577; *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267; *Tileston v. Brookline*, 134 Mass. 438; *Cowdrey v. Woburn*, 136 Mass. 409; *Smith v. Concord*, 143 Mass. 253, 9 N. E. 642; *Boston Belting Co. v. Boston*, 152 Mass. 307, 25 N. E. 613; *Sprague v. Dorr*, 185 Mass. 10, 69 N. E. 344; *Ætna Mills v. Waltham*, 126 Mass. 422; *Bailey v. Woburn*, 126 Mass. 416; *Brookline v. Mackintosh*, 133 Mass. 215; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L.R.A. 466, 18 N. E. 465; *Tyler v. Hudson*, 147 Mass. 609, 18 N. E. 582; *Waterbury v. Platt Bros. & Co.* 76 Conn. 435, 56 Atl. 856; *Waters Comrs. v. Perry*, 69 Conn. 461, 37 Atl. 1059; *New Whatcom v. Fairhaven Land Co.* 24 Wash. 493, 54-L.R.A. 190, 64 Pac. 735; *James v. West Chester*, 220 Pa. 490, 69 Atl. 1042,

the right to occupy the waters of the river with logs and other timber products consigned to it where the river borders upon his land, and the right to interfere with his right of navigation and access to and from his lands, and his appurtenant shore rights and privileges.

The relators' first contention is that the preliminary decrees are void, or at least erroneous, for the reason that the descriptions of the property sought to be taken are too indefinite within the requirements of the eminent domain statute. Section 5637, Ballinger's Anno. Codes & Statutes. The petitions, after alleging the facts as to the present and proposed construction of the boom, further allege that the lands of the several relators are contiguous to the river. They describe the lands by reference to government surveys and public plats now of record, and then allege that it will be necessary for respondent to occupy the river and interfere with shore rights and privileges of the several relators appurtenant to said lands, as above mentioned. Respondent thus seeks to condemn certain definite rights with which it must necessarily interfere, but asks no other property of the relators Burrows and Hiscock. In other words, it does not seek to take any of their lands by metes and bounds, but only certain private shore rights and privileges appurtenant thereto. As against the Lownsdales it further seeks to condemn certain rights in the Jessie slough and upon its west bank, which are set forth in the petition and decree. The descriptions are sufficient to identify the property rights sought to be taken and to meet the requirements of the statute.

The relators further contend that the respondent is seeking to condemn limited rights and easements which, when taken, will be insufficient to enable it to transact its business as a public service corporation without using additional property of the relators, not sought to be appropriated. We fail to understand how the respondent's alleged failure to condemn sufficient property for its public needs can afford the relators any ground of complaint. The record shows that the respondent is endeavoring to appropriate such property rights as it thinks it will need in its corporate business, so that it may use the same without disobeying the injunction decrees. That it might do so, the enforcement of those decrees was temporarily suspended by orders of this court, which orders of suspension will become inoperative upon the final determination of these condemnation proceedings. Respondent will then act at its peril if it interferes with any property or rights of the relators, protected by the injunctions. 17 L.R.A. (N.S.)

but not appropriated. The relators' rights have been heretofore adjudicated in their equitable actions, and, upon the final determination of these condemnation proceedings, they will be at liberty to immediately enforce and protect such of their property rights as may be thereafter illegally invaded by the respondent. The condemnation will only authorize it to use property legally appropriated. The injunctions were granted in the equitable actions because it appeared that the respondent was taking and damaging certain private property rights of the relators without just compensation, in direct violation of § 16, article 1, of the state Constitution. The respondent contends that it is now endeavoring to proceed in strict compliance with the Constitution, the eminent domain statute, and the injunctive decrees, and it should be permitted to do so without being required to condemn, at the relators' instance, lands which it insists it will neither need nor use. If respondent is not proceeding in good faith (a condition not yet appearing), the relators will be afforded ample protection when its bad faith or wrongful acts shall assume substantial form. The relators' riparian rights and interests here involved have been adjudicated to be property rights, which we now hold to be subject to condemnation for public use. This holding is in harmony with principles announced in the following cases, pertaining to rights of a somewhat kindred nature: *Hatch v. Tacoma*, O. & G. H. R. Co. 6 Wash. 1, 32 Pac. 1063; *New Whatcom v. Fairhaven Land Co.* 24 Wash. 493, 54 L.R.A. 190, 64 Pac. 735; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90; *State ex rel. Smith v. Superior Court*, 30 Wash. 219, 70 Pac. 484. Mr. Lewis, in the second edition of his work on *Eminent Domain*, vol. 1, at § 56, says: "If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken, and he is entitled to compensation." If riparian rights, right of access, right of light and air, and other kindred, intangible rights appurtenant to real es-

nished to the company within two months thereafter; and provided that legal proceedings to recover thereunder should not be brought before the expiry of three months from date of filing proofs at the company's home office, nor brought at all unless begun within six months from the time of death. The policy was issued in consideration of the payment of the premium, and of the statements of the schedule therein contained, "which statements the assured makes on the acceptance of this policy and warrants to be true." The "schedule of warranties," purporting to be made by the insured, began at the top of the third page after the signatures of the officers and the agent of the company to the policy, and was not signed by the insured or by the company. There were seventeen separate statements, numbered alphabetically, from A to T. Those from A to L stated the age and personal characteristics of the insured, his occupation and wages, the amount of the premium, and the name and address of the beneficiary. The other statements, from M to T, were not answered, but after each, except O, which was left blank, there was a V-shaped check mark in the middle of a blank line. Statement P, which was one of those challenged, will indicate the form of the others. It is as follows: "P. I have never had fits or disorders of the brain, or any bodily or mental infirmity, except as herein stated,"—followed by a blank line in which a check mark was placed. After the death of the insured on January 28th notice by telegram was given the company January 31st; and particulars by letter were forwarded the next day. A formal statement on a printed blank furnished by the company was forwarded and received at the Chicago office February 1. and at the New York office March 8, 1905. On April 19, 1905, Eliza J. French, the beneficiary, filled out a further proof of death at Cornwall, Canada, presumably upon a blank furnished her by the company, which was forwarded to the home office. In the meantime, and on February 8th, an autopsy had been held at the instance of the defendant to ascertain the cause of the death of the insured. On June 5th, 1905, the defendant notified the beneficiary that it had decided to reject the claim. Thereafter, and on July 18, 1905, this action was commenced.

The complaint is in the usual form, and the policy, containing the schedule of warranties, is attached as a part thereof. The answer admits the issue of the policy, the death of the insured, and the demand and refusal of payment. It denies that the insured sustained any bodily injury through external, violent, and accidental means, and denies other averments of the complaint not 17 L.R.A. (N.S.)

specifically admitted. It alleges that affirmative proof of death was not forwarded within two months thereafter, as required by the policy, and that the action was brought before the expiration of three months from the date of filing proofs at the company's home office. It then refers to the warranties contained in the schedule, and alleges the falsity of statements P and Q, and avers that the insured, at the time of the acceptance of the policy, was and for a long time theretofore had been suffering from chronic asthma and bronchitis. Statement P has already been referred to. Statement Q was treated as a warranty that the insured was in sound condition physically when the policy was issued. Upon the trial Dr. Lathrop, who was called as a witness by the plaintiff, testified on cross-examination, without objection, that he attended the insured the winter before the policy was issued as his physician when he was laid up with bronchitis; that he had the old-man chronic bronchitis; that he promptly recovered from the acute condition; and that he did not have any bronchitis during the summer. "I did not doubt but what he had a little old chronic bronchitis, as all old men have, but nothing that called for any attention." Mrs. Sinclair, at whose house the insured had lodged twenty months before his death, testified that his general health was good; that he had a hard cold the winter before, from which he had recovered; that she had not known that it was bronchitis that he had. The brakeman who served on the train with the insured the year before his death testified that he was a strong, robust man, and that his health was excellent up to the time of his injury. Upon the close of plaintiff's testimony, at defendant's request, the court granted a nonsuit, upon the ground that the policy was avoided by the falsity of the statements with respect to the physical soundness and condition of the insured "as to the deceased having had bronchitis at some time in his life." Thereupon judgment was entered in favor of the defendant, from which this appeal is taken.

Mr. George B. Nelson, with Messrs. W. M. Bowe and J. A. Anderson, for appellant:

The particular warranty relied on must be pleaded.

Goldman v. Fidelity & D. Co. 125 Wis. 390, 104 N. W. 80.

When a forfeiture of an insurance policy is alleged on merely technical grounds not going to the risk, the contract will be upheld if it can be without violating any principle of law.

Appleton Iron Co. v. British America

Assur. Co. 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100.

Unanswered questions do not constitute them warranties.

Dunbar v. Phenix Ins. Co. 72 Wis. 492, 40 N. W. 386; Hale v. Life Indemnity & Invest. Co. 65 Minn. 548, 68 N. W. 182.

To constitute a warranty such as will defeat an insurance policy, the language must be clear and unequivocal, and capable of being easily understood by the average person.

Provident Sav. Life Assur. Soc. v. Cannon, 103 Ill. App. 534; Mackinnon v. Fidelity & C. Co. 72 N. J. L. 29, 60 Atl. 180; Modern Woodman Acci. Asso. v. Shryock, 54 Neb. 250, 39 L.R.A. 826, 74 N. W. 607; Cotton v. Fidelity & C. Co. 41 Fed. 506; Trenton v. North American Acci. Ins. Co. (Tex. Civ. App.) 89 S. W. 276.

Death resulted from the wound "independently of all other causes."

Cary v. Preferred Acci. Ins. Co. 127 Wis. 67, 5 L.R.A.(N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055; 7 A. & E. Ann. Cas. 484; Weidner v. Standard Life & Acci. Ins. Co. 130 Wis. 10, 110 N. W. 246; Nax v. Travelers' Ins. Co. 130 Fed. 985; Omberg v. United States Mut. Acci. Asso. 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 900; Western Commercial Travelers' Asso. v. Smith, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; Delaney v. Modern Acci. Club, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91; note to Fidelity & C. Co. v. Johnson, 30 L.R.A. 209; Carroll v. Fidelity & C. Co. 137 Fed. 1012.

Messrs. Bundy & Wilcox, for respondent:

The fact of breach and facts constituting the breach were specially pleaded.

Blumer v. Phenix Ins. Co. 45 Wis. 622. The statements were warranties, proof of the falsity of which avoids the contract, whether they are material or not.

Baumgart v. Modern Woodmen, 85 Wis. 546, 55 N. W. 713; Boyle v. Northwestern Mut. Relief Asso. 95 Wis. 312, 70 N. W. 351; Straker v. Phenix Ins. Co. 101 Wis. 413, 77 N. W. 752; McGowan v. Supreme Court, I. O. F. 107 Wis. 462, 83 N. W. 775; Loehr v. Supreme Assembly, E. F. U. 132 Wis. 436, 112 N. W. 441; Stewart v. General Acci. Ins. Co. 35 Pa. Super. Ct. 120.

The words "independently of all other causes" mean more than the words "proximate cause."

Seaver v. Union, 113 Wis. 322, 89 N. W. 163.

Bashford, J., delivered the opinion of the court:

The first question presented for determination relates to the alleged warranties 17 L.R.A.(N.S.)

found in statements P and Q, referred to in the statement of facts. Respondent claims that a breach of warranty S is sufficiently alleged in the answer; but we do not so construe the pleading. S embodies the statement that the insured had not had, and did not have, bronchitis. The answer sets out warranties P and Q, and alleges that the same are false, in that the insured, at the time of the acceptance of the policy, and for a long time prior thereto, had been suffering from chronic asthma and bronchitis. The rule is well settled in this state that, in an action upon an insurance policy, a breach of warranty is not available as a defense unless expressly pleaded. Goldman v. Fidelity & C. Co. 125 Wis. 390, 104 N. W. 80. The proof admitted with respect to the ailments mentioned was competent in support of the breaches alleged, and could not therefore be considered as raising a new and distinct issue. A policy of insurance should be construed the same as any other contract in order to ascertain the intention of the parties from the language employed. Merrill v. Travelers' Ins. Co. 91 Wis. 329, 64 N. W. 1039. All provisions, conditions, or exceptions which in any way tend to work a forfeiture should be construed most strongly against the party preparing the contract, and for whose benefit they are inserted. Appleton Iron Co. v. British-America Assur. Co. 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100; Weidner v. Standard Life & Acci. Ins. Co. 130 Wis. 10, 110 N. W. 246. Any provision or exception which is uncertain or ambiguous in its meaning, or is capable of two interpretations, should receive that construction most favorable to the insured. Cook v. Benefit League, 76 Minn. 382, 79 N. W. 320; Travelers' Ins. Co. v. Murray, 16 Colo. 296, 25 Am. St. Rep. 267, 28 Pac. 774. These familiar rules of construction will serve as a general guide for the consideration of the construction of the provisions here in question. The statements in this policy with respect to the physical condition of the insured are declared to be warranties, and, if they have been answered, and the answers are false, then there can be no recovery. McGowan v. Supreme Court, I. O. F. 107 Wis. 462, 83 N. W. 775. Whether or not the answers are false is a question for the jury, if there is any conflict in the evidence. Are the statements here challenged to be construed as having been answered by the insertion of a check mark in the blank space where an exception should have been inserted, if any was to be made? Or is it reasonable to infer that the check mark in the blank space was understood by the insured as a waiver of any response to the statement? It is to be noted that the

policy contains no warranty that the statements are fully and truly answered, a provision not infrequently found in such contracts. The statements having been prepared by the insurer for its own protection and the spaces check-marked apparently by its own agent, the paper must be construed in the most favorable light permissible for the benefit of the plaintiff. If the statement was in the form of a question and not answered, or if the answer was ambiguous, then the question itself would be treated as having been waived. *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 678, 24 L. ed. 563; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 59 Am. Dec. 192; *Phoenix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500. In the case last cited it is said: "Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. [Citing cases.] But, where, upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial."

That an answer not wholly responsive cannot be regarded as a warranty was held in *Federal L. Asso. v. Smith*, 86 Ill. App. 427, and *Dilleber v. Home L. Ins. Co.* 69 N. Y. 256, 25 Am. Rep. 182. *Dilleber v. Home L. Ins. Co.* is a leading case upon the subject. It was there held that, where, by a policy of life insurance, the answers of the insured are made warranties, if a question is not answered, there is no warranty that there was nothing to answer; and, in the case of a partial answer, the warranty cannot be extended beyond the answer. In that case there was annexed to the application a statement signed by the insured, in which it was declared that the answers contained in the application "are warranted to be full, correct, and true, and that no circumstance is concealed or withheld in relation to the past or present state of his health, etc.," and in which it was agreed that, if the answers were not in all respects full, true, and correct, the policy should be void. It is said in the opinion: "When the language used in a policy may be understood in more senses than one, it is to be understood in the sense in which the insurer had reason to suppose it was understood by the assured. [Citing cases.] Conditions and provisos must be strictly construed against the insurers, because they have for their object to limit the scope and defeat the purpose of the prin-

cipal contract, and, as the insurer prepares the contract and furnishes the language used, any ambiguity in the contract must be taken most strongly against him." The court there held that the question was one of fact, to be submitted to a jury, whether the answer was honestly and fairly made. *MacKinnon v. Fidelity & C. Co.* 72 N. J. L. 29, 60 Atl. 180, is strongly in point. The warranties were in substantially the same form as in the policy here under consideration,—a general statement followed by an exception. There in the blank space was the word "nowhere." A check mark is here found. It was held that this word did not deny either of the component clauses of the statement. It is said in the opinion: "Here we are dealing with a question propounded by an insurer as the basis of a warranty on the part of the insured, a breach of which will avoid the insurer's contract. Such questions are formulated by the insurer under circumstances that admit of their being clear and direct. The purpose for which they are to be used is thoroughly understood, and, presumably, they are the result both of experience and of forethought. On the other hand, they are submitted to applicants for accident insurance, who as a class are not experts in matters of this sort, or in the construction of language by other than the simplest rules, to be answered under conditions that are, to say the least, none too favorable for critical examination. Under these circumstances, if, by reason of an ambiguity resulting from the form in which the question has been cast, the answer to it may state the truth or may state a falsehood, according as the ambiguity is resolved, our decisions constrain us to adopt the construction that is most strongly against the party who is responsible for the ambiguity; and to that end our cases permit the insured to stand upon the strict form of the question put to him by the insurer." *Dunbar v. Phenix Ins. Co.* 72 Wis. 492, 40 N. W. 386, supports this view. It is there held that, if an insurance company receives an application for insurance with a material question therein unanswered or not fully answered, and issues its policy thereon, it thereby waives a provision in the policy avoiding it in case the facts called for by such question are not fully disclosed. *Hale v. Life Indemnity & Invest. Co.* 65 Minn. 548, 68 N. W. 182, upholds an instruction given to the jury that the insured is bound to answer accurately so far as he undertook to answer, but that his warranty could not be extended beyond his answers as actually given.

Counsel for respondent, in support of the contention that the check marks are to be treated as a negative to the exception, refer

to *Stewart v. General Acci. Ins. Co.* 35 Pa. Super. Ct. 120. The schedule of warranties indorsed upon the policy in that case were substantially in the same form as in the instant case. There the line after the exception was left blank, while here the check mark is inserted. It was there held that no exception being inserted in the blank line was equivalent to a direct and unequivocal statement of a fact; that, "if the statement was to be regarded as qualified, the qualification must necessarily have been added." We are not prepared to yield assent to this conclusion, but we regard the cases as distinguishable. The check mark was a visible sign, made so as to attract attention and to carry some information. In the absence of any further proof upon the subject, we are not prepared to say that the insured was obliged to treat the check mark as a negative to the exception, or that he might not reasonably have considered it a waiver of the statement or the answer thereto. The insured may have signed a written application which was the basis of these warranties, and which, when produced, may aid the court in the proper interpretation of this contract. As presented upon this record, we must hold that an ambiguity exists with respect to the conclusion to be drawn from the warranties contained in the policy with a check mark in the blank space after the statements, and that it is a question for the jury to determine whether the check marks are to be treated as a denial of any exception, or as a waiver of the statement and any answer thereto. "It is for the court to say, in such a situation, whether different minds may reasonably differ as to what was in fact intended, and, if so, for the jury to say where the truth lies." *Vilas v. Bundy*, 106 Wis. 176, 81 N. W. 812. In case of ambiguity in a written contract, and ambiguous words or terms are to be construed by extrinsic evidence or the surrounding circumstances, then the question is one for the jury. *Ganson v. Madigan*, 15 Wis. 145, 82 Am. Dec. 659; *Bedard v. Bonville*, 57 Wis. 270, 15 N. W. 185; *Becker v. Holm*, 89 Wis. 86, 61 N. W. 307.

It is urged on behalf of the respondent in support of the judgment that it does not appear that the death of the insured was the result of "bodily injuries sustained through external, violent, and accidental means, independently of all other causes." The proof is undisputed that the insured received the accidental injury to his leg causing an abrasion of the skin, that an infection started at this place, and that he died fifteen days later from erysipelas or blood poisoning. The contention is that the accidental injury of itself would not have resulted fatally, but that death was due to

an independent intervening cause, namely, the germs which entered the system through the wound. It must be apparent, however, that but for the accidental injury there would have been no cause for infection; that, but for the abrasion, the disease germs could not have entered and produced the fatal result. The wound produced by the accident was therefore the proximate and sole cause of death. *Cary v. Preferred Acci. Ins. Co.* 127 Wis. 67, 5 L.R.A.(N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1065, 7 A. & E. Ann. Cas. 484. Counsel for respondent insists that the words "independently of all other causes" do not mean the "sole proximate cause;" that there was an independent intervening cause, which resulted in the death of the insured, and therefore the defendant is not liable. We cannot adopt this interpretation of the language, or the conclusion sought to be drawn from the testimony. The words employed in this policy are substantially the same as found in *Weidner v. Standard Life & Acci. Ins. Co.* 130 Wis. 10, 110 N. W. 246. In that case the insured was assaulted by a third person, causing the injury, through which bacteria entered, causing death from blood poisoning. The question there raised and decided was whether or not the assault was for the sole purpose of robbery within the terms of the policy, and this was held to be a question for the jury to determine. It was assumed in that case that, if death resulted from the assault in the manner indicated, the insurance company was liable. There could have been no recovery if, as contended here, the entry of bacteria into the system through the wound must be considered an independent cause. *Hall v. American Masonic Acci. Asso.* 86 Wis. 518, 57 N. W. 366, construes a policy which contains substantially the same language. The court there sustained the finding of the jury that the injury was the sole cause of death, construing it to mean that the injury was the sole and proximate cause of the apoplexy which intervened, and which was the immediate cause of death. The intervening cause which follows as a natural, though not necessary, consequence of accidental injury, cannot, therefore, be considered an independent cause producing death under the terms of this policy. We think the language here used can have no more extensive meaning than the words "sole and proximate," which have so recently been interpreted by this court in the *Cary Case*. The view here expressed seems to be the more reasonable construction of this provision of the policy, and is fully supported by the authorities which follow. Blood poisoning resulting from an abrasion of the skin on the toe by a new shoe, causing the death of the insured,

was attributable to bodily injury effected by external, violent, and accidental means alone, within the meaning of an accident policy. *Western Commercial Travelers' Asso. v. Smith*, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401. Pneumonia caused by taking cold while confined to bed as a result of an accident, when this would not have occurred had the person been in a normal state of health, was regarded as an accident. *Isitt v. Railway Passengers' Assur. Co.* L. R. 22 Q. B. Div. 504. The sting of an insect is the proximate cause of death resulting from blood poisoning caused by the sting. *Omberg v. United States Mut. Acci. Asso.* 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909. It was there held that the death was caused through "external, violent, and accidental means," and not as a result of poison "in any form or manner" or of "contact with poisonous substances." *Delaney v. Modern Acci. Club*, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91, holds that, where death results from disease which follows as a natural, though not necessary, consequence of a physical injury which is accidental, it is deemed a proximate cause of the injury, and not of the disease, and within the requirements of a policy that death must result solely from accidental injury. *Carroll v. Fidelity & C. Co.* (C. C.) 137 Fed. 1012, is directly in point. The policy sued on insured "against disability or death resulting, directly and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means." The insured engaged in an altercation with another party, and struck him in the mouth, causing an abrasion on his hand. Blood poisoning set in, caused by microbes in the mouth of the person receiving the blow. The arm of the insured was amputated, and death ensued. A recovery was sustained. See also *Mardorf v. Accident Ins. Co.* [1903] 1 K. B. 584.

We must hold, therefore, that, where death results from disease which follows as a natural, though not the necessary, consequence of an accidental physical injury, it is within the terms of the accident policy; the death being deemed the proximate result of the injury, and not of the disease as an independent cause.

The trial court held that there was a breach of the warranties above referred to upon the ground that the proof conclusively established that the insured was afflicted with bronchitis at the time the policy was accepted. As already stated, the testimony on this subject was admissible under the averments of the answer with respect to statements P and Q, and an amendment of the pleading is permissible to set up a breach of S. Statement S is claimed to be

a denial by the insured that he had had, or was then suffering from, bronchitis and other diseases there mentioned. It becomes necessary, therefore, at this time to state the conclusion we have reached with respect to the terms employed in the statements mentioned if they shall be found to constitute warranties. If the jury determines that the exceptions to these statements were negatived by the insured, then P warrants that he never had any bodily infirmity, Q that he was in a sound condition physically, and S that he never had bronchitis. There are other representations in each of these statements, but it is not necessary to mention them as their truthfulness is not challenged. It is important here to determine the proper meaning to be given to the words mentioned when construed as warranties in an accident-insurance policy. It must be presumed that the parties intended that the words should be understood in their ordinary sense when used in common speech. "Bodily infirmity" means a settled disease, an ailment that would probably result to some degree in the general impairment of physical health and vigor. It could not have been understood by the parties that by this statement the insured intended to warrant that during the sixty-five years of his life he had never suffered from any of the ills that human flesh is heir to. Temporary ailments from which there has been a full recovery, and which leave no perceptible effect, cannot reasonably be included in this term. Bodily infirmity as used in an accident policy exempting the insurer from liability only includes an ailment or disorder of a somewhat established or settled character, and not merely a temporary disorder arising from a sudden and unexpected derangement of the system. *Meyer v. Fidelity & C. Co.* 96 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945. A sound condition physically signifies an absence of bodily infirmity, and what has already been said applies to this statement. This term has been construed by this court in *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351. It is there said: "'Sound health,' as used with reference to an application for life insurance, has been defined to mean a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously. The word 'serious' is not generally used to signify dangerous, but rather to define a grave, important, or weighty trouble." A sound condition physically means the same as sound health, which does not mean perfect health. "A mere tem-

porary indisposition or ailment would not ordinarily be regarded as rendering the health unsound within the meaning of these words when used in an insurance contract. Speaking generally, they mean the absence of any vice in the constitution, and of any disease of a serious nature, that have a direct tendency to shorten life; the absence of a condition of health that is commonly regarded as disease, in contradistinction to a temporary ailment or indisposition." *Packard v. Metropolitan L. Ins. Co.* 72 N. H. 1, 54 Atl. 287. Other decisions to the same effect are *Brown v. Metropolitan L. Ins. Co.* 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610; *Manhattan L. Ins. Co. v. Carder*, 27 C. C. A. 344, 42 U. S. App. 659, 82 Fed. 986; *Plumb v. Penn Mut. L. Ins. Co.* 108 Mich. 94, 65 N. W. 611; *Dietz v. Metropolitan L. Ins. Co.* 168 Pa. 504, 32 Atl. 119. Whether the insured was in a sound condition physically would depend upon the circumstances of each case, and would be a question for the jury to determine upon the evidence. *Packard v. Metropolitan L. Ins. Co.* supra; *Metropolitan L. Ins. Co. v. Howle*, 68 Ohio St. 614, 68 N. E. 4; *Connell v. Metropolitan L. Ins. Co.* 16 Pa. Super. Ct. 520. In the leading case of *Barnes v. Fidelity Mut. Life Asso.* 191 Pa. 618, 45 L.R.A. 264, 43 Atl. 341, it is said, in substance, that good health does not mean absolute perfection, but is comparative, and, if the insured enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and outward appearance his health is reasonably such that might with ordinary safety be insured and upon ordinary terms, the requirement of good health is satisfied. In that case it appeared that at the time of the payment of the premium the insured was in bed with a cold which developed into pneumonia, causing his death two days later. The court held that, under these circumstances, the question as to whether or not insured was in good health was for the determination of the jury.

The terms employed in statement S must be construed under the rules already stated. The warranty, if it be such, that the insured had not had and was not then suffering from bronchitis, must be given a reasonable interpretation in arriving at the intention of the parties. The order for nonsuit was based upon the conclusion of the court from the evidence that the insured had had bronchitis at some time in his life. We cannot agree with the view of the learned circuit judge that the proof established beyond controversy that the insured had

ever had chronic bronchitis, or that, if he had been so afflicted by the disease in an acute form, the policy was necessarily avoided. The object of the parties was to insure against disability or death from accidental injury. The present physical condition of the insured as affected by previous diseases was a natural subject of inquiry as bearing upon the character of the risk and as tending to increase liability to accidents or of serious results from accidents. The information was doubtless sought and furnished with that purpose in the minds of both parties. Bronchitis, as a medical term, is defined by Webster as "inflammation, acute or chronic, of the bronchial tubes or any part of them." If the term is given its broadest significance, bronchitis would include every hard cold that affects the bronchial tubes, or any part of them. We cannot assume that it was the intention of the parties to use this term in its broadest sense, as it would lead to results which are unreasonable, if not absurd. Such a construction should not be adopted unless enforced by the words employed. *Cady v. Fidelity & C. Co.* (Wis.) 113 N. W. 967. We conclude that the word "bronchitis," as found in this policy, was used in its limited sense as meaning a chronic disease which would not readily yield to treatment, and which tended to impair the health and strength of the insured; that it did not include an acute attack from which he had fully recovered at the time the policy was accepted. As already intimated, we do not think the proof showed conclusively that the insured ever suffered from chronic bronchitis. The testimony bearing on this subject is referred to in the statement of facts. The testimony of the attending physician left it somewhat uncertain whether the disease had become so pronounced and settled as to permanently affect the health at the time the policy was accepted. Two other witnesses intimately acquainted with the insured, and who saw him almost daily for months before and after that date, had never heard of his having bronchitis, and testified, in substance, that he attended regularly to his work, and that his general health was good. It is presumed that, if the disease had become settled so as to impair the strength and health of the insured, it would have been perceptible to ordinary observation. The testimony given by the attending physician would doubtless have been excluded if seasonable objection had been made. *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351; *Green v. Nebagamain*, 113 Wis. 508, 89 N. W. 520. As it was received on the trial without objection, it was entitled to full consideration, but should not have been accepted as con-

clusively establishing the existence of the disease. The question should have been submitted to the jury upon all the testimony on the subject. *Moulor v. American L. Ins. Co.* 101 U. S. 708, 25 L. ed. 1077. The case cited is strongly in point. There the attending physician testified that the insured had been afflicted with scrofula and chronic asthma before the policy was issued, thereby falsifying statements in the application for insurance. There was, however, in evidence the statements of two medical examiners attending the application, representing the insured was in perfect health and as never having any constitutional disease, and it was held that the case should have been submitted to the jury on all the evidence.

Counsel for respondent contends that the action was prematurely commenced. The policy provides that immediate written notice must be given to the company of any accident and injury for which a claim is to be made, that affirmative proof of death must be furnished within two months thereafter, and that legal proceedings for recovery thereunder may not be brought before the expiry of three months from date of filing proofs at company's home office, nor brought at all unless begun within six months from the time of death. Immediate written notice was furnished, as required, which was received at the company's home office March 8th. An autopsy on the body had already been held at the instance of the insurer, and the fact of death and its cause definitely ascertained. So far as the evidence discloses, no further proof was demanded, although it appears that the beneficiary verified a proof of claim April 19th, which was forwarded to the company. Both proofs of claim were retained by the company, but the answer alleges that the last was not furnished within two months from the time of death, an objection not urged upon the attention of the court. But, treating the paper forwarded on April 19th as the affirmative proof of death, the respondent contends that the action could not be brought before the expiration of three months from that date. The action was commenced on July 18, 1905. This contention cannot be sustained, for the reason that, after the proofs of loss had been furnished the company and by it retained, it denied any liability under this policy. Moreover, we are not prepared to say that affirmative proof of loss was not furnished at an earlier date. A policy containing substantially the same provisions was under consideration upon like proof in *Van Eman v. Fidelity & C. Co.* 201 Pa. 537, 51 Atl. 177. It was there held that affirmative proof of death required by the policy to be furnished the company is given where the company is

notified of death from an injury, and has its surgeon take part in a post mortem examination. It is there said: "The condition does not provide that the proof is to be in writing, nor by whom it is to be furnished; but the evidence is that such proof, in writing, did reach the company, which acted upon it by having its own surgeon take part in the post mortem examination." Under the rule of that case, affirmative proof was seasonably furnished and the action was commenced more than three months thereafter. The decision of this point, however, is placed upon the ground that the denial of liability was a waiver of the provision as to the time of bringing the action. Stipulations in policies of insurance that the loss should be paid within a specified time after proofs of loss are furnished and postponing action in the meantime are for the purpose of enabling the insurer, before paying the loss, to make a full investigation with a view of determining his liability and its extent, and to discharge the obligation, if any, without the costs of suit. If the insurer repudiates any obligation under the policy, there can be no reason for further delay, and it cannot be prejudiced by an immediate action. Hence it is held, both on reason and authority, that a denial of any liability on a policy is a waiver of the right of the company to have the stipulated time before suit is begun, and that the action may be commenced at once. *Hand v. National Live-Stock Ins. Co.* 57 Minn. 519, 59 N. W. 538; *Merritt v. Cotton States L. Ins. Co.* 55 Ga. 103; *Whitten v. New England Live Stock Ins. Co.* 165 Mass. 343, 43 N. E. 121; *Texas Mut. L. Ins. Co. v. Brown.* 2 Posey Unrep. Cas. (Tex.) 160; *Columbus Mut. Life Asso. v. Plummer*, 86 Ill. App. 446; *United States Casualty Co. v. Hanson*, 20 Colo. App. 393, 79 Pac. 176; *Binder v. National Masonic Acci. Asso.* 127 Iowa, 25, 102 N. W. 190. On the record here presented, we conclude that the learned circuit court erred in granting the nonsuit.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

CALIFORNIA SUPREME COURT.

FRANK COREA, Resp't.,

v.

BERNARDO HIGUERA et al., Appts.

(153 Cal. 451, 95 Pac. 882.)

Way — necessity — what constitutes.

1. The absence of a constructed track for teams to a road on which a grant of land is bounded is not sufficient to give the

grantee a way of necessity over remaining land of the grantor.

Trial — finding — fact.

2. A finding that a right of way specifically described is appurtenant to and owned by the owner of a tract of land is one of fact, and not merely a conclusion of law.

Appeal — finding — inconsistency — effect.

3. Upon an appeal on the judgment roll alone, findings as to the use of a way prior to the conveyance of land to which it is alleged to be appurtenant cannot affect a finding that the way was appurtenant to the land conveyed, if not inconsistent therewith.

Grant — appurtenance.

4. A conveyance of real estate carries with it an appurtenant right of way.

Limitation of actions — pleading.

5. A demurrer on the ground that the action is barred by the statute of limitations is not good unless the complaint affirmatively shows that fact.

(April 29, 1908.)

Case Note. — Way of necessity where other possible modes of access exist.

That no implication of a grant of a right of way can arise from mere considerations of convenience, but that it must be supported by necessity, is a proposition upon which the authorities are unanimous. Among the cases so holding are *Carey v. Rae*, 58 Cal. 159; *Anderson v. Buchanan*, 8 Ind. 132; *Ward v. Robertson*, 77 Iowa, 159, 41 N. W. 603; *Pousson v. Porche*, 6 La. Ann. 118; *Martin v. Patin*, 16 La. 55; *Trask v. Patterson*, 29 Me. 499; *White v. Bradley*, 66 Me. 254; *Stevens v. Orr*, 69 Me. 323; *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743; *Hildreth v. Googins*, 91 Me. 227, 39 Atl. 550; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Wills v. Reed*, 86 Miss. 446, 38 So. 793; *Oliver v. Pitman*, 98 Mass. 46; *Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 572, 55 N. E. 462; *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 463; *Vossen v. Dautel*, 116 Mo. 379, 22 S. W. 734; *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004; *Batchelder v. State Capital Bank*, 66 N. H. 386, 22 Atl. 592; *Staples v. Cornwall*, 114 App. Div. 596, 99 N. Y. Supp. 1009, affirmed without opinion in 190 N. Y. 506, 83 N. E. 1132; *Re New York*, 83 App. Div. 513, 82 N. Y. Supp. 417; *Gill v. Trout*, Tappan (Ohio) 251; *Meredith v. Frank*, 56 Ohio St. 579, 47 N. E. 656; *Jones Fertilizing Co. v. Cleveland*, C. C. & St. L. R. Co. 7 Ohio N. P. 245; *Linkin v. Terwilliger*, 22 Or. 97, 29 Pac. 268; *McDonald v. Lindall*, 3 Rawle, 492; *Ogden v. Grove*, 38 Pa. 487; *Francies's Appeal*, 96 Pa. 200; *O'Brien's Appeal*, 11 W. N. C. 229; *Valley Falls Co. v. Dolan*, 9 R. I. 489; *Seabrook v. King*, 1 Nott & M'C. 140; *Witter v. Harvey*, 1 M'Cord, L. 67, 10 Am. Dec. 650; *Turnbull v. Rivers*, 3 M'Cord, L. 131, 15 Am. Dec. 622; *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260; *Hall v. Austin*, 17 L.R.A. (N.S.)

A PPEAL by defendants from a judgment of the Superior Court for Santa Clara County in plaintiff's favor in an action brought to enjoin interference with an alleged right of way. Affirmed.

The facts are stated in the opinion.

Mr. Charles Clark, for appellants:

The complaint does not state facts showing a right of way by grant, or by limitation, or by necessity, or as appurtenant, or any right of way whatever.

Kripp v. Curtis, 71 Cal. 64, 11 Pac. 879; *Blum v. Weston*, 102 Cal. 366, 41 Am. St. Rep. 188, 36 Pac. 778; Civil Code, §§ 662, 806, 1104, 3522; Washb. Easements, 95, 159, 163; *Alley v. Carleton*, 29 Tex. 78, 94 Am. Dec. 260; *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Kennedy v. Burnap*, 120 Cal. 492, 40 L.R.A. 476, 52 Pac. 843; *Cave v. Crafts*, 53 Cal. 135; 3 Washb. Real Prop. § 626; *Kerr's Civ. Code*, § 662; *McShane v. Carter*, 80 Cal. 315, 22 Pac. 178; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149;

20 Tex. Civ. App. 59, 48 S. W. 53; *Plimpton v. Converse*, 42 Vt. 712; *Dee v. King*, 73 Vt. 375, 50 Atl. 1109.

Accordingly, it has been held that evidence that one claiming a way by necessity had purchased other land over which to make a way to the public road is admissible (*Russell v. Napier*, 82 Ga. 770, 9 S. E. 746); that a right of way cannot be acquired by necessity where there is a nearer and better way than the one claimed (*Jeter v. Mann*, 2 Hill, L. 641); that a particular way cannot be claimed as appurtenant to an allotment upon partition where access may be had by a less burdensome way (*Murphy v. Lincoln*, 63 Vt. 278, 22 Atl. 418).

So, where the parties have considered and agreed upon the mode of access to coal conveyed, no implication can be allowed of any other way, however convenient (*Bascom v. Cannon*, 158 Pa. 225, 27 Atl. 968); nor will the grant of a way under the surface be implied from the fact that it is more convenient for the purpose of mining (*Pearne v. Coal Creek Min. & Mfg. Co.* 90 Tenn. 619, 18 S. W. 402).

And a way of necessity ceases upon the opening of a public road by which access is afforded, notwithstanding such way is more convenient than the road. *Cassin v. Cole* (Cal.) 96 Pac. 277; *Pierce v. Selleck*, 18 Conn. 321.

The courts, however, are not in complete agreement as to just what necessity will give rise to the implication of a grant of a way. Although in a number of cases it is said that only a strict necessity can give rise to such implication, it would seem that such expression is used as the antithesis of implication arising from convenience, and it is believed that no case has actually gone so far as to deny a way by necessity on the ground that another possible mode of access existed, which could be made available only at a wholly dispro-

Longendyke v. Anderson, 101 N. Y. 625, 4 N. E. 629.

Mr. William H. Johnson, for respondent:

In the case of a road appurtenance, there must be, as in this case, one existing at the time of the grant, which is open, laid out, apparent, and used with the land.

Civil Code, § 682; Lampman v. Milks, 21 N. Y. 505; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Currier v. Howes, 103 Cal. 431, 37 Pac. 521; Lansing v. Wiswall, 5 Denio, 213; Hills v. Miller, 3 Paige, 254, 24 Am. Dec. 218; Watson v. Bioren, 1 Serg. & R. 227, 7 Am. Dec. 617; Codling v. Johnson, 9 Barn. & C. 933, 4 Mann. & R. 671, 8 L. J. K. B. 68.

"Appurtenance" in a deed includes and will carry easements or privileges to another's land when they are annexed to the granted premises.

portionate expense. Upon the other hand, many courts have signified their approval of the declaration in *Pettingill v. Porter*, 8 Allen, 1, 85 Am. Dec. 671, that the word "necessary" cannot reasonably be held to be limited to absolute physical necessity, but is to receive a more liberal and reasonable interpretation so as to include cases where other possible modes of access cannot be made available without labor and expense disproportionate to the value of the property purchased. Among the decisions which held that another way of ingress and egress, to negative an implication of a grant of a way by necessity, must be reasonably practicable, see *Trump v. McDonnell*, 120 Ala. 200, 24 So. 353; *Smith v. Griffin*, 14 Colo. 429, 23 Pac. 905; *Gaines v. Lunsford*, 120 Ga. 370, 102 Am. St. Rep. 109, 47 S. E. 967; *Oliver v. Pitman*, 98 Mass. 46; *Schmidt v. Quinn*, 136 Mass. 575; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; and *Galloway v. Bonesteel*, 65 Wis. 79, 56 Am. Rep. 616, 26 N. W. 262, hereinafter stated at length.

Ways in general.

There can be no way from necessity where free access to the property in question is afforded by a public highway (*Pierce v. Selleck and Cassin v. Cole*, supra; *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700; *Smyles v. Hastings*, 22 N. Y. 217; *Palmer v. Palmer*, 71 Hun, 30, 24 N. Y. Supp. 613, reversed on other grounds in 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966); or where the landowner has other suitable means of access (*Charleston & W. C. R. Co. v. Fleming*, 118 Ga. 699, 45 S. E. 664, subsequent appeal, 119 Ga. 995, 47 S. E. 541; *Rice v. Wade* (Mo. App.) 111 S. W. 594; *McDonald v. Lindall*, supra).

So, also, the existence of a way by necessity has been denied where the evidence clearly showed that there were other reasonably practical ways of ingress and egress (*Trump v. McDonnell*, supra); where there was access by means of a road established

Swartz v. Swartz, 4 Pa. 353, 45 Am. Dec. 697; *Murphy v. Campbell*, 4 Pa. 480; *Philadelphia & R. R. Co. v. Philadelphia*, 47 Pa. 325; *Lampman v. Milks*, supra; *Simmons v. Cloonan*, 47 N. Y. 9; *Curtiss v. Ayrault*, 47 N. Y. 73; *Kurkel v. Haley*, 47 How. Pr. 75; *Outerbridge v. Phelps*, 13 Abb. N. C. 125, 58 How. Pr. 77, 13 Jones & S. 555.

A way which is visible and permanently established at the time of the grant will, upon severance of the estate, pass as an implied or constructed easement appurtenant to the part of the estate for the benefit of which it was established.

Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111; *Robinson v. Thraillkill*, 110 Ind. 117, 10 N. E. 647; *Thompson v. Miner*, 30 Iowa, 336; *Huttemeier v. Albro*, 18 N. Y. 48; *Baker v. Rice*, 56 Ohio St. 463, 47 N. E. 653; *Mosher v. Hibbs*, 24 Ohio C. C. 375; *Manbeck v. Jones*, 190 Pa. 171, 42 Atl. 536;

by a decree of partition, leading to another road which was rendered impassable by a ditch and a slough, which would require an expenditure of about \$1,000 to put in shape for travel (*Carey v. Rae*, 58 Cal. 159); or where it was not shown that one claiming a way by necessity could not easily construct a wagon road on its own land (*Bully Hill Copper Min. & Smelting Co. v. Bruson*, 4 Cal. App. 180, 87 Pac. 237); where settlement roads touched the tract in question, though such roads were steep and hilly and in worse condition than the public road to which access was sought, and although it was shown that there was a cut or obstruction in plaintiff's farm, between his residence and the settlement road, where the record did not show the character of the obstruction, its nearness to the highway, the additional cost of construction, and its relation to the value of the tract (*Gaines v. Lunsford*, supra); where a creditor who extended an execution upon the front of the farm had left a 5-rod strip connecting the back land with the road, although such strip could not be made passable for carriages without an expense of from \$25 to \$300 (*Allen v. Kincaid*, 11 Me. 155); where another carriage way in place of one obstructed might be laid out at some expense and with some impairment to the beauty and symmetry of the grounds (*Stuyvesant v. Woodruff*, 21 N. J. L. 134, 47 Am. Dec. 156); where a conveyance provided a way of access sufficient for ordinary purposes, although such way, which crossed a public park, could not therefore be used for carting away stone quarried on the premises (*Haskell v. Wright*, 23 N. J. Eq. 389); where no evidence was introduced tending to show that the cost of making an existing crossing over a railroad available would be greater than the value of the land sought to be appropriated for such crossing (*Jones Fertilizing Co. v. Cleveland, C. C. & St. L. R. Co.*; *Ohio N. P.* 245); where one claiming a way by necessity had another, necessitating traveling further (*Screven v. Gregorie*, 8

Cannon v. Boyd, 73 Pa. 179; Overdeer v. Updegraff, 69 Pa. 110; Phillips v. Phillips, 48 Pa. 178, 86 Am. Dec. 577; Kieffer v. Imhoff, 26 Pa. 438; Building Asso. v. Getty, 11 Phila. 305; Thomas v. Owen, L. R. 20 Q. B. Div. 225, 52 J. P. 516, 57 L. J. Q. B. N. S. 198, 58 L. T. N. S. 162, 36 Week. Rep. 440; Ford v. Metropolitan R. Co. L. R. 17 Q. B. Div. 12; Kay v. Oxley, L. R. 10 Q. B. 360, 44 L. J. Q. B. N. S. 210, 33 L. T. N. S. 164; Plant v. James, 5 Barn. & Ad. 791; Brown v. Alabaster, L. R. 37 Ch. Div. 490, 57 L. J. Ch. N. S. 255, 58 L. T. N. S. 265, 36 Week. Rep. 155; Bayley v. Great Western R. Co. L. R. 26 Ch. Div. 434, 51 L. T. N. S. 337; Barkshire v. Grubb, L. R. 18 Ch. Div. 616, 50 L. J. Ch. N. S. 731, 45 L. T. N. S. 383, 29 Week. Rep. 929; 17 Century Dig., "Easements," ¶ 45.

If the owner of a house and land makes a formed road over the land for the appar-

Rich. L. 158, 64 Am. Dec. 747); where another ford, on lands of complainant, could be made available by the expenditure of a few dollars (Murray v. Enly [Tenn. Ch. App.] 57 S. W. 412); where the premises in question were accessible by another road which was longer and not as good (Hyde v. Jamaica, 27 Vt. 443); where the tract in question could be reached over land of the claimant, although not without extreme inconvenience on account of a hill which could not be crossed without making several turns, and then only with very light loads, which way might be improved at an expense disproportionate to the income from the hill lot, but which would benefit the farm as a whole more than enough to offset the cost (Dee v. King, 73 Vt. 375, 50 Atl. 1109); where the lands in question bounded upon a road which was obstructed by a slough which could be bridged (Huddleston v. Love, 13 Manitoba L. Rep. 432); or where the land to which a way by necessity was claimed bounded on a highway running in a cut about 20 feet deep (Titchmarsh v. Royston Water Co. 81 L. T. N. S. 673, 48 Wk. Rep. 201). See also Kripp v. Curtis, 71 Cal. 62, 11 Pac. 879, where it is said that a way from necessity will not exist where a man can get to his property through his own land, and that the circumstance that the way over his own land is too steep, or too narrow, or that other and like difficulties exist, does not alter the case.

Nor will the fact that a way which has been granted has become wet and inconvenient entitle the dominant owner to an increase in the width of such way in order to render it passable and useful. Dudgeon v. Bronson, 159 Ind. 562, 95 Am. St. Rep. 315, 64 N. E. 910, 65 N. E. 752.

On the other hand, in Myers v. Dunn, 49 Conn. 71, it was held that the existence of a right of way, for the purpose of carting wood, to a highway on the west, reserved upon conveyance of the western portion of a tract of land, which right of way was included in the conveyance of the central por-

ent use of the house, and then conveys the house separately from the land with the ordinary general words, it seems that a right of way over the road will pass.

Watts v. Kelson, L. R. 6 Ch. 168, 40 L. J. Ch. N. S. 126, 24 L. T. N. S. 209, 19 Week. Rep. 338; Langley v. Hammond, L. R. 3 Exch. 161, 37 L. J. Exch. N. S. 118, 18 L. T. N. S. 858, 16 Week. Rep. 937; Barkshire v. Grubb, *supra*.

Sloss, J., delivered the opinion of the court:

The complaint in this action alleges that on November 2, 1894, the defendant Bernardino Higuera was the owner of lot 7 of the Higuera rancho. On that day the defendants conveyed a portion of said lot to John Freitas, one of the boundaries of the tract conveyed being described as the center of the Higuera ranch road, a road connect-

tion, did not, upon the erection of a dwelling house upon the central portion, preclude the owner of such central portion from claiming a way of necessity over the remaining portion of the tract to a highway on the east for the increased necessities of his lot, the court saying: "The plaintiffs claim further, and inasmuch as both the defendant's grantor and himself purchased land to which there was appurtenant a limited right of way over the Carpenter lot, of the precise character of which they had notice by their respective deeds, they are now to be presumed neither to have purchased nor intended to purchase any other, and are to be stopped from claiming the way of necessity over the *locus in quo*. We cannot assent to this proposition. Upon the conveyance of the piece of land inaccessible except for a single purpose, in the absence of an express agreement by the grantee to accept it in that condition, the law instantly laid in its favor upon the *locus in quo* the burden of an unlimited way of necessity for all legal uses; in the absence of such agreement the law will not presume that the grantee accepted in lieu of this a right less in extent and value; on the contrary, it will presume that the grantor received payment for, and intended to convey, land which, in addition to this unlimited way, had another for a specified single purpose."

And in Camp v. Whitman, 51 N. J. Eq. 467, 26 Atl. 917, it was held that the necessity which is the foundation of an implied grant was not satisfied by the existence of a footway across a park strip by which the lot was bounded, but that the grantee was entitled to a carriage way to her dwelling across the grantor's remaining lands.

Where access to the property in question may be had by water, no way of necessity exists across contiguous lands, although such way may be more convenient. Kingsley v. Gouldsbrough Land Improv. Co. 86 Me. 279, 25 L.R.A. 502, 29 Atl. 1074 (land surrounded on three sides by sea); Hildreth v. Googins, 91 Me. 227, 39 Atl. 550 (lot

ing with the county road. Thereafter Freitas died, and in 1897 the executors of his will, pursuant to a probate sale duly authorized and confirmed by the superior court, conveyed the land so acquired by their testator to the plaintiff, who has ever since been the owner and in possession thereof. At all the times mentioned there had been a road leading from the land conveyed to Freitas across the remaining portion of lot 7 to the Higuera ranch road. The road which thus traversed lot 7 was used by defendants prior to their conveyance to Freitas, and, at the time of the latter's purchase, was open, laid out, and used as a means of ingress and egress to and from the land conveyed, "and was the only road so laid out and open by which said place could be reached by team; and . . . the said road was and had been appurtenant to said lands." The defendants claim to be the exclusive owners of said road and have obstructed it. It is alleged that plaintiff is the owner of and entitled to said right of way. A demurrer

to the complaint having been overruled, the defendants answered, denying the allegations of the complaint regarding the existence of the road in question; denying that said alleged road was open, laid out, or used, at the time of Freitas's purchase, or that of plaintiff, or that it was the only road by which said place could be reached by team. The answer denies, further, that the road was or is appurtenant to the land of plaintiff, or that plaintiff is the owner of any right of way over defendants' lands. By way of affirmative defense it is alleged that the land conveyed to Freitas and subsequently to plaintiff was at all times bounded on one side by the main Higuera ranch road, by which the plaintiff and his predecessors had access to and from his lands to the county roads. There is a further averment that any use which plaintiff or Freitas may have made of the road over defendants' lands was solely by the permission of the defendants. The court finds that at the times of the conveyances to Freitas and to plaintiff there had been and was,

bounded on one side by ocean); *Staples v. Cornwall*, 114 App. Div. 596, 99 N. Y. Supp. 1009, affirmed without opinion in 190 N. Y. 506, 83 N. E. 1132 (hotel property fronting on navigable river which could be utilized by construction of a dock); *Lawton v. Rivers*, 2 M'Cord, L. 445, 13 Am. Dec. 741; *Turnbull v. Rivers*, 3 M'Cord, L. 131, 15 Am. Dec. 622 (island connecting with another at ebb tide).

Where, however, the way by sea is not available for general purposes: to meet the requirements of the uses to which the property may naturally be put, it may fairly be implied that a way of necessity was intended to be granted. *Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 572, 55 N. E. 462, where, although it appeared that a steamer usually ran up and down the river twice a day in the summer, which was commonly used by persons, there was testimony that the only way to get to the property with a team was by the way claimed, and evidence to warrant the finding that the way by water was not available at all seasons of the year for the transportation of all such things as might be needed for the use of the land in a reasonable way.

Alleyways.

As a general rule, where a lot fronts on a street or other established way, no way of necessity through an alley to a part of it can be implied. See *Smith v. Griffin*, 14 Colo. 429, 23 Pac. 905, where a lot 75 feet in depth, having a dwelling upon the front, and upon the rear a coal house and ash pit, fronted upon a highway from which access might be had to all parts of the premises; *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509, where the claimant could reach the rear of his premises by a passageway over his

own land, though the alley in question would be more convenient; *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004, where claimant's lots abutted on the street, and one of them had an alley along its whole south side; *Huttemeier v. Albro*, 2 Bosw. 546, where a lot having a dwelling house on both front and rear fronted on a street; *Milliken v. Denny*, 135 N. C. 19, 47 S. E. 132, where the lot conveyed fronted about 378 feet on each of two streets 216 feet apart; *Bailey v. Gray*, 53 S. C. 503, 31 S. E. 354, where access to claimant's lot might be had from public streets on the north and east; *Fischer v. Laack*, 76 Wis. 313, 45 N. W. 104, where claimant had sufficient ingress and egress to and from his lot by a street on which it fronted.

No necessity from which the grant of a right of way through an alley to the rear of a lot may be implied, exists where there is no other existing access to the claimant's garden and ice house for a team, but such a way could be constructed through his premises, which, though more circuitous, would not be impracticable or very expensive (*Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748); or where another way which might be constructed across claimant's own premises would destroy an ornamental garden (*Fetters v. Humphreys*, 18 N. J. Eq. 260); or where the whole front, or practically the whole front, of the lot is covered by buildings (*Motsford v. Wallace*, 69 Conn. 263, 37 Atl. 902; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188; *O'Brien's Appeal*, 11 W. N. C. 229; *Ogden v. Grove*, 38 Pa. 487; *Francies's Appeal*, 96 Pa. 200,—in which latter case no other access to a privy vault at the rear of the premises, for the purpose of cleaning it, could be had except through the house. *Contra*, *Goodall v. God-*

leading from the land so conveyed across the remaining portion of lot 7, a road used by the defendants prior to their conveyance with the lands conveyed to Freitas. This road is found to have been open, laid out, and used as a means of ingress or egress to said lands, and was the only road so laid out and open by which said lands could be reached by team. Said road was, at the time of Freitas's purchase, appurtenant to said lands and passed with the same. It was appurtenant to said lands at the time plaintiff purchased, and passed to him as appurtenant thereto. There is a finding that plaintiff "is the owner of and entitled to said right of way over the lands of defendants to the county road, to pass and repass on foot and with team." The court further finds that the lands of plaintiff are bounded on one side by the Higuera ranch road, which was and is an open traveled road leading to the county road. Said Higuera ranch road was not, prior to the commencement of this action, used by plaintiff, and plaintiff "has not easy access

to said Higuera ranch road for any purpose to and from his own lands or at all." It is found "that plaintiff is entitled to the said right of way as appurtenant over the lands of defendants," and there is a finding against the allegation of the answer that the use of said way by plaintiff and his predecessors was by the permission of defendants. Upon these findings the court entered a judgment declaring the plaintiff to be the owner of the roadway described in the complaint, and enjoining the defendants from obstructing said road or interfering with plaintiff's use thereof. The defendants appeal from the judgment. The evidence is not before us, the appeal being taken on the judgment roll alone.

The principal point urged is that neither the complaint nor the findings state a case entitling the plaintiff to relief. Assuming that the plaintiff claims a "way of necessity," the appellants argue that the facts alleged and found do not authorize the assertion of such right. This conclusion is undoubtedly sound. The complaint shows.

frey, 53 Vt. 219, 38 Am. Rep. 671, where the court held reasonable, and not strict, necessity to be the test).

Passage—and stairways.

No way of necessity can be claimed through a door between a hall rotunda and a barroom, where the barroom has an entrance opening upon the street. *Walker v. Clifford*, 128 Ala. 67, 86 Am. St. Rep. 74, 29 So. 588; *Belser v. Moore*, 73 Ark. 296, 84 S. W. 219.

No way of necessity through a portion of a building exists in favor of the lessee of another portion who has other, though less convenient, ways of access to the portion leased. *Ramirez v. McCormick*, 4 Cal. 245; *Ward v. Robertson*, 77 Iowa, 159, 41 N. W. 603.

In *Stillwell v. Foster*, 80 Me. 333, 14 Atl. 731, it was held that no way of necessity, in favor of the grantee of one of two adjacent stores, existed in the stairway with an entrance from the street, leading to the second story, as against the grantee of the other store, as he could make a stairway upon his own premises.

And in *Quimby v. Straw*, 71 N. H. 160, 51 Atl. 656, it was held that where the owners of adjacent lots built a block covering both lots, having a party wall on the dividing line extending to the top of the second story, the third and fourth stories being rented in common, no way of necessity existed in favor of the grantee of one of such lots over the stairways and passageways in the portion of the building upon the other lot, where, after the continuation, by the other party, of the partition wall through the third and fourth stories, such grantee constructed stairways in his portion of the building between those stories and the street.

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In *Outerbridge v. Phelps*, 13 Jones & S. 555, it was held that where access to an office might be had from a side street no way of necessity could be claimed by a lessee thereof through a connecting building fronting on a more frequented street.

On the other hand, in *Dillman v. Hoffman*, 38 Wis. 575, where a permanent business block of several stories was so built that the owner had access to the upper stories by certain stairways and passages and a hall, and different portions thereof were afterward conveyed to different grantees, it was intimated, although the court found it unnecessary to decide the question, that a mutual easement of necessity existed over such stairs, passages, and halls, although either party might have so altered his part of the building as to have made internal access to the upper stories, but not without such change in the structure and uses of his part as would make it virtually a different building.

And in *Galloway v. Bonesteel*, 65 Wis. 79, 56 Am. Rep. 616, 26 N. W. 262, where a building contained two stories, and a public hall on the second floor, the south store including a stairway which was the only entrance to such hall, it was held that the grantee of one of the stores had a way of necessity in such stairway as against the grantee of the store containing it, where no other entrance from the street could be constructed without destroying the front of the store below and the adaptability of the room above for public meetings.

For an exhaustive discussion of the subject of implication from necessity of easement other than right of way, see note appended to *Miller v. Hoeschler*, 8 L.R.A. (N.S.) 327.

CROSS-APPEALS from a judgment of the Appellate Court, First District, reversing a decree of the Superior Court for Cook County with directions perpetually to enjoin the maintenance of a nuisance on defendant's premises; defendant appealing from so much of the decree as granted the injunction; and plaintiffs appealing from so much as refused to prohibit defendant from keeping any horses on his premises and to compel him to remove an obstruction from a sidewalk. Affirmed.

Statement by Hand, J.:

This was a bill in chancery filed in the superior court of Cook county by the complainants, Oehler and Reichhold, against the defendant, Charles Levy, to restrain Levy

from maintaining a nuisance upon certain premises situated in the city of Chicago which belonged to him and which adjoined property owned by the complainants.

It appears from the pleadings and proofs that the complainants are the owners of a flat building, containing 10 flats, fronting upon South Lincoln street, in the city of Chicago, which flats, with the exception of one which is occupied by Oehler as a residence, are occupied as residences by tenants of the complainants; that the defendant is the owner of two lots immediately north of and adjoining the complainants' flat building, fronting upon the same street; that defendant's south lot is improved with a basement and one-story brick building, in which the defendant keeps the horses, about

The question whether or not any particular stable is a nuisance will often depend upon the character of the neighboring property,—the property "seeking protection." *Hochstrasser v. Martin*, 74 Hun, 338, 26 N. Y. Supp. 410 (there being a henery and privy on plaintiff's own lot, producing offensive odors); *Rodenhauser v. Craven*, 141 Pa. 546, 23 Am. St. Rep. 306, 21 Atl. 774 (carpet-cleaning establishment and stable immediately opposite plaintiff's kitchen and dining room); *Curtis v. Winslow*, supra.

But it is no defense that there is, on defendant's premises, another and smaller stable built prior to plaintiff's house, and which causes as much annoyance as the stable complained of. *Filson v. Crawford*, supra.

Nor is it any defense that the site selected is desirable and convenient, when it appears that other sites not far distant could have been procured at a less cost, and when defendant had been notified, prior to the building of the stable, that plaintiff intended to enjoin him from so doing. *Ibid*.

But in *McKenzie v. Kayler*, 15 Manitoba L. Rep. 660, it was held that the fact that the locality where the livery stable there involved was situated was likely, in a short time, to be given over to business places, was not to influence the decision, when, at the time of the suit, such locality was a residential section; and this was true though the land thereabout had already acquired a speculative value in anticipation of the change.

A stable in the immediate vicinity of a hotel is not necessarily a nuisance. *Shivory v. Streeper*, 24 Fla. 103, 3 So. 865 (injunction to restrain conversion of a store building into a livery stable close by the hotel); *Bonaparte v. Denmead* (Md.) 69 Atl. 697 (a stable accommodating 18 horses, situated close to an apartment house). And see *Harrison v. Brooks*, 20 Ga. 537, and *Coker v. Birge*, supra.

And the same is true of a stable in close proximity to a church. *St. James Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332, infra; *Albany Christian Church v. Wilborn*, 112 Ky. 507, 86 S. W. 285, infra, 17 L.R.A. (N.S.)

A stable is none the less a nuisance because it is conducted as stables are ordinarily conducted, or because it is equipped with all "modern improvements," if, as a matter of fact, it seriously and substantially interferes with complainant in his reasonable enjoyment of life or property. *Drysdale v. Dugas*, 26 Can. S. C. 20 (odors and noises proceeding from a livery stable); *Rapier v. London Tramways Co.* [1893] 2 Ch. 588; *Aldrich v. Howard*, 8 R. I. 246 (noises, smells, and vermin caused by a livery stable situated near plaintiff's house), cited with approval in *Flint v. Russell*, 5 Dill. 151, Fed. Cas. No. 4,876, infra; *Filson v. Crawford*, 23 N. Y. S. R. 335, 5 N. Y. Supp. 892 (noises and smells from livery stable close by plaintiff's dwelling).

And this principle is recognized in *Durfey v. Thalheimer*, 85 Ark. 544, 109 S. W. 519, infra; and *Broder v. Saillard*, L. R. 2 Ch. Div. 692.

There may, however, be found cases containing language not altogether reconcilable with the proposition that a stable, though properly constructed and carefully conducted, may nevertheless be a nuisance.

Thus, in *Harvey v. Consumers' Ice Co.* 104 Tenn. 583, 58 S. W. 318, where the stable overhung plaintiff's cottage and was within 3 feet of his windows, curtaining, as he contended, the peaceable and comfortable enjoyment of his home by offensive odors and noises of both the horses and the stable hands, the jury were held properly instructed to find for defendant if the matters complained of were only such as were ordinarily incident to stables; the court saying: "Whatever is necessary for the proper handling of stock and caring for a stable does not make the owner thereof liable to anybody." Likewise, *Dubos v. Dreyfous*, 52 La. Ann. 1117, 27 So. 663, infra.

And in *Fischer v. Sanford*, 12 Pa. Super. Ct. 435, an action by an adjoining owner against the proprietor of a livery stable for damages caused by odors, noises, and the permeation of urine into plaintiff's cellar, it was said, sustaining a verdict for plaintiff, that the case had been tried on the right theory when the jury were charged

20 in number, used by him in delivering newspapers for several of the companies publishing daily newspapers in the city of Chicago; that the defendant has in his employ 10 or 12 men engaged in delivering said newspapers; that the floor of the building above the basement is about 5 feet above the street level, which floor is reached by a driveway 5 feet wide, commencing at the street and extending to said floor at the front of the building; that the horses are kept in the building above the basement and the wagons in a building upon the adjoining lot; that the horses are harnessed in the building where kept and led or driven down said driveway to the street, where they are hitched to the wagons, which are run out upon the street for that purpose;

that the defendant has suffered the building where said horses are kept to become filthy, and manure and urine to accumulate in and about said building in large quantities, from which noxious and offensive odors are given off, which enter said flat building and contaminate the air therein; that the horses during all hours of the night, in passing to and from the building where they are kept and while standing in their stalls, and by walking, pawing, and kicking, make a great deal of noise; that the men in charge of the horses, while handling the same, use loud, profane, and obscene language; that said driveway obstructs the free passage of pedestrians upon the street in front of the defendant's building; and that the offensive odors given off from the accumulated man-

that plaintiff could not recover from the mere fact of there being a livery stable, but that he had to show "negligence" in its construction or operation.

The rule that, where the "thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so," an injunction will not lie in advance, is applicable to stables, on the ground that a stable is not necessarily a nuisance, and whether any particular stable will prove so remains to be "ascertained from future events." That a stable will prove a nuisance is not to be presumed, and consequently an injunction will not lie to enjoin its erection. *Flint v. Russell*, supra (livery stable proposed to be erected in a residential section); *Keiser v. Lovett*, 85 Ind. 240, 44 Am. Rep. 10 (buggy shed and stable to accommodate one horse, to be erected 25 feet from plaintiff's well and 28 feet from his house); *Curtis v. Winslow*, 38 Vt. 690 (horse barn being located 10 feet from plaintiff's house); *Albany Christian Church v. Wilborn*, 112 Ky. 507, 66 S. W. 285 (a private stable 27 feet distant from a church); *St. James Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332 (the injury to be apprehended from a stable near a church not being, the court said, of a "vast and overwhelming character," as is requisite for the issuance of an injunction); *Hyden v. Terry*, 32 Ky. L. Rep. 1198, 108 S. W. 241 (suit by owner of property 42 feet distant from the proposed stable and on opposite side of street); *Shivery v. Streep*, 24 Fla. 103, 3 So. 865 (suit by proprietor of adjoining hotel to enjoin conversion of a store building into a livery stable); *Stilwell v. Buffalo Riding Academy*, 21 Abb. N. C. 472, 4 N. Y. Supp. 414 (stable with 46 stalls, 90 feet from plaintiff's property); *Kirkman v. Handy*, 11 Humph. 406, 54 Am. Dec. 45 (bill by adjoining owner to restrain completion of livery stable).

The court, in *Aldrich v. Howard*, 7 R. I. 87, 80 Am. Dec. 636, recognizes the force of this principle, though it was there held that, since a demurrer to a bill praying an injunction to enjoin the completion and user of a livery stable in close proximity to

plaintiff's dwelling, store buildings, and hotel admitted the allegations that the stable would prove a nuisance, this rule did not apply.

But in *Shiras v. Olinger*, 50 Iowa, 571, 33 Am. Rep. 138, the rebuilding of a livery stable upon the plan of the former stable was restrained at the suit of an adjoining owner, it having been shown that, by reason of the proximity of the stable doors to plaintiff's dwelling, and of the method of disposing of the manure, the stable had actually proved to be a nuisance. The court distinguished *Flint v. Russell*, supra, on the ground that in the present case it had been demonstrated that the construction of the stable was such as to render it a nuisance; but in *Flint v. Russell* no such demonstration had taken place, and there the fault, if any, would lie in the "mode of keeping" the stable.

Coker v. Birge, 9 Ga. 425, 54 Am. Dec. 347, seems, however, to hold that it is but reasonable to anticipate that a livery stable will be so used as to prove a nuisance. This was an injunction to restrain the erection of a livery stable adjoining plaintiff's hotel and within 65 feet thereof, the bill alleging that, because of unhealthy effluvia, noises, and flies, the stable would prove detrimental to plaintiff's health and ruinous to his hotel business; the case coming up on a demurrer to the bill, it was held the demurrer should not have been sustained. And, on a second appeal (10 Ga. 336), this time from an order dismissing the bill, passed upon the filing of an answer, a similar view was adopted. The bill had been amended to charge the keeping of a jack in the stable and letting him to mares in full view of plaintiff's guests, and the littering of the stalls with leaves with a view to increasing the amount of manure; the answer, while admitting the keeping of the jack in the stable, denied the charges relating thereto, and denied, also, that the stable would prove objectionable, and asserted an intention properly to cleanse and care for the same. It was held that the injunction should have been continued *ad interim*, for plaintiff had no assurance that

ure and urine in and about said building, the continued tramping, pawing, and kicking of the horses kept in the building, and the loud talking, profanity, and obscenity of the employees of the defendant render the flat building of the complainants unhealthy and undesirable as a place in which to live, and thereby the rental value thereof has been greatly reduced.

The trial court held that the complainants were not entitled to an injunction restraining the defendant from keeping horses upon the said premises, on the ground that the building of the defendant had been erected and used as a place for stabling horses prior to the time of the erection of complainants' flat building, but held complainants were entitled to have, and so decreed, the stable upon said premises kept in a sanitary condition, and to have the use of profane and obscene language by defendant's employees while upon the said premises discontinued. The complainants prosecuted an appeal to the appellate court for the first district, and the defendant assigned cross-errors. That court reversed the decree of the superior court upon the ground that the decree was so indefinite that it could not be enforced, and remanded the cause to that court, with directions to enter a decree perpetually enjoining the defendant from maintaining, or permitting to be maintained, on the property of the defendant, a stable for horses in such num-

bers or in such manner as to produce noise sufficient habitually to disturb the sleep or comfort of the dwellers in the building owned by the complainants, or so as to produce odors or gases deleterious to the health or comfort of the dwellers in said building, or to so conduct business on said premises as to cause, by the noise and loud talking incident thereto, habitual disturbance to the health, sleep, or comfort of said dwellers. From that judgment of the appellate court Charles Levy has prosecuted an appeal to this court, and errors and cross-errors have been assigned upon the record by the respective parties to this appeal.

Messrs. Samuel B. King and Jule F. Brower, for plaintiffs:

The stamping of horses' feet in a stable in which horses are kept is as much an element of nuisance which will be enjoined as are odors arising from stables.

Broder v. Saillard, L. R. 2 Ch. Div. 701; Chicago, M. & St. P. R. Co. v. Darke, 148 Ill. 232, 35 N. E. 750; Aldrich v. Howard, 8 R. L. 246; Rodenhausen v. Craven, 141 Pa. 546, 23 Am. St. Rep. 306, 21 Atl. 774; Shiras v. Olinger, 50 Iowa, 571, 33 Am. Rep. 138; Burditt v. Swenson, 17 Tex. 489, 67 Am. Dec. 665; Coker v. Birge, 10 Ga. 336; Dargan v. Waddill, 31 N. C. (9 Ired. L.) 244, 49 Am. Dec. 421; Drysdale v. Dugas, 26 Can. S. C. 20; Filson v. Crawford, 23 N.

defendant would conduct the stable as he asserted he intended to do; the court saying: "If, upon the hearing, the jury should be of the opinion that this stable, with its inmates and attendants, is not a nuisance of itself, but that it may be kept in such a manner as to make it unobjectionable, they will, no doubt, require by their verdict a decree that the defendant shall enter into bond, . . . that it shall be kept in this manner, or, in some other mode, provide adequate protection to the complainant. But this cause may not be tried for several years, and, if the injunction is dissolved, what security has [plaintiff] . . . in the meantime?"

However, in *Harrison v. Brooks*, 20 Ga. 537, it was held that an injunction would not lie to restrain the completion of a livery and sale stable 80 feet distant from complainant's hotel, between which and the stable there was a carriage house; the theory of the decision being that an injunction will lie only to restrain evils "certain and inevitable," and that, instead of it being "certain that this stable, if built as contemplated, would be a nuisance, the probability is that it would not be." And to the same effect is *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505 (injunction by adjoining owner to restrain erection of a private stable). Thus, whatever may have been the effect of the earlier Georgia cases, 17 L.R.A. (N.S.)

these later cases put the state in line with other jurisdictions in holding that it is not ordinarily to be presumed that any particular stable will prove a nuisance.

And since a stable, *qua* stable, is not necessarily a nuisance, the relief granted will quite frequently be, not an absolute injunction against the use of the building as a stable, but an injunction against so using it as to constitute a nuisance. *Kaspar v. Dawson*, 71 Conn. 405, 42 Atl. 78 (regulating the removal of the manure); *Collins v. Cleveland*, 2 Ohio S. & C. P. Dec. 380 (enjoining certain structural features of proposed livery stable); *Dubos v. Dreyfous*, 52 La. Ann. 1117, 27 So. 663 (compelling an alteration in the walls); *Durfey v. Thalheimer*, 85 Ark. 544, 109 S. W. 519 (enjoining the opening of a livery-stable window facing plaintiff's dwelling); *Robinson v. Smith*, 3 Silv. Sup. Ct. 490, 7 N. Y. Supp. 38 (regulating the disposal of the manure); *Gifford v. Hulett*, 62 Vt. 342, 19 Atl. 230; *Trulock v. Merte*, 72 Iowa, 510, 34 N. W. 307 (regulating keeping of manure); *McKenzie v. Kayler*, 15 Manitoba L. Rep. 660; *Rapier v. London Tramways Co.* [1893] 2 Ch. 588; *Broder v. Saillard*, L. R. 2 Ch. Div. 692.

But, where the fault lies in the construction and location of the stable, and not in the mode of its keeping, the injunction must

Y. S. R. 335, 5 N. Y. Supp. 882; Robinson v. Smith, 3 Silv. Sup. Ct. 490, 7 N. Y. Supp. 38; Pickard v. Collins, 23 Barb. 445; Gemppe v. Bassham, 60 Ill. App. 84.

Noise in a residence district, which will disturb the sleep of the inhabitants in an adjoining building, is a nuisance which may be enjoined.

Chicago, M. & St. P. R. Co. v. Darke, 148 Ill. 226, 35 N. E. 750; Chicago, P. & St. L. R. Co. v. Nix, 137 Ill. 141, 27 N. E. 81; Curran v. McGrath, 67 Ill. App. 566; Wente v. Commonwealth Fuel Co. 232 Ill. 526, 83 N. E. 1049.

Where the facts by which the existence of a nuisance is established are clearly proved, relief will be granted by injunction, although a remedy at law has not been sought.

Wente v. Commonwealth Fuel Co. supra; Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218.

As population surrounds a thing which is not a nuisance *per se*, but becomes a nuisance only because of the fact that population moves to it, the business which thus becomes a nuisance must vacate.

Lafin & R. Powder Co. v. Tearney, 131 Ill. 322, 7 L.R.A. 262, 19 Am. St. Rep. 34, 23 N. E. 389; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Bispham, Eq. 7th ed. § 442; Clancy v. Flusky, 187 Ill. 605, 52 L.R.A. 279, 58 N. E. 594; Tipping v. St. Helen's Smelting Co. L. R. 1 Ch. 66; Mercer

be absolute. Burditt v. Swenson, 17 Tex. 489, 67 Am. Dec. 665.

A municipal ordinance operating to prevent the erection or use of a livery stable, and which is otherwise void, cannot be upheld on the theory that a livery stable is necessarily a nuisance. St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470 (disapproving State ex rel. Russell v. Beattie, 16 Mo. App. 131, where the ordinance in question was sustained); Crowley v. West, 52 La. Ann. 526, 47 L.R.A. 652, 78 Am. St. Rep. 355, 27 So. 53; Phillips v. Denver, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902.

And, because of the rule that courts of equity do not interfere at the suit of an individual "to enforce by injunction the observance of city ordinances prohibiting the erection of buildings not nuisances *per se*," the erection of a stable in violation of a municipal ordinance will not be enjoined. King v. Hamill, 97 Md. 103, 54 Atl. 625; Gallagher v. Flury, 99 Md. 181, 57 Atl. 672, supra; Sheldon v. Weeks, 51 Ill. App. 314 (livery stable in residential section).

The rule is otherwise where, in addition to the unlawfulness of the erection, special injury is shown. Caskey v. Edwards, 128 Mo. App. 237, 107 S. W. 37; Mason v. Deitering (Mo. App.) 111 S. W. 862.

Other cases may be found, in addition to those here collected, which, while turning 17 L.R.A. (N.S.)

County v. Harrodsburg, 114 Ky. 851, 71 S. W. 928; Drysdale v. Dugas and Filson v. Crawford, supra; Brady v. Weeks, 3 Barb. 157; Taylor v. People, 6 Park. Crim. Rep. 353; Kissel v. Lewis, 156 Ind. 233, 59 N. E. 478; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 9 L.R.A. 737, 25 Am. St. Rep. 595, 20 Atl. 900; King v. Morris & E. R. Co. 18 N. J. Eq. 397; Lohmiller v. Indian Ford Water Power Co. 51 Wis. 683, 8 N. W. 601; Joyce, Nuisances, § 49.

Mr. Zach Hofheimer, for defendant:

To be a nuisance, defendant's place must materially lessen the value of plaintiffs' property, must be deleterious to the health, and must be unreasonably obnoxious.

Bispham, Eq. §§ 438, 439; 21 Am. & Eng. Enc. Law, 2d ed. pp. 684, 692; Chicago v. Stratton, 162 Ill. 501, 35 L.R.A. 84, 53 Am. St. Rep. 325, 44 N. E. 853; Lafin & R. Powder Co. v. Tearney, 131 Ill. 326, 7 L.R.A. 262, 19 Am. St. Rep. 34, 23 N. E. 389; Gallagher v. Flury, 99 Md. 188, 57 Atl. 672; St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470.

The nuisance must first be found to exist, by a jury. Equity will not interfere unless the nuisance and the resulting injury are clearly shown by the evidence.

1 High, Inj. 3d ed. §§ 740-785; 2 Beach, Inj. §§ 104, 1064; Oswald v. Wolf, 129 Ill. 200, 21 N. E. 839; Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; Robb v. LaGrange, 158 Ill. 21, 42 N. E. 77;

upon points not relevant here, in their argument assume as established the proposition that a stable is not necessarily a nuisance. Lowell v. Archambault, 189 Mass. 70, 1 L.R.A. (N.S.) 458, 75 N. E. 65; White v. Kenney, 157 Mass. 12, 31 N. E. 654; Chicago v. Stratton, 162 Ill. 494, 35 L.R.A. 84, 53 Am. St. Rep. 325, 44 N. E. 853; Roth v. District of Columbia, 16 App. D. C. 323; Metropolitan Sav. Bank v. Mansion, 87 Md. 68, 39 Atl. 90; Pickard v. Collins, 23 Barb. 444; Coon v. Board of Public Works (Cal. App.) 95 Pac. 913.

This note does not purport to cover all cases wherein the subject-matter of the controversy was a stable, but is confined to cases involving the law of nuisance as applied to stables, and then only to stables used, or intended to be used, for horses. Nor is the note concerned with the criminal law.

For power of municipal corporations to define, prevent, and abate nuisances, see note to Grossman v. Oakland, 36 L.R.A. 693.

For liability of landlord to third persons for condition of premises in possession of tenant, see note to Lee v. McLaughlin, 26 L.R.A. 197.

For municipal power over nuisances affecting safety, health, and personal comfort, see note to Harrington v. Providence, 38 L.R.A. 305.

the superior court to enter a decree requiring the appellant to remove the driveway from across the sidewalk in front of his premises, which connected his stable with the street. The appellees did not specifically pray for such relief, and it is not averred in the bill or shown by the proof that the appellees are specially damaged by reason of the construction of said driveway. It has often been decided to be the law of this state that, for an obstruction to streets not resulting in special injury to the individual, the public only can complain. *McDonald v. English*, 85 Ill. 232; *Chicago v. Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598; *Barrows v. Sycamore*, 150 Ill. 588, 25 L.R.A. 535, 41 Am. St. Rep. 400, 37 N. E. 1096; *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305; *Hamilton v. Semet Solvay Co.* 227 Ill. 501, 81 N. E. 538.

It is also assigned as cross-error that the appellate court erred in not directing the superior court to enter a decree enjoining the appellant from keeping any horses in his building or upon the premises adjoining the property of the appellees. The nuisance created by the appellant consisted in the manner of the use of his premises; and, while the direction to the superior court by the appellate court, when incorporated in the decree of that court, practically will prohibit the appellant from maintaining his stable upon the said property, theoretically it does not. The appellate court was not, as it states in its opinion, prepared to hold as a matter of law—and neither is this court—that a stable may not be kept in a residence district of a large city in such manner that it would not be regarded as a nuisance, and for that reason it refused to direct the superior court to enter a decree enjoining the appellant from keeping any horses in his building or upon his premises. In this we think there was no error.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

KENTUCKY COURT OF APPEALS.

LOWRY & GOEBEL, Appts.,

v.

J. D. DYE, Assignee, etc., of C. H. Hitch,
et al.

(33 Ky. L. Rep. 573, 110 S. W. 833.)

Assignment — fraudulent purchase — title.

Goods procured by an insolvent merchant by fraudulent representations as to his financial standing, without any intention of paying for them, do not pass by his assign-

ment for the benefit of creditors, or to his assignee in bankruptcy.

(May 26, 1908.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Mason County in defendants' favor in an action brought to recover possession of certain goods which had been fraudulently obtained from plaintiffs by defendants' assignor. Reversed.

The facts are stated in the opinion.

Messrs. Worthington & Cochran for appellants.

Barker, J., delivered the opinion of the court:

The appellants, Lowry & Goebel, are wholesale merchants in Cincinnati, Ohio. In September, October, and November of 1906 the appellee C. H. Hitch purchased certain goods from them, which amounted in the aggregate to \$360.68. In November, 1906, Hitch made a general assignment of all of his property, for the benefit of his creditors, to J. D. Dye. Thereupon the appellants instituted this action in the Mason circuit court, claiming that Hitch knew he was insolvent at the time he purchased the goods, and had no intention of paying for them, but that the purchase was fraudulently made for the purpose of cheating the appellants of their property. Without going into the details of the petition, it may be stated that it contains all of the necessary allegations to constitute a petition for claim

Case Note. — Right of seller to reclaim goods as against assignee for creditors or trustee in bankruptcy of buyer, who procured them by false representations.

Although there is some conflict among the cases as to what constitutes sufficient fraud on the part of an insolvent purchaser of goods to permit the seller to rescind the contract and retake the goods,—a question, however, with which this note is not concerned,—it is universally recognized that, if the fraud is of such a nature as to permit the seller to retake them from the purchaser, he may also rescind the contract and retake them from an assignee for the benefit of creditors or a trustee in bankruptcy of the purchaser, if in the meantime they have fallen in such assignee's or trustee's hands, since they stand in no better relation to the title to the goods than did the assignor, being, as is said in some of the cases, not a bona fide purchaser for value.

The following cases support this proposition: *Cohn Bros. v. Stringfellow*, 100 Ala. 242, 14 So. 286; *Peninsular Stove Co. v. Ellis*, 20 Ind. App. 491, 51 N. E. 105; *Longdale Iron Co. v. Swift's Iron & Steel Works*, 91 Ky. 191, 15 S. W. 183; *Crozier v. Cromie*, 14 Ky. L. Rep. 858; *Crozier v. Johnson*, 14

and delivery of personal property under the provisions of the Code regulating this matter. The assignee, J. D. Dye, was made a party defendant. He answered, denying all the allegations of the petition as to the fraud, and claimed the right to hold the property under the deed of assignment to him. In a second paragraph he denied that all of the goods came into his hands under the assignment, but admitted that \$252.67 worth came into his hands, and that he held them as assignee. Afterwards the creditors of C. H. Hitch took such procedure in the Federal court as was necessary to have him adjudged an involuntary bankrupt, and J. D. Dye, his assignee under the deed of assignment, was appointed assignee in bankruptcy. Thereupon J. D. Dye, as assignee in bankruptcy, tendered an amended answer, setting up the bankruptcy proceedings in bar of the jurisdiction of the state court to proceed further with this action. The motion to file this amended answer, on the objection of the plaintiffs, was overruled by the court. Afterwards the case came on regularly for trial on the issues joined, and, a jury being impaneled, the evidence was heard. At the close of all the testimony, the court sustained the defendants' (appellees') motion for a peremptory instruction to the jury to find for them, which was done; and of this ruling the plaintiffs (appellants) now complain.

We feel constrained by our views of the merits of this case to disagree with the circuit judge in his conclusion on the facts arising from the evidence adduced. C. H. Hitch had purchased the stock of goods belonging to one C. A. Hainline, in Maysville, Kentucky, in August, 1906. Afterwards he visited Cincinnati and called on Lowry & Goebel, from whom Hainline had purchased goods. It is claimed by appellants that he made certain representations to them as to his solvency which induced them to extend to him the necessary credit, thus enabling him to purchase the goods involved here without prepayment of the price. Three witnesses testify that he stated to the credit clerk of appellants that he had inherited \$3,000; that he paid \$1,500 of it cash for Hainline's stock of goods, and had a thousand of it remaining intact with which to do business; and that he was not indebted to anyone. We do not understand that Hitch contends that these statements were true. He simply denies that he made them. As a matter of fact, the record shows indubitably that he was insolvent at the time he bought the goods. It is true he says he was solvent, but was unable to state the details of his financial condition at that time. In three months after he opened up business he made an assignment. He could have had no capital at the time he commenced. He says that he was solvent at the time

Ky. L. Rep. 858; *Wright v. Geo. W. McAlpin Co.* 18 Ky. L. Rep. 226, 35 S. W. 1039; *Ingersoll v. Barker*, 21 Me. 474; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 10 L.R.A. (N.S.) 245, 66 Atl. 390; *Ratliffe v. Sangaton*, 18 Md. 383; *Kansas Moline Plow Co. v. Wayland*, 81 Mo. App. 305; *Farley v. Lincoln*, 51 N. H. 577, 12 Am. Rep. 182; *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259; *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404; *American Sugar Ref. Co. v. Fancher*, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 206; *Van Neste v. Conover*, 20 Barb. 547; *Levy v. Carr*, 85 Hun. 289, 32 N. Y. Supp. 1023, affirmed without opinion in 158 N. Y. 675, 52 N. E. 1124; *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. 892; *Knowles v. Lord*, 4 Whart. 500, 34 Am. Dec. 525; *Artman v. Walton*, 34 Phila. Leg. Int. 13; *Belding Bros. v. Frankland*, 8 Lea, 67, 41 Am. Rep. 630; *Williams v. Kohn* (Tex. Civ. App.) 28 S. W. 920; *Wertheimer-Swartz Shoe Co. v. Faris* (Tenn. Ch. App.) 46 S. W. 336; *Goodyear Rubber Co. v. Schreiber*, 29 Wash. 94, 69 Pac. 648; *Lee v. Simmons*, 65 Wis. 523, 27 N. W. 174; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. 101; *Purviance v. Union Nat. Bank*, Fed. Cas. No. 11,475; *Davis v. Stewart*, 3 McCrary, 174, 8 Fed. 803; *Re Hamilton Furniture & Carpet Co.* 117 Fed. 774; *Re Mertens*, 131 Fed. 507; *Openhym v. Blake*, 157 Fed. 536; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993.

In a great many cases where goods fraudulently purchased were recovered from an assignee for the benefit of creditors or a trustee in bankruptcy the question was never raised as to whether or not such assignee or trustee had a better title than had the vendee, the question generally being whether there was sufficient fraud to permit a recovery. These cases, therefore, are only indirect authority for the question here under discussion. Among these cases are *Richelieu Hotel Co. v. Miller*, 50 Ill. App. 390; *Coursey v. Coe*, 24 App. Div. 271, 48 N. Y. Supp. 495; *Re Weil*, 111 Fed. 897; *Re Patterson*, 125 Fed. 562; *Haywood Co. v. Pittsburgh Industrial Iron Works*, 163 Fed. 799; *Montgomery v. Bucyrus Mach. Works*, 92 U. S. 257, 23 L. ed. 656.

The only case found apparently holding to the contrary is *Wickham v. Martin*, 13 Gratt. 427, where it was held that a trustee for the benefit of creditors to whom goods had been conveyed by an insolvent merchant, and which the latter had purchased without intending to pay for them, was a bona fide purchaser for value, and therefore protected against the claim of the original vendor.

Effect of bankruptcy proceedings upon prior action to rescind sale for fraud, see case note to *Linstroth Wagon Co. v. Ballew*, 8 L.R.A. (N.S.) 1204.

What amounts to an adverse holding by third persons of property acquired from bankrupt, see case note to *Morning Teleg. Pub. Co. v. S. B. Hutchinson Co.* 8 L.R.A. (N.S.) 1232.

he commenced, but broke afterwards, and attributes his failure to the expense of conducting his business. Taking his own figures for it,—the clerk hire, store rent, and advertising,—he could not have laid out more than \$450 during the three months intervening between his beginning as a merchant and his bankruptcy. He denies that he made any representations as to his credit to Lowry & Goebel at all, and states that they did not ask his financial standing. Of course, it is possible that these wholesale merchants might open up an account with an unknown man without making any inquiry as to his financial standing; but such procedure on their part would be so unusual that it requires little testimony to convince us that it was not true. Hitch's statements as to these dubious facts are unsupported by any other testimony, and they are overwhelmingly disproved by three witnesses. If Hitch knew he was insolvent, and fraudulently purchased the goods without an intention of paying for them, the title remained in appellants, and therefore it did not pass under the deed of assignment, or to the assignee in bankruptcy. *Bradberry v. Keas*, 5 J. J. Marsh. 446; *Dietz v. Sutcliffe*, 80 Ky. 650; *Bridgford v. Barbour*, 80 Ky. 529; *Bank of Commerce v. Payne*, 86 Ky. 446, 8 S. W. 856; *Longdale Iron Co. v. Swift's Iron & Steel Works*, 91 Ky. 191, 15 S. W. 183; *Linatroth Wagon Co. v. Bal-
lew*, 8 L.R.A.(N.S.) 1204, 79 C. C. A. 470, 149 Fed. 960.

It results from this conclusion as to the value of the evidence adduced that the trial court erred in awarding a peremptory instruction to the jury to find for the defendants, and the judgment is therefore reversed for a new trial consistent with the views herein expressed.

KENTUCKY COURT OF APPEALS.

CLEVELAND, CINCINNATI, CHICAGO,
& ST. LOUIS RAILWAY COMPANY,
Appt.,

v.

LOUISVILLE TIN & STOVE COMPANY.

(33 Ky. L. Rep. 924, 111 S. W. 358.)

Carrier — unfit car — liability.

A railroad company cannot escape liability for injury through rust to metal loaded into one of its cars, by the facts that the car was sent to the shipper loaded with eoda ash, the nature of which is to cause the boards of the car to shrink and expose its contents to the weather and to cause metal to rust, and that he reloaded it with the metal without exercising reasonable care

to ascertain whether or not it was in fit condition for the intended use.

(June 20, 1908.)

APPEAL by defendant from a judgment of the Second Division of the Common Pleas Branch of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for injury to property while in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Messrs. Humphrey & Humphrey and Alexander P. Humphrey, Jr., for appellant:

The shipper is the agent of the consignee, for the purpose of shipping.

Smith v. Lewis, 3 B. Mon. 229; 5 Am. & Eng. Enc. Law, p. 368.

A railroad company is not liable for latent defects in a car which a shipper selects in which to transport his goods.

4 *Elliott, Railroads*, § 1480; 2 *Hutchinson, Carr.* § 508; *Harris v. Northern Indiana R. Co.* 20 N. Y. 232; *Densmore Commission Co. v. Duluth, S. S. & A. R. Co.* 101 Wis. 563, 77 N. W. 904; 6 *Cyc. Law & Proc.* p. 441; *Frohlich v. Pennsylvania Co.* 138 Mich. 116, 110 Am. St. Rep. 310, 101

Case Note. — Duty of shipper to inspect car.

Very little direct authority can be found upon this question, though it may be laid down as a clearly established rule of law that no duty is imposed upon a shipper to inspect the car furnished him by the carrier for the transportation of his goods, unless he has, by his own acts, or by special contract, assumed the responsibility for the selection of the car.

Some authority for this proposition is to be found in *Cincinnati, N. O. & T. P. R. Co. v. N. K. Fairbanks & Co.* 33 C. C. A. 611, 62 U. S. App. 231, 90 Fed. 467, in which the carrier sought to avoid liability for loss due to a defective car, by the fact that the car was selected by the shipper. The court, in refusing to listen to this contention, laid down the rule that it was the duty of the carrier to furnish fit and suitable cars for the carriage of goods, and that it could not avoid responsibility for a failure to perform such duty by devolving upon the shipper the duty of inspecting or selecting the cars in which his goods were to be shipped.

And in *Sloan v. St. Louis, K. C. & N. R. Co.* 58 Mo. 220, the court said that the shipper was not to judge whether the cars furnished him were sufficient, but that the carrier was the sole judge of the sufficiency of the vehicles in which it was proposed to carry freight. And this language was quoted with approval in *Potts v. Wabash, St. L. & P. R. Co.* 17 Mo. App. 394.

So, in *Harris v. Northern Indiana R. Co.*

N. W. 223, 4 A. & E. Ann. Cas. 1140; Schwartz v. Erie R. Co. 32 Ky. L. Rep. 777, 106 S. W. 1188.

Mr. James Quarles, for appellee:

The appellant rested under the common-law liability of a common carrier.

Ky. Const. § 196; Elliott, Railroads, § 1506.

The carrier is bound to furnish sound and suitable cars for transportation of freight, and is liable for any injury resulting from the failure so to do.

Elliott, Railroads, § 1478; Hutchinson, Carr. 3d ed. § 497.

There was no such "selection" of the car by the consignor in this case as would relieve the appellant of liability.

Hutchinson, Carr. § 508.

Hobson, J., delivered the opinion of the court:

The Louisville Tin & Stove Company brought this suit against the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company, alleging in its petition that on January 8, 1907, there was delivered to the defendant, at Muncie, Indiana, in good condition, a car load of oil cans which it agreed, for hire, safely to transport and deliver to the plaintiff in Louisville in good condition,

but that, in violation of its agreement, the defendant loaded the cans in a defective and leaky car, by reason of which they were exposed to the elements, became wet and rusted, and thereby rendered unmarketable, to the plaintiff's damage in the sum of \$258. The defendant filed an answer to the petition in two paragraphs. The first paragraph was afterward withdrawn. The court sustained a demurrer to the second paragraph, and, there being a stipulation filed that the plaintiff's damages amounted to \$258, the court entered judgment in favor of the plaintiff for that sum, and the railroad company appeals.

The only question to be determined on the appeal is the sufficiency of the second paragraph of the answer to which the court sustained a demurrer. It is in these words: "Defendant, further answering, states that the car mentioned in the petition had been filled with soda ash, a chemical, the action of which causes boards to shrink and metals to rust; that defendant had delivered said car to another railway company, to wit, the Muncie Belt Railway, and that the Muncie Belt Railway had delivered said car to the Muncie & Western Railway Company, which latter company had delivered said car to the factory of Ball Brothers,

20 N. Y. 232, referred to in CLEVELAND, C. C. & ST. L. R. CO. v. LOUISVILLE TIN & STOVE CO., judgment was for the shipper for a loss occasioned by defects in a car, though he selected the car and the defects would have been patent to anyone entering the same, upon the ground that the shipper was not bound to enter the car, but that he had a right to presume that the company would not offer him cars with such defects.

And in Hunt v. Nutt (Tex. Civ. App.) 27 S. W. 1031, it was held that a railroad company was not relieved from liability for failure to provide a suitable car, by the fact that the shipper examined the car and determined as to its fitness to transport his property.

So, in Gardner v. New Orleans & N. E. R. Co. 78 Miss. 640, 29 So. 469, the court refused to sustain a peremptory charge for the defendant, although it appeared that the most casual inspection of the roof of the car must have disclosed its unsuitableness.

That the duty to inspect cars is upon the carrier rather than upon the shipper is supported, also, by the following cases in which the carrier was held liable for defective cars, though by a special contract the shipper stipulated that he had examined the car and found the same safe and suitable: Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Lake Erie & W. R. Co. v. Holland, 162 Ind. 406, 63 L.R.A. 948, 69 N. E. 138; Jones v. St. Louis & S. F. R. Co. 115 Mo. App. 232, 91 S. W. 158; Welsh v. Pittsburg, Ft. W. & C. R. Co. 10 Ohio St. 65, 75 Am. Dec. 490; Wallingford v. Columbia & G. R. 17 L.R.A. (N.S.)

Co. 26 S. C. 258, 2 S. E. 19; Louisville & N. R. Co. v. Dies, 91 Tenn. 177, 30 Am. St. Rep. 871, 18 S. W. 266; Leonard v. Whitcomb, 95 Wis. 646, 70 N. W. 817; Nevius v. Chicago, St. P. M. & O. R. Co. 124 Wis. 313, 109 Am. St. Rep. 935, 102 N. W. 489.

So, in the following cases in which an opposite conclusion was reached to that of the cases just cited, and which upheld the validity of special contracts by which the carrier relieved himself of liability for defective cars, it was assumed, in the absence of such a special contract, to be the duty of the carrier to furnish safe and suitable cars, and that therefore there would be no duty upon the shipper to inspect the same: Williams v. Central R. Co. 117 Ga. 830, 43 S. E. 980; Central R. Co. v. James, 117 Ga. 832, 45 S. E. 223; Ragsdale v. Southern R. Co. 119 Ga. 627, 46 S. E. 832.

And the following cases, in which it was held that the carrier is not exempted from liability for furnishing unsuitable cars by the fact that the shipper knew them to be defective and used them, would seem to preclude the idea that any duty is devolved upon the shipper to inspect a car offered for the transportation of his goods: Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827, affirming 102 Mass. 557; St. Louis, I. M. & S. R. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802; Potts v. Wabash, St. L. & P. R. Co. supra; Mason v. Missouri P. R. Co. 25 Mo. App. 473; Paddock v. Missouri P. R. Co. 60 Mo. App. 328; Forrester v. Southern R. Co. 147 N. C. 553, 61 S. E. 524.

near Muncie, Indiana, upon a private switch of said Ball Brothers; that said Ball Brothers unloaded the soda ash from said car, and, without the knowledge or consent of defendant, placed the cans of which complaint is made in the petition in said car; that said car, having been loaded with soda ash, was not in fit condition to carry any sort of metal; that said Ball Brothers knew, or by the exercise of reasonable care could have known, that said car was in no condition for said shipment; that said car was delivered by said Ball Brothers to the Muncie & Western Railway and by the latter delivered to the Muncie Belt Railway, and by the Muncie Belt Railway delivered to the defendant; that the defendant had no power or right to inspect the contents of said car, or to inspect said car for any other purpose than to determine whether its running gear was in a sufficiently safe condition to carry over its road."

The railroad as a common carrier is an insurer of the goods intrusted to it for transportation, with certain exceptions not material here, and, for its own protection, must provide proper cars. The owner is not required to see that the cars are suitable or safe. He is not required to show negligence on the part of the railway company. All that he is required to show is the loss of his goods. No defect in the vehicles can excuse the common carrier from its common-law liability. *Hutchinson, Carr. § 497; Elliott, Railroads, § 1478.* The answer does not deny the allegations of the petition as to the defectiveness of the car. It was the duty of the company to furnish a car which would protect the goods from the elements. The defense set up in answer is in effect that Ball Brothers, by ordinary care, could have known that the car was defective; but it is not shown in the answer that Ball Brothers selected the car or assumed to be responsible for its condition. There are cases holding that, where the shipper selects the car himself, trusting to his own judgment, the railroad company is not responsible if he selects a car that is insufficient; but that is not this case. It is not alleged that Ball Brothers selected the car; nor is it alleged that the car was not delivered to Ball Brothers for the purpose of the cans being loaded upon it. In *Harris v. Northern Indiana R. Co.* 20 N. Y. 232, the shipper selected the car himself. In *Densmore Commission Co. v. Duluth, S. S. & A. R. Co.* 101 Wis. 563, 77 N. W. 904, the shipper fixed the car to suit himself. In *Frohlich v. Pennsylvania Co.* 138 Mich. 116, 110 Am. St. Rep. 310, 101 N. W. 223, 4 A. & E. Ann. Cas. 1140, the shipper had supervision of the loading, with power to reject any car unfit for loading glass, and 17 L.R.A. (N.S.)

kept inspectors whose duty it was to select and inspect the cars before the glass was loaded. In these cases the railroad company was held not liable for any defect in the car. But ordinarily, to release the carrier from his common-law liability, there must be a distinct agreement by the plaintiff to assume the risk of the sufficiency of the car, or facts must be shown warranting the conclusion that he did not leave this matter for the carrier to determine, but assumed to determine it himself. *Pratt v. Ogdensburg & L. C. R. Co.* 102 Mass. 557. It was not the duty of Ball Brothers to inspect the car, or to exercise care to know whether it was in condition for the goods to be shipped in it; but they had a right to put the goods in the car assuming that the railroad company would not have directed this to be done unless the car was suitable. It is not charged that Ball Brothers were not authorized to place the cans in the car. The fact that it was done without the defendant's knowledge or consent does not show that the initial carrier did not authorize it, and it was the duty of the defendant to keep the goods safely after it received them.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EDITH ELIZA DILLAWAY BLOUNT

v.

FRANK HENRY DILLAWAY et al., Appts.

(199 Mass. 330, 85 N. E. 477.)

Compromise — will contest — consideration.

1. The promise by one who in good faith intends to contest a will for a cause which does not appear to him to be vexatious or frivolous, not to do so, is a sufficient consideration for a promise to let him share in the estate, without the necessity of showing that the promisor had reasonable cause to believe that he had a fair chance of succeeding in the contest.

Contract — division of estate.

2. A contract between the next of kin of a decedent, that they will each have a certain portion of the estate, does not amount to an agreement to divide the estate without probating the will.

Note. — The question as the validity of a contract not to contest the probate of a will is considered in a case note to *Grochowski v. Grochowski*, 13 L.R.A. (N.S.) 484, with respect to both an objection based on public policy and an objection based on lack of consideration.

Specific performance — contract to share estate.

3. Equity has jurisdiction specifically to enforce an agreement between next of kin to share the estate in certain proportions, in compromise of a threat by one of them to contest the validity of the will.

(June 16, 1908.)

APPPEAL by defendants from a judgment of the Superior Court for Suffolk County in complainant's favor in a suit to compel specific performance of an agreement to permit complainant to share in the estate of Georgianna L. Dillaway, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Leonard G. Roberts and Hugh D. McLellan, for appellants:

Forbearance to prosecute an invalid claim is not a valid consideration for a promise unless the promisee, as a reasonable person, believes that she has a fair chance of succeeding in the contest.

Palfrey v. Portland, S. & P. R. Co. 4 Allen, 55; *Ware v. Morgan*, 67 Ala. 461; *Fuller v. Green*, 64 Wis. 159, 54 Am. Rep. 600, 24 N. W. 907; *Tucker v. Ronk*, 43 Iowa, 80; *Bellows v. Sowles*, 55 Vt. 391, 45 Am. Rep. 621; *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84; *Harriman, Contr.* 2d ed. §§ 112-114; *Phillips v. Pullen*, 50 N. J. L. 439, 14 Atl. 222; *Galusha v. Sherman*, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495; *Gering v. School Dist.* 76 Neb. 219, 107 N. W. 250; *Pitkin v. Noyes*, 48 N. H. 294, 2 Am. Rep. 218, 97 Am. Dec. 615; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449.

Mr. Elisha Greenhood, for appellee:
Equity had jurisdiction of this bill.

Stapleton v. Stapleton, 1 Atk. 2; *Leach v. Fobes*, 11 Gray, 506, 71 Am. Dec. 732; *Abbott v. Gaskins*, 181 Mass. 501, 63 N. E. 933; *Fulton v. Smith*, 27 Ga. 413; *Wycherly v. Wycherly*, 2 Eden, 175; *Pullen v. Ready*, 2 Atk. 587; *Supreme Assembly, R. S. G. F. v. Campbell*, 17 R. I. 402, 13 L.R.A. 601, 22 Atl. 307; *Baker v. Pyatt*, 108 Ind. 61, 9 N. E. 112; *Smith v. Smith*, 36 Ga. 191, 91 Am. Dec. 761; *Willey v. Hodge*, 104 Wis. 81, 76 Am. St. Rep. 852, 80 N. W. 75; *Neale v. Neale*, 1 Keen, 672; *Strange v. Harris*, 3 Bro. Ch. 365; *Blake v. Blake*, 2 Sch. & Lef. 26; *Beaufort v. Berty*, 1 P. Wms. 703; *Yare v. Harrison*, 2 Cox, Ch. Cas. 377; *Nathan v. Nathan*, 166 Mass. 294, 44 N. E. 221; *Seaman v. Colley*, 178 Mass. 478, 59 N. E. 1017; *McCaa v. Woolf*, 42 Ala. 389; *Amis v. Cameron*, 55 Ga. 449; *Morris v. Halbert*, 36 Tex. 19; *Glasgow v. Martin*, 1 Strobb. L. 89; *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90; *Parker v. Moore*, 59 N. H. 454; *Pritchard v. Norwood*, 153 17 L.R.A. (N.S.)

Mass. 539, 30 N. E. 80; *Phillips v. Phillips*, 8 Watts, 195; *Louisville & N. R. Co. v. Sanders*, 19 Ky. L. Rep. 1941, 44 S. W. 644.

Mere mutual affection between brother and sister and the desire to avoid quarrels and a will contest are sufficient consideration for a compromise agreement.

Williams v. Williams, L. R. 2 Ch. 294; *Westby v. Westby*, 2 Drury & War. 503.

The threat to exercise the legal right, as heir, to contest the will, and the agreement to give up that right, were sufficient consideration for the contract.

Leach v. Fobes, supra; *Bunel v. O'Day*, 125 Fed. 317.

Loring, J., delivered the opinion of the court:

This is a bill brought by a sister against her brother and against the executor of the will of their mother. The plaintiff seeks to establish an agreement of compromise between her brother and herself as to the will and property of their mother, and to have the executor directed to pay to her one third of the residue when his accounts are settled in the probate court and the time for distribution shall have come.

The mother died at 1:30 A. M. on Friday, July 28, 1905, at the City Hospital. There had been an estrangement between the plaintiff and her mother for some ten years. The brother lived in New York. He reached Boston in the afternoon of the day of his mother's death, and went directly to the house of the plaintiff in Everett. The judge found that, on the morning of the 29th, the defendant Dillaway told the plaintiff there was a will leaving him everything and her nothing. This was the only knowledge she had of the contents of the will. They made the agreement of compromise on the evening of that day. By this agreement the plaintiff promised not to contest the will, and the defendant promised that he would share with her, she taking one part and he two parts of the estate.

The mother was buried on Sunday. After the funeral the brother told his sister that he would not keep his agreement. The will was admitted to probate on September 28th, without opposition, and this bill was filed on November 14th.

The cause was heard on the merits, the evidence being taken by a commissioner. The judge made findings of the material facts and ordered a decree to be entered for the plaintiff. In pursuance of that order, a decree was entered declaring that, by virtue of the agreement of compromise, the plaintiff was entitled to one third of all moneys coming to the defendant in addition to one third of the legacy of \$5 bequeathed to her; and directing the defendant Wheeler, as

executor, to make said payments after the settlement of his final account in the probate court. It was further provided in said decree that the plaintiff should have the same standing in the probate proceedings that she would have had if the plaintiff and defendant had been residuary legatees.

The case is now before us on appeal by both defendants.

1. The first contention of the appellants is that the offer of the defendant was, by its terms, to ripen into a contract of compromise on the plaintiff's not contesting the probate of the will; that it was withdrawn before the time for such an acceptance came, and therefore no contract ever came into existence. But the plaintiff testified that, when the defendant made the offer to her, she told him that she would not contest the will. The judge, in terms, found that to be true. He found that "the plaintiff in good faith stated to the defendant, her brother, that she would contest the will on the ground of undue influence and want of sanity, and, in consideration of his agreement to share the estate with her, promised not to make any contest." After a careful examination of the whole evidence, we see no reason to overturn that finding.

2. The second contention is that on the evidence there was, as matter of law, no valid consideration because it was not proved that the plaintiff had a fair chance of success in contesting the will. Their argument in support of this contention is that forbearance to prosecute an invalid claim is not a valid consideration for a promise unless "the promisee as a reasonable person believed that she had some fair chance of succeeding in the contest." As we have already said, the judge found that the plaintiff "acted in good faith" in stating that she would contest the will, and in agreeing not to contest it, in consideration of his agreement to share with her. The judge further ruled "that she is not required to go further and prove that there was a doubtful question as to sanity or undue influence in order to establish a valid consideration. She had the right, acting in good faith, to go to court and make a contest; and she promised not to exercise that right, and did not exercise it."

There are decisions in other jurisdictions for the position taken by the appellants. A collection of the decisions to that effect may be found in Wald's *Pollock on Contracts*, 3d Am. ed. 214, note 23. But, since the decision of this court in *Prout v. Pittsfield Fire Dist.* 154 Mass. 450, 28 N. E. 679, those cases are not law in this commonwealth, and the earlier case of *Palfrey v. Portland, S. & P. R. Co.* 4 Allen, 55, must be taken to be 17 L.R.A. (N.S.)

modified accordingly. This court, in *Prout v. Pittsfield Fire Dist.*, adopted the rule finally established in England in *Miles v. New Zealand Alford Estate Co.* L. R. 32 Ch. Div. 266, in which Cook v. Wright, 1 Best & S. 559, *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449, *Ockford v. Barelli*, 20 Week. Rep. 116, and the doubts thrown on those decisions by Lord Esher, M. R., in *Ex parte Banner*, L. R. 17 Ch. Div. 480, 490, were considered at length. The rule there laid down was stated on page 291 with accuracy by Lord Bowen to be: "If an intending litigant bona fide forbears a right to litigate, . . . he does give up something of value." He added, speaking of the case then before him: "I think, therefore, that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession." Again, on page 292, Lord Bowen says: "When the Master of the Rolls in *Ex parte Banner*, L. R. 17 Ch. Div. 480, says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was, would be sufficient ground for a compromise, I agree if by that he means there must be a real cause of action,—that is to say, one that is bona fide and not frivolous or vexatious; but I do not agree if he means by a real cause of action some cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case." The case of *Prout v. Pittsfield Fire Dist.* 154 Mass. 450, 453, 28 N. E. 679, was affirmed in *Kennedy v. Welch*, 196 Mass. 592, 83 N. E. 11.

In the case at bar, having regard to the knowledge of the plaintiff, can it be said that her claim was a vexatious or frivolous one? Unless a duly executed will had been made she was entitled, as one of the two next of kin, to a half of her mother's estate. She had just been told by the other next of kin, her brother, that their mother had left a will by which everything had been bequeathed to him. Even although she had been estranged from her mother for ten years, a determination to examine the will and the circumstances under which it had been made could not be said (having regard to the knowledge of the plaintiff) to be either vexatious or frivolous. We are of opinion that this finding and this ruling were right. The claim in *Palfrey v. Portland, S. & P. R. Co.* 4 Allen, 55, was a frivolous and vexatious one.

3. The next contention made by the appellants is that the plaintiff did not keep her agreement not to contest the will. Whether what was done by the plaintiff and her at-

torney did or did not amount to a performance of that promise depended upon the credit given by the judge to the conflicting stories told on one side and the other. It is enough to say that the judge believed the story told by the plaintiff's witnesses. His finding on this point was as follows: "The will was presented for probate in the probate court on August 1, 1905. The plaintiff, on the day before, had employed Charles W. Hodgdon, an attorney at law, and instructed him to enforce the agreement. This was the only authority given to the attorney. Mr. Hodgdon entered his appearance on the probate petition as attorney for Mrs. Blount. The case was continued to September 28th, when the will was admitted to probate without contest, and no appeal was taken. Before that date Mr. Hodgdon had concluded that the entry of his appearance was a mistake, as a means of enforcing the agreement, and, on September 27th, withdrew it, after consulting with other counsel. Mr. Roberts, the attorney for the executor, after the entry of Mr. Hodgdon's appearance and after conversation with him, believed that the will was to be contested, and made some preparation for a contest before the appearance of Mr. Hodgdon was withdrawn. The court finds as a fact that the plaintiff did not contest the will, and that she is not estopped by the entry or appearance by Mr. Hodgdon in the probate court, or by any acts done in consequence of that appearance, from contending or proving that she did not contest the will."

4. The fourth contention made by the appellants is that the agreement of compromise is an agreement between the plaintiff and her brother to divide the estate without probate of the will. This was disposed of by the judge in these words: "The belief of the parties that they could settle the estate without probating the will, and any understanding based upon that belief, were merely incidental to the written agreement, and not connected with it as a condition. Both parties were acting without legal advice when the agreement was made, and in ignorance of their legal duties in regard to the production and probating of the will. The court finds that the written agreement, fairly construed in the light of all the surrounding facts, means that such property as might remain in the estate after all lawful claims were paid should be divided between the parties to it in the proportions named, and does not require that the legacies shall not be paid or that the will shall not be probated." We agree with that conclusion.

5. The last position taken by the appellants is that there is no jurisdiction in equity.

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We do not stop to consider whether this objection was taken at the proper time, for we are unanimously of opinion that the position is not sound.

The jurisdiction of this court specifically to enforce an agreement of compromise of a will where some of the property in question is real estate was upheld in *Leach v. Fobes*, 11 Gray, 506, 71 Am. Dec. 732. The question now presented is not covered by that case because the property now in question consists of personalty only.

We are, however, of opinion that, in such a case as that now before us, an agreement of compromise will be specifically enforced.

One who contests the validity of an instrument offered as the last will of another, under which the contestant claims as next of kin, and who, by an agreement of compromise, becomes entitled to a share of the residue, is entitled to the same standing in the probate proceedings that a person has to whom part of the residue is bequeathed. This right is expressly given to the plaintiff by the decree now under consideration. The right of such a contestant to such a standing in the probate proceedings is recognized in decrees establishing an agreement of compromise under Rev. Laws, chap. 148, § 15, where the aid of the court is necessary for making the compromise. It is the practice to insert a clause in decrees made under that act, providing that the executor shall administer the estate in accordance with the agreement of compromise established by the decree. See, in this connection, *Bartlett v. Slater*, 182 Mass. 208, 65 N. E. 73. In connection with that case, see *Hastings v. Nesmith*, 188 Mass. 190, 74 N. E. 323. That practice is not decisive of the jurisdiction in equity in the case at bar. The jurisdiction in equity in those cases is given by the statute (Rev. Laws, chap. 148, § 15), and the insertion in such decrees of the clause just spoken of might well stand as a clause necessary to do complete justice when equity has taken jurisdiction for another purpose.

We are, however, of opinion that the right recognized by this clause is a ground for equity's taking jurisdiction, and that, in cases where there is no necessity for action, under Rev. Laws, chap. 148, § 15, to make a compromise valid (see *Abbott v. Gaskins*, 181 Mass. 501, 506, 63 N. E. 933), if the rights of the contestant under such an agreement of compromise are not recognized by the executor, the contestant can, by a bill in equity, compel him (the executor) to recognize the rights given him (the contestant) under the agreement of compromise. Were this not so, the executor and the other party to the compromise could settle the estate without reference to the contestant, leaving to him only a right to col-

lect, by an action at law, the share so established. That does not give him what he is entitled to.

There is nothing in the further objection that such a bill in equity as that now before us and the decree entered in the superior court are an undue interference with the settlement of the estate in the probate court. Where a bill for instructions is brought in the supreme judicial court by a trustee appointed by the probate court, his accounts are settled there and the distribution of the amount so found due is made here. See *Brown v. Wright*, 194 Mass. 540, 80 N. E. 612; *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560.

The same method of proceeding should be followed in cases like the case at bar.

Decree affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

LAURA A. SARGENT, Appt.,
v.

DANIEL F. BLAKE, Trustee, etc., of Samuel W. King et al.

(— C. C. A. —, 160 Fed. 57.)

Bankruptcy — individual debt — payment with partnership funds.

1. K. and M. were partners. They and the partnership were insolvent. K. took \$234.34, with M.'s consent, out of the partnership funds for himself, and, in consideration thereof and of M.'s covenant to assume and pay the partnership debts, conveyed to him the remainder of the partnership property and the partnership business. Immediately thereafter, M. paid to Mrs. S., his mother, out of the funds which had been partnership property, \$3,731.90, which he owed her for money he had borrowed to put into the partnership business. Mrs. S. did not have reasonable cause to believe that

Headnotes by SANBORN, Circuit Judge.

Case Note. — *Application of partnership assets with the consent of all the partners to the payment of an individual debt of a partner as a voidable preference under the bankruptcy act.*

There is a great conflict of authority on the general question as to the validity of a transfer of partnership assets in payment of an individual debt of a partner, but the cases on the question whether such a transfer creates a voidable preference within the meaning of the bankruptcy acts are not numerous.

The rule preferring partnership property to the payment of partnership debts is for the benefit of partners, and may be waived; and a mortgage given by them upon partnership property to secure an individual debt

any preference was intended by this payment, nor did she have any cause to believe that it was made with intent to hinder, delay, or defraud creditors of the firm, or of the firm partners. K. and M. had no intent to hinder, delay, or defraud creditors to any greater extent than the payment to Mrs. S. would necessarily hinder or prevent them from collecting their debts. Within four months, K. and M. and the partnership were adjudged bankrupts. The trustee brought suit to recover the \$3,731.90 of Mrs. S. Held, the trustee was not entitled to recover this money of Mrs. S.

Same — transfers — unlawful intent.

2. Intentional transfers by insolvents to secure or pay pre-existing debts within four months prior to the filing of a petition in bankruptcy, which are not voidable as preferences under § 67e, or violative of other provisions of law, and which are made without intent to hinder, delay, or defraud creditors more than such securities or payments necessarily have that effect, do not evidence an intent to hinder, delay, or defraud creditors, within the meaning of § 67e of the bankruptcy act of July 1, 1898, chap. 541, 30 Stat. at L. 564, U. S. Comp. Stat. 1901, p. 3449.

It is not every intent to hinder or delay creditors in collecting, or to prevent them from collecting, but an intent to do so unlawfully only, that is denounced by that section.

Same — partnership property — statutory rule of administration.

3. Act July 1, 1898, chap. 541, § 5f, 30 Stat. at L. 548, U. S. Comp. Stat. 1901, p. 3424, enunciates a rule of administration of partnership and individual property; and it governs only such partnership and such individual property as the alleged bankrupts owned at the time the petition is filed, and that which has been previously transferred fraudulently or to make a voidable preference.

Insolvency — partnership — payment of individual debts.

4. Until partnership property is placed in the custody of the law by some suit or act

of one of the partners was held valid as such a waiver, in voluntary bankruptcy proceedings, in *Re Kahley*, 2 Bias. 383, Fed. Cas. No. 7,593.

In *Merchants' Bank v. Thomas*, 57 C. C. A. 374, 121 Fed. 306, where all the creditors in a bankrupt partnership were such at the time the firm agreed to pay the individual debt of one of its partners, but had been paid in full prior to the filing of the firm's petition in bankruptcy, it was held that the firm's agreement to pay such individual debt could not be attacked by the trustee or other creditors on the ground that it was a fraud on the firm's creditors, notwithstanding the insolvency of the firm at the date of such transfer.

But in *Re Kahley*, supra, the sale of a stock of goods by a partner to an individual creditor of one of the partners, such cred-

which invokes the interposition of a court to administer it, partners, with the consent of each, have the right and the power to convert it into individual property, to apply it to the payment of individual debts in preference to the debts of the partnership, or to make any other disposition of it, in good faith, which does not constitute a voidable preference. Insolvency does not destroy or diminish this right of disposition. The right of the creditors of a partnership to be paid out of the partnership property in preference to the individual creditors does not attach until an application is made to some court for the administration of the partnership property, nor then, unless some partner has at that time that right, for the preferential equity of the partnership creditors is the mere right to enforce the right of the partners to compel such a preference. Before the partnership property is placed in *custodia legis* it is not held in trust for the partnership creditors, and they have no lien upon it.

Bankruptcy — partnership — intent to defraud creditors.

5. When all the partners consent, their application of the partnership property to the payment of an individual debt of a partner within four months of the filing of

itor being aware that the partnership debts exceeded the assets, was held void as to partnership creditors, as not having been made in the usual and ordinary course of business under § 35, bankruptcy act, 1867.

And in *Re Jones*, 100 Fed. 781, a transfer was held fraudulent, as against firm creditors, where one partner procured a firm indorsement to his overdue individual note within four months of the filing of a petition in bankruptcy, the firm having been insolvent at the time, to the knowledge of the preferred creditor.

And, where the transfer was made in contemplation of insolvency, and the evidence shows that the transferee had reasonable cause to believe that a fraudulent preference was intended, the transfer is void as to the assignee in bankruptcy. *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. ed. 400, 8 Sup. Ct. Rep. 441, affirming 16 Fed. 759. *Re Gillette*, 104 Fed. 769, is to the same effect.

And a mortgage of the whole stock in trade of a dissolved insolvent firm, given to secure a pre-existing individual debt of a partner, constitutes a *prima facie* preference as against petitioning creditors in bankruptcy. *Re Waite*, 1 Low. Dec. 207. Fed. Cas. No. 17,044.

And in *Re Head*, 114 Fed. 489, it was held that the dissolution of a partnership while insolvent, and the division of firm property between partners to be held as individual property, thereby giving individual creditors a preference over firm creditors, if made within four months of bankruptcy, constitutes a void preference within bankruptcy act 1898, § 67e, without reference to the actual intention of the partners, who must be held to have intended the necessary and inevitable consequences of their acts.

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a petition in bankruptcy, and while the partners and the partnership are insolvent, does not evidence any intent to hinder, delay, or defraud the creditors of the partnership within the meaning of § 67e of the bankruptcy law (act July 1, 1898, chap. 541, 30 Stat. at L. 564, U. S. Comp. Stat. 1901, p. 3449); and it is not void or voidable where the creditor paid has no reasonable cause to believe that a preference was intended thereby.

Partnership — conveyance of insolvent's interest — consideration.

6. The covenant of an insolvent partner to assume and pay the debts of an insolvent partnership is a valuable consideration, sufficient to support a conveyance of an interest in the partnership property.

Same — assumption of debts — trust.

7. The assumption of payment of partnership debts by one partner, in consideration of an absolute conveyance of the partnership property to him by the other, creates no trust in, and fastens no lien upon, the property thus conveyed, in favor of the partnership creditors, prior to any request for the interposition of a court to administer the partnership property.

(March 19, 1908.)

So, in *Ex parte Shouse, Crabbe*, 482, Fed. Cas. No. 12,815, in speaking of the dissolution of an insolvent partnership, the court said: "But, if the dissolution is a mere cover to conceal either actual or legal fraud, or with intent to give a preference to a separate creditor over those of the partnership, or to bring him in on an equality with them in the distribution of the assets of the firm, which could not have been if the partnership had continued, then there is such a fraud on the partnership creditors as will make it an act of bankruptcy."

In *Re Cook*, 3 Biss. 122, Fed. Cas. No. 3,150, it was held that, where partners are in fact insolvent, they should be considered, in equity, as holding the partnership effects in trust for the benefit of the firm creditors; and that a sale by one partner to his copartner, on the eve of insolvency, was presumptively fraudulent, since the legal effect would be to prefer the private creditors over the firm creditors, and thus void as creating a preference within the provision of § 35, bankruptcy act 1867.

And the conveyance of the joint assets of an insolvent firm to a continuing partner, made within four months of the petition in bankruptcy, was held a fraudulent preference within the bankruptcy act of 1867. in *Re Johnson*, 2 Low. Dec. 129, Fed. Cas. No. 7,369.

In *Re Floyd*, 156 Fed. 206, a mortgage executed by an insolvent partnership, within four months of bankruptcy, to secure the individual debt of a partner, was held void as a preference. This disposition of the question was without discussion or citation of authority, and apparently proceeded upon the assumption that the rule as stated was an unquestioned one.

APPEAL by defendant from a decree of the District Court of the United States for the Southwestern Division of the Judicial District of Missouri in complainant's favor as trustee in bankruptcy in an action brought to set aside and recover from the defendant the amount paid her on a certain promissory note. Reversed.

The facts are stated in the opinion.

Argued before Sanborn, Hook, and Adams, Circuit Judges.

Messrs. A. E. Spencer and Willard P. Hall, for appellant:

The right of the partnership creditors to be paid out of partnership property is an administrative right merely, and can be enforced only by laying hold of the property and placing it *in custodia legis*.

Sexton v. Anderson, 95 Mo. 381, 8 S. W. 564; Hundley v. Farris, 103 Mo. 78, 12 L.R.A. 254, 23 Am. St. Rep. 863, 15 S. W. 312; Reyburn v. Mitchell, 106 Mo. 365, 27 Am. St. Rep. 350, 16 S. W. 592; Norris v. Rumsey, 54 Mo. App. 143; Tennant v. McKean, 46 Mo. App. 486; Goddard-Peck Grocery Co. v. McCune, 122 Mo. 426, 29 L.R.A. 681, 25 S. W. 904; McDonald v. Cash, 57 Mo. App. 536; Mansur-Tebbetts Implement Co. v. Ritchie, 169 Mo. 213, 60 S. W. 87.

The provision of the bankruptcy act relating to unlawful preferences (§ 60b) has no bearing upon the right of one partner to buy out his copartners.

Re Rudnick, 102 Fed. 750.

There was no lack of consideration to support said sale.

McDonald v. Cash, *supra*; Kansas City So. R. Co. v. Q. O. & K. C. R. R. Co. (1907; Mo.); Gratton & K. Mfg. Co. v. Troll, 77 Mo. App. 339; *Ex parte* Williams, 11 Ves. Jr. 5.

The trustee failed to show that defendant knew, or had probable cause to believe, that said Maxwell or his firm was insolvent, or that said payments were being made with the intent to give a preference under the bankruptcy act.

Loveland, Bankr. p. 609; Barbour v. Priest, 103 U. S. 293, 26 L. ed. 478; Des Moines Sav. Bank v. Morgan Jewelry Co. 123 Iowa, 432, 99 N. W. 121; Grant v. First Nat. Bank, 97 U. S. 80, 24 L. ed. 971; Stucky v. Masonic Sav. Bank, 108 U. S. 74, 27 L. ed. 640, 2 Sup. Ct. Rep. 219; Re Eggert, 43 C. C. A. 1, 102 Fed. 735; Stevenson v. Milliken, Tomlinson Co. 99 Me. 320, 59 Atl. 472; Re Pettingill, 135 Fed. 218; Blankenbaker v. Charleston State Bank, 111 Ill. App. 393; Johnston v. George D. Witt Shoe Co. 103 Va. 611, 50 S. E. 153; Re Goodhile, 130 Fed. 471; Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. Supp. 781; Medsker v. Bonebrake, 108 U. S. 66, 27 L. ed. 654, 2 17 L.R.A. (N.S.)

Sup. Ct. Rep. 351; Townes v. Alexander, 69 S. C. 23, 48 S. E. 214; Re Oppenheimer, 140 Fed. 51.

Messrs. Samuel Feller and Karnes, New, & Krauthoff, with Messrs. Arthur Miller and Edwin A. Krauthoff, for appellees:

Until notice of the assignment is given to the creditor it will not bind him so as to deprive him of equities arising between the date of the assignment and the date when he received notice thereof.

4 Cyc. Law & Proc. pp. 33, 34; Richards v. Griggs, 16 Mo. 416, 57 Am. Dec. 240.

The effect of the agreement to assume the debts of the partnership is to create a trust in favor of the creditors of the partnership, and to impress the assets of the partnership with a distinct lien in favor of the partnership creditors, enforceable in equity.

West Plains Bank v. Edwards, 84 Mo. App. 462; Blackmore v. Parkes, 26 C. C. A. 670, 54 U. S. App. 123, 81 Fed. 899; Williams v. Crow, 84 Mo. 298; Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57, 5 So. 164; Carr v. Thompson, 67 Mo. 472.

One partner cannot use the partnership funds to pay his individual debts without the consent of the other members of the firm, either with or without the knowledge of the creditor that such property belonged to the partnership.

Rogers v. Batchelor, 12 Pet. 221, 9 L. ed. 1063; Caldwell v. Scott, 54 N. H. 414; Ackley v. Staehlin, 56 Mo. 558; Price v. Hunt, 59 Mo. 258.

Sanborn, Circuit Judge, delivered the opinion of the court:

In December, 1902, King and Maxwell formed a partnership in the business of dealing in paints, oils, glass, and other articles at Kansas City, in the state of Missouri, under the name of King & Maxwell Paint & Glass Company; and Maxwell borrowed \$3,500 of his mother, Mrs. Sargent, to put into the business, and gave her his promissory note for the money, payable with interest in three years from the date of the note. He paid the interest on it from time to time until, on June 11, 1904, he paid her \$2,500 of it, and, on June 14, 1904, \$1,231.90, the amount still owing upon it; and she surrendered the note to him. During the year 1903 and the first half of the year 1904, the company made a profit, or the partners thought it made a profit, of \$3,800. Between February 1, 1904, and June 18, 1904, \$9,096.08, which was derived from the sales of merchandise by the partnership, was deposited in the banks to the credit of the company, and, prior to June 11, 1904, all this money, except \$3,731.90 subsequently paid to Mrs.

Sargent and \$867.60 paid for merchandise bought, was drawn out of the bank by the partners as individuals. On June 11, 1904, or a day or two before that day, Maxwell learned that King, who had the financial management, had drawn out all the money that he had put into the firm as capital and his half of the profits, which amounted to about \$4,400 in all, with the exception of \$234.34. Maxwell was dissatisfied with King's action, and, upon consultation, they agreed that, in consideration of \$234.34 paid to him out of the moneys of the company, and of Maxwell's covenant to assume and pay all the firm debts, King should sell and convey his interest in the property of the company and in the business to Maxwell, should authorize Maxwell to carry on the business in the name of the company, and should agree to keep out of any like business for a year. On June 11, 1904, the \$234.34 was paid to King, and he executed and delivered to Maxwell a formal bill of sale in which the terms just stated were clearly embodied, and delivered to him the exclusive possession of the property and business of the company. At this time the partnership and each of the partners were insolvent, its liabilities were probably about \$25,000, and its assets about \$15,000; but each of the partners testified that he did not know or think, at that time, that the firm was insolvent. After Maxwell had purchased the interest of his partner in the firm property and business, and had received his bill of sale and exclusive possession and control of the property, and on the same day, he bought a draft for \$2,500 with a check which he drew in the name of the company upon the moneys that had been theretofore deposited to its credit in a bank, and he sent this draft to his mother in part payment of his note. On June 14, 1904, he bought, in the same way, and sent to her, another draft for \$1,231.90, the balance then owing on the note she held; and she surrendered it to him paid. King testified that he never consented to the application of the partnership funds to the payment of the individual debt of Maxwell to his mother. Mrs. Sargent did not have reasonable cause to believe that it was intended by this payment to give her a preference over any other creditor of Maxwell or of the partnership. She did not know, believe, or have reasonable cause to believe, that these payments were made with the intent on the part of Maxwell to hinder, delay, or defraud any of his creditors or any of the creditors of the company, or that they were made out of the funds or property of the partnership. On June 23, 1904, a petition in bankruptcy was filed, and, on August 1, 1904, the partnership and the in-

dividuals, King and Maxwell, were adjudged bankrupts. The evidence at the final hearing in this suit disclosed no facts material to the questions before this court, which have not now been stated. Upon these facts, the court below rendered a decree that the amounts paid to Mrs. Sargent belonged to the estate of the partnership; "the partnership firm," in the words of the decree, "at the time of said payments by said James E. Maxwell to the defendant Laura A. Sargent, being insolvent, and the same having been so paid to the defendant in fraud of the equitable preferential right thereto of the partnership creditors of said partners," and that she should pay them back to the trustee of that estate with interest. Mrs. Sargent appealed from this decree.

This suit was instituted by the exhibition in the court below of a bill in equity against Mrs. Sargent alone, in which the trustee set forth two inconsistent causes of action: First, that Maxwell paid Mrs. Sargent \$3,731.90 out of the funds of the partnership with intent to hinder, delay, or defraud its creditors at a time when it was insolvent and did not owe her anything, and that Mrs. Sargent knew this at the time she received the payment; second, that Maxwell paid her this \$3,731.90 with intent to prefer her over his other creditors of the same class, that the payment did thus prefer her, and that Mrs. Sargent had reasonable cause to believe that the payment was intended to give such a preference. The proof was that the bill of sale from King to Maxwell had been made and delivered so that it had made all the debts of the company his individual debts by his assumption of them, and all its property his individual property, before he paid Mrs. Sargent, and that she had no cause to believe, and did not believe, that any preference was intended, nor that the payment was made to hinder or defraud any creditor. The result was that, at the close of the evidence, the first cause of action, upon the face of the transaction, failed because the payment was not made out of the funds of the partnership; and the second failed because Mrs. Sargent had no cause to believe that a preference was intended by the payment. Bankruptcy law July 1, 1898, chap. 541, 30 Stat. at L. 502, § 60b, U. S. Comp. Stat. 1901, p. 3445. In order to escape from this conclusion, counsel for the trustee invoke the provision of § 5f of the bankruptcy law, that the net proceeds of the property of the partnership shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts, and the provisions of § 67e that transfers made by a

bankrupt within four months of the filing of the petition against him, with the intent on his part to hinder, delay, or defraud his creditors, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; that unexempt property so transferred shall remain a part of the estate of the bankrupt, and shall pass to his trustee, whose duty it shall be to reclaim and recover it for the benefit of the creditors; and they argue that the bill of sale from King to Maxwell, and the contract of payment of the note by Maxwell to Mrs. Sargent, were void under these sections because their effect was that property of the partnership estate was applied, after the firm and the partners were insolvent, to pay the individual debt of one of the partners.

The only evidence that Maxwell intended to hinder or defraud the creditors of the partnership is that, while the firm and the partners were insolvent, King conveyed his interest to Maxwell, and the latter paid his mother in preference to his other creditors. The only way in which Maxwell could have made this payment in bad faith would have been to have made it, in whole or in part, in secret trust for himself, or with the actual intent to hinder or defraud the creditors of the company more than the mere payment of the debt to his mother, out of the property of the former partnership, in preference to the claims of the partnership creditors, must necessarily have delayed or prevented their collection of their claims; and there was no evidence of any such trust or intent. The evidence was that he intended to pay his mother in preference to the partnership and to other creditors, that his mother had loaned him the money to engage in and conduct the partnership business, that he had purchased the interest of his partner, and that, as soon as the business and the property became his, he paid her the debt which he owed her.

The facts that the payment to Mrs. Sargent had the inevitable effect to deprive the creditors of the partnership of an opportunity which they would otherwise have had to collect their claims, in whole or in part, and that Maxwell knew that this would be its effect, and hence must have intended that result, do not establish the fact that he intended to hinder, delay, or defraud those creditors within the meaning of § 67e. It is every intent to hinder, delay, and defraud creditors unlawfully only, not every intent to hinder or delay them in collecting, or to prevent them from collecting, their claims, that avails to avoid a transfer under that section. An insolvent debtor has the *jus disponendi* of his property until 17 L.R.A. (N.S.)

the commencement of proceedings in bankruptcy against him. He has the legal right to secure and pay his debts with it, provided always the security or the payment is not violative of any of the acts of Congress or of any of the laws of the land. A preference of one creditor over others by such a payment or by such security, which is free from actual or constructive fraud and from any purpose to affect other creditors injuriously beyond the necessary effect of the security or preference, is valid and lawful; and it cannot evidence such an intent to hinder, delay, or defraud creditors as will make it void or voidable under § 67e. *Coder v. Arts*, 15 L.R.A. (N.S.) 372, 82 C. C. A. 91, 152 Fed. 943, 947; *Sabin v. Columbia River Lumber & Fuel Co.* 25 Or. 15. 42 Am. St. Rep. 756, 34 Pac. 692, 695, 35 Pac. 854; *Lampson v. Arnold*, 19 Iowa, 479. 484; *Stewart v. Dunham*, 115 U. S. 61, 66, 29 L. ed. 329, 331, 5 Sup. Ct. Rep. 1163.

Since the payment and the preference were made in good faith, the only question remaining is, Were they unlawful? If so, they were made with intent to hinder, delay, and defraud creditors within the meaning of the law; if not, they were made without any such intent, and they were not voidable. If Mrs. Sargent had been a creditor of the partnership, the payment could not have been avoided, and, if she was paid out of the individual property of Maxwell, the payment was not voidable, because she had no cause to believe that a preference was intended thereby. Did the facts that both partners and partnership were insolvent when the bill of sale and payment were made, and that the payment was made, after the bill of sale was delivered, out of funds which had been partnership property before King sold and conveyed his interest to Maxwell, render the payment illegal and voidable? Counsel for the trustee argue that this question should be answered in the affirmative, because, as they contend, (a) the net proceeds of all the partnership property, which were applied to the payment of individual debts within four months preceding the commencement of proceedings in bankruptcy against it, must be appropriated to the payment of the partnership debts to the exclusion of the individual debts of the partners under § 5f; (b) that the sale by King to Maxwell was fraudulent and void; (c) that notice of the sale was not immediately given to the bank; and (d) that the assumption of the firm debts by Maxwell fastened a trust or lien upon the firm property in favor of the firm creditors. They cite, in support of their first contention, *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; *Davis*

v. Bohle, 34 C. C. A. 372, 92 Fed. 325; Re Sievers (D. C.) 91 Fed. 366; and Re Knight (D. C.) 125 Fed. 35,—in which the courts have held that, inasmuch as the making of a general assignment is an act of bankruptcy, property conveyed by such an assignment passes to the trustee in bankruptcy as of the date of the assignment as against the assignee, as against purchasers from him after the bankruptcy proceedings are instituted, and as against purchasers from him who have not paid for their purchases, where the bankruptcy proceedings are commenced within four months after the general assignments; and they argue by analogy that, wherever a payment of an individual debt is made out of the partnership property within four months of the institution of bankruptcy proceedings, the title to the trustee relates back and attaches to that property as of the date of the payment. They insist that the mere fact that partnership property is applied to the payment of individual debts within the four months constitutes the transaction a fraudulent transfer or preference, although the payee has no reason to believe it was intended as such; and they cite *Re Jones* (D. C.) 100 Fed. 781, 783; *Re Gillette* (D. C.) 104 Fed. 769, 771, 772; *Re Head* (D. C.) 114 Fed. 489, 491; *Collier, Bankr.* 6th ed. p. 85; *Re Johnson*, 2 Low. Dec. 129, Fed. Cas. No. 7,369; *Collins v. Hood*, 4 McLean, 186, Fed. Cas. No. 3,015; *Re Cook*, 3 Biss. 122, Fed. Cas. No. 3,150; *Re Wilcox* (D. C.) 94 Fed. 84. But the analogy between a general assignment and the application of partnership property to the payment of an individual debt, or the application of individual property to the payment of a partnership debt,—for if one is fraudulent and void the other is,—is neither complete nor persuasive; and the construction of § 5f here sought is neither expressed by the words of the section, nor is it natural or reasonable. The parties as to whom general assignments have been held futile to convey title against a trustee have all been volunteers,—parties who neither paid nor surrendered anything before the bankruptcy proceedings were commenced,—and, as they held no higher title or better equity than the bankrupt, their titles passed to the trustee. In the case at bar, on the other hand, Mrs. Sargent surrendered her note in good faith, and released her claim upon her debtor for \$3,731.90 before the bankruptcy proceedings were instituted. Unless the payment was unlawful, and, for that reason, evidenced an intent of Maxwell to defraud his creditors,—a question to be further considered,—the only act of bankruptcy here was the preference of Mrs. Sargent to other creditors, which, by the express terms of 17 L.R.A. (N.S.)

§ 60b, was not voidable because she had no reasonable cause to believe that it was intended to give her a preference thereby. A general assignment is voidable without regard to such cause to believe.

The clause of § 5f upon which counsel rely is nothing but the familiar rule of administration of partnership and individual estates, which has been imported into the bankruptcy law from the courts of equity. "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts." The partnership property and the individual estate at what time, four months, or at some indefinite time within four months before the petition is filed, or at the time it is filed? This section treats of administration in the bankruptcy court, and hence of the partnership and individual property, the title to which is in the bankrupt at the time the petition against him is presented to the court, and that which he had transferred in fraud of his creditors. § 70. Any other interpretation would produce intolerable vexation and confusion, for, in the daily conduct of business, partners are necessarily and constantly applying partnership property to the payment, not only of large individual obligations, but to the payment of their petty individual debts for living expenses, and are often devoting their individual property to the promotion of the partnership business and the discharge of the partnership debts. It never could have been, it never was, the intention of Congress that these transactions—these transformations of partnership into individual and of individual into partnership property within four months, or within any other time preceding the commencement of bankruptcy proceedings—should either be rescinded or avoided by subsequent adjudications in bankruptcy, unless they were actually fraudulent or voidably preferential. It did not make them fraudulent in themselves. The terms of § 5f and the natural and rational interpretation of them in the light of the general rules of law and of the entire act in which they appear limit their application to partnership and individual property at the commencement of bankruptcy proceedings, and to property the transfer of which is fraudulent for other reasons than that partnership property was applied to the payment of individual debts, or individual property to the payment of partnership debts. This conclusion is in accord with the general principles applicable to the management and disposition of partnership property.

There are two rules of law which at different times apply to the management and disposition of the property of a partnership: First, partners own, and, with the consent of each, have the right and power to sell and dispose of the partnership property, to transform it into the individual property of one or more of the partners, to apply it or its proceeds to the payment of their individual debts in preference to those of the partnership, and to make such other honest disposition of it as they deem fit; second, in the administration of the property of a partnership in the courts, the creditors of the partnership have the right to the application of the partnership property to the payment of the partnership debts in preference to the individual debts of the respective partners. The first is a rule of operation, the second a rule of administration. The first governs during the operation of the partnership business and the disposition of the partnership property by the partners, the second operates during the administration of the partnership property after it is brought into the custody of a court. The first rule prevails until, by some suit or act, the interposition of some court is invoked to administer the partnership property, and, until that time, the second rule is ineffective. Before the partnership property is placed in *custodia legis* for administration, it is not held in trust for the payment of the partnership creditors in preference to the creditors of the individual partners. The partnership creditors have no lien upon it and no independent right to its application to the payment of their claims in preference to the claims of the creditors of the individual partners. Each partner, however, has the right to require the partnership property to be applied to the payment of the partnership debts in preference to the debts of the individual partners, to the end that he may not be required to pay the former out of his individual estate. The right of the creditors of the partnership to payment out of the partnership property in preference to the individual creditors is the mere right by subrogation or derivation to enforce this right of one of the partners after the partnership property has been placed in the custody of the law. Until it has been so placed, each partner has plenary power at any time to release or waive this right, and, if each partner has done so, and, at the time the property comes within the jurisdiction of a court no partner has this right, then no creditor of the partnership has it, for a stream cannot rise higher than its source.

Before the petition in bankruptcy was filed in this case, and before any of the property involved in this controversy was placed

in the custody of the law, King had taken \$234.34 out of the partnership property, and had transformed it into his individual property, with the consent of Maxwell, and, in consideration of that consent and of Maxwell's assumption of the partnership debts, had conveyed all his interest in the remainder of the partnership property to Maxwell, and had thereby transformed it into Maxwell's individual property, and, out of that individual property, Maxwell had paid his individual debt to his mother. Unless these releases of these partners were voidable and were avoided, neither of them had any right thereafter, and hence none of the creditors of the partnership had any right, to the application of the \$3,731.90, which had been paid to Mrs. Sargent, to the payment of partnership obligations.

Counsel say that King's bill of sale and the release it evidenced were void, (1) because he subsequently testified that he never consented to the payment of Mrs. Sargent out of the proceeds of the partnership property in preference to the creditors of the partnership; but his bill of sale contained that consent, for it granted full title and plenary power of disposition of all the partnership property, except the \$234.34 which he took as his share, to Maxwell, and he is estopped from avoiding the legal effect of the conveyance he made by subsequent testimony that he did not intend that it should have that effect; (2) because the assumption of the debts by the insolvent Maxwell was not a valuable consideration for King's conveyance; but, while there are authorities to that effect (*Darby v. Gilligan*, 33 W. Va. 246, 249, 6 L.R.A. 740, 10 S. E. 400), the better reason and the weight of authority are to the contrary, for a promise to pay the debt of another, although the promisor may never be able to do so, creates a legal and a moral obligation burdensome to the promisor and presumptively beneficial to the promisee (*Ex parte Peake*, 1 Madd. Ch. 346; *Howe v. Lawrence*, 9 Cush. 553, 556, 57 Am. Dec. 68, and cases there cited; *McDonald v. Cash*, 57 Mo. App. 536, 544, and cases there cited; *Kansas City Southern R. Co. v. Q. O. & K. C. R. R. Co.* [opinion filed May 29, 1907] by the supreme court of Missouri; *Gratton & K. Mfg. Co. v. Troll*, 77 Mo. App. 339), and the consent of Maxwell that King should withdraw the \$234.34, which he took, constituted in itself a sufficient consideration to sustain the bill of sale; (3) because King's sale was not accompanied by delivery in a reasonable time and followed by an actual and continued change of possession of the things sold, as required by Mo. Rev. Stat. 1899, § 3410 (Anno. Stat. 1906, p. 1940); but the evidence is that it

was accompanied by such a delivery and followed by such a change of possession; (4) because notice of the purchase by Maxwell was not immediately given to the bank in which the funds of the partnership were deposited; but this fact is not material because the bank paid out the moneys upon deposit with it, without objection, upon drafts drawn by Maxwell in the name of the partnership, which, by the terms of the bill of sale, he had the right to use for a year; (5) because the assumption of the partnership debts by Maxwell created a trust in favor of the partnership creditors and imposed an equitable lien upon the partnership property for their benefit; but the weight of authority and the better reason sustain the view that it had no such effect at any time before the \$3,731.90 was paid to Mrs. Sargent, or before an application was made for the interposition of a court to administer the partnership property.

There is another reason why this bill of sale cannot be disregarded in this suit. In the most favorable view to the trustee, it was voidable only, not void. King, the grantor, has not set it aside. He cannot rescind or avoid it until he pays back the \$234.34 which he received, and proves, to the satisfaction of some court, that he was induced by some misrepresentation or deceit to make it; and there is no such evidence in this case.

Finally, counsel for the trustee argue that the bill of sale and the payment must be considered as a single transaction; that they evidence an application of partnership property to the payment of an individual debt of one of the partners within four months of the bankruptcy while the partnership and the partners were insolvent; and that such an application is unlawful, and proves the intent of the debtors to hinder, delay, and defraud the creditors. Concede that the entire transaction was the intentional payment of a debt of one of the partners out of the partnership property in preference to the partnership creditors; the question then becomes, May partners lawfully appropriate partnership property to the payment of their individual debts when they and the partnership are insolvent? Authorities are cited which either directly or indirectly indicate that this question should be answered in the negative. *Arnold v. Hagerman*, 45 N. J. Eq. 186, 198, 199, 14 Am. St. Rep. 712, 17 Atl. 93; *Flack v. Charron*, 29 Md. 311; *Re Edwards*, 47 Mo. App. 307; *Earle v. Art Library Pub. Co. (C. C.)* 95 Fed. 544; *Darby v. Gilligan*, 33 W. Va. 246, 249, 6 L.R.A. 740, 10 S. E. 400; *People ex rel. Till v. Roy*, 3 Neb. 261; *Roop v. Heron*, 15 Neb. 73, 78, 80, 81, 17 N. W. 353; 17 L.R.A. (N.S.)

Re Jones (D. C.) 100 Fed. 781, 783; *Re Gillette (D. C.)* 104 Fed. 769, 771, 772; *Re Head (D. C.)* 114 Fed. 489-491; *Collier*, Bankr. 6th ed. p. 85; *Re Johnson*, 2 Low. Dec. 129, Fed. Cas. No. 7,369; *Collins v. Hood*, 4 McLean, 186, Fed. Cas. No. 3,015; *Re Cook*, 3 Biss. 122, Fed. Cas. No. 3,150. The decisions in these and many other cases have been carefully considered, but, because insolvency does not deprive persons of their right to dispose of their property for lawful purposes; because the application of partnership property, with the consent of all the partners, to the payment of the individual debts of the partners in preference to those of the partnership is a lawful purpose, so long as no application for the interposition of a court to administer the property is made, and the creditors paid have no reasonable cause to believe that a preference is intended; because, until the partnership property is placed in *custodia legis*, the rule of administration does not take effect, and the preferential equities of the partnership creditors do not attach to it either by way of trust or lien; and because the Supreme Court, by whose determination this court must be guided, and the weight of modern authority, have so determined,—we are constrained to hold and do decide that, when all the partners consent, their application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, while the partners and the partnership are insolvent, does not evidence any intent, on the part of the debtors, to hinder, delay, or defraud the creditors of the partnership, within the meaning of § 67e of the bankruptcy law; and it is not void or voidable where the creditor paid has no reasonable cause to believe that a preference was intended by the payment. *Case v. Beauregard*, 99 U. S. 119, 125-127, 25 L. ed. 370-372; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 656, 27 L. ed. 211, 213, 1 Sup. Ct. Rep. 369; *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 323, 30 L. ed. 971, 975, 7 Sup. Ct. Rep. 899; *Ex parte Peake*, 1 Madd. Ch. 346; *Allen v. Center Valley Co.* 21 Conn. 130, 54 Am. Dec. 333; *Armstrong v. Fahnestock*, 19 Md. 58, 65; *Howe v. Lawrence*, 9 Cush. 553, 57 Am. Dec. 68; *Upson v. Arnold*, 19 Ga. 190, 63 Am. Dec. 302; *Goddard-Peck Grocery Co. v. McCune*, 122 Mo. 426, 29 L.R.A. 681, 25 S. W. 904; *Schmidlapp v. Currie*, 55 Miss. 597, 599, 30 Am. Rep. 530; *Fulton v. Hughes*, 63 Miss. 61, 64; *McDonald v. Cash*, 57 Mo. App. 536; *Siegel v. Chidsey*, 28 Pa. 279, 70 Am. Dec. 124; *Case v. Ellis*, 4 Ind. App. 224, 30 N. E. 907; *Ex parte Ruffin*, 6 Ves. Jr. 119; *Kimball v. Thompson*, 13 Met. 283; *Ladd v. Griswold*, 9 Ill. 25, 46 Am. Dec.

443; *Smith v. Edwards*, 7 *Humph*, 106, 46 *Am. Dec.* 71; *Robb v. Mudge*, 14 *Gray*, 534; *Baker's Appeal*, 21 *Pa.* 76, 59 *Am. Dec.* 752; *Sigler v. Knox County Bank*, 8 *Ohio St.* 511; *Wilcox v. Kellogg*, 11 *Ohio*, 394.

In *Case v. Beauregard*, 99 *U. S.* 119, 125, 25 *L. ed.* 370, 371, a partnership composed of May, Graham, and Beauregard was insolvent, and each of its members was insolvent. It owed the Fourth National Bank of New York \$235,000.89, and May owed the United States over \$300,000. In this state of the case, May and Graham transferred their interest in the partnership property, which consisted of a lease and the equipment of a railroad, to the United States, in part payment of May's individual debt. The United States sold this interest for \$228,000 to third parties, who, with Beauregard, disposed of the partnership property for stock in the lessor railroad company. The bank brought a suit in equity against all these parties to set aside the transfer of the partnership property to pay the individual debt of May and to subject it, or its proceeds, to the payment of the bank's claim against the partnership, on the ground that the creditors of the partnership were entitled to a preference in payment out of its property over the individual creditor of May; but the Supreme Court affirmed a decree which dismissed the bill because, before the interposition of a court was asked, the equities of the partners in the property of the partnership had been extinguished, and, for that reason, the derivative equity of the partnership creditor had come to an end at the same time. The court said: "It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in *Ex parte Ruffin*, *supra*, where, from a partnership of two persons, one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining *in specie*. And such has been the rule generally accepted ever since, with the single qualification that the assignment of the retiring partner is not *mala fide*."

In *Schmidlapp v. Currie*, *supra*, Harney and Washington were partners. Harney owed Odeneal, but neither Washington nor the firm was indebted to him. Harney conveyed, and Washington consented to a transfer of, all the partnership property and business to Odeneal in part payment of his individual debt. Odeneal took Currie into partnership with him, and Schmidlapp & 17 *L.R.A.* (N.S.)

Brothers, who were creditors of the first partnership, attached the property formerly owned by that firm, on the ground that the transfer was made with intent to hinder, delay, and defraud the creditors of the partnership, and was therefore fraudulent and void as to them. The court refused to sustain the attachment, and said: "If, at a time when the firm was still in existence, when no legal liens of any sort had attached, when it was neither bankrupt nor contemplating bankruptcy, all the members have agreed to a particular disposition of its assets, and that disposition is neither colorable nor fraudulent,—that is to say, is upon a bona fide consideration, and reserves no benefit to the grantors,—inasmuch as none of the partners can be heard to complain of such disposition, so none of the creditors of the firm, or of the individual members composing it, can question or attack it."

In *Fulton v. Hughes*, 63 *Miss.* 61, 65. *Fulton* and *Hughes* were partners. On March 17, 1884, *Fulton* sold to *Hughes* all the partnership property except certain accounts valued at \$500, which he received to his individual use, and *Hughes* assumed and agreed to pay all the debts of the firm. On June 2, 1884, *Hughes* transferred the books and accounts which belonged to the former firm in payment of a debt of \$955 which the firm owed his mother, and in payment of his own individual debt of \$500 which he owed her. A creditor of the former firm garnisheed persons indebted to the firm, and the mother, to whom these claims had thus been assigned, appeared and contested the right of the firm creditor to collect. The court said: "The creditors of the firm had no lien upon the goods or choses in action which had previously belonged to the firm, but which, on its dissolution, became the property of *Hughes*; and, since he alone was owner, he might lawfully appropriate them to the payment of any debt which he owed, whether it was a debt due by the late firm or by himself alone."

To a similar effect are *Roach v. Brannon*, 57 *Miss.* 490, and *Eldridge v. Phillipson*, 58 *Miss.* 270. These cases, and the rule of the supreme court of Mississippi illustrated by them, have been adopted and approved by the Supreme Court of the United States in *Fitzpatrick v. Flannagan*, 106 *U. S.* 655, 658, 27 *L. ed.* 211, 214, 1 *Sup. Ct. Rep.* 369.

In *Fitzpatrick v. Flannagan*, 106 *U. S.* 648, 657, 27 *L. ed.* 211, 214, 1 *Sup. Ct. Rep.* 369, the partners and the partnership were insolvent from the commencement to the end of the transactions. One of the partners died. The surviving partner continued the business, applied some of the partnership property to the payment of his indi-

vidual debt which he had incurred to borrow money to pay pressing obligations of the partnership. A creditor of the partnership attached the property on the ground that the surviving partner's transfer to pay his individual debt was fraudulent and void as against the creditors of the partnership. The Supreme Court, speaking of this transfer, which was made between the death of the deceased partner and the commencement of the attachment suit, said: "Any intermediate disposition of the property, made in good faith, even although it may have been specifically a part of the partnership assets, and even if it has been applied to the payment of his individual obligations, will be valid and effectual; and, without circumstances showing an actual intention to defraud, cannot be treated as a fraud, in law, upon partnership creditors;" and a judgment which sustained the attachment was reversed.

The sale of the partnership property by King to Maxwell, and the subsequent payment by Maxwell of his individual debt with the proceeds of a part of this property, were not in themselves evidence of an intent on the part of the debtors to hinder, delay, and defraud the creditors of the partnership, the entire evidence in the case fails to convince that the debtors, or either of them, ever had any such actual intention, the creditor paid had no reasonable cause to believe that a preference was intended by the payment, and the trustee cannot recover of Mrs. Sargent the \$3,731.90 which she received in payment of the note of her son. The decree below must be reversed, and the cause remanded with directions to dismiss the bill; and it is so ordered.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

C. F. ATWELL, Plff. in Err.,

v.

UNITED STATES.

(— C. C. A. —, 162 Fed. 97.)

Grand juror — disclosure of evidence — contempt.

1. A grand juror is not guilty of contempt for violating his oath to keep the counsel of the United States by disclosing the evidence on which an indictment was founded after publication of the indictment has been made, the accused is in custody, and the grand jury has been finally discharged.

Contempt — juror — punishment.

2. Power to punish for contempt, disobedience by a juror to a command of the court, does not extend to a disclosure of

evidence by a grand juror some time after his final discharge from service as such.

(May 22, 1908.)

ERROR to the District Court of the United States for the Western District of North Carolina to review a judgment punishing for contempt a grand juror who disclosed the evidence upon which was founded an indictment against the Old Nick Williams Company. Reversed.

The facts are stated in the opinion.

Argued before Pritchard, Circuit Judge, and Morris and Dayton, District Judges.

Messrs. Moore & Rollins, Burwell & Cansler, Thomas Settle, J. E. Alexander, and William P. Bynum, Jr., for plaintiff in error:

The power of the court to commit for contempt is limited.

U. S. Rev. Stat. § 725, U. S. Comp. Stat. 1901, p. 583; Re Daniels, 131 Fed. 95; Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205.

The powers of the grand jury ceased upon the expiration.

17 Am. & Eng. Enc. Law, p. 1276.

The action of the plaintiff in error did not obstruct the due administration of justice, but promoted it.

United States v. Farrington, 5 Fed. 343; United States v. Kilpatrick, 16 Fed. 765.

What has transpired before a grand jury may be shown, and the only limitation is

Case Note. — Disclosure by grand juror of evidence given before grand jury, as contempt.

The question decided in the foregoing case is, as the court said, very unusual, and a search reveals but one other reported case which is at all similar, and in that the facts are so materially different as clearly to distinguish it. The case referred to is Re Summerhayes, 70 Fed. 769, where a grand juror, while the jury was still in session, sought an interview with one who had caused an alleged crime to be investigated, and related to him certain testimony given before the grand jury, and discussed with him matters then pending before it, and the court held him guilty of contempt. The fact that the jury was still in session, and that the disclosure was concerning matters still pending, clearly distinguishes this case from ATWELL v. UNITED STATES, and it cannot be considered authority for a case where, as in the latter case, the term of court had expired, and the jury had been discharged a considerable period of time previous to the disclosures.

There are various cases which involve the right of a trial court to compel a grand juror to give evidence concerning matters which occurred in the juryroom, but that presents a different question.

that it may not be shown how the individual jurors voted, or what they said during their investigation.

People v. Shattuck, 6 Abb. N. C. 34; *Com. v. Mead*, 12 Gray, 167, 71 Am. Dec. 741; *State v. Horton*, 63 N. C. 595; *State v. Ivey*, 100 N. C. 541, 5 S. E. 407; *State v. Frizell*, 111 N. C. 722, 16 S. E. 409.

Messrs. A. E. Holton and A. L. Coble for defendant in error.

Dayton, District Judge, delivered the opinion of the court:

At the April term, 1905, at Statesville, in the western district of North Carolina, a grand jury was regularly impaneled and sworn, and by it an indictment was presented against the Old Nick Williams Company, Incorporated, engaged in the business of rectifier of distilled spirits, N. G. Williams, and D. E. Kennedy, charging the violation of certain provisions of the revenue laws of the United States. This indictment was indorsed on its face as having been found upon the testimony of R. B. Sams and W. R. Stackleather. The plaintiff in error, Atwell, was a member of this grand jury, and to him was administered the usual oath, obligating him, among other things: "The United States' counsel, your fellows', and your own you shall keep secret."

This indictment was transferred, at this same April term, from Statesville to Charlotte, there to be tried at the June term following, and this grand jury was discharged, and this term at Statesville adjourned. Capias issued, and the personal defendants were arrested and gave bail for their appearance. When the case came on for trial at the June term the attorneys for the defendants, having determined to file a plea in abatement to said indictment on the ground that there was no evidence before the grand jury upon which to base the same, caused a subpoena to be issued against Atwell and other grand jurors to appear as witnesses on behalf of the defendants. In obedience to this subpoena, Atwell appeared in Charlotte about two months after his discharge as a grand juror, and, in the office of counsel for defendants, disclosed to such counsel in substance the statements made before the grand jury by the witnesses Sams and Stackleather. This disclosure was made after counsel there present had assured him that it was his duty, in the interest of justice, so to do. Counsel for the defendants thereupon prepared an affidavit, setting forth the statement of such evidence made by Atwell to them, and asked him to swear thereto; but, a doubt arising in his mind as to the propriety on his part of such action, he sought the United States district attorney and asked him as to his

right and duty in the premises. The district attorney advised him that he was uncertain as to the law governing the case and as to whether or not he would be guilty of illegal or improper conduct in making such affidavit. Thereupon Atwell refused positively to make the affidavit.

These facts coming to the attention of the court, on June 19, 1905, a rule was awarded against Atwell, among others, requiring him to appear on day stated and show cause why he should not be attached for contempt. Atwell appeared, answered, denying that the court had jurisdiction, or that his action in the premises constituted either contempt or misconduct, and denied that his disclosure was that of "the United States' counsel, his fellows', or his own," or that it was made for any other reason than because "he believed that he had a right to do so, and that the ends of justice required that he should make such statement," as he was aware that the defendants had been arrested and admitted to bail, that the case was then to be tried, and that the witnesses Sams and Stackleather were at the time present to testify. Upon this answer and the facts as above substantially set forth the court below found Atwell guilty of contempt, made the rule absolute, and entered judgment that he should pay to the United States a fine of \$50 and the costs of the proceeding. To this judgment Atwell has sued out this writ of error.

It seems to us that a determination of the unusual, if not new and novel, questions involved in this proceeding, may be aided by a careful analysis of the oath administered to this grand juror. This oath required him (a) diligently to inquire and true presentment make of all such matters and things as were given him in charge; (b) to present no one for envy, hatred, or malice; (c) to leave no one unrepresented for fear, favor, or affection, reward, or hope of reward; (d) the United States' counsel, his fellows', and his own to keep secret. It may well be said that the first three obligations of this oath relate to the positive duty required of the grand juror, while the latter relates to and defines the rule of conduct to be followed by him in the discharge of these positive duties. The first three are demanded by direct mandate of the law; the latter only by its policy, and solely in order that the first three may be the more thoroughly and effectively performed. The first three obligations are absolutely required by the law, to be laid by oath upon the conscience of the juror; the latter may be omitted, as in some courts is done, and supplied by instructions given by the court.

It seems clear to us that no indictment in any court could, having been once found, be quashed on the sole ground that the grand jurors, or any of them, had disclosed the government's counsel or the proceedings had in the grand-jury room. On the contrary, an extreme case, at least, can be conceived, where a deliberate conspiracy on the part of a sufficient number of jurors to indict, not because of good cause shown, but to fulfil the dictates of malice and ill-will, carried into effect by the presentation of a true bill, would be sufficient to quash. Such a case, it is true, in practical experience, could hardly occur; but, if it should occur, and the evidence of it was positive and indisputable, it seems to us the duty of the court in the premises would be clear. It is clear, too, that the jurors cannot violate the first three obligations without great wrong being done to justice and society. If they do, to a degree, law is impotent and society is threatened with anarchy. This degree is increased just in proportion as the violation of these three obligations becomes persistent and general. On the other hand, it is readily to be perceived that grand jurors may fully comply with the first three obligations and violate the fourth in very many cases, without practical injury to society. Therefore we incline to draw a distinction between the fourth obligation of this oath, dictated by the policy of the law, and the first three, expressly required by the mandate of the law itself.

With this distinction in view, it becomes important to ascertain the reason for this policy of the law,—when the reason for it begins, and when it ends. The reason of the law is the life of the law, and this in a much stronger sense is true as to its policy. When once the reason for a policy to be pursued no longer exists, certainly the requirement to pursue that policy ends. It would not be required of grand jurors, we think, by any possible sound course of reasoning, after indictment found, trial and conviction had, judgment rendered, and penalty suffered, to refrain from ever discussing or mentioning to anyone the testimony adduced on the trial, solely because it had been first adduced before them in the grand-jury room. To what extent, then, does the policy of the law require this secrecy to be maintained? In general terms it may be answered: To the full extent necessary to fulfil the ends of justice, and no further. Very certain it is that it should be maintained during the sittings and deliberations of the grand jury; for its sole province is to make a preliminary and *ex parte* investigation, to ascertain if probable cause for presentment be found. This could easily

be impeded by persons fearing indictment, causing themselves or others in collusion with them to be summoned to appear before that body to present their defense. Certain it is that it may well be extended to indefinite secrecy as to the discussions and vote of the individual members of the jury; for it is well that, when a citizen assumes this high and responsible duty, he may do so with the full assurance that the law will not allow him to be subjected to the malice and consequent injury growing out of his neighbor's knowledge that he had advocated or voted for a presentment against him. It may be conceded that policy demands that this secrecy be maintained until the finding is made public and the accused is in custody, in order that the government may not be in any way impeded in bringing the accused to a speedy trial.

But does this policy require secrecy as to the evidence adduced before the grand jury after such jury has made its presentment and indictment, publication thereof has been made, the grand jury finally discharged, and the defendant is in custody? We think not; because another principle of the law's policy intervenes. It is certainly the policy of the law that one accused of crime shall have every opportunity to prove his innocence; and so tender of human life and liberty is it that it throws around the accused every presumption of innocence until his guilt before the bar is clearly shown. It furnishes him counsel if he is indigent. It compels the attendance of his witnesses. It is true that it makes him criminally liable if he attempts to suborn the government witnesses, to spirit them away from the trial, or by any improper or corrupt means seeks to impede the course of justice, just as it would make so liable any prosecuting officer or government agent seeking to secure conviction by like means; but, while it does this, its policy demands that the accused shall have the fairest and fullest opportunity to make clear his innocence. To this end it directs that the names of the witnesses upon whose evidence it is found be indorsed upon the presentment, and that a copy with this indorsement shall be furnished him in advance of trial if he demands it. Will anyone say that he is prevented from inquiry as to what these witnesses had or would testify against him, if such inquiry be without resort to corrupt and illegal practices? Cannot the district attorney himself, who has been before the grand jury and heard the evidence adduced before it, or has that body's notes taken at the time, so inform him or his counsel as to this testimony if he so desires? What reason, therefore, can exist why the grand jurors, under such conditions, should

be bound to secrecy? We can see none; and for these reasons we hold this fourth obligation of the grand juror's oath to require secrecy only so long as the policy of the law requires, and that that policy does not require it, so far as the evidence adduced before the grand jury is concerned, after presentment and indictment found, made public, and custody of the accused had, and the grand jury finally discharged.

But, independent of these considerations, we must consider this case, in view of § 725 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 583), which provides: "The said courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

While courts are vested by common law with inherent powers to protect themselves and enforce their mandates, there can be no question that this power may be limited by legislative authority, and it cannot be further questioned that this act of Congress has limited this power in Federal courts to a greater extent than it has been limited by any other government where the common law prevails. While this is true, it must be conceded by all that this power cannot be absolutely destroyed without making the mandate of the courts mere idle and meaningless fulminations to be ridiculed and not respected. Mr. Justice Johnson, in *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242, while substantially deciding that the power to punish by contempt may be limited by legislation, has nevertheless very pertinently said: "The idea is Utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger. No one is so visionary as to dispute the assertion that the sole end and aim of all our institutions

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is the safety and happiness of the citizen. But the relation between the action and the end is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences, if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment. But, if there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbors' rights."

The wisdom of these enunciations of sound morals and correct legal principals is accentuated with redoubled force under the conditions which exist to-day. The exercise of this discretion and power by the courts is not designed for evil, but for good; not for oppression, but for protection. Very frequently those who complain the loudest against its exercise are ultimately benefited the most. Men, inflamed by passion, are frequently not capable of rightly judging of their own conduct, or of foreseeing the consequences thereof. In such cases the restraining power on the part of judges, acting under solemn obligations to do "equal right to the poor and to the rich," chastened and humbled by the sense of the weighty responsibilities laid upon them, may save such persons from liability to civil and criminal actions, calculated to bring to them ruin and loss of liberty. While these things are true, we, as judges, must never fail to remember the restraints which hedge about this discretion. The contempt proceeding must be regarded as in its nature of a criminal character, and the accused must be entitled to all reasonable doubt arising from the facts alleged to constitute the contempt. He is guaranteed the right to appeal, and he may, by the executive power, be pardoned. This statute has been construed, and the limitations

placed upon this power by it have been very clearly defined, by Mr. Justice Field in *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205, wherein he says: "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited . . . by act of Congress March 2, 1831, chap. 99, 4 Stat. at L. 487, U. S. Comp. Stat. 1901, p. 583. The act in terms applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt; but that it applies to the circuit and district courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: (1) Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) where there has been misbehavior of any officer of the courts in his official transactions; and (3) where there has been disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."

In the case before us Atwell could be held liable as a juror only under the terms of the third paragraph above set forth, and only then, it seems to us, upon the assumption that, having been once a juror, he remains always such; for it is undisputed that he did not make his disclosure at Charlotte until two months after he had been finally discharged from service as grand juror at Statesville. We cannot convince ourselves that this assumption is sound. On the contrary, there are several reasons to hold otherwise. A grand jury is only impaneled to make preliminary investigations of

those things committed to its charge. These investigations require, in ordinary practice, but a few days each term to complete. The members are then discharged, and, by the terms of § 812, Rev. Stat., U. S. Comp. Stat. 1901, p. 627, as modified by act June 30, 1879, chap. 52, § 2, 21 Stat. at L. 43, U. S. Comp. Stat. 1901, p. 624, a juror who has thus served a term should not be allowed to serve again until after the lapse of one year. But, if the oath should be held to require perpetual secrecy on the part of such juror, and even if he might subject himself to prosecution for perjury because of its violation, he is nevertheless shielded, we think, from the power of the court to attach him for contempt so soon as the court has discharged him from further service.

We can well understand how a trial judge, who is charged with the responsibility of securing a fair and impartial enforcement of the law, should be exceedingly anxious to use all means within his power to prevent the slightest interference with the administration of justice on the part of anyone who may show a disposition to unduly oppress the citizen, or, on the other hand, through sympathy or a misguided notion as to his duty, attempt to do anything calculated to hinder or embarrass the court in the due administration of justice. We fully appreciate that the learned judge before whom the matters involved in this case were pending felt that he was charged with a grave duty to protect the proper administration of the law, and that the matter had his closest scrutiny. The questions involved were, however, as we have indicated, almost wholly new, and, while we have felt constrained to dissent from his judgment, we have been led to do so only after a long and earnest consideration.

The judgment of the court below must be reversed, and the case remanded, with directions to discharge the rule.

VIRGINIA SUPREME COURT OF APPEALS.

TIDEWATER RAILWAY COMPANY, Plff.

v. in Err.,

v.

JULIA A. SHARTZER.

(107 Va. 562, 59 S. E. 407.)

Eminent domain — compensation — injuries.

1. A statute requiring compensation to be made for injuries to adjacent property not taken by corporations exercising the right of eminent domain is within the legitimate scope of legislative power, where the Con-

ed to this report as to the allowance made to Julia A. Shartzter, and thereupon, "the court being of opinion to sustain the exceptions and recommit the said report on account of the form thereof, and because the same included damages to the business of the said Julia A. Shartzter, by consent of parties it is agreed that the said report be amended and treated as if it read as to her property as follows: 'To the lands of Julia A. Shartzter, no part of which are taken, we fix the damages at the sum of \$600, and, in ascertaining said damages, we took into consideration the proximity thereof to the said railroad, and find that the difference in the market value of said property before the construction and operation of said railroad and afterwards will be the sum of \$600,

and that said depreciation in said market value and consequential damages to said property will be caused by smoke, noise, dust, and cinders arising from the proper, ordinary, and lawful operation of said road.'"

To the report as amended by this decree the applicant again excepted, and, on consideration of the said exception, it was overruled by the court, and the report, as amended, confirmed. From that order a writ of error was allowed by one of the judges of this court.

The specific constitutional provision upon the subject of taking property for public uses, as it existed prior to 1902, is found in Const. 1869, art. 5, § 14, which reads as follows: "The general assembly shall not

be occasioned by a direct physical disturbance of a property right, of a character for which redress could have been had at the common law if such disturbance had not been authorized by statutory enactment. It is not enough that the damage exceeds merely in amount that sustained by the public generally. It must be greater in kind,—that is, greater by reason of its peculiar nature; for, if only greater in degree, no recovery can be had."

To the same effect is Illinois C. R. Co. v. School Trustees, 212 Ill. 406, 72 N. E. 39, where the injury complained of was the noise of passing trains, interfering with the instruction of children, and not the throwing of smoke, cinders, and ashes upon the premises.

To the same effect, are often cited the English authorities where the same question has arisen upon the wording of the railroad clauses act, somewhat similar to the constitutional provision here under consideration. *Hammersmith & City R. Co. v. Brand*, L. R. 4 H. L. 171; *Atty. Gen. v. Metropolitan R. Co.* [1894] 1 Q. B. 384. The decision in these cases, however, depended upon the wording of the act, which gave compensation only for such damages as resulted from the construction of the railroad, and not from the operation of its trains.

It follows that, where the noise, confusion, and disturbance caused by the engines and cars are such as would, in the absence of legislative authority, have constituted an actionable nuisance, the existence of such authority in no way relieves them of their damaging effect so as to take away from property owners their right to redress, or convert what would otherwise have been actionable into a case of *damnum absque injuria*, if the Constitution prohibits the "damaging" as well as the taking of private property for public use without compensation. So held *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750, where, because of the building of a railroad and various buildings connected with it, great quantities of smoke, cinders, and dust were thrown upon the property. To the same effect is *Illinois C. R. Co. v. Kuehle*, 95 Ill. 17 L.R.A. (N.S.)

App. 185 (smoke, dust, and vibrations caused by many daily trains in adjoining street). A similar case, and sufficiently set out in *TIDEWATER R. CO. v. SHARTZER*, is *Baker v. Boston Elev. R. Co.* 183 Mass. 178. 66 N. E. 711.

So, where smoke, cinders, and ashes from passing trains in an adjoining street are precipitated upon property, and therefore do an actual physical injury,—something beyond causing mere noise or inconvenience.—they may be considered as one of the elements of damage to which the adjoining property owner is entitled.

Thus, in *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320, 9 S. E. 1078, where an abutting property owner complained of a horse railway cutting off all safe entrance to or exit from his property, and that, through its operation, the noise and dust connected with it greatly annoyed him and his family and injured his premises, the court, after having distinguished between the rule under the old Constitution and the rule under the new, said: "We think any evidence would be admissible that would tend to show damage to the property. If noise, smoke, dust, cinders, or things of that sort, could be shown to have damaged the property itself, then they should be considered by the jury in arriving at the amount of the recovery; if, however, they amount simply to inconvenience or discomfort to the occupants of the property, they would not be an element of damages, and should not be considered by the jury."

A case holding to the same effect is *Omaha & N. P. R. Co. v. Janacek*, 30 Neb. 276. 27 Am. St. Rep. 399, 46 N. W. 478, where the railroad company constructed its road in front of a person's property, although on its own land, and, because of the soot, smoke, etc., caused the property greatly to deteriorate in value. The court, in this case, said: "It has become the settled law of this state that, under this provision of our Constitution, it is not necessary that any part of an individual's property should be actually taken for public use in order to entitle him to compensation. If the property has been depreciated in value by reason

pass . . . any law whereby private property shall be taken for public uses without just compensation."

It was uniformly held, under that provision and the statute which carried it into execution, that there could be no recovery for an injury or damage to property no part of which was actually taken. This construction resulted in much hardship, and was a denial of justice in cases where the use, the enjoyment, and the value of property were greatly impaired under conditions which were held not to amount to a taking within the meaning of the law as it then existed.

Influenced by these considerations, the convention which framed the Constitution of 1902 amended § 14, art. 5, which now

appears as § 58, art. 4, of the Constitution of 1902, by which are prescribed certain prohibitions on the powers of the general assembly, and among them that "it shall not enact any law whereby private property shall be taken or damaged for public uses without just compensation;" and the general assembly, when it came to legislate upon the subject and give effect to this constitutional provision in § 1105f, cl. 5, Code 1904, provided, where a corporation authorized to have land condemned for its uses has complied with the requirements of the preceding section, for the "appointment of commissioners to ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for its uses,

of the public improvement, which the owner has specially sustained, and which is not common to the public at large, a recovery may be had. In the case at bar the plaintiff's property is depreciated in value by the noise caused by the operation of the defendant's engines and cars in front of his premises and in close proximity to his house, by the casting of soot, smoke, and cinders upon his property, and by the vibration of his house. The plaintiff has sustained special damages by the construction and operation of the railroad near his premises, in excess of that sustained by the community at large. Smoke, soot, and cinders are not thrown upon property situate a few blocks from the road, nor does the moving of trains jar buildings that are distant from the track."

To the same effect are *Illinois C. R. Co. v. Turner*, 194 Ill. 575, 62 N. E. 798, where a railroad running along a street threw great quantities of smoke and cinders upon adjoining property; also *Calumet & C. Canal & Dock Co. v. Morawetz*, 195 Ill. 398, 63 N. E. 165; *Illinois C. R. Co. v. Schmidgall*, 91 Ill. App. 23; *Davenport, R. I. & N. W. R. Co. v. Sinnet*, 111 Ill. App. 75; *Mason City & Ft. D. R. Co. v. Wolf*, 78 C. C. A. 589, 148 Fed. 961; *Helmer v. Colorado, S. N. O. & P. R. Co. (La.)* 47 So. 443. This would also seem to have been recognized in *Stockdale v. Rio Grande Western R. Co.* 28 Utah, 201, 77 Pac. 849.

So, in *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93, it was held that the depreciation in value of a lot caused by the building of a railroad and the embankment near by in a street was a damaging within the constitutional provision, for which compensation could be collected.

In *Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 249, 38 N. E. 556, the owner of property near which, in the street, a railway was built, was permitted to prove special disadvantages and annoyances, such as smoke, caused by trains in passing and re-passing, which interfered with the full enjoyment of the premises, and, in his action for damages, was not limited to a recovery for those on account of a direct physical

injury to the corpus or subject of the property.

In *Stone v. Fairbury, P. & N. W. R. Co.* 68 Ill. 394, 18 Am. Rep. 556, the court recognizing that the proper rule was that, in order to enable a recovery, there must be a physical injury, a declaration averring, in substance, that smoke and cinders were thrown from the engines onto the plaintiff's property was held, on demurrer, to show a good cause of action.

In *Columbus, H. V. & T. R. Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. 69, it was held that, under a statute providing that every railroad laying a track upon any street, alley, or other ground shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, the annoyances occasioned to the occupant of property by noises, smoke and sparks of fire, by the running of locomotives and cars along the track, if it is shown that these caused special injury and depreciation to the property, might be taken into account in estimating the damages.

However, in *Gainesville, H. & W. R. Co. v. Hall*, 78 Tex. 169, 9 L.R.A. 298, 22 Am. St. Rep. 42, 14 S. W. 259, it was said: "We think that the insertion of the words 'damaged or destroyed' in the provision of the Constitution under consideration was at all events intended to obviate any question of exemption from liability to the owner for property injuriously affected by a public work, and to provide a remedy for any damage which, in such cases, the legislature might authorize to be inflicted." It was accordingly held in that case that damages are recoverable for the diminution of the value of the property by reason of the noise, smoke, and vibrations incident to the operation of a railroad passing near it, although no part of it was taken for the construction of the road, which at that point was built entirely on lands taken from private citizens. It is possible, however, that in this case the noise, smoke, and vibrations, but for the legislative authority, would have amounted to a nuisance, for the court took occasion to say, further: "It is sufficient for the determination of this case to say

and to award the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works. . . ."

With respect to the statute, we shall first observe that, if the Constitution of the state were to be construed as a grant of power to the legislature, the statute just quoted could be maintained as being a reasonable and proper exercise by the legislature of the delegated power. But such is not the rule of construction as applied to the Constitution of the state. The legislature is clothed with full legislative authority, except so far as it is restrained by some provision of the Constitution, either expressed or necessarily to be implied from the terms of that instrument. When, therefore, the Constitution says that the legislature shall not enact any law whereby private property shall be taken or damaged for public purposes without just compensation, a statute which declares that a corporation invoking the exercise of the power of eminent domain must make just compensation, not only for the land or other property proposed to be condemned for its uses, and damages, if any, resulting to the adjacent or other property of the owner, but also for damages to the property of any other person, is within the legitimate scope of the legislative power.

Coming, then, to a consideration of the statute, it cannot be doubted that, by the change of the law in the Constitution and statute, it was plainly intended to enlarge the right to compensation.

"Of this," says Lewis on Eminent Domain, at § 232, speaking of similar amendments, "there can be no question. Any other construction would render the words nugatory. They are 'an extension of the common provision for the protection of pri-

vate property.' The words "injured or destroyed" were not used in vain and without meaning. It was intended that they should have effect, and, unless they operate to impose a liability not previously existing, they are without operation.' The Supreme Court of the United States, referring to the Constitution of Illinois, says: "The use of the word "damaged," in the clause providing for compensation to the owners of private property appropriated to public use, could have been used with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use than was guaranteed by the former Constitution.'" 1 Lewis, Em. Dom. 2d ed. § 232, and authorities there cited. The same author says: "The words in question should be liberally construed. The provisions of the Constitution requiring compensation to be made for property taken, injured, or damaged for public use, are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected; and the authorities so hold. 'The language of the Constitution is to be construed liberally, so as to carry out, and not defeat, the purpose for which it was adopted.'" Section 232a.

It will be observed that in the discussion of this subject text writers and adjudicated cases use the words "damaged," "injured," and "injuriously affected" as being equivalents, and meaning in substance the same thing.

Considering the terms of the Constitution and of the statute as they stood prior to 1902, and recognizing that the changes then introduced were designed to enlarge the

that it was certainly intended that the legislature should not authorize a corporation to do an act for a public use which, if done by an individual without legislative sanction, would be actionable, and at the same time exempt it from liability to respond in damages to the owner whose property had been injured."

This case was followed by *Ft. Worth & R. G. R. Co. v. Downie*, 82 Tex. 383, 17 S. W. 620; *Missouri, K. & T. R. Co. v. Calkins* (Tex. Civ. App.) 79 S. W. 852, and *Novich v. Trinity & B. Valley R. Co.* (Tex. Civ. App.) 101 S. W. 476, where the court took occasion to say: "The rule as announced by our decisions, as we understand it, is that, where property is damaged by the construction and operation of a railway, the owner is entitled to compensation, although the operation is done in a lawful manner; 17 L.R.A. (N.S.)

the measure of damage being the depreciation in the market value of the property. If there is no depreciation in the value of the property, no damage is recoverable, unless the business is improperly or negligently conducted; that is, in such a case as this, if more noise, dust, cinders, odors, etc., are produced than would necessarily attend such operation properly conducted, then the party could recover for annoyance, discomfort, etc."

For cases on the presumption of statutory authority to commit a nuisance as applied to railroad corporations, see subject note to *Missouri, K. & T. R. Co. v. Mott*, 70 L.R.A. 585.

For effect of legislative authority upon liability for private nuisances, see subject note to *Louisville & N. Terminal Co. v. Lellyett*, 1 L.R.A. (N.S.) 49.

right to compensation and extend it to cases where, under the old law, compensation was denied, it would seem that the language employed in the existing Constitution and Code are not difficult of interpretation, and should be held to embrace and give a remedy for every "physical injury to the plaintiff's property, or by noise, smoke, gases, vibrations, or otherwise." Lewis, *Em. Dom.* § 236.

It is contended on the part of plaintiff in error that "the proper construction of the clause under consideration is to take away from public service corporations the immunity that they have heretofore enjoyed under legislative sanction, and place them on the same footing with individuals and private corporations. The words 'or damaged' mean actionable damages; that is, such damages as would form the basis of an action at common law or under some general statute, such as may be caused by the physical invasion of property or an interference with some right, public or private, appurtenant to the property."

To this proposition we cannot give our unqualified assent. A person, natural or artificial, who is asking nothing with respect to his property, is limited in the use of his own property only by the maxim that he must enjoy it in such a manner as not to injure that of another; or, less literally, but more accurately, perhaps, "So use your own property as not to injure the rights of another." Broom, *Legal Maxims*, 7th ed. p. 364.

But in the case before us the Tidewater Railway Company was not the owner of the property. It had been unable to acquire what it needed because of its "inability to agree on terms of purchase with those entitled" to the land it desired, and therefore had invoked the exercise of the power of eminent domain; and the state has seen fit to prescribe upon what terms that power shall be exercised.

It appears that the language of our Constitution was taken from that of Illinois, which was adopted in 1870, and had been the subject of judicial construction by the courts of that state and of the United States.

In *Rigney v. Chicago*, 102 Ill. 64, the city had constructed a viaduct or bridge on a public street, near its intersection with another street, thereby cutting off access to the first-named street from the plaintiff's house and lot over and along the street intersected, except by means of stairs, whereby the plaintiff's premises fronting on the latter street and near the obstruction were permanently damaged and depreciated in value by reason of being deprived of such access. It was held that the city was liable 17 L.R.A. (N.S.)

in damages for the injury, and, in the discussion of the case, rights as they existed under the Constitution of 1848 and those rights as extended by the Constitution of 1870 are compared; the court saying: "That restriction of the remedy of the owners of private property to cases of actual physical injury to the property was under the Constitution of 1848, which simply provided that private property should not 'be taken or applied to public use' without just compensation, etc. The Constitution of 1870, however, provides that 'private property shall not be taken or damaged for public use without just compensation,' thus affording redress in cases not provided for by the Constitution of 1848, and embracing every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provision, give a right of action."

In *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511, the court observes: "It is needless to say our decisions have not been harmonious on this question, but in the case of *Rigney v. Chicago*, supra, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was that, under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate; but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party damaged may recover. We regard that case as conclusive of this question."

The Supreme Court of the United States, in *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820, referring to the Illinois cases, says: "We concur in that interpretation. The use of the word 'damaged' in the clause providing for compensation to owners of private property appropriated to public use, could have been with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be ap-

propriated to public use, than was guaranteed by the former Constitution."

In *Baker v. Boston Elev. R. Co.* 183 Mass. 178, 66 N. E. 711, it is held that, under Stat. 1894, chap. 548, p. 764, § 8, providing for compensation for damages caused by the construction, maintenance, or operation of the lines of the Boston Elevated Railway Company, "noise which, operating with other causes, would constitute a private nuisance to abutting property if it were not authorized, is special and peculiar damage, for the whole of which compensation can be recovered without seeking to determine how much of the effect is due to that part of the noise which alone would not constitute a liability and how much to the excess." In the course of its opinion the court in that case says: "In dealing with the question which is presented, we have a helpful analogy in the rules of common law. Noise is necessarily incident to the transaction of many kinds of business, and, so long as it is not excessive, it is not unlawful. But, when it is so great as to become a nuisance to property in the vicinity, it is actionable. It is judged by its effect, and not merely by its cause. In England, the difference in effect between damage which, as between private persons, would give a right of action for a nuisance, and that which is permissible in the use of land, is often treated as an important consideration, if not an absolute test, in deciding what shall be paid for by a corporation acting under public authority.

. . . disturbance which constitutes a private nuisance may be treated as causing damage different in kind, and not merely in degree, from that caused by disturbance which falls short of being a nuisance. Damage from noise which is unlawful by reason of its excess may well be considered unlike the detriment which is so slight as to be legally permissible in the ordinary use of property. In the case at bar it is found that, but for the statutory authority, the noise 'would constitute a private nuisance of a grave character to the petitioner's, said estate.' At common law, in such a case, the rights of the owner of the property affected, and his relations to the cause of the disturbance, are treated as very different from those of the general public, who are also affected by it, and he is entitled to compensation in damages. . . . We are of opinion that noise, such as would constitute a private nuisance to abutting property if it were not authorized, should be treated as causing special and peculiar damage under this statute, which entitles the landowner to compensation."

In *Swift & Co. v. Newport News*, 105 Va. 108, 3 L.R.A. (N.S.) 404, 52 S. E. 821, this court said: "Where private property has

been simply damaged by a public improvement, but no part thereof has been taken, the measure of damages is the diminution in the value of the property by reason of the improvement,—difference between the fair market value of the property immediately before and after the construction of the public improvement."

But, as was said by the supreme court of California in *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750, quoted with approval by Lewis on Eminent Domain, § 236: "The Constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the Constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But, whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation."

"A recovery has not been allowed," says Lewis on Eminent Domain (same section), "in any case, unless there was some physical injury to the plaintiff's property, or, by noise, smoke, gases, vibrations, or otherwise, an interference with the street in front of his property, or with some right appurtenant thereto, or which he was entitled to make use of in connection with his property. On the other hand, several cases have held that mere depreciation caused by the proximity of a public improvement afforded no ground for redress."

No question is raised in this case as to the amount of damages allowed. The sole question is whether or not the depreciation in market value and consequential damages to property, caused by smoke, noise, dust, and cinders arising from the ordinary and lawful operation of a railroad, are the subject of compensation under the provisions of our Constitution and laws.

"The operation of a railroad," says Lewis on Eminent Domain, § 230, "the switching of cars to and fro, the use of coal bins, stock yards, etc., may be a serious annoyance to the occupiers of adjacent property, by reason of the noise, smoke, cinders, vibrations, smells, etc. The use and value of property may be greatly impaired thereby. The question whether such an impairment of property constitutes an independent cause of action is quite distinct from the question whether such annoyances may be taken into consideration when part of a tract is taken, or when a railroad is laid in a street or highway. In the latter case the annoyances referred to are mere incidents to what is in law the main grievance. But in the former case they constitute the principal and only cause of complaint. Whether the impairment caused by such annoyances constitutes a taking, we have already considered. But, whether a taking or not, it would seem that such an impairment of property was a damage or injury within the purview of recent Constitutions. Where the use and operation of a railroad . . . depreciates the value of his property by reason of the noise, smoke, vibration, etc., his property is damaged within the Constitution, and he is entitled to compensation."

Such being, as we think, the proper interpretation of the Constitution, the thought at once arises that it will give rise to an indefinite number of claims. We cannot state this proposition more satisfactorily than is done by the author from whom we have already quoted so extensively.

In § 227, Lewis on Eminent Domain, it is said of this contention that it is without merit. "The Constitution guarantees compensation for property damaged or injured for public use. The right to compensation is coextensive with the damage or injury, both in space and in amount. This point was fully considered in the McCarthy Case [McCarthy v. Metropolitan Bd. of Works, L. R. 8 C. P. 191], and, in reference to it, Justice Bramwell says: 'If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place 10 miles away, if there was no other within 20 of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected, for present or other purposes, or the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were 1,000 claims of £1,000 each. If they are well founded, £1,000,000 of property is destroyed, and why is not that part of the 17 L.R.A. (N.S.)

cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?' Lord Penzance, in the same case, observes: "It was asked in argument, Where are the claims to compensation to stop, if the rule be so applied? The answer, I think, is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attached to the premises in question by reason of their proximity to, or relative position with, the highways obstructed; and that this special value has been permanently destroyed or abridged by the obstruction. If this limit be thought a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking; for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy." [L. R. 7 H. L. 263.] That case dealt with the obstruction of a highway, but its reasoning applies as well to the diminution in value occasioned by smoke, noise, dust, and cinders.

It is impossible to lay down any arbitrary rule upon the subject,—certainly none based upon mere measurements. It will be for commissioners and juries, under the supervision of the courts, to determine upon the facts of each case whether or not there has been such damage to property as should be compensated. Of course, claims without merit will not be preferred; but it will be the duty of those intrusted with the administration of the law—commissioners, juries, and courts—to separate those deserving of compensation from those which are without merit.

For these reasons, we are of opinion that there is no error in the judgment of the Circuit Court, and it is affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

GRACE E. LAMBERT, Appt.,
v.

CITY OF NORFOLK.

(— Va. —, 61 S. E. 776.)

Eminent domain — diminution in value.

Loss through diminution in the value of property for residence purposes because of the location of a cemetery near it is not

within the meaning of a constitutional provision requiring compensation in case property is damaged for public use.

(June 11, 1908.)

APPEAL by plaintiff from a judgment of the Circuit Court for the City of Norfolk in defendant's favor in an action brought to recover compensation for diminution in the value of land through the location of a cemetery near it. Affirmed.

The facts are stated in the opinion.

Mr. Thomas W. Shelton, for appellant:

The legislature of Virginia takes into consideration the decrease in market value of land caused by sentimental considerations and personal prejudice.

Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 675, 43 L. ed. 1131, 19 Sup. Ct. Rep. 827.

On petition for rehearing.

"The purposes for which land may be used and is wanted at present or in the near future" are considered in ascertaining the value of land.

Richmond, P. & C. R. Co. v. Chamblin, 100 Va. 405, 41 S. E. 750.

An owner has the same remedy he would have had against a nuisance *per se*.

Wood, Nuisances, 3d ed. §§ 11, 12, 763.

Messrs. James F. Duncan and E. R. F. Wells, for appellee:

An adjoining landowner cannot complain of an injury to his feelings only.

Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315; *Cooley, Torts*, 600; 2 Dill. Mun. Corp. § 587d; *Swift & Co. v. Newport News*, 105 Va. 108, 3 L.R.A.(N.S.) 404, 52 S. E. 821; *Tidewater R. Co. v. Shartzler*, 107 Va. 562, ante, 1053, 59 S. E. 407; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Taylor*, 125 U. S. 166, 31 L. ed. 640, 8 Sup. Ct. Rep. 820.

Depreciation in value caused by the establishment of a cemetery on property adjoining the plaintiffs is not legal damage.

Eachus v. Los Angeles Consol. Electric R. Co. 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; *Lewis, Em. Dom.* § 236; 2 Dill. Mun. Corp. § 587d; *Connelly v. Western U. Teleg. Co.* 100 Va. 51, 56 L.R.A. 663, 93 Am. St. Rep. 919, 40 S. E. 618.

Note. — No other cases have been found wherein the question was raised whether the location of a cemetery near property was a "damaging" of the property within the constitutional provision prohibiting the taking or damaging of property for public use without just compensation.

For cases on the question whether, within such a constitutional provision, a property owner may recover damages for injury to his property occasioned by smoke, soot,

Harrison, J., delivered the opinion of the court:

This action was brought against the city of Norfolk to recover damages which the plaintiff alleges she has sustained in consequence of the city having established a cemetery adjacent to her lands.

It appears that, on February 15, 1906, the city of Norfolk purchased, for cemetery purposes, a tract of land situated on Mason's creek, in the county of Norfolk, 2½ miles north of the present city limits, containing 106½ acres, at the price of \$320 per acre, and has paid for the same and received a deed therefor. This purchase was made under power conferred on the city by its charter and by virtue of § 1414 of the Code of 1904, as amended by act February 9, 1906, chap. 12, p. 10.

The amended section is as follows: "Sec. 1414. Location of Cemeteries; Limitation as to Quantity of Land.—Nothing contained in the four preceding sections shall be so construed as to authorize any cemetery to be hereafter established in the corporate limits of any city or town, or within 100 yards of any residence, without the consent of the owner of such residence; or to authorize the conveyance of more than 300 or the condemnation of more than 2 acres of land for use of a cemetery; but, when damage is done to adjacent lands by the establishment of such cemetery, whether established by purchase of land or condemnation proceedings, the owners whose lands have been damaged shall have right of action against any person, firm, corporation, or municipality establishing said cemetery. said action to be instituted within one year from the establishment of such cemetery." Acts 1906, chap. 12, p. 10.

Prior to this amendment, the statute inhibited the establishment of a cemetery within the corporate limits of any city or town, or within 400 yards of any residence, without the consent of the owner of such residence, and further inhibited the conveyance of more than 75 acres or the condemnation of more than 2 acres of land for use as a cemetery. Acts 1902-04, chap. 563, p. 896.

The changes, reducing the distance from a residence at which a cemetery could be es-

noise, vibration, etc., emitted from passing trains, see case note to *Tidewater R. Co. v. Shartzler*, ante, 1053.

For cases on the question of liability of a municipality for injury to abutting property from bringing street to the grade established in the first instance, under a constitutional provision against "damaging" private property for public use without compensation, see case note to *Leiper v. Denver*, 7 L.R.A.(N.S.) 108.

tablished from 400 to 100 yards, and increasing the area that could be bought for cemetery purposes from 75 to 300 acres, were doubtless suggested by the greatly increased demand for burial space, especially within convenient reach of large cities. The right of action, given for the first time by this amendment, was manifestly in furtherance of the recent constitutional provision that the legislature should not "enact any law whereby private property shall be taken or damaged for public uses, without just compensation." Const. 1902, § 58.

The statute, as amended, seeks to protect two objects, namely, residences and land. It protects residences by inhibiting the establishment of a cemetery within 100 yards thereof. This denial of the right to establish a cemetery within 100 yards of a residence, without the consent of the owner, was doubtless considered a sufficient and effective protection to such residence. The right of action is confined to a recovery for damage done to adjacent lands by the establishment of a cemetery. The limitation of 100 yards is not measured from the land, but from a residence. It affects residences alone, and has nothing to do with the right of action given to an adjacent landowner.

The plaintiff owns and resides on 125 acres of land, which is adjacent to the rear portion of the tract owned by the city. No part of the plaintiff's land has been taken, and no right appurtenant thereto has been invaded. The record shows that the establishment of this cemetery has in no way interfered with any of the plaintiff's rights of property, such as access, rights of way, water rights, light and air, easements, lateral support, etc., or that the cemetery is being operated as a nuisance. On the contrary, it appears that she has offered no such injuries. The plaintiff's declaration, her bill of particulars, and the evidence all show that her case is based solely upon the theory that the market value of her land has been diminished by reason of the purchase of the land by the city of Norfolk for cemetery purposes, and by its passage of an ordinance establishing the same as "Evergreen Cemetery." The plaintiff's land is only used for farming purposes. It has never been platted or laid out in streets, and no lots there have ever been offered for sale. In view, however, of the rapid growth of Norfolk, the plaintiff expects her land to have a future value for residential purposes, and she thinks that an adjacent cemetery will greatly impair its value for such purposes. It is clear that the claim of the plaintiff to damages rests entirely upon sentimental considerations, and the prejudice that some people have to living near a cemetery.

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Such considerations as constitute the basis of the plaintiff's claim were not recognized at common law as ground for a recovery of damages. At common law it was generally damage done to the corpus of the plaintiff's property, or to some right enjoyed by the plaintiff in connection therewith, and not to the feelings, for which a recovery was allowed. The inconvenience had to be something more than fancy or fastidiousness. The law did not recognize damage to the feelings or mind, commonly called sentimental damage, but applied the maxim, *Damnum absque injuria*.

This doctrine of the common law is aptly illustrated by the case of *Monk v. Packard*, 71 Me. 309, 36 Am. Rep. 315. There the plaintiff sued an individual for damages suffered on account of a private burying ground located wholly on the land of the defendant; the nearest grave being 40 feet from, and opposite to, the plaintiff's sitting room, and in plain view of his front windows and door. He claimed that it rendered his residence uncomfortable and the enjoyment of his property disagreeable, and that it had lessened its market value. The jury allowed \$25 damages, and the defendant appealed. It was held that the verdict was against the law and should be set aside; the court saying: "Nor can the verdict be sustained upon the sole ground of the cemetery's proximity to the plaintiff's premises, and the consequent depreciation of the market value of his property; for a repository of the bodies of the dead is as yet indispensable, and, wherever located, it must *ex necessitate* be in the vicinity of the private property of someone who might prove its market value injuriously affected thereby. *New Orleans v. Church of St. Louis*, 11 La. Ann. 244. But, assuming that the jury, in respect to these matters, found in behalf of the defendants, and concluded that there was no injury to the plaintiff's property or to his physical health or comfort, and based their verdict solely upon the ground that, on account of its relative position with the plaintiff's house, the cemetery inevitably meets his immediate view whenever he looks from the north window of his sitting room or steps from his door, and that thereby the comfortable enjoyment of his dwelling house is interfered with; then the defendants contend that the verdict is against law upon the ground that such discomfort is one purely mental, and is not a cause of action." This contention of the defendants was also sustained; the court, quoting from *Cooley on Torts* [§ 800], saying: "The inconvenience must be 'something more than fancy, delicacy, or fastidiousness.' . . . If this burial ground is, under the circumstances, a private nuisance,

sance, then is it also a public nuisance to every traveler who passes on that road, as well as every soldiers' monument in the country."

It is plain, therefore, that, under the common law, the plaintiff would not be entitled to damages against the city of Norfolk on account of the establishment of "Evergreen Cemetery" merely because it offended her taste or feelings, or might affect the fastidious sentiments of some of her prospective purchasers of lots.

This was the state of the law when the Constitution of 1902 was adopted. This instrument, for the first time, provides that the legislature shall not enact any law whereby private property shall be taken or damaged for public uses without just compensation. In § 1414 of the Code of 1904, as amended, the word "damaged" is used in the same sense that it is in the Constitution. The statute simply carries out the constitutional provision on the subject.

Before the adoption of the present Constitution, private property could be damaged by a municipality, acting under legislative authority, and no compensation for such damage could be recovered. *Home Bldg. & Conveyance Co. v. Roanoke*, 91 Va. 52, 27 L.R.A. 551, 20 S. E. 895; *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106. In each of these cases, and in others that might be cited, a municipal corporation, acting under legislative authority, had been the offender, and each of them was decided on the general principle that these cities, although they violated common-law rights of property, nevertheless did so under authority of the legislature; and that the legislature had the power, under the then existing Constitution, to grant such authority, without requiring damages to be paid, inasmuch as the acts done did not constitute a "taking" of property within the meaning of the constitutional provision then in force. In each of the cases to which we have adverted the act done constituted a violation of a common-law right, and would have been actionable if it had been done by an individual. Relief was denied, not because no right had been invaded, but because there was legislative authority for the invasion.

This line of decisions was referred to and commented on in the debates on the subject of inserting the "damage clause" in the Constitution of 1902; and their effect in making the right of recovery for an admitted injury depend upon whether the wrong was inflicted in pursuance of legislative authority or otherwise, was repeatedly criticized. It is clear that the law, as illustrated by the decisions which we have just mentioned, was regarded by the convention as unsatisfactory, and that it was the de-

sire to remedy that condition of things which led to the insertion in the Constitution of the words "or damaged," thereby inhibiting the legislature from enacting any law whereby private property might be taken "or damaged" without providing for compensation. The convention was not attempting to create any new right, incident to land, but was providing a right of action which, before the enactment of this provision, did not exist where the injury was inflicted under legislative authority. The meaning of the word "damaged" was neither enlarged nor restricted by the Constitution. It must, therefore, have been used in the same sense and with the same meaning that it had at common law,—not damage to the feelings, tastes, or sentiments, but physical damage to the corpus or to some right of property appurtenant thereto.

This provision of the Constitution of 1902 has been considered by this court in two cases,—*Swift & Co. v. Newport News*, 105 Va. 108, 3 L.R.A.(N.S.) 404, 52 S. E. 821, and *Tidewater R. Co. v. Shartzter*, 107 Va. 562, ante, 1053, 59 S. E. 407. In the *Swift* Case the injury complained of was the physical establishment of a new grade on a street on which the plaintiff's property abutted. The injuries which it was claimed the plaintiff had suffered were injuries to his right of access to his property. No question of sentimental damages or depreciation in value caused by sentimental considerations was involved in the case; but the court, both in the *Swift* Case and in the *Shartzter* Case, cited with approval the leading case of *Rigney v. Chicago*, 102 Ill. 64, which case had also received the approval of the Supreme Court of the United States in the case of *Chicago v. Taylor*, 125 U. S. 166, 31 L. ed. 640, 8 Sup. Ct. Rep. 820.

The *Rigney* Case appears to have been the first case decided under the constitutional provision embodying the "damage clause." In that case it was held that the damages contemplated were those resulting from the direct physical disturbance of a right, either public or private, which a landowner enjoyed in connection with his property, and which gave to it an additional value. The court does not say in this case that the land must be actually invaded or disturbed in order to give its owner a right for damages under the constitutional provision, but that it was sufficient if some right connected with the land had been disturbed, basing the right of damages on the ground that a right had been disturbed.

The question was more fully discussed in the *Shartzter* Case. That was a condemnation proceeding by the *Tidewater Railway Company*. *Julia A. Shartzter* owned land adjoining that which was condemned, and the

question involved was in regard to the proper measure of her damage and the items which it was proper to consider.

The case at bar is stronger than the *Shartzer Case*. Here the city of Norfolk has not sought to condemn the plaintiff's property, but has established a cemetery on its own property, and no property rights of the plaintiff have been in any way affected or disturbed thereby. She simply objects to the presence of a cemetery adjacent to her land.

In the *Shartzer Case*, *supra*, Judge Keith says: "A person . . . who is asking nothing with respect to his property is limited in the use of his own property only by the maxim that he must enjoy it in such a manner as not to injure that of another; or, less literally but more accurately, perhaps, 'So use your own property as not to injure the rights of another.'"

In further discussion of the subject, it is said, quoting with approval the following language from the opinion of the court in the case of *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750: "The Constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the Constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation."

The learned judge, further quoting with approval, says: "'A recovery has not been allowed,' says Lewis on Eminent Domain [§ 236], 'in any case, unless there was some physical injury to the plaintiff's property, or, by noise, smoke, gases, vibrations, or otherwise, an interference with the street in front of his property, or with some right appurtenant thereto, or which he was en-

titled to make use of in connection with his property. On the other hand, several cases have held that mere depreciation, caused by the proximity of a public improvement afforded no ground for redress.'"

Judge Dillon makes the following clear and forcible statement of the law applicable to the subject under consideration: "The words 'injured or damaged,' found as they are in the eminent-domain clause relating to the taking or appropriation of property for public use, as well as the history of the origin and cause of this provision, and a consideration of the mischief intended to be remedied, show that it was not the intention of the constitutional amendment to create a right and to give a remedy in all cases of consequential damage which may result from the exercise of legislative power in making public improvements, or even from the appropriation of private property, or for injuries to private property for public use. A city, for example, under legislative authority, might condemn land for the purpose of establishing a hospital thereon, or a prison, which, if established, would have the consequential effect to injure or depreciate the market or actual value of property in the neighborhood. Such injuries, however, would not, in our judgment be within the constitutional amendment. This amendment must, as it seems to us, be limited to cases where the corpus of the owner's property itself, or some appurtenant right or easement connected therewith, or by the law annexed thereto, is directly (that is, in general, if not always, physically) affected, and is also specially affected (that is, in a manner not common to the property owner and to the public at large); and such direct and special injury must be such as to depreciate the value of the owner's property. These elements 'concurring', his property is 'damaged' within the meaning of the constitutional amendment; and to the extent of such diminished value, beyond the damages sustained by the public at large from the improvement, the property owner is, under the constitutional amendment, entitled to compensation. It may, perhaps, be premature to affirm that the meaning of the word 'damaged,' as used in the recent constitutional amendments, is absolutely confined to cases where the common law would have given a remedy for injuries to property or property rights, if the legislative authority to do the act which caused the damage had not, aside from such constitutional amendment, deprived, or been previously construed to deprive, the owner of his right to compensation therefor: and yet such is, in our judgment, its main, if not exclusive, purpose and effect." 2 Dill. Mun. Corp. § 587d.

It follows from what has been said that the plaintiff is not entitled to recover, having suffered no injury because of the establishment of the cemetery that is recognized by the law as a wrong to be compensated in damages.

The instructions given by the circuit court were in harmony with the views herein expressed, and without prejudice to the rights of the plaintiff.

The judgment complained of must be affirmed.

Keith, J., absent.

Petition for rehearing denied.

CALIFORNIA SUPREME COURT.
(In Bank.)

GEORGE SWAN, Resp't.,

v.

JAMES R. TALBOT, Appt.

(152 Cal. 142, 94 Pac. 238.)

Trial — change of judge — denial — error.

1. Denial of a motion for change of judge is not error where facts set out in the affidavits tending to show bias and favoritism are fully and completely denied, and the falsity of the charges to some extent established.

Equity — contract — setting aside.

2. An action to set aside a sale for knowingly taking advantage of the seller when he was incapacitated by intoxication is one addressed to the equitable consideration of the court.

Same — remedy at law.

3. The equitable jurisdiction of the court to rescind a sale for fraud is not ousted by the existence of a remedy at law to recover possession of the property conveyed.

Case Note. — Right to affirmative relief in equity from contract upon the ground that it was procured from complainant while intoxicated.

The general subject of intoxication as a defense to contracts, or as affecting the validity of contracts, will be found exhaustively considered in a note to *Wright v. Waller*, 54 L.R.A. 440. See also note to *Kuhlman v. Wieben*, 2 L.R.A. (N.S.) 666.

The question here under consideration is somewhat different from that considered in either of the above notes, and is limited in its scope strictly to the question of the right to affirmative relief in equity from contracts entered into when intoxicated.

The question of the degree of the intoxication will not be touched upon herein, except as it may bear upon the question of 17 L.R.A. (N.S.)

Sale — setting aside — intoxication.

4. Equity will set aside a sale of property obtained from a person when incapacitated by intoxication, when the consideration was grossly inadequate.

Evidence — incapacity.

5. A finding of incapacity on the part of one executing a sale of property is supported by evidence that he had been having a protracted debauch, and, before the execution of the contract, he was so drunk that he fell in the street, and, three hours after executing the instrument, was so drunk that he collapsed and had to be put to bed, and recalled nothing of the transaction.

Equity — accounting.

6. Where restoration of property the sale of which is sought by bill in equity to be set aside has become impracticable, the court may state an account between the parties, and decree the payment of the value of the property received, although such relief is not asked by the bill.

On Rehearing.

Same — note — value.

7. A money judgment against one whose purchase of property from another is rescinded for fraud when the return of the property has become impracticable should not include the face value of a note of a third person which passed by the sale, where the maker denies liability on it, and there is no evidence as to his responsibility or the value of the note.

(October 3, 1907.)

APPEAL by defendant from a judgment of the Superior Court for Glenn County in plaintiff's favor and from an order denying a motion for new trial in an action brought to rescind a sale of property. Modified.

The facts are stated in the opinion.

Messrs. E. A. Bridgeford, Hiram W. Johnson, Benjamin F. Geis, and Frank Moody for appellant.

jurisdiction. A very clear distinction exists between relief in equity and relief at law from contracts on the ground of intoxication, although this distinction has become so confused as to be well-nigh obliterated. Relief is granted in the law courts from contracts entered into when a party thereto is intoxicated, principally upon the ground of incapacity. It therefore becomes necessary, in order to obtain relief from such a contract in a court of law, usually, to show that the degree of intoxication of the party making that claim was such as to have so impaired the mind as temporarily to have disabled the intoxicated party from being able to enter into a legal contract. Undoubtedly, the question of fraud may also be raised in a court of law; but this is the primary ground of jurisdiction of courts of equity to grant relief from contracts

Messrs. Frank Freeman and Charles L. Donohoe for respondent.

Henshaw, J., delivered the opinion of the court:

Plaintiff sued for the cancelation and rescission of a bill of sale which he had executed to defendant, and under which defendant had taken possession of the personal property therein described. He prayed that he be restored to the possession of the property, and, in case possession could not be had, be compensated for the value of the property withheld. The ground of action was that defendant had knowingly taken advantage of plaintiff while the latter was so intoxicated as to be incapable of transacting business, and, under these circum-

stances, secured his signature to the instrument. It was alleged that the property conveyed was of great value, and that the consideration for the bill of sale was grossly inadequate. The cause was tried before the court without a jury, and the court found the incompetency and incapacity of the plaintiff because of his drunkenness, found that the property which Swan conveyed to Talbot was of the value of \$21,949.86, while the total amount due from Swan to Talbot, including \$200 in coin paid to Swan at the time of the execution of the bill of sale, was but \$10,604.32. The court found, moreover, that, owing to changes of ownership in the personal property, it was impracticable, while decreeing a cancelation of the bill of sale, to further order the res-

entered into when one of the parties thereto is intoxicated. A court of equity will hear a party who seeks relief against his own act on the ground of intoxication. To avoid a contract on this ground, it must be shown that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of his situation. Total impairment of the mind is not a necessary element to relief in equity. If the intoxication was produced by the connivance of the other party to the contract; if an unfair advantage was taken of the intoxication of a party; if the consideration of the contract was grossly inadequate,—equity will give relief without inquiring minutely into the question of the degree of the intoxication.

This proposition finds support in *Mansfield v. Watson*, 2 Iowa, 111, wherein it is said that excessive drunkenness will invalidate a contract whether it is voluntary or caused by the effort or procurement of the other party to the contract. There may be such a contrivance or management to draw a party into drink, and thus take advantage of his intoxication, as to cause equity to interfere in his behalf on the ground of fraud, even where drunkenness is less effective. As to the facts, this case is not in point, as intoxication was used as a ground of defense to a bill for specific performance.

This doctrine was also applied by that court in *Willcox v. Jackson*, 51 Iowa, 208, 1 N. W. 513, wherein a note and mortgage were set aside in equity on a cross bill because of the intoxication of the mortgagor, procured by the mortgagee, who secured an unconscionable advantage.

Voluntary intoxication, produced in part by or through agents of the defendant, together with gross inadequacy of consideration, forms a sufficient basis for equitable relief. *Thackrah v. Haas*, 119 U. S. 499, 30 L. ed. 486, 7 Sup. Ct. Rep. 311 (demurrer to bill in equity on the ground of want or lack of jurisdiction; overruled).

In *O'Conner v. Rempt*, 29 N. J. Eq. 156, equity assumed jurisdiction, and gave relief 17 L.R.A. (N.S.)

from a contract for support, where one of the parties thereto was intoxicated at the time, which intoxication, while originally voluntary on his part, was afterward continued by the acts of the other party. The contract in this case was characterized by the court as an unfair one.

In *Hutchinson v. Brown, Clarke*, Ch. 408, it was said that there is a distinction between cases where the intoxication was voluntary and where the deceived party was enticed to drink by the procurement or contrivance of the party with whom the contract was made. In such a case it is said that relief will be given in equity, though there is no temporary total derangement of the mind.

A lease of real estate was set aside in a court of equity, in *Say v. Barwick*, 1 Ves. & B. 195, where the lessor was intoxicated at the time of the execution of the lease through the contrivance of the lessee. The consideration of the lease was also inadequate.

Equity assumed jurisdiction to grant to one member of a copartnership relief from a settlement of the partnership matters, entered into by him at a time when he was intoxicated by the contrivance of his partner, in *White v. Cox*, 3 Hayw. (Tenn.) 79. The doctrine is here enunciated that, if any advantage is taken of a man when drunk; or if he is brought into that situation by the contrivance or management of the person who obtained the contract,—it is fraudulent; and the contract or advantage thus gained shall be taken from him.

In *Nance v. Kemper*, 35 Ind. App. 605, 73 N. E. 937, where the agent of the seller of goods induced the intoxication of the purchaser, a rescission of the contract to purchase was denied because the findings did not show that, in producing the intoxication, the agent was acting for his principal. Although there was great inadequacy of consideration, and the court conceded that fraud might be inferred from the condition of the purchaser, at the time of the purchase, taken in consideration with the other circumstances, it refused to draw that inference, since the trial court had

toration of the personal property, and therefore proceeded to give judgment for plaintiff in the sum of \$11,345.54, being the difference between the amount of Swan's indebtedness to Talbot and the value of the property which Talbot obtained under the bill of sale. From this judgment and from the order denying defendant's motion for a new trial, he prosecutes this appeal.

Before trial defendant moved the court and Honorable Oval Pirkey, judge thereof, that another judge be called in to try the case, and pressed this motion with great vigor. With the same vigor he presses the matter upon this appeal, and a large part of the voluminous briefs is given over to extracts from the affidavits for and against the motion, and to a discussion of the alleged disqualification of the judge. The ground of the motion was the disqualification of the judge by reason of bias against the defendant and certain of his attorneys, together with charges of favoritism toward plaintiff's attorneys. The evidence upon both sides presented has been read and considered. It must suffice to say, without any

extended review thereof, which would serve no useful purpose, that the matters charged as facts and susceptible of denial were denied fully and completely by the counter affidavits, and in some instances, at least, the falsity of the charges established. It cannot be said that it was error of the court to have refused the motion, and it is but just to add, in view of the trial court's ruling refusing so to do, that the position of the trial judge situated as was this one must always of necessity be most embarrassing and painful; for, upon the one hand, while it is his duty to grant the motion should bias or other disqualification be shown, yet, upon the other hand, it is equally his duty to deny the motion and to sit in the case himself if, in his judgment, the disqualifying cause alleged is not sufficiently established by the evidence. An added embarrassment under such circumstances arises from the fact that the judge himself is made the trier of the question touching his own bias or other disqualification; but the law has seen fit to impose this painful duty upon him, and he may not

not found fraud as a fact. This case, therefore, not presenting the element of induced intoxication by the party benefited, or fraud on his part, it was held that, in order to be entitled to relief, the purchaser must show that he was totally incapacitated, which the court held he failed to do.

In overruling a demurrer to a bill in equity to set aside a contract between partners on the ground that a fraudulent advantage had been taken of one of the partners' intoxicated condition, the court, in *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737, said that, where a fraudulent advantage was taken of drunkenness, this was so great and palpable a fraud as always to render the contract voidable in all courts, whether in law or in equity.

Where an intoxicated person, a few days after arriving at his majority, executed a bond, a court of equity set it aside, in *L'Amoureux v. Crosby*, 2 Paige, 422, 22 Am. Dec. 655, there being evidence of overreaching on the part of the other party thereto.

A contract by an intoxicated person with one upon whom he placed much confidence, where the consideration was grossly inadequate, was held to be invalid, and set aside by a court of equity, in *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257, although the court found that the plaintiff was not totally incapacitated at the time of the contract.

And in *Warnock v. Campbell*, 25 N. J. Eq. 485, an intoxicated person was relieved in equity from a deed of real estate made without consideration, although intoxication was not induced by the grantee therein. Neither did it appear that the grantor, at the time, was totally incapacitated.

The doctrine as stated in the foregoing New Jersey cases was stated by that court 17 L.R.A. (N.S.)

with approval in *Waldron v. Angleman*, 71 N. J. L. 166, 58 Atl. 568. In the latter case, however, intoxication was set up as a defense in an action at law.

In *Birdsong v. Birdsong*, 2 Head, 289, equity assumed jurisdiction, at the instance of an heir, to set aside a conveyance by him of his share in his father's estate, on the ground of his intoxication at the time of the conveyance. There was also evidence in this case of mental incapacity, caused, in part at least, by habitual drunkenness. The intoxication charged was not produced by the connivance of the defendant.

In *Wigglesworth v. Steers*, 1 Hen. & M. 70, 3 Am. Dec. 602, relief was also given in equity from a bond to exchange real estate unfairly obtained from an intoxicated person, since deceased, at the instance of his heirs, although the intoxication was not caused or procured by the other party.

And in *Butler v. Mulvihill*, 1 Bligh, 137, equity set aside a re-lease of real estate because the lessor, at the time of the execution, was intoxicated, and because of the inadequacy of the consideration.

In the following cases relief was granted in equity from contracts entered into at a time when one of the parties thereto was intoxicated to such a degree as to be wholly incompetent to execute a valid conveyance: *Prentice v. Achorn*, 2 Paige, 30; *Reynolds v. Waller*, 1 Wash. (Va.) 164 (contract also unfair); *Clifton v. Davis*, 1 Pars. Sel. Eq. Cas. 31; *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183 (contract also unfair); *Hardy v. Dyas*, 203 Ill. 211, 67 N. E. 852; *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76.

In the following cases equity assumed jurisdiction to hear and determine the validity of contracts where the validity was attacked

shirk its performance. *Higgins v. San Diego*, 126 Cal. 304, 58 Pac. 700, 59 Pac. 209; *People v. Findley*, 132 Cal. 305, 64 Pac. 472; *Lamberson v. Superior Court*, 151 Cal. 458, 11 L.R.A. (N.S.) 619, 91 Pac. 100.

Defendant's general demurrer to the complaint was properly overruled. That demurrer seems to be argued rather upon the proposition that the complaint does not state a cause in equity, than upon the theory that it does not state a cause of action at all; appellant, in his argument, saying that "it is possible that the complaint . . . may be held to state a cause of action in claim and delivery." Of course, if it states a cause of action addressed either to the legal or equitable side of the court, the pleading is good against a general demurrer. But, as the question of the real character of the action arises in other ways upon this appeal, as upon the court's refusal to grant a jury trial, it may here be said that the action is one addressed to the equitable consideration of the court. The instrument in question was not void upon its face, but

called for extrinsic proof to show its invalidity. Under such circumstances, it is well settled that an action in equity will lie. 3 Pom. Eq. Jur. § 1399; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474. Nor does the mere fact that there is a remedy at law oust the court of its equitable jurisdiction. That remedy must also be speedy, adequate, and efficacious to the end in view, or otherwise equity will entertain the plea of the suitor. *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580. The rule of equity in lending its assistance to a man who pleads drunkenness in avoidance of his contract is thus laid down by Judge Story (Eq. Jur. § 231), and it has come to receive well-nigh universal acceptance. He says: "Courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will

on the ground of the intoxication of one of the parties thereto, but denied relief on the merits: *McGinley v. Cleary*, 2 Alaska, 269; *Martin v. Harsh*, 231 Ill. 384, 13 L.R.A. (N.S.) 1000, 83 N. E. 164; *Wright v. Fisher*, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605; *Campbell v. Ketcham*, 1 Bibb, 406; *Harbison v. Lemon*, 3 Blackf. 51, 23 Am. Dec. 376; *Keough v. Foreman*, 33 La. Ann. 1434; *Cockrill v. Cockrill*, 34 C. C. A. 254, 92 Fed. 811; *Loftus v. Maloney*, 89 Va. 576, 16 S. E. 749; *Morris v. Nixon*, 7 Humph. 579.

In *Cooke v. Clayworth*, 18 Ves. Jr. 12, where it did not appear that an intoxicated party to a contract was, by contrivance and management, drawn into drink, or that unfair advantage was taken of his intoxication to obtain an unreasonable bargain, relief from the contract was denied in a court of equity. It is also interesting to note that in this case, while the court refused to grant affirmative relief to the intoxicated party, it also refused, by way of specific performance, to grant relief to the other party to the contract.

In *Belcher v. Belcher*, 10 Yerg. 121, the court of chancery, in refusing relief from a contract on the ground that one party thereto was intoxicated at the time of its execution, said that the fact that a grantor in a deed was to some degree intoxicated at the time of its execution was not sufficient ground for its avoidance in equity in the absence of proof that the grantee used any contrivance or management to draw him into drink, or that he took an unfair advantage of the state of his intoxication.

The doctrine of the English courts seems to be that equity will not give assistance to a person who has obtained an agreement from another in a state of intoxication; 17 L.R.A. (N.S.)

and, on the other hand, will not assist a person to get rid of an agreement or deed merely on the ground of his having been intoxicated at the time; the course of the courts in such cases being not to interfere. *Slaw v. Thackray*, 17 Jur. 1045.

The fact that one of the parties to a family settlement, which the law favors, was in drink at the time thereof, is not sufficient ground in equity to justify setting it aside where it was not unreasonable and no unfair advantage was taken. *Cory v. Cory*, 1 Ves. Sr. 19.

In *Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895, 97 N. W. 176, a court of equity denied relief to a mortgagor who was addicted to the habitual use of intoxicating liquors, where it did not appear that actual intoxication had dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the mortgage was executed. To the same effect, also, is *Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760.

The same doctrine was also enunciated in *Johnson v. Phifer*, 6 Neb. 401, wherein a court of equity denied relief to a grantor in a deed of real estate, who was intoxicated at the time of its execution by the procurement of defendants, because his intoxication did not rise to that degree which may be called excessive drunkenness,—that is, where a party is deprived of his reason and understanding. The deed was given in consideration of a promise to support the grantor for life, and it does not appear whether the consideration was adequate or inadequate.

In *Lacy v. Garrard*, 2 Ohio, 7, equitable relief was denied a party to a contract because of his intoxication at the time of its execution, on the ground that he had an adequate remedy at law.

leave the parties to their ordinary remedies at law unless there is some fraudulent contrivance or some imposition." Equity, therefore, will not assist a man to avoid a contract which he has entered into when drunk, merely because when in his sober senses he may wish he had not entered into it. But, upon the other hand, it will not countenance fraudulent imposition. Gross inequality in the values exchanged—between the consideration moving to and that moving from the drunken party—is always received as evidence of imposition. Here the party pleads his total ignorance of the transaction by reason of his drunkenness, and, in effect, that he was induced to part with property of the value of about \$12,000 for \$200 in hand paid to him while in the midst of a drunken debauch. Here surely is presented one of the cases of exception to the rule that equity in general will leave the parties to such contracts to their ordinary legal rights and remedies. *Phelan v. Gardner*, 43 Cal. 306; *Moore v. Moore*, 56 Cal. 92. In *Phelan v. Gardner*, *supra*, it is declared that, in order to defeat a settlement made by him, the plaintiff may show that at the time he was incapable of contracting intelligently by reason of intoxication, and evidence of his condition as to being intoxicated several hours after the settlement may be given, as tending to throw light on his condition when the settlement was made. In *Moore v. Moore*, *supra*, the well-settled principle is laid down that, whenever there is great weakness of mind in a person executing a contract, arising from any cause, and the consideration given for the property is grossly inadequate, imposition or undue influence will be inferred, and equity will, upon a proper and reasonable application, interfere and set the contract aside. From what has already been said, it is apparent, therefore, that the judge was justified in refusing defendant's demand for a trial by jury.

It is contended that the evidence is insufficient to support the finding of plaintiff's legal incapacity by reason of intoxication. By plaintiff it was shown that he was, and for years had been, a tenant of defendant, farming parts of defendant's lands on shares, and that he had accumulated personal property, farming utensils, stock, interest in growing crops and the like, of great value. He was married, and, with his wife, lived upon one of defendant's ranches. He discovered that his wife was illicitly intimate with defendant, and, upon the discovery, went to the neighboring town of Willows and undertook to drink away his sorrow. His drinking led to a protracted debauch, lasting several days. Upon the day that the bill of sale was executed, and 17 L.R.A. (N.S.)

before its execution, he was so drunk, according to the testimony of several witnesses, that he fell on the streets and had to be helped upstairs, and, three hours after the execution of the instrument, he was so drunk that he collapsed and was put to bed. He recollected nothing of the transaction. There was thus certainly sufficient evidence in the record to support the finding of the court.

The action is in form a simple action for a rescission of the bill of sale and the restoration to plaintiff of the property of which defendant took possession under the instrument. As has been said, the court found for a rescission of the instrument, but found, also, that it was impracticable to decree a restoration and return of the property; and it proceeded thereupon to state and settle an account, between the parties. Objection is made to this by the appellant upon the ground that the complaint nowhere asks for such relief. But the proceeding adopted by the court was wholly consonant with the principle that, where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented. It is, indeed, the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation. *Ord v. McKee*, 5 Cal. 515; *Kraft v. De Forest*, 53 Cal. 657; *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64. It is no objection to the relief which is thus decreed in an equitable action that the court should finally determine that the necessary and appropriate remedy should take the form of a personal monetary judgment. *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 21 N. E. 75. The court in this case was therefore justified in determining the value of the properties conveyed by Swan, the amount of Swan's indebtedness to Talbot, and in decreeing a personal judgment for the difference.

For these reasons the judgment and order appealed from are affirmed.

We concur: *McFarland, J.; Sloss, J.; Angellotti, J.; Shaw, J.; Lorigan, J.*

A petition for rehearing having been filed, the following *Per Curiam* opinion was handed down November 2, 1907:

In his petition for a rehearing appellant, with other matters, presses upon the attention of the court the fact that in the judgment given against him he is charged with the sum of \$2,591.96, being the amount of a note for \$2,000, with interest, executed by one Anderson to plaintiff and by plain-

tiff deposited as collateral security for his indebtedness to the bank, the payment of which indebtedness defendant had assumed. Petitioner, moreover, shows that there is a direct conflict in the evidence between Swan, the payee, and Anderson, the maker of the note; Swan testifying that it was a note given by Anderson in payment of moneys which plaintiff had from time to time loaned to him, Anderson testifying that it was a mere accommodation note given to Swan to assist him in borrowing money. There is no evidence touching the responsibility of the maker of the note, nor of its value. Under these circumstances, it was inequitable to charge Talbot with the amount of the note and accrued interest. The judgment against Talbot should therefore be modified by subtracting therefrom the amount of the Anderson note with accrued interest.

The judgment heretofore given by this court is set aside, and the following judgment given: It is ordered that the court below modify the judgment heretofore given by subtracting from the judgment against Talbot the amount of the Anderson note, with accrued interest, and that, when so modified, the judgment shall stand affirmed. The order denying a new trial is affirmed. Appellant shall recover his costs on this appeal.

ILLINOIS SUPREME COURT.

CITY OF BELLEVILLE

v.

ST. CLAIR COUNTY TURNPIKE COMPANY, Appt.

(234 Ill. 428, 84 N. E. 1049.)

Eminent domain — turnpike — compensation.

1. The extension of the limits of a municipal corporation for 6 miles along the line of a turnpike road, and the removal by the municipal authorities of the tollgates within the limits as so extended, is a taking of property of the turnpike company for which compensation must be made.

Toll road — destruction — police power.

2. The police power will not authorize a municipal corporation to extend its limits 6 miles along a toll road and remove the gates without making compensation to the owner, where nothing in the increase of population, topography of the ground, nor any other reason in connection with the health, safety, or comfort of the community, is shown to require it.

(April 23, 1908.)

17 L.R.A. (N.S.)

APPEAL by defendant from a decree of the Circuit Court for St. Clair County in complainant's favor in a suit to enjoin the maintenance of tollgates within the limits of the complaining city. Reversed.

Statement by Carter, J.:

This is a bill for injunction, filed by appellee in the circuit court of St. Clair county October 16, 1906, praying that appellant, its officers and agents, might be restrained from maintaining upon any part of a certain turnpike tollgates, bars, and obstruction in territory within the limits of said city of Belleville. October 27, 1906, a temporary order of injunction was entered by one of the judges of that court. After the pleadings were finally settled, the case was heard upon bill, answer, and replication, together with a stipulation of facts, and, on December 24, 1907, the court entered a decree for perpetual injunction as prayed in the bill. Thereupon appellant duly excepted and prayed an appeal to this court.

In 1845 a charter was granted to the town (now city) of Belleville, under which the municipal authorities were empowered to regulate, pave, and improve streets, alleys, and lanes within the limits of said town, and have complete control over the same. February 13, 1847, the charter of appellant company was granted by the legislature for

Case Note. — Extension of city limits to include toll road as taking of property for which compensation must be made.

It would appear that there could be little question that the decision in the foregoing case is correct. If a city, by extending its limits, deprives a toll-road company of its right to take tolls upon the portion of the road included in the extension, it is difficult to see why it is not a taking of property for which compensation must be made within the provisions of the Constitution.

The case of *Snell v. Chicago*, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532, which is cited in *BELLEVILLE v. ST. CLAIR COUNTY TPK. CO.*, is apparently the only case directly to the contrary; and this decision turns upon the effect of the state statutes and the amendments to the charter of the toll-road company. The original charter permitted the company to build its road from the city line, and, by an amendment, it was entitled to "enjoy the same privileges granted to other plank-road companies by the general plank-road law." By a subsequent amendment to the general plank-road law, no tollgate could be kept, or tolls collected, within the corporate limits of any city; and there were provisions of the Constitution which had been construed by the courts of the state to the same effect. Upon an extension of the limits of the city so as to include one of the company's tollgates, it was held

a term of twenty-five years. Pub. & Priv. Laws 1846, p. 71. By this act appellant was authorized "to construct and maintain a turnpike road from the bank of the Mississippi river opposite to the city of St. Louis, to High street, in Belleville, in St. Clair county, Illinois, said road to be made on the Great Western mail route." The act also provided as to the width and character of the road to be built, and that the state and county roads might intersect and cross said turnpike; also that the construction should begin within one year, and that 7 miles across the river bottom should be the first work done, and that this should be completed within three years and the balance of the road within five years. Section 8 provided: "As soon as one mile and a half of said road is completed, said corporation shall have a right to erect a toll-gate, and charge toll proportionable to the rate of toll hereinafter specified; and, when the whole of said road is completed, the said corporation shall have power to erect and maintain such tollhouses, tollgates and other buildings for the accommodation and management of the said road, and the transport thereon, as may be deemed suitable to their interest: Provided, that no tollgate shall be erected or maintained east of the point on said road where the lower, commonly called the southern, road, leading from Belleville to St. Louis, now leaves the Great Western mail route: Provided, fur-

ther, that persons traveling on said road east of the first-named gate shall not be charged any toll for such travel," etc. It then provided, among other things, the rate of toll, how it should be collected, as to the inspection of the road and its repair, and that the county authorities should "keep in good repair that portion of the said road, after it is completed, lying between the western limits of the corporation of the town of Belleville and the fork of the road leading from Belleville to St. Louis; and it shall be the duty of the trustees of the town of Belleville to keep and maintain that part of the said road lying within the corporate limits of the town of Belleville in good repair after the same shall be completed by the company." Section 15 provided: "The state reserves the right to purchase said road, at the expiration of said charter, by paying to said corporation the original cost of said road laid out and expended in constructing the same, to be ascertained by examination of the books of said corporation, by commissioners to be appointed by the legislature; and, in case of nonpayment or redemption by the state at the expiration of the charter, the said road, with all its appendages, shall remain in the possession of said corporation, to be used, controlled, and possessed under the rights and restrictions in this charter contained, and may demand and receive tolls, as herein stated, until such

that tolls could not thereafter be collected within the city's boundaries. The court said that the company must be deemed to have accepted the charter granted to it upon the implied condition and under the implied understanding that the right to use the highway for a toll road should give way as to such part thereof as should become subject, by the growth of the state and its increase in population, to the control and government of an incorporated city. In the course of the opinion the court said: "The state could not be bound by a contract whose enforcement under new conditions would be forbidden by the Constitution.

. . . The state had authorized the company to use the highway by permission of the county upon petition of three fourths of the adjoining property owners; but, under the requirements of the organic law, that use could not continue after the authority of an incorporated city had become substituted for that of the county, and the title of the adjoining property owners to the land subject to the easement of the highway had become vested in the incorporated municipality of a city."

In *Lower River Road Co. v. Riverside*, 25 Ohio St. 658, it was contended that the provision of a statute which prohibited any corporation from erecting or maintaining tollgates within the corporate limits of a city did not apply where, by a subsequent

extension of its corporate limits, a tollgate was brought within such limits; and, if it did apply, it would be unconstitutional as an unwarranted infringement upon the rights of private property. In reply to this contention, the court said that the proposition, to say the least, was stated too broadly. The decision, however, turned upon other grounds, and the expression, at most, is mere *dictum*.

In some states provision is made by statute for payment to tollgate companies where gates have been included in an extension of the city limits. In such states, of course, this question would not arise.

In numerous decisions, however, such a taking has been held to be within the constitutional provisions requiring compensation. Thus, in *Ft. Wayne Land & Improv. Co. v. Maumee Ave. Gravel Road Co.* 132 Ind. 80, 15 L.R.A. 651, 30 N. E. 880, it was held that a turnpike company could not be deprived of its road or its franchise by the mere extension of the limits of a municipal corporation to include the road.

In *Columbia & C. C. Turnp. Co. v. Vivion*, 103 Mo. App. 327, 77 S. W. 89, in an action for tolls for traveling upon a toll road, the plaintiff contended that, as part of its roadway had been embraced within the limits of a city, the latter, and not the plaintiff, was responsible for the maintenance of the street; but the court said: "The extension

time as the state shall refund said sum of money, the original cost of construction; and which right the state hereby reserves." Section 16 provided that the stock of the corporation should be personal property, subject to sale and transfer and also to levy and sale on execution. Section 17 provided that said corporation should be safe and secure, "for and during the term of the charter and until the road shall be redeemed by the state as provided, in all the rights, interest, and privileges granted and intended to be conferred to said company by the strict letter and meaning thereof, the corporation complying strictly, clearly, and fully on their part." This charter was amended by the legislature in 1849, 1851, 1853, 1857, 1859, 1861, and 1865, and such amendments were accepted and acted upon by appellant company. The amendment of 1859 (Pub. Laws 1859, p. 726) provided, among other things, that §§ 11 and 12 of the original charter, with reference to the toll charges of the company, were repealed, and, in lieu thereof, appellant company should be subject to the provisions of a general act as to plank roads, passed February 15, 1857 (Laws 1857, p. 142); also that appellant company might vacate, by resolution, "any part of their road within the limits of the town of West Belleville."

From the stipulation of facts it appears that from the center of High street, in the city of Belleville, to the "lower or southern

road" mentioned in said charter, is 10,065 feet. Said lower or southern road is not now, and never was, a part of the St. Clair county turnpike. The western limits of the original town of Belleville at the time the charter was granted to said appellant were 3,080 feet westerly from the center of High street. Thereafter they were extended west to Mill street, a distance of 3,585 feet from the center of High street; then to the center of Silver street, a distance of 4,568 feet from the center of High street; then to the center of Logan street, 6,450 feet from the center of High street; thereafter they were extended and located 8,675 feet westerly from the center of High street. The first toll gate of appellant as it was originally located and as it stood at the time of said annexation was 12,156 feet west of the center of High street. On June 18, 1906, a majority of the legal voters and a majority of the property owners in certain territory petitioned, in writing, that such territory should be annexed to said city, and thereafter, in pursuance of a resolution adopted by the city authorities, the question of the annexation of said territory was submitted to the people at an election held July 31, 1906, resulting in 2,019 votes for and 88 against annexation. On September 17, 1906, the city council passed, and the mayor thereafter approved, an ordinance annexing said territory.

of the territorial limits of the city by an act of the legislature did not have the effect to deprive the roadway of its character, nor the plaintiff of its right of property therein. . . . The city, by the exercise of the right of eminent domain, or by purchase, or in some other way, might have acquired the absolute control of this part of the plaintiff's roadway; but this, it clearly appears, it did not do."

So, a statute which required a plank-road company to remove its tollgates beyond the limits of a city was held unconstitutional in *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275, upon the ground that it was a taking without due process of law, where the gates were legally erected originally, but were included within the city by a subsequent extension of its limits.

Where the charter of a plank-road company authorized it to build its road from a point within the city, and to erect tollgates at its discretion, provided that none were placed within the limits of the city, it was held, in *People ex rel. Chope v. Detroit & H. Pl. Road Co.* 37 Mich. 195, 26 Am. Rep. 512, that the restriction as to the erection of tollgates was confined to the city as it then was, and an extension of the city limits would not correspondingly destroy the company's right to place gates at its discretion, and a proposed gate within the extension would not be enjoined as a nuisance.

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In *Re Road*, 2 Lack. Leg. News, 279, the right to take tolls was held to be property, for which compensation must be made.

In *Re Flatbush Ave.* 1 Barb. 286, in a proceeding to assess damages for injury caused by the laying out of a new street in a city, the commissioners did not allow any damages to a plank-road company whose franchise was seriously injured by the new road, which enabled travelers to avoid the company's tollgates. The court, in overruling the decision of the commissioners, said: "The franchise which they had obtained from the legislature was as much the subject of value to them as the private property of any individual damaged by this improvement, and they had as clear a right as any individual to be indemnified for any injury which they might sustain by the appropriation of their property to the public use. The idea that, because the company derived its franchise from the same source from which the city of Brooklyn obtained its power to open this avenue, therefore the company was not entitled to any compensation for an injury to its property, is as untenable in law as it is unsound in morals."

Upon the question of right to take toll on road within a city, see note to *Ft. Wayne Land & Improv. Co. v. Maumee Ave. Gravel Road Co.* 15 L.R.A. 651.

Previous to said last annexation the city limits were 3,481 feet east of said first toll gate on said turnpike. By said annexation the city limits were extended westerly 6 miles, the territory so annexed being that lying within 1,000 feet north and 1,000 feet south of the center of the turnpike road. In other words, the strip annexed was 2,000 feet in width north and south and extended 6 miles east and west, said turnpike road running through the center of the strip east and west. On this 6 miles of appellant's turnpike were situated two tollhouses and two tollgates, where toll was being collected at that time by appellant; and said company continued to charge and collect toll and exercise its rights and privileges under said charter until October 29, 1906, when it was restrained by the temporary writ of injunction. Immediately after this writ was served on appellant, appellee assumed and exercised jurisdiction and control of said St. Clair county turnpike within the territory thus annexed. All of the roadway within the city of Belleville, as the limits existed prior to said last-mentioned annexation of territory, has been permanently improved by paving the entire roadway with brick and constructing a sidewalk and public sewers, the cost being paid by special assessment, free from any charge against the turnpike company. The improvement of said road was done openly and notoriously without any adverse claim or pretense of claim on the part of said company or anyone in its behalf. Prior to the last annexation of territory, appellant company had never collected, or attempted to collect, toll within the corporate limits of the city of Belleville. The turnpike road has been inspected in the manner provided by the general law of 1857 and amendments thereto. So much of said turnpike road as is now situated within the exclusive limits of the city of East St. Louis has been within the exclusive control and management of the authorities of that city. The state of Illinois has never redeemed said turnpike road as provided under the act of 1847, and has exercised no option to pay to the turnpike company the cost of said road as in said act provided. The turnpike road has remained in the possession of and been operated by appellant company from its organization under said act, and said appellant claims the right to continue to maintain and operate the turnpike and the tollgates and tollhouses in question, and to collect toll, under and by virtue of its charter and amendatory acts thereto, the same after as before the annexation of said 6-mile strip of land.

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Messrs. William Baum and Forman & Whitnel, for appellant:

The turnpike road, the tollhouse, and tollgates, as well as the franchise and right to take toll, are private property belonging to the appellant.

East St. Louis v. O'Flynn, 19 Ill. App. 64; Rigney v. Chicago, 102 Ill. 64; Chicago & W. I. R. Co. v. Ayres, 106 Ill. 511; Culbertson & B. Packing & Provision Co. v. Chicago, 111 Ill. 651; Chicago v. McDonough, 112 Ill. 85; Bank of the Republic v. Hamilton County, 21 Ill. 53; Illinois C. R. Co. v. Bloomington, 76 Ill. 451; People ex rel. Chope v. Detroit & H. Pl. Road Co. 37 Mich. 195, 26 Am. Rep. 512.

The charter of appellant is a contract with the state.

St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240.

The legislature has no power, under the pretense of exercising the police power, to pass laws impairing the obligation of contracts, or to take or impair private property for public use.

Millett v. People, 117 Ill. 300, 57 Am. Rep. 869, 7 N. E. 631; Com. v. Pennsylvania Canal Co. 66 Pa. 50, 5 Am. Rep. 329; People v. Jackson & M. Pl. Road Co. 9 Mich. 307; Chicago v. O'Brien, 111 Ill. 532, 53 Am. Rep. 640; People ex rel. Billings v. Riggs, 56 Ill. 484; Cooley, Const. Lim. p. 392; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Dobbins v. First Nat. Bank, 112 Ill. 556; Conway v. Cable, supra; Thompson v. Alexander, 11 Ill. 54; People ex rel. McCrea v. Thatcher, 95 Ill. 109; Betts v. Bond, Breese (Ill.) 223; People ex rel. Johnson v. Peacock, 98 Ill. 172; Garrett v. Doe, 2 Ill. 335, 30 Am. Dec. 653; Rinehart v. Schuyler, 7 Ill. 473; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Marsh v. Chesnut, 14 Ill. 223.

The municipality cannot, by extension of its limits, confiscate the turnpike company's property.

Elliott, Roads & Streets, §§ 72, 74, p. 90, note 2; People ex rel. Chope v. Detroit & H. Pl. Road Co. supra; Atty. Gen. ex rel. McKay v. Detroit & E. Pl. Road Co. 2 Mich. 138; Conestoga & B. S. Valley Turnp. Road Co. v. Lancaster. 151 Pa. 543, 24 Atl. 1092; Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140, 5 N. W. 275; Detroit v. Detroit & E. Pl. Road Co. 12 Mich. 333; Somerville v. O'Neil, 114 Mass. 353; Hall v. State. 20 Ohio, 8; St. Catharines v. Gardner, 20 U. C. C. P. 107; Barber v. Rorabeck, 36 Mich. 399; Quinn v. Paterson, 27 N. J. L. 35; Ft. Wayne Land & Improv. Co. v. Maumee Ave. Gravel Road Co. 132 Ind. 80, 18 L.R.A. 651, 30 N. E. 880; State v. Passaic Turnp. Co. 27 N. J. L. 217; Com. v. Covington & L. Turnp. Road Co. 9 Ky. L. Rep. 538, 5 S. W.

743; *St. Clair County Turnp. Co. v. Illinois*, 96 U. S. 63, 24 L. ed. 651, 82 Ill. 174.

Mr. J. M. Hamill, with Mr. A. H. Baer, for appellee:

There cannot be two separate, independent, or distinct authorities exercising the same powers at the same time in the same territory.

West Chicago Park v. Chicago, 152 Ill. 406, 38 N. E. 697; *Snell v. Chicago*, 133 Ill. 431, 8 L.R.A. 858, 24 N. E. 532; *St. Clair County Turnp. Co. v. People*, 82 Ill. 174.

Grants of charters to private corporations are strictly construed against the corporations.

Mills v. St. Clair County, 7 Ill. 198; *Snell v. Buresh*, 123 Ill. 151, 13 N. E. 856; *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634; *Snell v. Chicago*, 133 Ill. 431, 8 L.R.A. 858, 24 N. E. 532; *Blocki v. People*, 220 Ill. 444, 77 N. E. 172; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co.* 24 Fed. 306; *Cooley, Const. Lim.* 318.

All roads, including turnpike roads, lying within the territory annexed to the municipality, by virtue of such annexation, *eo instanti*, become streets of such municipality.

Snell v. Chicago, supra; *Palatine v. Kreuger*, 121 Ill. 72, 12 N. E. 75; *Williams v. Nashville*, 89 Tenn. 487, 15 S. W. 364; *Mackin v. Wilson*, 20 Ky. L. Rep. 218, 45 S. W. 663; *Versailles & N. Turnp. Co. v. Versailles*, 10 Ky. L. Rep. 844, 10 S. W. 280, 11 S. W. 712; *Almand v. Atlanta Consol. Street R. Co.* 108 Ga. 417, 34 S. E. 6; *Backus v. Lebanon*, 11 N. H. 25, 35 Am. Dec. 466.

The laws of the state in reference to municipalities and the ordinances of the city immediately become self-operative in territory annexed to the municipality.

Pittsburg, Ft. W. & C. R. Co. v. Chicago, 159 Ill. 369, 42 N. E. 781; *People ex rel. Morrison v. Chegier*, 138 Ill. 401, 28 N. E. 812; *McGurn v. Board of Education*, 133 Ill. 122, 24 N. E. 529; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363; *People ex rel. Chicago v. Chicago Teleph. Co.* 220 Ill. 238, 7 N. E. 245.

Private corporations become subject to the ordinances of the municipality into which they are brought by annexation.

People ex rel. Chicago v. Chicago Teleph. Co. supra; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 580, 65 N. E. 470; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; *Rogers Park Water Co. v. Fergus*, supra; *Pittsburg, Ft. W. & C. R. Co. v. Chicago*, supra; *Chicago & N. W. R. Co. v. Chicago*, 151 Ill. 348, 37 N. E. 842, *Cairo & V. R. Co. v. People*, 92 17 L.R.A. (N.S.)

Ill. 170; *Hibbard v. Chicago*, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256.

The legislative control of streets is an element of sovereignty and legislative right, which cannot be bartered away.

Hyde Park v. Oakwoods Cemetery Asso. 119 Ill. 141, 7 N. E. 627; *Cooley, Const. Lim.* p. 316; *Palatine v. Kreuger*, supra; *Craig v. People*, 47 Ill. 487.

The charter in question is not a contract within the constitutional provisions, since the legislature has not renounced the power further to legislate, or to place the rights granted, subject to further legislative control.

Bank of the Republic v. Hamilton County, 21 Ill. 53.

The power exercised by appellee is within its police powers.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Carter, J., delivered the opinion of the court:

The charter of appellant, in consideration of building and keeping in repair the turnpike, conferred upon it the right to exact certain tolls for twenty-five years, and as much longer as the state should fail to purchase the road. The charter was a contract. *St. Clair County Turnp. Co. v. Illinois*, 96 U. S. 63, 24 L. ed. 651; *St. Clair County Turnp. Co. v. People*, 82 Ill. 174. The interest of appellant, under its charter, in the public highway in question, has been called by this court an easement. *Trotier v. St. Louis, B. & S. R. Co.* 180 Ill. 471, 54 N. E. 487. Whether the interest of appellant is denominated a franchise or an easement, it is a valuable property right, and its practical destruction would be the taking of property within the Constitution. *Lewis, Em. Dom.* §§ 135, 142. So, also, the interfering with such an interest may be, *pro tanto*, a taking of property which will entitle the owner to compensation. *Lewis, Em. Dom.* §§ 56, 137. Private property forbidden by the Constitution to be taken or damaged for public use without just compensation is not limited to the tangible subject-matter or corpus of the property, but includes the right of user and enjoyment of it. When such rights are destroyed or taken for public use their owner is entitled to compensation. *Rigney v. Chicago*, 102 Ill. 64; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Illinois C. R. Co. v. Bloomington*, 76 Ill. 447.

Appellant contends that the annexation of said territory 6 miles in length and 2,000 feet in width to the appellee city and the

taking possession of the turnpike and the tollgates in question, thereby preventing appellant from collecting tolls under the charter, is contrary to the provisions of the United States Constitution in that it impairs contract obligations (U. S. Const. art. 1, § 10), and is also the taking of private property for public use without just compensation (U. S. Const. Amend. 5; Ill. Const. art. 2, § 13), and is depriving a person of property "without due process of law." Ill. Const. art. 2, § 2. Appellee contends that the charter of appellant, construed with the statutes affecting toll roads, authorized the taking possession of that portion of the turnpike of appellant as set out in the foregoing statement. The further contention is made by appellee that, even though the charter did not permit such taking, it was still fully authorized in the exercise of police power. If such taking cannot be justified on one of these grounds, then it must be held to be unconstitutional as depriving appellant of its property without due process of law, for it then would be of such an arbitrary and unusual character as to condemn it as unknown to the law of the land. *Cooley, Const. Lim.* 7th ed. p. 504.

The words "due process of law," of the Constitution are synonymous with "law of the land." *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62. Due process of law means the due course of legal proceedings according to the rules and forms which have been established for the protection of private rights. *Burdick v. People*, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952. It is the principle of law intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559; *Cooley, Const. Lim.* 7th ed. p. 505.

Appellee calls attention to the provisions of the turnpike charter that no tollgate should be erected east of a certain point west of the town (now city) of Belleville, that no toll should be charged by the company for travel east of the junction with the southern road leading to St. Louis and for a stipulated distance therefrom; that, upon the municipal authorities of Belleville devolved the duty of keeping and maintaining that part of the turnpike road lying within the corporate limits of the town; and argues that these provisions, considered in connection with the charter of Belleville, granted in 1845, vesting in the municipal authorities the power to control its streets within the corporate limits, lead to the

conclusion that the legislature, in granting appellant's charter, intended so to limit the rights of appellant therein that it could not interfere with the necessary growth and development of the municipalities lying along the line of said turnpike. It further contends that the act of 1874 (Rev. Stat. 1874, chap. 138) governing toll roads must be held to apply to this road. Section 12 of that act provides: "No tollgate shall be erected or kept, or toll demanded, within the corporate limits of any incorporated city, or within 160 rods of such limits" (Hurd's Rev. Stat. 1905, chap. 138, p. 1996, § 12), and appellee insists that this section, construed in the light of the reasoning in *Snell v. Chicago*, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532, authorizes the taking possession of said turnpike and tollgates in the manner indicated.

The annexation appears to have been petitioned for by a majority of the legal voters and a majority of the property owners in said territory. Whether there were 5 or 5,000 inhabitants in the annexed district is not shown. The annexation proceedings appear to be in conformity with the statute (Hurd's Rev. Stat. 1905, chap. 24, p. 322, § 195); but to justify the taking of this property without paying for the interest of appellant requires something more. The right to private property is in a sense sacred, resting upon equities within reasonable limitations and restrictions, and having regard to the general welfare and public policy. It cannot be a right examined, settled, and defended on the separate and distinct consideration of a particular case, but rather on the broad and general ground which embraces the welfare of the whole community, wherein the interests of all receive equal and impartial protection. *Cooley, Const. Lim.* 7th ed. p. 509. If the natural growth of the city required the extension of its limits in a reasonable manner—which seems to have been the situation in the *Snell Case*, supra—so as to take in the first tollgate of appellant 12,156 feet west of the center of High street, whether the appellee could then take possession of the turnpike within its limits and compel the removal of the tollgate 160 rods beyond such limits would present an entirely different question. It is unnecessary, however, to decide that question in this case. Under § 12 and the other provisions of said toll road act of 1874, if under this annexation appellee is authorized to take possession of appellant's property in question, then by the same reasoning the city authorities could take possession of the entire turnpike by the annexation of a strip reaching to the limits of East St. Louis, or East St. Louis

could extend its territory in like manner, thus confiscating at once the entire turnpike and all the property of appellant. In *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, it was held that the courts have power to inquire whether the toll rates prescribed by the legislature are unjust and unreasonable, and such as work a practical destruction of the rights of property, and, if found to be so, to restrain their operation, because such legislation is not due process of law. Even if it be conceded that the provisions of said act of 1874 apply to appellant company, yet it must be held on the facts before us, both under that act and the charter of appellant as now amended, that the taking of this 6 miles of turnpike for public use without paying just compensation therefor is depriving appellant of its property without due process of law.

Can the action of appellee be justified as a proper exercise of police power? "Police power" has been defined by this court as that inherent plenary power in the state which permits it to prohibit all things hurtful to the comfort, welfare, and safety of society. It "is coextensive with self-protection, and is not inaptly termed 'the law of overruling necessity.'" *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71. While the police power of the state can be used to promote the health, comfort, safety, and welfare of the city, and is very broad and far-reaching, it is not without its restrictions. *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454. It must not conflict with the Constitution, and must have some relation to and be adapted to the ends sought to be accomplished. Rights of property will not be permitted to be invaded under the guise of police regulation. *Bailey v. People*, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98. The legislature may determine when the exigency exists for the exercise of the police power; but it is for the courts to determine what are the subjects of police powers, and what are reasonable regulations thereunder. *People v. Steele*, 231 Ill. 340, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; *Booth v. People*, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798. Has appellee taken possession of this turnpike to enable it to promote the health, comfort, safety, or welfare of society?

Counsel for appellee insists that if, after this territory is annexed, appellant can still remain in possession of the turnpike and collect toll within the limits of the city, it would be of great inconvenience to the public; that this court has recognized

the principle that there cannot be at the same time within the same territory, exercising the same powers, two distinct municipal corporations (*West Chicago Park v. Chicago*, 152 Ill. 392, 38 N. E. 697); that the building of sewers and laying of water pipes in the newly annexed territory, the laying out and paving of streets, and all other work necessary for the proper administration of municipal affairs, will be greatly interfered with if appellant's contention be upheld. While it would doubtless be of inconvenience to the public to be compelled to permit appellant to manage and control its turnpike road within the limits of the newly annexed territory and collect toll thereon, we are of the opinion that the fears of appellee as to the magnitude of the evils thus resulting are without substantial basis. The charter of the company provides for the construction of streets and roads across the turnpike, and inferentially for water pipes and sewers; and, even if the charter did not, in terms, refer to any of these matters, the city would certainly have the necessary authority to do all this work under the police power, which appellee now contends not only permits it to do this class of work, but to take entire possession of the property to the total exclusion of appellant. Even where annexation of territory has plainly been made necessary by the growth of the city, it has been decided in other jurisdictions that the municipal authorities could not, on the ground of the safety, comfort, and well-being of society, take possession of a turnpike acting under a charter similar to the one here under consideration. *Elliott, Roads & Streets*, 2d ed. § 72, and cases cited; *Cooley, Const. Lim.* 7th ed. p. 839, and cases cited. Nothing is disclosed on this record either as to the increase of population, topography of the ground, or any other reason in connection with the health, safety, or comfort of the community, that will furnish any reasonable argument for taking the appellant's property without paying therefor through the present annexation of territory. This court, in *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640, speaking through Mr. Justice Schofield, said (p. 536): "Even the police power, comprehensive as it is, has some limitations. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be, for the time, to the public health, safety, etc."

Every person is bound to use his property so as not to interfere with the reasonable use and enjoyment of the property of others, and not to interfere with the general welfare of the community in which he lives.

This last duty may be regulated by the police power of the state. "Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty the owner must submit to, and for any inconvenience or loss which he sustains thereby he is without remedy. It is a regulation, and not a taking; an exercise of police power, and not of eminent domain. But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power." Lewis, Em. Dom. § 6. Under the police power, the public welfare is promoted by regulating and restricting the use of property; under the exercise of the right of eminent domain, the public welfare is promoted by the actual taking of the property for some particular use. We held in *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91, that the state has reserved to itself all the police power necessary and proper to protect the life and property of the citizen. It is, however, the duty of the courts to inquire whether there is a real or substantial relation between the avowed objects of the law and the means devised therein for attaining those ends. *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862. The requirement that compensation be made for public use imposes no restrictions upon the power of the state to make reasonable regulations to protect life and secure the safety of its people. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. In this last case the court, in speaking of the property necessarily taken from a railroad in building a street across its right of way, said (page 256 of 166 U. S.): "While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people." Whether especially directed by the city, or by somebody acting under its sanction, the legality of a police regulation depends upon the circumstances of each case and the character of the regulation,—whether arbitrary or reasonable and whether reasonably designed to accomplish a legitimate purpose. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175. And that case also held that, even to promote the public health, public morals, or public safety, prop-

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erty could not be taken without compensation, for public use, under the police regulation, any more than it could when it bore no relation to such matters, but only to the general welfare; that the foundations of the police power were the same in every case. The cases of *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363, and *People ex rel. Chicago v. Chicago Teleph. Co.* 220 Ill. 238, 77 N. E. 245, cited by appellee, so far as they have any application to the question here under consideration, come clearly within the principle that the municipality had only undertaken a reasonable regulation of the business of the corporations there in question.

No "overruling necessity," public or otherwise, has been shown for the taking of this toll-road property through the annexation of this long narrow strip of territory. The means employed bear no real, substantial relation to public objects. They are manifestly arbitrary and unreasonable, and beyond the necessities of the case. It is the duty of the court, therefore, to disregard mere forms, and interfere for the protection of rights injuriously affected. *Chicago, B. & Q. R. Co. v. Illinois*, supra. Under the pretense of regulation, appellee has attempted to take from appellant essential rights and privileges conferred by its charter. Police regulations, to be upheld, must be such in fact, and not merely for the purpose of curtailing corporate rights and franchises. *Cooley*, Const. Lim. 7th ed. 838; *Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41. Nothing is said in this opinion that is intended to question or decide the legality of said annexation.

The decree of the trial court perpetually enjoining appellant, its agents, officers, employees, and servants, from maintaining upon any part of the turnpike embraced within the territory annexed to the city of Belleville in September, 1906, toll houses and gates, and from collecting tolls and charges from persons who drive or ride over that part of said turnpike in the annexed territory, must be held on this record to disregard constitutional guaranties in respect to the taking of private property without due process of law, and as not within the limits of the proper exercise of the police power of the state. The trial court should have dismissed the bill for want of equity.

For the reasons indicated in this opinion, the decree must be reversed, and the cause remanded to the Circuit Court, with directions to dismiss the bill for want of equity.

Petition for rehearing denied June 9, 1908.

ILLINOIS SUPREME COURT.

ELLEN V. WEBBE et al.

v.

SAMUEL E. WEBBE et al., Appts.

(234 Ill. 442, 84 N. E. 1054.)

Devise — personal heirs — fee.

A devise to testator's children and to their personal and lawful heirs, share and share alike, creates a fee in the children, and the words "personal and lawful heirs" are not equivalent to "heirs of the body" so as to create an estate tail.

(April 23, 1908.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Cook County dismissing a bill filed to partition certain real estate. **Affirmed.**

Statement by Farmer, J.:

Appellants filed their bill in the circuit court of Cook county for partition and other relief. Appellees demurred to the bill and the court sustained the demurrer. Appellants electing to stand by their bill, the court entered a decree dismissing it for want of equity, from which this appeal is prosecuted.

The real estate sought to be partitioned is 40 acres of land in Cook county. Henry Meader was the owner in fee of said land at the time of his death, which occurred in 1867. He left a will disposing of his estate, which was executed in 1864, and is as follows:

I, Henry Meader, of Manchester, Dearborn county, Ind., being now well stricken in years (but of sound mind and memory) and considering at all times the great uncertainty of life, and feeling anxious to prevent any disquietude or litigation about the property which I may leave to my heirs at my death, do make this as my last will and testament, to wit: I will that my funeral expenses and all my just debts be paid promptly, without any vexation or delay, out of the first moneys that shall come into

the hands of my testatrix or administrator of my estate. I give and bequeath to my ever faithful and beloved wife, Sarah Y. Meader, the full occupancy and control of all the residue of my personal and real estate during her lifetime, except as herein-after provided. And I also will and direct that my said beloved wife may and shall at pleasure sell and dispose of any portion of my personal property as shall best suit her own interest and convenience. I repose unlimited confidence in her fidelity and ability, and prayerfully and hopefully commit her unto the hands of God as "unto a faithful Creator." Amen. I give and bequeath unto my very kind son-in-law, Ahira Smith, and to my most affectionate and dutiful daughter, Matilda J. Smith, wife of the said Ahira Smith, all my farming utensils, household and kitchen furniture, and so much thereof at my death as my said wife can of her own free will and accord conveniently spare, and the residue at her death. The balance of all my estate, both personal and real, I give and bequeath to my dear children, John Meader, Ezekiel E. Meader, Henry Meader and Matilda J. Smith, and to their personal and lawful heirs, share and share alike. (See over on next page.) I hereby constitute and appoint my said beloved wife, Sarah Y. Meader, sole executrix of this my last will and testament.

In witness thereof I have hereunto set my hand and seal this sixth day of September, in the year of our Lord 1864.

Henry Meader. [L. S.]

The will was admitted to probate in Cook county December 5, 1888, and letters of administration with the will annexed were issued to the testator's daughter, Matilda J. Smith. The bill alleges that Henry Meader left surviving him Sarah Y. Meader, his widow, John, Ezekiel E., and Henry Meader, his sons, and Matilda J. Smith, his daughter, as his only children and heirs at law. (The theory of the bill, which is very lengthy, covering 30 pages of the abstract, is that, by the will of Henry Meader, his four children each took a life estate in the undi-

Note. — An examination of the authorities has failed to disclose the existence of any other case which the question whether the phrase "personal heirs," or "personal and lawful heirs," used in a devise, may be taken as having been used as words of procreation, so as to create an estate tail in a devisee, has been passed upon by the courts.

While instances are common in which the words "lawful heirs" in a devise have been taken as words of procreation, thereby creating an estate tail (e. g., *Williams v. McCall*, 12 Conn. 328; *Covert v. Robinson*, 17 L.R.A. (N.S.)

46 Pa. 274; *Moody v. Snell*, 81 Pa. 359), this has always been due to the presence of other expressions clearly evincing an intention to use such phrase in the sense of "heirs of the body." Decisions are not wanting which declare the word "lawful" to be insufficient *per se* to show an intention not to use the word "heirs" in its ordinary legal sense, as a word of inheritance or limitation. *Wool v. Fleetwood*, 136 N. C. 460, 67 L.R.A. 444, 48 S. E. 785; *Deemer v. Kessinger*, 206 Ill. 57, 69 N. E. 28.

lands shall go to his lawful heirs." The court said (page 61 of 206 Ill.): "In legal effect the devise to William L. Deemer contained in the codicil and that contained in the will are the same,—that is to say, a freehold estate by each of said provisions is given to William L. Deemer and an estate in fee is limited immediately to his lawful heirs, and the fee to the premises, under the codicil as well as under the will, vested in William L. Deemer. . . . The words 'nearest,' 'legal,' 'lawful,' or similar expressions preceding the word 'heirs,' without others words of limitation, in a devise, do not convert the word 'heirs' from a word of limitation to that of purchase." If the word "personal," as used in the will, is to be construed as a limitation to the heirs of the bodies of the testator's children, then it would have to be held that they took only a life estate; but, if the words "personal and lawful heirs" were intended by the testator to mean the heirs in general of his children, then said children took an estate in fee. Counsel say in their briefs they have been unable to find any case where the word "personal," as used in this will, has been construed. As the word has no technical legal meaning, the question here involved is one of construction.

We cannot agree with counsel for appellants that, as used in this will, the words "personal and lawful heirs" are equivalent to or synonymous with "heirs of the body begotten." It is true, as said by Preston (vol. 2, p. 503): "It is not necessary that the words of procreation, descriptive of the person by whom or on whose body the heirs inheritable under the entail are to be begotten, shall be in the clause of immediate gift to the donee. It will be sufficient that, on the collective sense of the will or deed, it appears that, by the heirs described in that clause, heirs of the body were intended." It is necessary to the creation of an estate tail that, in addition to the word "heirs," words of procreation to indicate the body from which the heirs are to proceed must be used or necessarily implied from the language of the will. 1 Washb. Real Prop. § 199; 2 Bl. Com. p. 115; *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589; *Metzen v. Schopp*, 202 Ill. 275, 87 N. E. 36. In *Lehn-dorf v. Cope*, 122 Ill. 317, 13 N. E. 505, it was said that, while the ordinary form was to make the gift or grant to the donee or grantee "and the heirs of his body," or "heirs upon her body to be begotten," or "upon her body to be begotten by A," there is no especial efficacy in these forms of words; and an estate tail, at common law, may be created by equivalent words "which, by necessary implication, describe and designate the particular body out of which the heirs

should proceed." It has accordingly been held that in a will a devise to one "and his offspring," "his lineal descendants," "his issue," "his seed," and similar expressions in the connection used, were equivalent to the words "heirs of the body begotten." The reason for such construction was that the words were held to indicate the bodies out of which the heirs should issue, and clearly no straining of words was required in so construing the language used. In our opinion "personal and lawful heirs" no more indicates the bodies out of which the heirs shall issue than if the word "personal" had been omitted. They are no more words of limitation than the word "children" or "heirs," without other qualification. In *Leiter v. Sheppard*, 85 Ill. 242, a devise to a devisee, "and to her children, heirs, and assigns after her," was held to give the fee to the devisee. In *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65, it was held that the words "nearest," "next" or "first" prefixed to the term "heirs," without use of other words of limitation, would not vary or affect the devise. See also *Silva v. Hopkinson*, 158 Ill. 386, 41 N. E. 1013; *Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. 974.

It is contrary to the policy of our law and the spirit of our statute to tie up property; and courts are not disposed to adopt a construction that will produce that result, but, on the contrary, where it can be done without violating a settled rule of law, they will adopt the construction that will give an estate of inheritance to the first taker. *Leiter v. Sheppard*, supra; *Davis v. Ripley*, 194 Ill. 399, 62 N. E. 852; *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; *Strawbridge v. Strawbridge*, 220 Ill. 61, 4 L.R.A.(N.S.) 948, 110 Am. St. Rep. 226, 77 N. E. 78; *Dick v. Ricker*, 222 Ill. 413, 113 Am. St. Rep. 426, 78 N. E. 823. In *Butler v. Huestis*, 68 Ill., it was said (page 603): "If we are to interpret wills in the light of precedents, we ought to follow those that are most in harmony with the genius and laws of this country and the manners and customs of its people. We ought rather to be guided by those that would most effectually do justice, and not by such as would give an arbitrary and technical meaning to words never understood or contemplated by the testator; that may defeat all the objects of his beneficence, as manifested by the last solemn act of his life, in disposing of his property to those he may deem most worthy of his bounty."

In the introductory part of the will the testator gives reasons for making the will and disposing of the property "which I may leave to my heirs at my death;" and no ref-

erence anywhere in the will is made by the testator about leaving property to any other persons than his widow and children. In the residuary clause he disposes of both personal and real estate, and the language used is applicable to both. No estate tail can be created in personal property, and the testator must be held to have intended that the devisees should take the personal property absolutely. The fact that he included real estate in the same sentence of the will, when not otherwise indicated in some other part of the instrument, indicates an intention that the devisees should take the same estate in the land that they were given in the personal property. This, of course, is not conclusive, but is an important circumstance to be considered in arriving at the intention of the testator. In *Leiter v. Shepard*, 85 Ill., it was said (page 247): "The fact that personal estate was comprehended in this residuary clause and was expected by the testator to go with the shares of real estate in question, to the legatees named, is an indication that an absolute estate was intended to be given them." This language was substantially quoted and applied in *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225.

Greater latitude is allowed in the construction of wills than is allowed in the construction of deeds. In the former, effect is to be given to the intention of the testator, and this is to be determined from a consideration of all of the provisions of the instrument. When such intention is ascertained, if not in conflict with some rule of law, it is to be given effect in the construction of the will. In *Blackmore v. Blackmore*, 187 Ill. 102, 108, 58 N. E. 410, 412, the court said: "A technical construction of words and phrases, although *prima facie* the one which should prevail, will not be carried to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas, and who, from a consciousness of such deficiency, often exert themselves to drag in such phrases wherever they suppose they would probably have been adopted by an experienced draughtsman."

Our conclusion is, from the language used by the testator in his will, that it was his intention to give his four children named an estate in fee in the real estate; and to so construe the will is not contrary to and does not conflict with any settled rule of law or rule of property. It is unnecessary, therefore, to refer to the question of laches discussed by counsel in their briefs.

The decree of the Circuit Court is affirmed.

Petition for rehearing denied June 9, 1908.

17 L.R.A. (N.S.)

KANSAS SUPREME COURT.

MODERN WOODMEN OF AMERICA et al.

v.

EDNA A. PUCKETT et al.

(— Kan. —, 94 Pac. 132.)

Insurance — benefit certificate — interest of member.

1. A member of a mutual-benefit society who holds a certificate of insurance therein has no interest in the fund. He possesses simply the power of appointment, which, if not exercised, becomes inoperative. Neither the certificate nor the proceeds become a part of the estate of the member.

Same — change of beneficiary — will.

2. A member of a mutual-benefit society who is the holder of insurance therein has no interest in the certificate which can be disposed of by will. And, where the rules and by-laws of the order and the contract of insurance provide a method by which a change of beneficiary may be made by the member, that method must be followed; and a testamentary direction will be held ineffectual as a new designation.

Same — interest of beneficiary — nature.

3. Where the beneficiary named in a benefit certificate issued by a mutual-benefit society dies before the insured member, no interest in the fund vests in the beneficiary, and her heirs cannot take the fund by in-

Headnotes by PORTER, J.

Case Note. — Disposition of fund in mutual benefit society upon failure of beneficiary.

It is a general rule that the member of a mutual-benefit association has no property right in the fund which the association undertakes to pay upon his death, but has only the power of appointing a beneficiary.

It is so declared in the following cases, which pass upon the right to the benefit in case of failure of a beneficiary: *Duval v. Goodson*, 79 Ky. 224; *Worley v. Northwestern Masonic Aid Asso.* 3 McCrary, 53, 10 Fed. 227; *Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 543; *Eastman v. Provident Mut. Relief Asso.* 62 N. H. 555; *Greeno v. Greeno*, 23 Hun. 479; *Masonic Mut. Relief Asso. v. McAuley*, 2 Mackey, 70; *Swift v. Railway Pass. & F. C. Mut. Aid & Ben. Asso.* 96 Ill. 309; *Supreme Council, C. M. B. A. v. Priest*, 46 Mich. 429, 9 N. W. 481; *Arthur v. Odd Fellows' Beneficial Asso.* 29 Ohio St. 557.

In passing upon the interest of a member in such an association, the court, in *Maryland Mut. Benev. Soc. I. O. R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52, said: "The interest acquired by a member of this association is not one payable to himself or for his own benefit, further than his funeral expenses. It is not a *debitum in presenti, solvendum in futuro*; if the deceased had only a power, and not an interest or property in the sum or fund, it

made defendants, and that the court determine who was entitled thereto. This was done, and the Pilcher heirs set up their claims by proper pleadings. There was a trial to the court, and judgment in favor of the Dilley children, giving to each one third of the amount of the certificate. The Modern Woodmen of America and the Pilcher heirs, as plaintiffs in error, seek to reverse the judgment, and Edna A. Puckett files a cross petition claiming that the court should have adjudged her entitled to the full amount of the certificate.

The rules and regulations of the order in force at the time of the death of William Pilcher provide as follows:

"Sec. 41. Who may be Beneficiaries. Benefit certificates shall be made payable

to an emergency fund, from which payment might be made to needy members of the deceased's family; and any portion remaining after such use was stipulated to lapse and go to the reserve fund.

But in *Newman v. Covenant Mut. Ins. Assn.* 76 Iowa, 56, 1 L.R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87, where the certificate was payable to the devisees of the member as designated in his last will, it was held that the heirs of the member were the beneficiaries upon failure to designate. To the same effect is *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 113, 29 N. E. 480.

And in *Supreme Lodge, K. & L. H. v. Menkhäusen*, 106 Ill. App. 665, affirmed in 209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567, where the beneficiary was precluded from taking because he murdered the member, and the purpose of the order was to furnish the benefit to the widow, heirs, etc., on the death of the member, and its by-laws provided that the benefit might be made payable to the member's wife, husband, children, etc., it was held that the fund did not lapse, but went to the children of the deceased member. To the same effect is *Schmidt v. Northern Life Assn.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800.

So, in *Chicago Guaranty Fund Life Soc. v. Wheeler*, 79 Ill. App. 241, the society contended that, according to the contract, it was bound to pay no one, no beneficiary having been named, but it was held that the substantial undertaking was to pay to some of the persons named in the constitution and charter of the society if there was a failure to designate, the purpose of the society being to furnish benefit to the widow, etc., of the member. Same effect, *Caudell v. Woodward*, 15 Ky. L. Rep. 63; *Gibbs v. Anderson*, 16 Ky. L. Rep. 397.

Most courts grasp at provisions of the constitutions, charters, and by-laws of the society, both general and special, to prevent a forfeiture; and the disposition of the benefit is generally determined by these provisions.

In the following cases, where the designation was invalid as provided in the by-laws, 17 L.R.A. (N.S.)

only to the wife, surviving children, or some other person or persons specifically named in said benefit certificate as beneficiary, who are related to the member as heir, blood relative, or person dependent upon him, or member of his family whom the applicant shall designate in his application: Provided, however, that no payment shall be made upon any benefit certificate to any person who does not bear relationship as wife, surviving child, heir, blood relative, or person dependent upon, or member of the family of, the member at the time of his death.

"Sec. 42. If Beneficiary dies, Disposition of Benefits. In the event of the death of a beneficiary prior to the death of a member, and upon the failure of such member to des-

the benefit went to the member's heirs: *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628; *Sargent v. Supreme Lodge, K. H. Mass.* 557, 33 N. E. 650; *Shea v. Massachusetts Ben. Assn.* 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; *Burns v. Grand Lodge A. O. U. W.* 153 Mass. 173, 26 N. E. 443; *Doherty v. A. O. H. Widows' & Orphans' Fund*, 176 Mass. 285, 57 N. E. 463; *Supreme Council, O. C. F. v. Bennett*. 47 N. J. Eq. 39, 19 Atl. 785; *Clarke v. Schwarzenberg*, 162 Mass. 98, 38 N. E. 17; *Boyden v. Massachusetts Masonic Life Assn.* 167 Mass. 242, 45 N. E. 735.

And in the following cases the member's heirs took to the exclusion of the beneficiary's heirs or representatives: *Haskins v. Kendall* 158 Mass. 224, 35 Am. St. Rep. 490, 33 N. E. 495; *Espy v. American Legion of Honor*. 7 Kulp, 134; *Speegle v. Sovereign Camp, W. W.* 77 S. C. 517, 58 S. E. 435; *Fischer v. American Legion of Honor*, 168 Pa. 283, 31 Atl. 1089; *Supreme Council A. L. H. v. Gehrenbeck*, 124 Cal. 43, 56 Pac. 640; *Michigan Mut. Ben. Assn. v. Rolfe*, 76 Mich. 146, 42 N. W. 1094; *Supreme Council R. A. v. Bevis*, 106 Mo. App. 429, 80 S. W. 739; *Richmond v. Johnson*, 28 Minn. 447, 10 N. W. 596; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166.

In the following cases the member's heirs took to the exclusion of one whose designation was invalid: *Lister v. Lister*, 73 Mo. App. 99; *Schonfield v. Turner*, 75 Tex. 324, 7 L.R.A. 189, 12 S. W. 626.

So, in *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253, the benefit went to the heirs at law of the member, and was administered according to the intestate law.

And in *Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 543, provisions of the society's laws were construed to pass the benefit to the member's heirs, widow, etc., and not to work a forfeiture. To the same effect are *Cullin v. Supreme Tent, K. M. W.* 77 Hun. 6, 28 N. Y. Supp. 276, and *Smith v. Covenant Mut. Ben. Assn.* 24 Fed. 685.

And in *Greeno v. Greeno*, 23 Hun. 478, the member's heirs took to the exclusion of a devisee. To the same effect is *Supreme*

ignate another beneficiary, then the amount to be paid under the benefit certificate shall be payable to the other surviving beneficiaries, if any there are, or if no beneficiary survive him, then to the wife of such member, if she survives him, and in case he has no surviving wife, to his legal heirs."

In addition, § 43, entitled "Change of Beneficiaries," provides, in substance, that a member in good standing who may desire to change the name of the beneficiary shall pay a fee of 50 cents, and deliver his certificate with the surrender clause duly executed by him, designating such change; and that no change in the beneficiary shall be effective or of binding force until the old certificate be delivered to the head clerk and a new certificate issued during the lifetime

of the member. It also provides that the new beneficiary or beneficiaries named shall be within the description of beneficiaries mentioned in § 41.

Edna A. Puckett based her claim upon the last will and testament of William Pileher, deceased. This will was executed on the 3d day of January, 1902. It devised all of his property, real and personal, to the Dilley children. The fourth paragraph reads as follows: "The beneficiary certificate which I hold in the Modern Woodmen is not intended to be included in the provisions of this will but it is my will that upon my decease the sum designated in said certificate be paid to the beneficiary therein named."

In her petition it was alleged that, at

Council A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634.

In the following cases the widow and children of the member took to the exclusion of a creditor named as beneficiary: Kentucky Grangers' Mut. Ben. Soc. v. McGregor, 7 Ky. L. Rep. 750; Gibson v. Kentucky Grangers' Mut. Ben. Soc. 8 Ky. L. Rep. 521; Dale v. Brumbly, 96 Md. 674, 54 Atl. 655; Carson v. Vicksburg Bank, 75 Miss. 167, 37 L.R.A. 559, 65 Am. St. Rep. 596, 22 So. 1.

And in the following cases the benefit went to the member's wife or children to the exclusion of his administrator: Deacon v. Clarke, 112 Tenn. 289, 79 S. W. 383; Fenn v. Lewis, 10 Mo. App. 478, affirmed in 81 Mo. 259; Whitehurst v. Whitehurst, 83 Va. 153, 1 S. E. 101.

And in O'Neal v. O'Neal, 109 Ky. 113, 58 S. W. 529, the member's widow took to the exclusion of his father.

So, in Grand Lodge, A. O. U. W. v. Connolly, 58 N. J. Eq. 39, 43 Atl. 286, the widow received the benefit where the designation was invalid. To the same effect is Weinstein v. Weinstein, 120 App. Div. 496, 104 N. Y. Supp. 1113.

And in Mattison v. Sovereign Camp W. W. 25 Tex. Civ. App. 214, 60 S. W. 897, the widow of the member took to the exclusion of his brothers.

So, in Re Arthars, 20 Phila. 287, the widow took in preference to a deceased beneficiary's representatives. To the same effect are Re Arthars, 20 Phila. 291, and Riley v. Riley, 75 Wis. 464, 44 N. W. 112.

And in Supreme Council, A. L. H. v. Adams, 68 N. H. 236, 44 Atl. 380, the widow took to the exclusion of representatives of the beneficiary, under by-laws passed subsequent to the issuance of the certificate.

So, in Harris v. Harris, 44 Tex. Civ. App. 152, 97 S. W. 504, the benefit was held to go to the widow to the exclusion of children of a prior marriage. To the same effect is Given v. Odd Fellows' Mut. L. Ins. Co. 71 Wis. 547, 37 N. W. 817.

In Supreme Lodge O. M. P. v. Dewey (Supreme Lodge O. M. P. v. Nevins) 142 Mich. 666, 3 L.R.A.(N.S.) 334, 113 Am. St. Rep. 596, 106 N. W. 140, 7 A. & E. Ann. 17 L.R.A.(N.S.)

Cas. 681, the husband of the member took to the exclusion of one not entitled to be named as beneficiary.

And in Grand Lodge, A. O. U. W. v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142, the member's children took to the exclusion of one whose designation was invalid.

So, in Handwerker v. Diermeyer, 96 Tenn. 619, 36 S. W. 869, children by a prior marriage of the member's wife were excluded in favor of children by her marriage with the member.

In Pease v. Supreme Assembly R. S. G. F. 176 Mass. 506, 57 N. E. 1003, under by-laws amended after the decease of the beneficiary, the next of kin of the member took to the exclusion of the beneficiary's next of kin.

In Jewell v. Grand Lodge, A. O. U. W. 41 Minn. 405, 43 N. W. 88, the benefit was held to go to the member's relatives, as named in the by-laws.

And in Re Smith, 42 Misc. 639, 87 N. Y. Supp. 725, the fund was distributed according to the statute of distribution, where a designation in a will was invalid.

So, in Moss v. Littleton, 6 App. D. C. 201, the fund was distributed according to the provisions of the by-laws, and not of the member's will. To the same effect is Grand Lodge, A. O. U. W. v. Fisk, 126 Mich. 356, 85 N. W. 875.

And in Arthur v. Odd Fellows' Beneficial Asso. 29 Ohio St. 557, a provision of the by-laws prevailed as against an attempted devise.

And in Munroe v. Providence Permanent Firemen's Relief Asso. 19 R. I. 491, 34 Atl. 997, the society was held liable to the class entitled to take by the by-laws although no designation was made.

So, in Supreme Council, R. A. v. Kacer. 96 Mo. App. 93, 69 S. W. 671, provisions were construed, and the member's relatives were held entitled to the fund where the member and beneficiary perished in the same catastrophe. To the same effect, Southwell v. Gray, 35 Misc. 740, 72 N. Y. Supp. 342.

And in Bishop v. Grand Lodge, E. O. M. A. 112 N. Y. 627, 20 N. E. 562, the member's

the time the will was prepared, the testator made certain statements to his attorney expressing his desire that the proceeds of the certificate in question should be paid in full to Edna A. Puckett; that he was advised that he had the right, under the by-laws of the order, to change the beneficiary at any time; that, upon being so advised, he directed the above-mentioned clause of his will to be written; that it was his intention thereafter to change the beneficiary so that the proceeds should be paid to Edna A. Puckett, but that he was ill and unable to attend to business and continued so until the date of his death, which accounted for his failure to make the change in the certificate; that he had a special inducement to provide for the plaintiff, because, for more than two years before his death, she nursed and cared for him. It was the theory of the petition that such a latent ambiguity in the fourth clause of the will was shown to exist by the facts stated, as to

authorize the admission of parol testimony to explain the testator's intention; and that his intention should prevail. Over the objections of defendants, the court admitted testimony of this character, which is assigned as one of the errors complained of.

Messrs. Carr W. Taylor and George E. Battin for plaintiffs.

Messrs. Vandevceer & Martin for defendants.

Porter, J., delivered the opinion of the court:

We shall first notice the contentions of the cross petitioner, Edna A. Puckett, which are that the certificate was part of William Pilcher's estate; and that, under the fourth paragraph of his will, as explained and aided by the parol testimony of his intentions, the proceeds should be paid to her; that, if, for any reason, the intent of the testator thus established cannot be given effect, the

family, etc., were held entitled to the benefit; and it was held that the issuance of a certificate was not a condition precedent. To the same effect in *Pfeifer v. Supreme Lodge*, B. S. B. S. 173 N. Y. 418, 66 N. E. 108.

In *Kaemmerer v. Kaemmerer*, 231 Ill. 154, 83 N. E. 133, where the fund was claimed by the widow and also by some of the member's children, and there was no express provision for disposition of the fund in case of failure of the beneficiary, but it was provided that benefits should be paid only to the families, heirs, etc., it was held distributable according to such provision; and a by-law under which some of the parties claimed, adopted after the issuance of the certificate, providing for such contingency, was held not to apply, it not being retrospective in operation.

In *Britton v. Supreme Council*, R. A. 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675, affirmed in 47 N. J. Eq. 325, 21 Atl. 754, there was a conflict of provisions, and "heirs" was construed as meaning "next of kin."

And in *Walsh v. Walsh*, 66 Hun. 297, 20 N. Y. Supp. 933, affirmed in 143 N. Y. 662, 39 N. E. 21, "legal heirs" was construed as meaning those who would take in case of intestacy.

In *Simon v. O'Brien*, 87 Hun. 160, 33 N. Y. Supp. 815, where the member's beneficiary predeceased him and no other designation was made, it was held that the beneficiary's interest was contingent, and wholly divested by her death before the member, so that the case then stood as though no beneficiary had been named; and where, by the provisions of the contract, upon proof of permanent disability the member was entitled to receive one half the benefit, it was held that his interest was a vested one, so that, under the facts of the case, the fund went to his legal representative.

In *Sons & Daughters of Job v. Wilson* 17 L.R.A. (N.S.)

(Ga. App.) 61 S. E. 134, where, by the by-laws, the benefit was payable to the person in whose favor the member should make his will, and he died without making a will, it was held, where it was shown to be the custom of the society to pay the benefit to the surviving member of deceased's family and that this custom was in accord with its by-laws, that the widow was entitled to the fund.

In *Hadley v. Odd Fellows' Beneficial Asso.* 173 Mass. 583, 54 N. E. 345, at the time the certificate was issued, it was unnecessary to designate a beneficiary if the member left a widow. The by-laws were subsequently amended, making the benefit payable to such person or persons as the member's certificate required. It was held that these words were chosen in view of the outstanding certificates which designated no beneficiary, and which, when issued, had the effect to make the benefit payable to the widow if there was one, and that it was the intention that this should continue; so that, upon the death of the member and failure to designate a beneficiary, the fund passed to the widow.

In *Brew v. Clement*, 48 Kan. 386, 29 Pac. 704, where the beneficiary died before the member, and the beneficiary and also the member gave the proceeds of the insurance to their daughter by will, it was held that the daughter thereby became entitled to the fund,—at least as against other heirs of the parties, who were the only contestants in the case, the fund having been paid into court by the insurer.

For note on the right to change beneficiaries by will, see case note to *Re Harton*, 4 L.R.A. (N.S.) 939.

For note as to the meaning of the word "family" in statutes and by-laws of societies of this character, see note to *Supreme Lodge O. M. P. v. Nevins*, 3 L.R.A. (N.S.) 334.

fourth paragraph of the will should be considered null and void, and the three Diley children would then be entitled to take under the second paragraph of the will; also that, if the court should hold the will inoperative as to the certificate, then Emma H. Pilcher had a vested right in it, which passed at her death to her heirs. None of these contentions are sound. The certificate is no part of the estate of the member. *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, 14 Pac. 449. It is inconsistent with the theory upon which benefit societies are organized that the proceeds of a benefit certificate should be considered assets of the member's estate. Otherwise it would become liable for his debts and the costs of administration,—something not within the contemplation and purpose for which such orders are established. The insured member himself has no interest in the fund. He possesses simply a power of appointment which, if not exercised, becomes inoperative. *Rollins v. McHatton*, 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254; *Hellenberg v. District No. 1*, 1 O. B. B. 94 N. Y. 580; *Bacon, Ben. Soc.* § 243; *Fisher v. Donovan*, 57 Neb. 361, 44 L.R.A. 383, 77 N. W. 778; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253; *Keener v. Grand Lodge*, A. O. U. W. 38 Mo. App. 543; *Eastman v. Provident Mut. Relief Assn.* 62 N. H. 555; *Coleman v. Supreme Lodge*, K. H. 18 Mo. App. 189. Again, where the rules and by-laws of the order prescribe the way in which a beneficiary may be changed, and require that the procedure shall be followed in order to effect a valid change, the rules and by-laws control, and a testamentary direction is ineffectual. In *Olmstead v. Masonic Mut. Ben. Soc.* supra, it was expressly held not to be within the power of such member to change the beneficiary by will, but that, in order to effect such change, the procedure prescribed by the rules and by-laws of the order which are a part of the contract must be followed. In the opinion Mr. Justice Johnston, speaking for the court, said: "We are to decide whether the beneficiary named in the certificate could be changed, and the fund disposed of, by the will, as was attempted to be done. . . . The assured had no interest in the benefit resulting from his membership. In no event was it payable to him, nor could it become a part of his estate; and, having no interest in the fund, what was there for him to bequeath? We think the will was ineffectual to change the beneficiary or direct the fund from the persons named in the certificate." In *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166, where 17 L.R.A. (N.S.)

the by-laws of the society provided that no change of beneficiary should be valid except when made in accordance with the rules of the order, the last will of the member was held ineffectual as a change of designation. These views are supported by the weight of reason and authority. The decisions generally are to the effect that the member of a benefit society who is the holder of a certificate of this character has no interest in the certificate which can be disposed of by will. In *Kemper v. Modern Woodmen*, 70 Kan. 119, 78 Pac. 452, which followed and approved the *Olmstead Case*, supra, there was no question of a will; but it was squarely decided that, in order to effect a valid change of beneficiaries, the procedure prescribed by the order, which is part of the contract, must be followed; and that the rules and by-laws of the order, in respect to the procedure for changing the beneficiary, are not directory. As was said by the court in *Rollins v. McHatton*, 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254: "It would be a dangerous precedent were we to hold that the designation of the change of beneficiary by entry upon the books of the company is not imperative. Disregard of the prescribed mode of substitution would tend to frustrate the wise and benevolent object to which these societies owe their existence."

Cases may arise where equity would aid in an attempted, but uncompleted, change of beneficiary, where the assured has done his part in making the substitution in accordance with the rules and laws of the order; but no such case is presented here. Since the certificate never became a part of the estate of William Pilcher, and as he did not possess the power to change the beneficiary by will, but could only do this in the manner prescribed by the laws of the order, the various contentions of the cross petitioner must fall. The will itself, however, does not attempt, in our opinion, either to dispose of the certificate, or to change the beneficiary. In the fourth clause it is expressly stated that the certificate is not included in the provisions of the will. We may concede that the parol testimony disclosed a latent ambiguity in the will when it showed that the beneficiary whose name then appeared in the certificate mentioned in the fourth clause of the will had previously died. The same testimony, however, showed that the testator not only knew, but had in his mind the fact, that the beneficiary named was no longer living; that he discussed and considered his right and intention thereafter to change the beneficiary. So that it is only reasonable to presume that he used

the language with reference to his intention to make a change, and that, by the words "beneficiary therein named" he meant, not the beneficiary whose name at that time appeared in the certificate, but the one he expected thereafter to name, and whose name would appear in the certificate at the time of his death. We have, therefore, a case where a latent ambiguity is created by parol testimony, and the same testimony removes the ambiguity and leaves the language of the instrument to control. 17 Cyc. Law & Proc. p. 677b. William Pilcher was for several years an officer of the local lodge and familiar with the by-laws and the procedure to be followed in order to make a change of beneficiary. The evidence in rebuttal established the fact that, after the execution of the will, he was uncertain as to his desires in the matter, and that he never made, or attempted to make, any change therein. The latent ambiguity in the fourth clause having been removed by the same testimony which created it, there is no ground for the contention that this clause should be held null and void. The Dilley heirs, therefore, cannot take by virtue of the second clause in the will, which gives them all of the testator's property, real and personal. This clause must be construed in connection with the fourth, which, in terms, states that the certificate is not included in the provisions of the will. The claim that Emma H. Pilcher ever obtained a vested right in this certificate which passed at her death to her heirs is also contrary to the weight of authority. The only interest in the certificate she had in her lifetime was in the nature of an expectancy, which ceased at her death. See *Rollins v. McHatton*, supra; *Riley v. Riley*, 75 Wis. 464, 44 N. W. 112; *Handwerker v. Diermeyer*, 96 Tenn. 619, 36 S. W. 869; and authorities cited, supra.

There is still another reason why the judgment of the court cannot be permitted to stand. The class of persons who may become beneficiaries is designated in express terms, by the rules of the order. The designation excludes those who are not either the "wife, surviving child, heir, blood relative, or person dependent upon, or member of the family of, the member, at the time of his death." The judgment gave portions of the proceeds to two of the stepchildren, who were not shown to have been persons dependent upon William Pilcher, nor members of his family. A person not of the class for whose benefit the society is organized cannot become a beneficiary. *Britton v. Supreme Council*, R. A. 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; *Alexander v. Parker*, 17 L.R.A. (N.S.)

144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94, 52 N. E. 41; *Fisher v. Donovan*, supra.

The contention is urged by defendants in error and Edna A. Puckett that the rules and by-laws of the order which are referred to herein were adopted after the execution and delivery of the certificate, and after the death of Emma H. Pilcher, and, although in force at the time of the death of the member, they are not a part of the contract. It is insisted that to hold these laws adopted subsequently to the date of the certificate as part of the contract is to make them retroactive. The certificate itself reads as follows: "Subject to all the conditions on the back of this certificate and named in its fundamental laws, and liable to forfeiture if said member shall not comply with said conditions, laws, and such by-laws and rules as are or may be adopted by the head camp or the local camp of which he is a member." We have no difficulty in determining that the contract was made subject to all by-laws and rules of the order that might be adopted after the execution of the certificate.

The doctrine of retroactive laws has no application here. No vested rights, as we have shown, accrued to anyone, assured or beneficiary. The by-laws were adopted as much for the benefit of William Pilcher as for that of the society. He participated in their adoption, and they expressed the objects and purposes of the order, crystallized by years of experience. If the assured had designated a change in the beneficiary which complied with the by-laws in force at the time such change was made, and by-laws were afterwards adopted which prescribed a different procedure, a question might arise involving the doctrine of the retroactive effect of the by-laws subsequently enacted. In the instant case no attempt was made to designate a different beneficiary; and we have, therefore, the not unusual case where the designated beneficiary dies before the assured, and the latter fails to appoint or substitute a beneficiary. In such a case, where the rules and by-laws of the society, which were a part of the contract, expressly provide where the fund shall go at his death, the contract governs. In this case the laws of the order provide that, under the facts, which are not disputed, the proceeds are payable only to the heirs of the assured.

The judgment will be reversed, and the cause remanded, with directions to enter judgment in favor of the heirs of William Pilcher.

MINNESOTA SUPREME COURT.

LEO CONHEIM, Respt.,
v.CHICAGO GREAT WESTERN RAILWAY
COMPANY, Appt.

(104 Minn. 312, 116 N. W. 581.)

Carrier—baggage—delay.

1. When a trunk is delivered to the baggageman at a railway station in proper season, the passenger has the right to require that it shall be carried on the same train which he takes.

Same—measure of damages.

2. The proper measure of damages for the failure of a railway company to deliver a traveling man's trunk containing samples is the value of the use of the property during the delay, including such incidental expenses and damages as were in the contemplation of the parties when the contract for carriage was entered into.

Same—indefiniteness.

3. The evidence in this case was too indefinite and speculative to form a basis for estimating the amount of the damages.

(May 22, 1908.)

Headnotes by ELLIOT, J.

Case Note.—Duty of carrier to transport baggage on same train with passenger.

It is generally held to be the duty of a carrier of passengers, in the absence of an agreement or understanding to the contrary, to transport a passenger and his baggage by the same train, and that a failure to perform such duty will render it liable for the loss or destruction thereof. *Glasco v. New York C. R. Co.* 36 Barb. 557; *Wald v. Pittsburg, C. C. & St. L. R. Co.* 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888; *Toledo, St. L. & K. C. R. Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. 462; *Coward v. East Tennessee, V. & G. R. Co.* 16 Lea, 225, 57 Am. Rep. 227.

Thus, a railway company accepting as a passenger one who purchases a ticket over its line from a connecting carrier and pays an excess charge for a greater amount of baggage than is carried free is liable for the loss of the baggage which is not forwarded upon the same train with the passenger. *Glasco v. New York C. R. Co.* supra.

So, there being an implied understanding on the part of a railway company, when a passenger buys a ticket for passage upon a limited express train and applies to have his baggage checked, that the baggage shall go upon the same train on which he takes passage, unless he gives some direction, does or attempts to do something which authorizes the carrier to send the baggage by another train, it will be liable for the destruction thereof, if, because of its neglect to attach a proper tag thereto in order to secure its

A PPEAL by defendant from an order of the Municipal Court of St. Paul denying a new trial upon a verdict in plaintiff's favor in an action brought to recover damages alleged to have been caused by defendant's failure to forward a trunk as directed. Reversed.

The facts are stated in the opinion.

Messrs. A. G. Briggs and Edward A. Knapp, for appellant:

The transportation of the trunks of a traveling salesman, containing samples, is an independent contract to transport merchandise, and the liability of the carrier with reference thereto is that of a common carrier of merchandise.

Haines v. Chicago, St. P. M. & O. R. Co. 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447; *McKibbin v. Great Northern R. Co.* 78 Minn. 232, 80 N. W. 1052; *McKibbin v. Wisconsin C. R. Co.* 100 Minn. 270, 8 L.R.A. (N.S.) 489, 117 Am. St. Rep. 689, 110 N. W. 964; *Trimble v. New York C. & H. R. Co.* 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532; 6 Cyc. Law & Proc. p. 669.

The ordinary measure of damages resulting from the delay in the shipment or delivery of merchandise is the difference in the value of the property at the time it did arrive and when it should have arrived.

transportation by the limited train, it is sent by a slower train, which is destroyed by coming in contact with a flood which, in itself, is an act of God. *Wald v. Pittsburg, C. C. & St. L. R. Co.* supra.

And, where a trunk is delivered in proper season to a railway company, with a request that it be forwarded on the same train with the passenger, and, without excuse, it is forwarded on a later train, and the owner, by reason of the improper conduct of the railway company's agent at the point of destination, is unable to obtain it before its destruction by the burning of the station, the railway company is liable for the value thereof, as such delay constitutes palpable negligence. *Toledo, St. L. & K. C. R. Co. v. Tapp*, supra.

And the carrier is not absolved from liability by the fact that its station building was set on fire by the act of God, as the trunk would not have been destroyed had it not been for the carrier's negligence in failing to forward it upon the same train with the passenger. *Toledo, St. L. & K. C. R. Co. v. Tapp*, supra. To same effect, see *Wald v. Pittsburg, C. C. & St. L. R. Co.* supra.

So, a railway company is liable for the loss of a passenger's baggage which it failed to transport upon the same train with him, but despatched by a later train, and which was rifled in transit, as the contract of carriage contemplated that both should be transported by the same train, and the fact that it arrived by a later train disclosed gross negligence on the part of the railway

9 Century Dig. § 451, p. 365; Whalon v. Aldrich, 8 Minn. 346, Gil. 305; Katz v. Cleveland, C. C. & St. L. R. Co. 46 Misc. 259, 91 N. Y. Supp. 720; Gulf, C. & S. F. R. Co. v. Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320; Schulze v. Great Eastern R. Co. L. R. 19 Q. B. Div. 30.

Special damages are recoverable only where notice of the facts upon which the same are based was given to the carrier at the time the contract was entered into.

Hutchinson, Carr. § 1369.

The plaintiff cannot recover more than the value of the use of the baggage during delay.

Southern R. Co. v. Coleman (Ala.) 44 So. 837; Texas & P. R. Co. v. Douglas (Tex. Civ. App.) 30 S. W. 487; Texas & N. O. R. Co. v. Russell (Tex. Civ. App.) 97 S. W. 1090; Turner v. Southern R. Co. 7 L.R.A. (N.S.) 188, note, 75 S. C. 58, 54 S. E. 825; Gulf, C. & S. F. R. Co. v. Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303; International & G. N. R. Co. v. Phillips, 63 Tex. 590; Elliott Railroads, 1662a; Texas Mexican R. Co. v. Willis, 3 Tex. App. Civ. Cas. (Willson) 94; Denver & R. G. R. Co. v. De Witt, 1 Colo. App. 419, 29 Pac. 524; Ingledew v.

company in the absence of a showing by it why it did not ship it as it had undertaken to do, and as the law required it to do. Coward v. East Tennessee, V. & G. R. Co. supra.

And the carrier is not relieved from liability from such negligence by a stipulation in the ticket limiting its liability for loss of baggage to a designated sum, notwithstanding the delay and loss occurred upon the line of the connecting carrier over which it had sold the ticket. Ibid.

And the carrier is not relieved from liability for such negligence, even when the loss of the baggage occurs upon the line of a connecting carrier, by a stipulation in the ticket that, in selling it, it acted as agent only, and was not responsible beyond its own line, as such stipulation has reference only to injuries to the person of the passenger. Ibid.

It was said in *Glasco v. New York C. R. Co.* supra, that "the obligation of a railroad company undoubtedly is to take whatever is delivered and received as baggage from a passenger, in the baggage car of a passenger train in which the passenger takes his passage, and take it along with, and deliver it to, the passenger at the place of destination, in the usual manner of transporting and delivering baggage. And in this respect the obligation is the same whether the baggage is within the quantity allowed to a passenger to be carried without any charge other than the ordinary fare of the passenger, or whether it is an extra quantity, for which an additional charge is made. If it is taken as the baggage of the passenger, whether ordi-

Northern R. Co. 7 Gray, 86; Anderson v. Toledo, W. & W. R. Co. 32 Iowa, 86; Milhous v. Atlantic Coast Line R. Co. 75 S. C. 351, 55 S. E. 764; Katz v. Cleveland, C. C. & St. L. R. Co. supra.

Messrs. Markham & Calmenson, for respondent:

Trunks which, to the knowledge of the carriers, contain merchandise or samples belonging, not to the passenger, but to his employer, are regarded as the baggage of the traveler.

McKibbin v. Great Northern R. Co. 78 Minn. 232, 80 N. W. 1052.

A passenger has the right to require his baggage to be sent on by the same train which he takes, if it is delivered to the company in proper season.

Baldwin, Am. Railroad Law, p. 336; Toledo, St. L. & K. C. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462.

Elliott, J., delivered the opinion of the court:

The respondent, Conheim, a traveling salesman for a house dealing in men's wearing apparel, desiring to go from St. Paul to Rochester, Minnesota, purchased a ticket

nary or extra, it is to be carried with the passenger, unless there is some agreement to the contrary. Any other rule would be productive of great inconvenience and hardship, if not loss, and would subject travelers often, to intolerable delays and annoyance."

It was said in *Blumenthal v. Maine C. R. Co.* 79 Me. 550, 11 Atl. 605, that a passenger's purchase of a passage ticket entitles him to safe transportation of himself and his personal baggage upon the same train.

But it was held in *St. Louis Southwestern R. Co. v. Ray*, 13 Tex. Civ. App. 628, 35 S. W. 951, that the carrier's duty was to transport baggage only within a reasonable time after its receipt; and that it need not, in the absence of a special agreement, forward it upon the same train by which its owner takes passage.

In *Webb v. Atlantic Coast Line R. Co.* 76 S. C. 193, 9 L.R.A. (N.S.) 1218, 56 S. E. 954, punitive damages were awarded a traveling salesman for the failure of a carrier to deliver his sample trunks promptly at his destination, by reason of which his business was interfered with and interrupted.

As to awarding punitive damages for a wanton failure of a carrier to transport baggage, see the note to *Webb v. Atlantic Coast Line R. Co.* 9 L.R.A. (N.S.) 1218.

As to the liability of a carrier for baggage not accompanied by a passenger, see the case of *McKibbin v. Wisconsin C. R. Co.* 100 Minn. 270, 8 L.R.A. (N.S.) 489, 117 Am. St. Rep. 689, 110 N. W. 964, and the note to *Marshall v. Pontiac, O. & N. R. Co.* 55 L.R.A. 650.

and checked his trunk containing samples necessary for use in his business. This trunk, of the kind and style usually carried by traveling salesmen, was delivered to the appellant's baggageman at the Union Station in St. Paul at 4:30 P. M. of December 6, 1906. Conheim was known to the baggageman, who had seen his samples and knew that he was a traveling man. When the trunk was checked, Conheim told the baggageman that it must be sent forward to Rochester, Minnesota, on the Chicago Great Western train which was to leave the station at 5:40 P. M. of that day. There was no other conversation between the parties. Conheim went to Rochester on that train, and did not learn until the next morning that the trunk had not accompanied him. It finally reached Rochester at 1:30 P. M. of that day, and, in an action for damages, Conheim claimed that, through the negligence of the railway company in failing to forward this trunk as directed, he lost one day's time, to his damage in the sum of \$50. The trial court awarded him \$17.50, and this appeal was taken from an order denying defendant's motion for a new trial.

Under the rule announced in *McKibbin v. Great Northern R. Co.* 78 Minn. 232, 80 N. W. 1052, and *McKibbin v. Wisconsin C. R. Co.* 100 Minn. 270, 8 L.R.A. (N.S.) 489, 117 Am. St. Rep. 689, 110 N. W. 964, the plaintiff established a cause of action for nominal damages, at least, against the railway company; but we regret to say that it is necessary to reverse the order because of the application of an erroneous rule for determining the damages and the indefinite and unsatisfactory nature of the evidence offered to prove damages. When the agent of a railway company knows the nature of the trunks and the character of the business of a traveling salesman, and is aware of the fact that the passenger cannot transact his business without using the contents of the trunk, and that it is necessary that the trunk shall accompany him, and nevertheless neglects to forward the trunk as directed, whereby the passenger is delayed in his business, the carrier is liable for the damages naturally resulting therefrom. Under such circumstances, the passenger is entitled to have a trunk which he delivers to the baggageman at the station in proper season go forward on the same train which he takes. This action was brought on the theory that the plaintiff was entitled to recover the value of the time lost by him through the delay in forwarding his trunk according to directions. Assuming that the trunk was delivered to the station baggageman, and directions given, within a reasonable time before the departure of the train, the company was negligent, and plain-17 L.R.A. (N.S.)

tiff was entitled to recover the damages which he was able to prove resulted from such negligence. The action was brought on the theory that he could recover for the value of the time lost; but the respondent now practically concedes that the proper measure of damages in such a case is the value of the use of the property during the time of delay of delivery, including such incidental expenses and damages as were in the contemplation of the parties at the time the contract was entered into. *Southern R. Co. v. Coleman* (Ala.) 44 So. 837; *Texas & P. R. Co. v. Douglas* (Tex. Civ. App.) 30 S. W. 487; *Texas & N. O. R. Co. v. Russell* (Tex. Civ. App.) 97 S. W. 1090; *Elliott, Railroads*, 2d ed. § 1662a; *Moore, Carr.* p. 730.

It was not pleaded, and there was no evidence to show, that the defendant's baggageman was notified that any special reason existed for expediting the delivery of this trunk. In a case very like this (*Katz v. Cleveland, C. C. & St. L. R. Co.* 46 Misc. 259, 91 N. Y. Supp. 720) the court said: "The reason given by plaintiff's principal witness why unusual damage resulted from the delay was that he needed the samples in order to fulfil engagements already made to meet prospective customers, and that he could not sell goods in the absence of his samples. He did not, however, give defendant any notice of these special circumstances. All he did was to notify defendant's baggageman that he had a large sample trunk which he wished checked. This certainly was not calculated to convey the intelligence that any special reason existed for expediting the trunk which would not apply to any trunk. Upon the evidence as it stood, the plaintiff should have been non-suited." If Conheim had been able to prove that the baggageman was notified of the special reasons why it was important that this trunk should go with him on the next train, he might have recovered what he lost by not having the use of the samples. He spent the morning, after he learned that his trunk had not arrived, in calling on his customers in Rochester. In the afternoon, after the trunk had arrived, he showed them his samples, and it is not claimed that he lost any sales in Rochester. He does claim that, if the trunk had been in Rochester in the forenoon, when he called for it, he could have finished his work and left there about 3 o'clock in the afternoon, and gone to Owatonna, where he intended to call upon other customers; and that, because of the delay in Rochester, he did not stop at Owatonna, but went on to Austin. He says that the loss for which he claims damage was "the subsequent loss of time from not having the samples at Rochester on that

particular day." It does not appear that he had any regular customers at Owatonna, or that there was any reasonable probability that he would make any sales there. It was all left to conjecture.

The estimate of the value of his time was also very indefinite. He "figured that his time ran from \$25 to \$50 a day on the average," and sometimes more. He "estimated that his time ran not less than \$25 a day, and from that up, while he was on the road." He testified that the only loss he sustained was by reason of the loss of the commissions he might have made; but it appeared that, while he was working on a commission basis, the firm paid him a stipulated sum every month, regardless of his earnings,—that is, he received a fixed amount each month to cover his living expenses. It does not appear what this amount was, although it is conceded that it was paid for the day which he claims to have lost. Upon this state of the evidence, it is impossible to estimate with any reasonable degree of accuracy what the value of the use of the property would have been during the time its delivery was withheld.

The order is therefore reversed, and a new trial granted.

MINNESOTA SUPREME COURT.

L. T. CLEMENT, Admr., etc., of John Schmitt, Deceased, Appt.,
v.

DAVID WILLETT et al., Respts.

(— Minn. —, 117 N. W. 491.)

Deed — assumption of mortgage — covenant.

1. A provision in a deed whereby the grantee assumes and agrees to pay an existing mortgage does not create a covenant which runs with the land, although inserted in connection with the covenants of seisin and against encumbrances.

Contract — assumption of mortgage — liability of grantor.

2. Such an assumption contract creates no enforceable obligation, unless the grantor in the deed was personally liable to pay the mortgage debt, or owed the owner thereof some duty or obligation respecting the subject-matter of the promise.

Same — place of performance.

3. A deed which conveyed land situated in Iowa, executed and delivered in Minnesota, between parties residing therein, contained a provision by which the grantee assumed and agreed to pay an existing mortgage on the land conveyed. Held, that the assumption agreement is a personal con-

tract, and governed by the laws of Minnesota.

(August 7, 1908.)

APPEAL by plaintiff from an order of the District Court for Martin County sustaining a demurrer to the complaint in an action brought to enforce an agreement by the defendant Willett to assume a mortgage on land conveyed to him, which mortgage had not been assumed by his immediate grantor. Affirmed.

The facts are stated in the opinion.

Messrs. Harrington & Dickinson and Dean & Palmer, for appellant:

In Iowa one assuming payment of a debt is liable upon the broad principle that a promise of one person to another for the benefit of a third person may be enforced by the latter.

Gilbert v. Sanderson, 56 Iowa, 349, 41 Am. Rep. 103, 9 N. W. 293; Ross v. Kennison, 38 Iowa, 396; Thompson v. Bertram, 14 Iowa, 476; Corbett v. Waterman, 11 Iowa, 86; Scott v. Gill, 19 Iowa, 187; 1 Jones, Mortg. § 758; 1 Beach, Modern Law of Contr. § 196.

The Minnesota court held that the mortgagee may maintain a personal action against the assuming grantee.

Follansbee v. Johnson, 28 Minn. 311, 9

Case Note. — Law governing covenant in deed or mortgage of real property.

This note does not include cases like Polson v. Stewart, 36 L.R.A. 771, upon the question as to the governing law of an executory contract to convey real property or to surrender an interest therein; nor, on the other hand, does it include cases upon the question as to the governing law of executed contracts considered in relation to their effect to create or transfer the title to, or an interest in, real property. The general principle which refers deeds or mortgages of real property to the *lex rei sitæ*, so far as concerns laws which deal directly and distinctively with their character and effect as conveyances of the title to, or interests in, the property, is well settled. It is obvious, however, that such instruments may contain covenants which, in the exercise of their ordinary and legitimate functions, affect only the personal rights and obligations of the parties, and, though affected by the state of the title, do not themselves, except when relied upon as an estoppel, affect the title itself. The distinction is sharply suggested by Smith v. Ingram, 132 N. C. 959, 95 Am. St. Rep. 680, 44 S. E. 643, where the court, without undertaking to decide whether the validity of a covenant of warranty in a deed executed by a married woman, considered as a personal contract for the breach of which damages may be recovered, would be determined by the *lex loci contractus* or *lex rei sitæ*, held that at all events its ef-

N. W. 882; Connecticut Mut. L. Ins. Co. v. Knapp, 62 Minn. 405, 64 N. W. 1137; Pinch v. McCulloch, 72 Minn. 71, 74 N. W. 897; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Goetz v. Foos, 14 Minn. 265, Gil. 196, 100 Am. Dec. 218.

The Iowa rule governs in this case.

Marble Sav. Bank v. Mesarvey, 101 Iowa, 285, 70 N. W. 198; Root v. Kansas City Southern R. Co. 195 Mo. 348, 6 L.R.A. (N.S.) 212, 92 S. W. 621.

The assumption covenant is an integral part of the covenant of seisin and the covenant against encumbrances; and such covenants run with the land and are controlled by the *lex rei sitæ*.

Security Bank v. Holmes, 68 Minn. 538, 71 N. W. 699; Knadler v. Sharp, 36 Iowa,

232; Harwood v. Lee, 85 Iowa, 622, 52 N. W. 521; McClure v. Dee, 115 Iowa, 546, 91 Am. St. Rep. 181, 88 N. W. 1093; Schofield v. Iowa Homestead Co. 32 Iowa, 317, 7 Am. Rep. 197; 11 Cyc. Law & Proc. p. 1052; Dalton v. Taliaferro, 101 Ill. App. 593; Riley v. Burroughs, 41 Neb. 296, 59 N. W. 929; 22 Am. & Eng. Enc. Law, p. 1338; Fisher v. Parry, 68 Ind. 465; Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260.

The assumption contract is part and parcel of the deed, and, in construing the deed, the court should construe it as a whole, and in accordance with the law of the state in which the land thereby conveyed is situated.

9 Cyc. Law & Proc. p. 680; Riley v. Burroughs, *supra*; McGoon v. Scales, 9 Wall.

fect as an estoppel against the covenantor to claim the land should be determined by the *lex rei sitæ*. It is obvious that when, as in that case, such a covenant is relied upon, not as the ground of an action for damages, but as an indirect means of cutting off an interest in real property, it falls within the general principle already stated.

The distinction is also clearly made in Phelps v. Decker, 10 Mass. 267, where, in holding that a covenant of warranty in a deed for the lands in the Connecticut Susquehanna Purchase in the state of Pennsylvania, made by a citizen of Pennsylvania to a citizen of New York, was binding on the party making it; and that an action might be maintained in Massachusetts thereon, notwithstanding the law of Pennsylvania prohibiting the entry of a claimant under such title,—the court said: "As a conveyance its [deed's] operation is local and determinable only where the land lies which was pretended to be conveyed by it; but, respecting the consideration paid and the personal contracts collateral to the title for the assurance of the purchaser, this contract made in another state with a person there domiciled, and not a subject or presumed to be consulant of the laws of Pennsylvania, is not to be considered as void *ab initio*; nor would it be so considered, I apprehend, if the present demand were made in the courts of that state."

In the light of this distinction, it is clear that covenants,—at least those that do not run with the land,—when relied upon as the basis of an action for damages, are not governed by the *lex rei sitæ* as such. Thus, the existence of an implied covenant that does not run with the land in a deed of real property depends upon the law of the place where the deed is executed (*lex loci contractus*) rather than upon the *lex rei sitæ*. Bethell v. Bethell, 54 Ind. 428, 23 Am. Rep. 650; Craig v. Donovan, 63 Ind. 513; Jackson v. Green, 112 Ind. 341, 14 N. E. 89. In the first two cases the parties were residents of the state in which the deed was executed, but in the last case it does not appear where the parties resided.

A distinction, however, has been recog-

nized between covenants that run with the land and those that do not, and the question as to the existence of implied covenants running with the land has been held to be governed by the *lex rei sitæ*. Dalton v. Taliaferro, 101 Ill. App. 592; Crane v. Blackman, 126 Ill. App. 631; Fisher v. Parry, 68 Ind. 465.

This distinction, however, was repudiated in Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260, holding that the question whether a deed executed in Indiana, conveying land in another state, contained a covenant of seisin running with the land, was to be determined by the law of Indiana rather than by the law of the state in which the land was situated. The court said that Fisher v. Parry, *supra*, had been inferentially overruled, and further said: "We can very well conceive the rationality of a rule that requires all questions concerning the title of real property, or of an estate or interest therein, or the determination in any form of such right or interest, to be decided by the law of the situs. But, when the question is one of the right to recover damages for a breach of contract purely, it has generally been held in our courts that the law of the state where the contract was made is the one that governs. The reason for this distinction must be obvious. In the one case it is the interest in the thing itself that is to be determined, and in the other it is a personal right growing out of the contract made in relation to that thing." It would seem, however, that the decision in Fisher v. Parry must be accepted as the doctrine of Indiana on the subject until it has been overruled by the supreme court of that state.

It having been determined in Bethell v. Bethell, *supra*, in accordance with the *lex loci contractus*, that the deed did not imply a personal covenant of seisin, the court, upon a subsequent appeal (92 Ind. 318) affirmed a decree reforming the deed by incorporating such a personal covenant therein, although the land was situated in another state. (As to jurisdiction of equity over suits affecting real property in another state or country, see note to Proctor v. Proctor, 69 L.R.A. 673.)

23, 19 L. ed. 545; Story, Conf. L. § 363; 22 Am. & Eng. Enc. Law, p. 1337.

It was the intent and within the contemplation of both parties that the law of Iowa should govern their contract.

Bigelow v. Burnham, 90 Iowa, 300, 48 Am. St. Rep. 442, 57 N. W. 865; Pritchard v. Norton, 106 U. S. 137, 27 L. ed. 108, 1 Sup. Ct. Rep. 102; Riley v. Burroughs, supra.

Where a contract is entered into in one state, to be performed in a certain other state, the validity of the contract will be determined by the laws of the latter state.

Seamans v. Christian Bros. Mill Co. 66 Minn. 207, 68 N. W. 1065; Hoyt v. McNeil,

13 Minn. 390, Gil. 362; Swedish-American Nat. Bank v. First Nat. Bank, 89 Minn. 113, 99 Am. St. Rep. 549, 94 N. W. 218; Thomson-Houston Electric Co. v. Palmer, 52 Minn. 179, 38 Am. St. Rep. 536, 53 N. W. 1137; Ames v. Benjamin, 74 Minn. 335, 77 N. W. 230; 9 Cyc. Law & Proc. p. 668; Andrews v. Pond, 13 Pet. 77, 10 L. ed. 66; Riley v. Burroughs, supra; Rorer, Interstate Law, 50; Crumlish v. Central Improv. Co. 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456; Forepaugh v. Delaware, L. & W. R. Co. 128 Pa. 217, 5 L.R.A. 508, 15 Am. St. Rep. 672, 18 Atl. 503; First Nat. Bank v. Shaw, 109 Tenn. 237, 59 L.R.A. 498, 97 Am. St. Rep. 840, 70 S. W. 807; Heaton

In the foregoing cases the courts, without expressly passing upon the point, seem to have determined the question whether or not the covenant, if it existed, would run with the land, by reference to the rule in the state in which the court was sitting; but whether upon the theory that the *lex loci contractus* or *lex fori* governed is not clear, as the two were coincident in all of those cases.

In Riley v. Burroughs, 41 Neb. 296, 59 N. W. 929, however, it was held that the question whether a covenant of warranty in a deed executed in Nebraska to land in Iowa ran with the land so as to enable a subsequent grantee to maintain an action thereon directly against the original grantor depended upon the law of Iowa. The decision was influenced by the consideration that, if the law of the place where the deed was executed were held to be the governing law in this respect, many complications and much confusion and uncertainty in relief might happen, assuming that different mesne conveyances were executed in different states by the law of some of which the covenant is regarded as running with the land and by that of the others as merely a personal covenant not running with the land.

Upon the original hearing in Cassidy's Succession, 40 La. Ann. 827, 5 So. 292, it was held, in accordance with the law of Louisiana, that a vendee of real property could not maintain an action for breach of warranty against the grantor of his vendor, without first having established his right as against the latter, notwithstanding that the land was situated in Texas, where a contrary rule prevailed. The decision was upon the ground that the question related to the form and effect of an action, and not to the law governing the contract. Upon a rehearing, however, the decision on this point was changed, and the law of Texas, whereby a grantee may maintain an action and recover for breach of covenant of warranty against his immediate or remote vendor, was applied, upon the ground that, under the law of Texas, a covenant of warranty runs with the land. It appeared in this case that the first conveyance was executed in Louisiana and the second in Texas. The decision is referred to the law of Texas as the *lex rei sitæ*.

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In Thayer v. March, 11 Hun, 501, affirmed in 75 N. Y. 340, the court seems to refer the question whether a mortgage shall be construed as implying a promise to pay the sum intended to be secured, to the law of the state where the mortgage is executed; though, there being no evidence as to where the mortgage was in fact executed, the presumption was indulged that it was executed in New Jersey, where the real property was situated, and there was therefore, upon the hypothesis assumed by the court, no conflict between the *lex rei sitæ* and the *lex loci contractus*.

The validity of a covenant not to engage in a competing business is governed by the *lex loci contractus*, although included in a contract for the conveyance of real property in another state. Robinson v. Suburban Brick Co. 62 C. C. A. 484, 127 Fed. 804.

It is obvious that, without conceding that personal covenants fall within the operation of the general principle that refers questions relating directly and distinctively to the effect of deeds and mortgages upon the title to the *lex rei sitæ* as such; and assuming that the governing law of such covenants is to be ascertained by reference to the principles applicable to contracts generally,—the application of those principles with respect to some questions may be affected by the location of the property. In CLEMENT v. WILLET, it will be observed that the court not only rejected the law of Iowa, as the *lex rei sitæ*, as the governing law of the assumption clause, but also rejected the contention that the law of Iowa, as the place of performance of the contract considered as a personal contract, should govern.

In Cling v. Sejour, 4 La. Ann. 128, however, the court held that a covenant of warranty in an act of sale executed in Louisiana, of land situated in another state, is a contract to be performed in that state; and therefore the question, what amounts to a fulfilment or breach thereof must be determined by its laws.

So, apparently upon the ground that Minnesota was the place of performance of the covenant, the court, in Tillotson v. Pritchard, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302, referred the question as to the measure of damages for breach of a covenant in a deed of lands in Minnesota, executed in Ver-

v. Eldridge, 56 Ohio St. 87, 36 L.R.A. 817, 60 Am. St. Rep. 737, 46 N. E. 638; Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Schaeffer v. Berry, 62 Tex. 705.

Messrs. Putnam & Nicholson, for respondents:

The grantee in a deed, who, in terms, agrees to pay a particular mortgage, is not liable thereon unless his immediate grantor was liable for the payment of such mortgage.

Brown v. Stillman, 43 Minn. 126, 45 N. W. 2; Nelson v. Rogers, 47 Minn. 103, 49 N. W. 526.

The assumption agreement in the deed is not a part of the covenant against encum-

brances, and is entirely separate and distinct therefrom.

The covenantee must be the owner of the land to which the covenant relates in order to claim under a covenant running with such land.

Shaber v. St. Paul Water Co. 30 Minn. 179, 14 N. W. 874; Glenn v. Canby, 24 Md. 127; Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461, 6 L.R.A. 111, 43 N. W. 469; Sjoblom v. Mark, 103 Minn. 193, 15 L.R.A. (N.S.) 1129, 114 N. W. 746; Graber v. Duncan, 79 Ind. 565.

There is a difference between a covenant in a deed which relates to and affects the land granted and creates an estate or in-

ment by a resident in that state to a resident of New Hampshire, to the law of Minnesota.

In Looney v. Reeves, 5 Kan. App. 279, 48 Pac. 606, however, it was held that the measure of damages for the breach of warranty in a deed, executed in the state in which the action is brought, to land situated in another state, is governed by the laws of the former state. It is not clear from the opinion whether the decision is upon the ground that the question is governed by the *lex loci contractus* or the *lex fori*.

In Nichols v. Walter, 8 Mass. 243, it is apparently assumed that the *lex fori* governed as to the measure of damages in an action for breach of covenant of seisin in a conveyance of land in another state.

It will be observed by referring to the note to Gray v. Western U. Teleg. Co. 56 L.R.A. 301, on the conflict of laws as to measure of damages, that by the weight of modern authority the question as to the measure of damages for breach of a contract is regarded as pertaining to the substantive rights of the parties rather than to the remedy, and therefore as not governed by the *lex fori* as such. A contrary view, however, seems to prevail in Massachusetts.

The decision in Matheny v. Stewart, 108 Mo. 73, 17 S. W. 1014, merely excludes the *lex fori* as the governing law with respect to the measure of damages for breach of such a covenant; as it holds that attorneys' fees cannot be recovered in such an action in Missouri where not allowed by the laws of another state in which the deed was made and the land was situated.

In Hazelett v. Woodruff, 150 Mo. 534, 51 S. W. 1048, the measure of damages for breach of warranty in a deed of land in Indiana, made in that state, was determined by the common-law rule as held in Missouri; but this was because the law of Indiana on the subject was not proven.

It is obvious, of course, that the *lex fori* prevails over *lex rei sitæ*, the *lex loci contractus*, the *lex loci solutionis*, and all other laws so far as concerns matters that relate to the remedy as distinguished from the substantive contract. Thus, the form of action for breach of an executory obligation in a deed or mortgage, whether assump-

tit or covenant, depends upon the *lex fori*; and, for such purposes, the question whether or not an instrument is deemed to be under seal is also to be determined by the *lex fori*. Le Roy v. Beard, 8 How. 451, 12 L. ed. 1151; Broadhead v. Noyes, 9 Mo. 56; Douglas v. Oldham, 6 N. H. 150; Andrews v. Herriot, 4 Cow. 508.

So, the *lex fori* governs as to whether the liability of a grantee by virtue of his assumption of a mortgage upon the property may be enforced in an action at law, or may be enforced only in a suit in equity. Willard v. Wood, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831; Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437; New York L. Ins. Co. v. Aitkin, 125 N. Y. 680, 26 N. E. 732.

And the necessity of alleging facts avoiding the grantor's attempted release of the grantee from the assumption covenant is also determined by the *lex fori*. New York L. Ins. Co. v. Aitkin, *supra*.

And the *lex fori* also governs as to the necessity of obtaining consent of the court before bringing an action for the recovery of a debt secured by a mortgage upon real property, pending a bill for the foreclosure of the same. Belmont v. Cornen, 48 Conn. 342.

The limitation of time for bringing an action for breach of a covenant in a deed or mortgage of real property also in general depends upon the *lex fori*. Flowers v. Foreman, 23 How. 132, 16 L. ed. 405; Willard v. Wood, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176.

But it has been held that a statute of a state in which a mortgage upon real property is executed, which requires that the original proceedings to collect the debt shall be by suit to foreclose the mortgage, and limits the time for bringing suit upon the bond to recover any deficiency to six months after the sale of the mortgaged premises, pertains to the substantive rights of the parties; and therefore an action cannot be maintained in another state for the deficiency if not brought within the period prescribed by that statute. Sea Grove Bldg. & L. Assn. v. Stockton, 148 Pa. 146, 23 Atl. 1063.

terest which is a covenant real, and a mere personal contract between the parties to the particular instrument.

Kettle River R. Co. v. Eastern R. Co. and Sjoblom v. Mark, *supra*; Polson v. Stewart, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737; Phelps v. Decker, 10 Mass. 267; Rooney v. Koenig, 80 Minn. 483, 83 N. W. 399; Bruns v. Schreiber, 43 Minn. 468; 45 N. W. 861; Allen v. Allen, 48 Minn. 462, 51 N. W. 473; Bossingham v. Syck, 118 Iowa, 192, 91 N. W. 1047; Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051; Morgan v. South Milwaukee Lake View Co. 97 Wis. 275, 72 N. W. 872.

The legal operation and effect of a covenant must be determined by its subject-matter, and not by the terms in which it is expressed.

Glenn v. Canby and Kettle River R. Co. v. Eastern R. Co. *supra*; Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882.

Iowa rejects the theory of comity of law, and Minnesota should, in a like case.

Franklin v. Twogood, 25 Iowa, 521, 96 Am. Rep. 73; Saul v. His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212.

The contract need not be construed as an Iowa one because it related to land in Iowa, as it is a personal contract between the parties, and is not so related to, or connected with, the Iowa land as to make it a real covenant, or within the class of contracts relating to the transfer of title to real estate.

Bethell v. Bethell, 54 Ind. 428, 23 Am. Rep. 660; Polson v. Stewart, *supra*; Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260.

Where no place of performance is specified in a contract, it is presumed that it is to be performed in the jurisdiction where made; and the debtor is not bound to tender performance in another state.

Allshouse v. Ramsay, 6 Whart. 331, 37 Am. Dec. 417; Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136; Morris v. Hockaday, 94 N. C. 286, 55 Am. Rep. 607; Smith v. Smith, 25 Wend. 406; Bigelow v. Burnham, 90 Iowa, 300, 48 Am. St. Rep. 442, 57 N. W. 865; Lewis v. Headly, 36 Ill. 433, 87 Am. Dec. 227; First Nat. Bank v. Shaw, 61 N. Y. 290; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Hunt v. Jones, 12 R. I. 265; Spies v. National City Bank, 174 N. Y. 222, 61 L.R.A. 193, 66 N. E. 736; Brockway v. American Exp. Co. 168 Mass. 257, 47 N. E. 87; O'Regan v. Cunard S. S. Co. 160 Mass. 356, 39 Am. St. Rep. 484, 35 N. E. 1070; Millard v. Brayton, 177 Mass. 533, 52 L.R.A. 117, 83 Am. St. Rep. 294, 59 N. E. 436. 17 L.R.A. (N.S.)

Elliott, J., delivered the opinion of the court:

This is an appeal from an order sustaining a demurrer to a complaint which, in substance, alleges the following facts: In November, 1904, Fred Shaer and wife gave to John Schmitt, a resident of Iowa, a mortgage on 80 acres of land in Kossuth county, Iowa, to secure the payment of three promissory notes, aggregating the sum of \$1,300. On June 11, 1905, Shaer and wife conveyed the land to Frank P. Barnes. Barnes did not assume and agree to pay the debt secured by the Schmitt mortgage. Thereafter, on September 28, 1905, Barnes and wife conveyed the land to David Willett by a deed which recited: "That the same are free from encumbrances, except a lien created by a public drain No. 3 in Kossuth county, Iowa, assessed at \$403.20, which lien second party assumes and agrees to pay, also a mortgage of \$1,300 in favor of John Schmitt, and a mortgage of \$1,500 in favor of Rose M. Bulsom. Said second party assumes and agrees to pay these two mortgages." Default was made, and under foreclosure the land realized but \$342.30 for the mortgagee. This action was then brought by the administrator of the estate of John Schmitt to obtain a personal judgment for the deficiency against Willett, on the theory that he became liable therefor by virtue of the assumption clause in the deed from Barnes to Willett.

The question is whether the owner of the mortgage can enforce the assumption agreement made with a grantor who had not himself assumed personal liability for the mortgage and owed no duty or obligation to the owner thereof respecting the subject-matter of the promise. It is the settled law of this jurisdiction that there can be no recovery in such a case. If the grantor is personally liable to pay the debt, the mortgagee or his grantee may maintain an action against the assuming grantee. *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. 882; *Connecticut Mut. L. Ins. Co. v. Knapp*, 62 Minn. 405, 64 N. W. 1137; *Pinch v. McCulloch*, 72 Minn. 71, 74 N. W. 897; but, when the immediate grantor is not liable, and owes no duty or obligation to the owner of the mortgage in respect to the subject-matter, no cause of action arises in favor of the owner of the mortgage. *Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925, and cases cited. In this instance there was no debt or obligation due from Barnes to Schmitt, which Willett agreed to pay as part of the consideration, and thus made his own debt; and, under the decisions in the state, no cause of action arose in favor of Schmitt. But in Iowa an action may be maintained by the owner of the mortgage, regardless

of whether the immediate grantor was liable to pay the debt secured by the mortgage. *Marble Sav. Bank v. Mesarvey*, 101 Iowa, 285, 70 N. W. 198. The appellants contend that the validity of this assumption contract should be determined by the laws of Iowa, because (a) such was the intention of the parties; (b) it was to be performed in Iowa; (c) it is a part of the deed, which should be construed as a whole; and (d) it is a part of the covenants of seisin and against encumbrances, and therefore runs with the land.

We cannot agree with the appellant that the contract to assume and pay the mortgage is a part of the covenant of seisin or the covenant against encumbrances. It is true that it is written into the deed in connection with these covenants; but this is not controlling. The question of what covenants in a deed run with the land received such full consideration by Mr. Justice Lewis in the recent case of *Sjoblom v. Mark*, 103 Minn. 193, 15 L.R.A. (N.S.) 1129, 114 N. W. 746, as to render any detailed discussion at this time unnecessary. Covenants of seisin and against encumbrances are real covenants and run with the land (*Security Bank v. Holmes*, 68 Minn. 538, 71 N. W. 699; *McClure v. Dee*, 115 Iowa, 546, 91 Am. St. Rep. 181, 88 N. W. 1093; *Schofield v. Iowa Homestead Co.* 32 Iowa, 317, 7 Am. Rep. 197), and are, therefore, to be governed by the law of the state where the land is situated (1 Cyc. Law & Proc. p. 1052). Such covenants, whether they impose burdens or confer benefits, pass with the land to the grantees thereof. But, strictly speaking, at law there must be privity of estate existing between the parties when the covenant is made, and it must concern the land or estate. "The covenant must respect the thing granted or demised. When the thing to be done or omitted to be done concerns the land or estate, that is the medium which creates the privity between the plaintiff and defendant." It must inhere in, or be attached to, the land, or relate to its mode of occupation or enjoyment, and it runs with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee. *Kettle River R. Co. v. Eastern R. Co.* 41 Minn. 461, 6 L.R.A. 111, 43 N. W. 469. See also *Shaber v. St. Paul Water Co.* 30 Minn. 179, 14 N. W. 874. "If . . . the covenant does not extend to, nor affect, the quality, value, or mode of enjoying the land conveyed, and is merely collateral to it, or is of such a character that a performance of it will defeat the estate of the party claiming the performance, then it does not run with the land nor bind the assignee of the covenantor, though he

be expressly included by the general term 'assigns.'" *Glenn v. Canby*, 24 Md. 127.

The agreement to assume and pay a mortgage manifestly is not such a covenant. It is the personal agreement of the grantee to pay money due to a third person for which the grantor is bound, and the legal effect of which is to create the relation of principal and surety. *Trayer v. Dorr*, 60 Minn. 173, 62 N. W. 269. The contract does not relate to, or in any manner concern, the land conveyed, or its use and enjoyment. The covenant against encumbrances relates to the title, and inheres in and passes with the land; but an agreement to assume and pay to a third party a mortgage which constitutes an encumbrance is of a different character. It is not an integral part of the deed, but is a collateral personal contract, which does not run with the land. It much resembles an agreement on the part of a grantee to pay all taxes due on the land at the time of the conveyance, of which, in *Graber v. Duncan*, 79 Ind. 565, it was said: "An agreement to discharge an existing lien or encumbrance on the land conveyed, although contained in the deed, does not create a covenant running with the land. Such an agreement amounts ordinarily to a mere contract to do a particular thing within a specified or a reasonable time, from a breach of which damages may result to the grantee, and not to a covenant annexed to, or connected with, the realty in such a way as to run with and be appurtenant to it." That an agreement to assume a mortgage is not a covenant which constitutes an integral part of the deed appears from the rule that covenants in deeds cannot be varied by parol evidence (*Rooney v. Koenig*, 80 Minn. 483, 83 N. W. 399; *Allen v. Allen*, 48 Minn. 463, 51 N. W. 473; *Bruns v. Schreiber*, 43 Minn. 468, 45 N. W. 861), while an agreement to assume a mortgage may be shown by parol evidence, and the obligation be imposed although the deed is silent. The covenant is an integral part of the deed, while the agreement to pay the mortgage is a collateral and personal contract relating to the consideration.

The mortgage referred to is upon land in Iowa, and its validity must be determined by the laws of that state; but the assumption contract was made in Minnesota between persons residing therein. It was a personal contract between Barnes and Willett. It did not relate to real property, or any interest therein, within the meaning of the law relating to covenants which run with the land. It was intended to provide for the payment of the debt secured by the mortgage by means separate and distinct from the enforcement of the mortgage lien upon the land. The contract itself is si-

lent as to the place of performance, and it cannot be inferred that Willett was to perform the obligation out of the state where the contract was entered into. Where no place of performance is specified in a contract, it is presumed that it is to be performed in the jurisdiction where made, and the debtor is not bound to tender performance in another state. Our conclusions are that the assumption contract did not provide for its performance within the state of Iowa, and that it does not appear that the parties intended that the validity of the obligation should be determined by the laws of Iowa, instead of the laws of Minnesota.

Order affirmed.

MISSOURI SUPREME COURT.
(Division No. 2.)

STATE OF MISSOURI, Resp.,
v.

E. D. HENDERSON et al., Appts.

(212 Mo. 208, 110 S. W. 1078.)

Criminal law — witness — not on indictment.

1. It is not error to permit a witness to testify for the state in a criminal case, whose name was not indorsed on the indictment.

Case Note. — Burglary by forcing screen door or window.

In the consideration of this subject it has been necessary to draw a somewhat arbitrary line of distinction between the cases. Where the breaking was of shutters, transoms, gratings, etc., the cases have been excluded because such obstructions are permanent and a more substantial barrier against intruders than screens, the latter being temporary and obviously affording but little protection.

Another phase of the subject in hand will be found in a note to *People v. White*, post, 1102, where the cases collected present the question as to whether the further opening of a window already partly open constitutes a burglarious breaking.

The removal from an open window of a wire screen upon which the window rested was held sufficient to constitute a burglarious "breaking," in *State v. Herbert*, 63 Kan. 516, 66 Pac. 235.

Entering a house through a window by removing the screen, which was fastened into the window with nails which the trespasser took out, sufficiently establishes a breaking to constitute burglary. *Sims v. State*, 136 Ind. 358, 36 N. E. 278.

Although not indicted for burglary, the defendant, in *State v. Connors*, 95 Iowa, 485, 64 N. W. 295, was found guilty of "feloniously breaking and entering," where he

Burglary — opening screen door.

2. Opening a screen door held shut by springs, with the intent to commit larceny, is a breaking within the meaning of the law of burglary.

Same — evidence — sufficiency.

3. Possession, by persons who had been seen in the yard of a burglarized house about the time the crime was committed, of the stolen property when overtaken by its owner on the road shortly after the burglary, is sufficient to justify a presumption of guilt in the absence of satisfactory evidence as to how they came into possession of the property, consistent with their innocence.

(May 19, 1908.)

APPEAL by defendants from a judgment of the Circuit Court for Ralls County convicting them of burglary and larceny. Affirmed.

The facts are stated in the opinion.

Mr. E. L. Corwine for appellants.

Messrs. Herbert S. Hadley, Attorney General, and N. T. Gentry, for respondent:

Permitting a witness for the state to testify, her name not being indorsed on the indictment, is not error.

State v. Barrington, 198 Mo. 23, 95 S. W. 235; *State v. Myers*, 198 Mo. 225, 94 S. W. 242; *State v. Hottman*, 196 Mo. 110, 94 S. W. 237.

opened a temporary screen door which was kept closed by spring hinges.

And so a conviction for burglary was affirmed in *State v. Moon*, 62 Kan. 801, 64 Pac. 609, where the defendant opened an outer screen door held in place by springs.

The breaking or tearing away from an open window, of a network of twine placed there to let in the air and keep out cats and other smaller animals, is such a breaking as to constitute a burglarious breaking and entry. *Com. v. Stephenson*, 8 Pick. 354.

There is a sufficient breaking to constitute burglary where the entry is made by tearing away a curtain from an open transom. *Holland v. State*, 47 Tex. Crim. Rep. 623, 85 S. W. 798.

Removing a canvas covering from the window of an unfinished building is a breaking sufficient to make the offense burglary. *Grimes v. State*, 77 Ga. 762, 4 Am. St. Rep. 112.

In *Hunter v. Com.* 7 Gratt. 641, 56 Am. Dec. 121, it appeared that an entrance to a house was effected by partly removing from an opening an old cloak hung at the top on nails and loose at the bottom. The court declined to decide whether this established a breaking, but in the concurring opinion of one of the judges it is said that the facts set forth do not amount to burglary.

The instruction as to the breaking necessary to constitute burglary was correct.

State v. Tutt, 63 Mo. 600; State v. Hecox, 83 Mo. 538; Dennis v. People, 27 Mich. 151; Finch v. Com. 14 Gratt. 646; State v. Reid, 20 Iowa, 421; May v. State, 40 Fla. 426, 24 So. 498; State v. Moon, 62 Kan. 803, 64 Pac. 609; State v. Conners, 95 Iowa, 486, 64 N. W. 295.

The evidence of the guilt of both defendants was sufficient,—especially in the absence of any explanation or contradiction on their part.

State v. Howard, 203 Mo. 604, 102 S. W. 504; State v. Toohey, 203 Mo. 678, 102 S. W. 530; State v. James, 194 Mo. 277, 92 S. W. 679; State v. Moore, 117 Mo. 404, 22 S. W. 1086; State v. Owens, 79 Mo. 619; State v. Warford, 106 Mo. 62, 27 Am. St. Rep. 322, 16 S. W. 886; 4 Elliott, Ev. §§ 2725, 2918; 1 Wigmore, Ev. § 153; 1 Greenl. Ev. § 34.

Gantt, J., delivered the opinion of the court:

On October 30, 1907, the grand jury of Ralls county returned an indictment charging the two defendants with burglary and larceny. The offense was alleged to have been committed on the 20th of October, 1907, and the dwelling house of Utmer Herman burglarized, and certain personal property then and there in the said house stolen and carried away. The defendants were arrested, and, at the said October term, 1907, were duly arraigned, and entered their plea of not guilty. Afterwards, in November, 1907, the defendants were jointly put upon their trial and convicted of both burglary and larceny, and their punishment, respectively, assessed at three years in the penitentiary for the burglary and two years each for the larceny. After their motions for new trial and in arrest of judgment were filed and overruled, they were duly sentenced in accordance with the verdict of the jury; and from that sentence they have appealed to this court. The indictment is in the ordinary and often approved form, and hence it is not necessary to reproduce it in this opinion.

The evidence tended to prove that the prosecuting witness, Utmer Herman, lived in Saverton township, in Ralls county, Missouri, and was a farmer. His dwelling house was situated on the Saverton and Frankfort county road, which runs north and south by said farm into the town of Saverton. The house faced east, and was about 5 miles from Saverton. On Sunday, October 2, 1907, Herman and his family, which consisted of himself, his niece, Mrs. Gones, and three children, were at home until about 2:30 in the afternoon. At that

time they left the house, and went a quarter of a mile to a field to feed some calves. They were gone about two hours and a half, and, when they returned, discovered that the house had been burglarized during their absence. The outer door was a wire screen door, and was closed by hinges and a spring, and the inner door was latched, and the entrance had been effected by pulling open the screens and getting into the house. As soon as Mr. Herman and his family returned to the house, they discovered that various boxes and drawers had been opened, and different articles of apparel were scattered around on the floor. An examination disclosed that a gold watch and a white-handled razor belonging to Mr. Herman had been stolen from a dresser drawer. The watch was a gold-filled watch, and had attached to it a fob, which made it easy to identify it. Another box had been opened and the razor taken out of it. The watch was shown to be worth \$25, and the razor and other articles stolen were worth from \$32 to \$33. The pocketbook of Mrs. Gones containing \$1.95 in money had also been stolen. Mr. Herman at once armed himself, and started in pursuit of the thieves. He rode down the road towards Saverton, and overtook the two defendants just as they were coming into town. Both of the defendants were negroes. He ordered the defendants to stop, and compelled them to hold up their hands. He called upon Mr. Calvin to assist him, and they searched the two defendants in front of Mr. Fisher's house. While searching one of the defendants, the other one took off his overcoat, and made a motion towards the fence. Mrs. Gone's pocketbook was found in the possession of one of the defendants at that time, and contained \$1.95. The two defendants were then taken on down to the depot in the town and another party was sent back to examine the ground where the defendants were first searched. There on the ground and near the fence in front of Fisher's place this party found a gold watch and fob and the white-handled razor, which belonged to Herman. Various other articles were found on the person of the defendants, among others a revolver in the sleeve of one of the defendants. Mr. Glascock was riding that Sunday afternoon by Herman's place, and saw and recognized the two defendants walking along the side of the road about 200 yards from Herman's house, about 4 o'clock in the afternoon. And a Mr. Keech testified to seeing two negro men coming out of the front yard.

The defendants offered no evidence. The court instructed the jury on reasonable doubt, the presumption of innocence, and fully instructed them as to the elements of

burglary and larceny, and directed them that they might find the defendants both guilty or acquit both, or find one guilty and the other not guilty, accordingly as the evidence justified their verdict; and also instructed them as to the difference between grand larceny and petit larceny, and what their verdict should be in case they found the stolen goods were of less value than \$30, as to the offense of larceny. The court then gave the following instruction: "The court instructs the jury that, if they find from the evidence that the screen door mentioned in the evidence was kept closed by means of hinges and springs attached to the same in such manner that some force was necessary to open said door and that the defendants opened said door by using such force, then the jury can find that there was a breaking of the dwelling house mentioned in the evidence." The defendants excepted to all the instructions given by the court.

1. The defendants are not represented in this court by counsel. As already said, the indictment is in the long accepted and approved form, and is sufficient. No error is assigned as to the admission or rejection of testimony. The defendants do complain of the action of the circuit court in permitting the state to introduce Mrs. Gones as a witness for the state because her name was not indorsed on the indictment, but there was no error in this ruling of the court. *State v. Myers*, 198 Mo. 225, 94 S. W. 242; *State v. Hottman*, 196 Mo. 110, 94 S. W. 237.

2. The only assignment of error that calls for serious consideration is the propriety of the court's instruction in regard to what would constitute a breaking sufficient to constitute burglary. In *State v. Tutt*, 63 Mo. loc. cit. 600, it was ruled by this court that "the mere lifting of a latch and so opening a door not otherwise fastened, or pushing upward or lowering a window sash which is held only by a wedge or pulley weight, or raising a trapdoor meant to be kept down merely by its own gravitation, or procuring by craft or by threats or intimidation a person within the house to open the door, is in legal contemplation a breaking." And in *State v. Hecox*, 83 Mo. loc. cit. 538, it was held that the opening of a door which is closed and fastened with a chain hooked over a nail is a sufficient breaking to constitute burglary, provided such breaking was done with intent to steal and carry away property. In *Dennis v. People*, 27 Mich. 151, the supreme court of Michigan decided that the raising of an unlocked transom, which was suspended by hinges at the top, and which was kept in its place by its own weight, was a sufficient breaking to constitute the crime of burglary. To the same effect, see *Finch v. Com.* 14 Gratt. loc. cit. 646; *State v. Reid*, 20 Iowa, 421; *May v. State*, 40 Fla. 426, 24 So. 498. And in *State v. Moon*, 62 Kan. loc. cit. 803, 64 Pac. 609, it was held that a defendant was guilty of burglary when he opened a wire screen door, the outer door of the room being open and the screen door being held in place by coil springs, when such breaking was done with the intent to commit a felony. And in *State v. Connors*, 95 Iowa, loc. cit. 486, 64 N. W. 295, it was expressly decided that the opening of a screen door with intent to commit a felony in a house was breaking within the meaning of the law of burglary. 11 Am. & Eng. Enc. Law, p. 1662, and authorities there cited. Accordingly we think the circuit court correctly instructed the jury in said instruction.

3. As to the contention that the evidence was not sufficient to sustain the verdict, we think this assignment is without substantial merit. The presence of both of the defendants in the front yard of Mr. Herman's house a short time before the burglary was discovered, the fact that they were seen going together from the house in the direction of Saverton soon after the commission of the crime and were overtaken by Mr. Herman and the stolen goods found upon their persons, showed such recent possession of the stolen property as to justify the presumption that they committed the burglary, in the absence of any satisfactory explanation of the manner in which they came into possession of the said property consistent with their innocence. *State v. Howard*, 203 Mo. loc. cit. 603, 604, 102 S. W. 504; *State v. James*, 194 Mo. loc. cit. 277, 92 S. W. 679, and cases there cited.

The judgment must be, and is, affirmed.

Fox, P. J., and Burgess, J., concur.

MICHIGAN SUPREME COURT.

PEOPLE OF THE STATE OF MICHIGAN
v.

EDWIN L. WHITE.

(— Mich. —, 117 N. W. 161.)

Burglary — opening window.

Pushing up a window which is held down by its own weight only, and has been left open enough to admit the insertion of a

Case Note. — Burglary by raising window already partly open.

This note deals with but one of the essential elements of the common-law offense of burglary, viz., the "breaking." The statutory enactments of the various states

land under it, so as to form an aperture large enough to admit one's body, and entering the building through the aperture so made, is a sufficient breaking to constitute burglary.

(July 13, 1908.)

EXCEPTIONS by defendant before judgment to rulings of the Circuit Court for Clinton County made during the trial of an indictment charging burglary, which resulted in a conviction. Affirmed.

The facts are stated in the opinion.

Mr. William M. Smith, for defendant:

If a door or window is open a little way, it is not breaking, within the meaning of the law governing burglary, to push it further open.

Tiffany, *Crim. Law*, 5th ed. p. 89, note 51, p. 715; *Dennis v. People*, 27 Mich. 151; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106; *People v. Dupree*, 98 Mich. 26, 56 N. W. 1046; 2 *Bishop, Crim. Law*, 7th ed. § 91; *Bishop, Statutory Crimes*, § 312; 2 *Russell, Crimes*, 1896 ed. p. 3; *Clark, Crim. Law* 232; *Com. v. Strupney*, 105 Mass. 588, 7 Am. Rep. 556; *Com. v. Stephenson*, 8 Pick. 354; *Com. v. Steward*, 7 Dane, Abr. 136; *R. v. Hyams*, 7 Car. & P. 441; *R. v. Smith*, 1 Moody, C. C. 178.

Mr. Dean W. Kelley, for plaintiff:

The further opening of the window constituted a sufficient breaking.

Tiffany, *Crim. Law*, 5th ed. p. 89, note 51, p. 715, note 4; *Dennis v. People*, 27 Mich.

defining "burglary," even though they have superseded the common law to some extent, are of no importance here because, where a breaking is still a necessary element of the crime, the same principles are applicable as under the common law.

If a window is partly open, but not wide enough to admit of entry, the further raising of it for the purpose of allowing one to enter is not a breaking of the house, constituting burglary. *Rose v. Com.* 19 Ky. L. Rep. 272, 40 S. W. 245; *R. v. Smith*, 1 Moody, C. C. 178; *Com. v. Steward*, 7 Dane, Abr. 136; *Com. v. Hays*, 7 Dane, Abr. 136.

The lifting of a sash which lacks an inch or less of being closed is held, in *Com. v. Strupney*, 105 Mass. 588, 7 Am. Rep. 556, not to be such a breaking and entering as to constitute burglary.

But in *Claiborne v. State*, 113 Tenn. 261, 68 L.R.A. 859, 106 Am. St. Rep. 833, 83 S. W. 352, raising a window already partly open, so as to create an aperture sufficient to admit of entrance into a building, which is subsequently effected through the opening, is held a sufficient breaking to come within the statute defining "burglary" as the "breaking and entering into a mansion house by night with intent to commit a felony."

17 L.R.A. (N.S.)

151; *People v. Nolan*, 22 Mich. 229; *Harris v. People*, 44 Mich. 305, 6 N. W. 677; *Lyons v. People*, 68 Ill. 271; *People v. Dupree*, 98 Mich. 28, 56 N. W. 1046; *Claiborne v. State*, 113 Tenn. 261, 68 L.R.A. 859, 106 Am. St. Rep. 833, 83 S. W. 352; *State v. Connors*, 95 Iowa, 485, 64 N. W. 295; *Webb v. Com.* 18 Ky. L. Rep. 220, 35 S. W. 1038; *Knotte v. State* (Tex. Crim. App.) 32 S. W. 532; *Miller v. State*, 77 Ala. 41; *Marshall v. State*, 94 Ga. 589, 20 S. E. 432; *Barber v. State* (Tex. Crim. App.) 69 S. W. 515; *State v. Brower*, 127 Iowa, 687, 104 N. W. 284; *Holland v. State*, 47 Tex. Crim. Rep. 623, 85 S. W. 798; *Com. v. Stephenson*, 8 Pick. 354.

McAlvay, J., delivered the opinion of the court:

Respondent was convicted, in the circuit court for Clinton county, of breaking and entering, in the nighttime, a store building, not adjoining to or occupied with a dwelling house, with intent to commit the crime of larceny, being charged under § 11,547, *Comp. Laws* 1897. The case is before us on exceptions before judgment.

The following, taken from the record, will indicate what occurred upon the trial material to the question now before the court: "To the foregoing information the respondent pleaded not guilty, and, by his attorney, in open court, at the beginning of the trial, said respondent admitted that he was guilty of the larceny of the goods in ques-

Where one of two persons conspiring to enter a store partly raises a window and, leaving it thus, stands a short distance apart, while the other hoists the sash high enough to enter, and enters, both are guilty of burglary. *Cooper v. State*, 69 Ga. 761.

Where a person secretly raised a window a fraction of an inch during the day for the purpose of preventing the bolt from fastening, and that night opened the window and entered, he was guilty of burglary. *People v. Dupree*, 98 Mich. 26, 56 N. W. 1046. The question presented in this case was apparently considered by the judge writing the opinion as somewhat different from the one under discussion in this note, for he says: "The language of the court was perhaps too broad in stating that, if the window was raised any distance, but was not sufficient to permit the defendant to enter; and he raised it further,—it would be breaking in the meaning of the law; but the entire evidence was to the effect that it was raised so little as not to attract the notice of the occupant. We therefore think that the jury could not have been misled by the language."

tion, but denied that he was guilty of the burglary charge contained in the information. Said cause was tried in open court before a jury, chosen and sworn on the 10th day of December, A. D. 1907, and, upon said trial, said respondent took the stand in his own behalf, and testified that, on or about the night in question, he, while intoxicated, walked along the street which passed in front of the store in question, and that he left said street, and passed along the side of the said store building to a point about 60 feet from the said street, and there saw a window of said store raised about a couple of inches, so he could put his hands under the window, which window was held down by its own weight only; and that he did put his hands under the window, and pushed it up far enough so that the opening would admit his body; and that he crawled through said window into the store. He also testified that he was drunk at the time, and did not, before he went into the store through the window, or at the time he was going into the store through the window, have any intention of stealing anything in the store but he admitted that, after he went into the store, he did steal, take, and carry away a horse blanket and a fur overcoat. The respondent further testified that he and another workman had been working in and about the said store building, in repairing the same, on two different days, a few days previous to the night in question, and that, in doing their work, they had occasion to and did raise this window; and the testimony in the case, on behalf of the people, tended to show that the window had stops or plugs for the purpose of holding the same in place, and that, as far as the proprietors of the store had knowledge, the window had not for a long time been opened or raised previous to the time respondent worked at repairing the building, and they had no knowledge that it was raised on that occasion; and that the proprietors of the store building in question had no knowledge that said window was opened to any extent on the night in question; and that as far as they had knowledge, the window was closed completely in the usual manner, prior to and at the time respondent gained entrance into the building, as testified to by him. The testimony of the people showed, however, that an employee, who was deceased at the time of the trial, had charge of the room and the window in question on the day preceding the entering into the building by respondent, and no person on the part of the people testified positively that the window was not open on the night in question as testified to by respondent. The testimony of the people was to the effect that said horse blanket and said fur overcoat were worth

less than \$25. Upon the theory that such an entering as was testified to and admitted by respondent did not in law amount to a burglarious breaking and entering, his attorney presented four requests to charge the jury, to the effect that respondent could not be found guilty of burglary, and that, under the evidence, he could be convicted of no graver offense than larceny. The court refused to charge the jury as requested, and, upon the point at issue, charged as follows: "Now, you will notice that the charge here in this information says that the respondent feloniously did break and enter this building with intent to commit the crime of larceny therein. Under the evidence, which is undisputed as to the material points in that regard, the court has assumed the burden, and now instructs you that, as to the breaking and entering, the court charges you that, under the evidence, there was such a breaking and such an entering as satisfies the law, so far as committing this offense was concerned, in this case. In other words, the manner in which the respondent himself says that he went through the window and entered the building, the court thinks, as a matter of law, and now instructs you, is a sufficient breaking and entering to constitute the crime of burglary, providing the other elements that are necessary to make up the crime are found to exist, so that you need not take up any time in the jury room in passing upon the question of breaking and entering." The errors alleged are that the court erred in refusing to give the requests, and in charging as above quoted. The only matter for the court to determine is whether the admitted facts in the case constitute a burglarious breaking and entering.

It is insisted upon the part of the respondent that the lifting of a window which is partly open, in order to make an aperture large enough to admit the intruder, is not a breaking. Several eminent text writers and decisions of courts of other states are cited in support of this contention. The tendency of the courts of late has been to hold that but the slightest force is necessary to constitute a breaking. For example: Pushing open a closed door; opening a screen door which is held by its springs, the door of the house being open; removing a screen; entering through an unfastened transom which hung in place by its own weight; entering a mill through a hole cut for the purpose of allowing a belt to run, by pushing aside the belt; entering a mill house through a small hole under the sill; taking goods from a building by thrusting the arm through an opening either made or enlarged for the purpose; entering a house by coming down through the chimney; lifting a cellar door; raising the sash of a window, shut

down close, but not fastened; pulling down an upper sash,—all have been held to be a sufficient burglarious breaking. In this state the same tendency appears. It was held that the removal of an iron cellar-window grating was a breaking within the statute. *People v. Nolan*, 22 Mich. 229. Also pushing open a closed, but unfastened, transom swinging horizontally on its hinges. *Dennis v. People*, 27 Mich. 151. It was held that the fact that a respondent slightly raised a window in the daytime, so that the bolts which fastened it down would not be effectual, would not devert his subsequent breaking and entering through the window in the nighttime of the character of burglary. *People v. Dupree*, 98 Mich. 26, 56 N. W. 1046.

Respondent urges that, because this window was raised 2 inches, there was no "breaking," but admits in his brief that, had the window been closed, and he had raised it, although it was not fastened, and it was necessary to overcome but its weight, it would have constituted a "breaking." As stated above, such reasoning is supported by respectable authority. This, however, does not appeal to our judgment as sound reasoning. We think the rule adopted in the instances above quoted is a reasonable one. It is, in effect, that, if any force at all is necessary to effect an entrance into a building, through any place of ingress, usual or unusual whether open, partly open, or closed, such entrance is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present. We think such holding is in harmony with *Dennis v. People* and *People v. Dupree*, cited supra. A recent Tennessee case is exactly in point. The respondent entered a house in the nighttime, through a window found partially raised from the bottom, which he opened sufficiently to admit his person. In this case the court considers many of the instances referred to in this opinion, and cites the cases. The opinion concludes: "It seems to us a useless refinement to hold that the various instances above cited are sufficient evidence of breaking, and that the further raising of a window partly open is not sufficient evidence, when the opening in the window is enlarged by the person entering so as to make the aperture sufficient to admit his body. Here is a material change of the status, and the change is accomplished by the application of force." *Claiborne v. State*, 113 Tenn. 261, 68 L.R.A. 859, 106 Am. St. Rep. 833, 83 S. W. 352, and cases cited.

The circuit was not in error in holding the acts of respondent a sufficient breaking and entering. The conviction is affirmed. The cause will be remanded to the court below for the entry of a judgment in accord-

ance with the verdict, and respondent will be brought before that court for sentence.

OREGON SUPREME COURT.

FIRST NATIONAL BANK OF POME-ROY, IOWA, Appt.,
v.

B. F. McCULLOUGH et al., Respts.

(— Or. —, 93 Pac. 366.)

Appeal — order of proof — error.

1. A judgment will not be reversed because of the order in which the proof was admitted, in the absence of anything to show abuse of discretion on the part of the trial court.

Evidence — transfer of note.

2. Parol evidence is not admissible to show that the indorsement of notes to an individual not designated as the cashier of a bank was such a transfer as to vest the legal title in the bank, and preclude a defense which would be good against the payee.

Appeal — exceptions — sufficiency.

3. A bill of exceptions is unavailing to raise the objection that a witness was required to be cross-examined as to matters not testified to in chief, which does not purport to contain all his testimony on direct examination.

Note — holder by indorsement.

4. A bank which takes without indorsement, from its cashier, negotiable paper indorsed to him without designation of his fiscal position, holds it subject to all equities existing in favor of the maker.

Appeal — new trial.

5. The granting or denying of a motion for a new trial is not a final order from which an appeal lies.

Same — questions not raised below.

6. The appellate court will not pass upon the question whether or not a certain fact has been established by all the evidence in the case where it was not presented to the trial court.

(January 21, 1908.)

Case Note. — Right of transferee, without indorsement, of bill or note payable or indorsed to order of transferrer, to protection as a bona fide purchaser.

As is indicated by the title, this note is confined to cases involving the rights of a transferee of a note payable "to order," or indorsed "to order," and cases involving the rights of a transferee without indorsement of a note which had previously been indorsed in blank and is thus transferable by delivery, have been excluded.

The general rule as to the rights of a transferee without indorsement of a bill or note payable or indorsed to order is thus

APPEAL by plaintiff from a judgment of the Circuit Court for Umatilla County in defendants' favor in an action brought to recover the amount alleged to be due on certain promissory notes. Affirmed.

Statement by Moore, J.:

This is an action by the First National Bank of Pomeroy, Iowa, a corporation, against B. F. McCullough and M. H. Gillette, to recover on two promissory notes. The facts, so far as deemed material herein, are that, on March 2, 1904, and November 23d of that year, the defendants obtained from one W. J. Furnish leases of certain lands in Umatilla county for a term which would expire March 1, 1907, agreeing to give for the use of the premises \$640 an-

nually. This sum was evidenced by their negotiable promissory notes, executed to Furnish, for \$512 and \$128, respectively, which instruments, given for the rent of 1906, were payable June 1, 1906. The leases did not contain a covenant to the effect that, in case of a sale of the real property, the tenancy could be terminated at the option of either party. The landlord, in the fall of 1905, listed the land with one H. L. Moody, an agent, for sale, to whom he duly indorsed the notes, which would mature June 1, 1906. The agent having entered into a contract for the sale of the premises with one G. E. York, the defendants surrendered to the latter the possession of the real property, and relinquished to him all their rights under the

stated in 1 Daniel on Negotiable Instruments, § 864a: "When an instrument is made payable to 'order' the indorsement of the payee is necessary to transfer the legal title; and the transferee without indorsement takes it as a mere chose in action, and must aver and prove the consideration; and he takes it subject to all equities that attached to it in the hands of his transferor."

And at § 741 in the same volume there is this further statement: "Where a bill or note payable 'to order' is transferred without indorsement, the transferee does not acquire the legal, but only the equitable, title. The holder under such a transfer must aver and prove the assignment, for the mere possession of the instrument unindorsed is not evidence of ownership, and its exhibition in a suit not sufficient ground of recovery. And he can only stand in the shoes of his assignor, and recover subject to such defenses as were available against him, although he took it in good faith and for value. Therefore, if the party who transfers a note payable to the order of another, but unindorsed by him to whose order it is payable, and it turn out that the transferor had no title, the transferee could not recover, there being no equitable right to which he can claim succession."

In 2 Randolph on Commercial Paper, § 788, the rule is stated as follows: "If a bill is payable to order, and transferred without indorsement, its transfer will be subject to defenses existing against the transferor. To be clear of defense it must be indorsed before maturity and before notice of the defense has come to the transferee. An assignment in like manner, unaccompanied by indorsement, is subject to defense."

And in vol. 3, § 1877, the same author states the rule in the following words: "Where the purchaser of a bill or note takes it without indorsement, unless it is transferable by delivery, he will be subject to such defenses as are available against the payee."

Under the general rule as given above, there can be no question but that a note transferred by the payee without indorsement is subject, in the hands of the trans-

feree or any subsequent holder, to all the equities existing in favor of the maker against the payee. Such equities can be cut off only by an indorsement by the payee. The rule, as applied to cases where the payee did not indorse the note upon transfer, is upheld by a long line of decisions which will be noted and discussed below.

FIRST NAT. BANK v. MCCULLOUGH, however, presents a more difficult question. Here the note had been indorsed by the payee and subsequently by his indorsee to the cashier of the plaintiff bank, who assigned it, without indorsement, to the plaintiff. The first indorsee was evidently not a bona fide indorsee, and it is not expressly stated that the cashier was a bona fide holder; but, as the plaintiff endeavored, by means of parol evidence, to show that the indorsement of the cashier was in fact an indorsement to the bank, and consequently the latter was entitled to stand in the position of the cashier, it is at least a fair inference that the cashier was a bona fide holder. If otherwise, it would not have aided the bank to show that in fact the note had been indorsed to it, and not to the cashier. The decision seems to hold that the rule is that a note in the hands of an assignee without indorsement is subject to all the equities existing in favor of the maker, as against the payee, regardless of the fact that the assignor may have held it free from such equities. The question arises in this connection whether the well-established rule that a purchaser, at least an indorsee, before maturity with actual notice, or after maturity with actual or constructive notice, of a defense to the note in the hands of the payee, may recover if his indorser was a bona fide purchaser before maturity without notice, and thus protected against the defense, does not apply equally to one who takes by assignment from a bona fide holder. Were it not for the peculiar working of the law merchant by which the bona fide indorsee may have rights superior to his indorser, a negotiable note payable to order would, like any other chose in action, pass from hand to hand by assignment, each assignee standing in the shoes of his assignor, and consequently none standing in a bet-

leases. The notes mentioned were, prior to their maturity, transferred by the following indorsement: "Pay A. B. Nixon or order, waiving demand and notice of protest. H. L. Moody." The person named as the last indorsee was, at the time of such transfer, the cashier of the plaintiff bank. No part of the notes having been paid, this action was instituted without any other written transfer of the negotiable instruments. The complaint, embracing two causes of action, is in the usual form, states when the notes were executed, and contains, *inter alia*, in each count, the following averment: "That thereafter, and before the maturity thereof, said note was indorsed, transferred, and assigned to the plaintiff herein, and plaintiff is now the owner and holder of

said note." The answer denies the material allegations of the complaint, states the facts, in substance as hereinbefore detailed, and avers, in effect, that, about March 8, 1906, and while the defendants had a crop growing on the leased land, they, at the request of Furnish, who then was the owner and holder of the notes sued on, and at the solicitation of York, who had secured a contract for the purchase of the premises, surrendered to the latter the possession of the real property, in consideration of the cancelation of the notes given for the rent; that at that time Moody, who was then the agent of Furnish, was advised by the defendants of the payment of the notes, which, without any consideration therefor, and not in the ordinary course of business,

ter position than the original payee,—their rights not being affected by the superior rights of some intervening bona fide indorsee. The court, in the above case, seems to assume that such rights of the bona fide indorsee are lost if he does not indorse the note when he transfers it.

It will be noted that the statements of the rule as to the rights of an assignee without indorsement, as outlined by both Daniel and Randolph, are not sufficiently definite expressly to exclude this view, although the language used seems more consistent with the other view, *viz.*, that an assignee, like an indorsee with notice, stands fully in the shoes of his assignor, and, if the assignor is a bona fide indorsee holding free from prior equities, his assignee and subsequent assignees also hold free from such equities, although such an assignee, even if without notice, could not, like an indorsee without notice, recover if the assignor could not have recovered.

In support of the first view, it may be argued that it is only by the law merchant that an indorsee can have greater rights than his indorser, and that such superior rights are attained only by indorsement; consequently, if he desires to preserve such rights and transmit them to his assignee, he must also comply with the requirements of the law merchant and indorse the paper,—otherwise his superior rights would be lost.

There are but few cases which expressly cover this point. There are *dicta*, however, in some cases which seem to support this view. Thus, in *Haug v. Riley*, 101 Ga. 372, 40 L.R.A. 244, 29 S. E. 44, although this question was not before the court, the following rather significant language was used in the course of the opinion: "As the law in positive and unequivocal terms declares indorsement to be the method by which a transfer of the legal title to a promissory note payable 'to order' shall be evidenced, it would seem that nothing short of a strict compliance with this plain mandate can operate to effect such a result. Were really sought to be transferred by a mere scratch of the pen, or in any less formal manner than the law prescribes, it would not for a

moment be doubted that the legal title could not be deemed to have passed, no matter what may have been the intention of the parties; the test being, not what the parties intended to do, but whether they had complied with the requirements of the law. Is there any good reason for assuming that, although the law is imperative in regard to the mode of transferring title to real property, it does not mean what it says when it in no less positive and unequivocal terms declares what shall be the manner in which the legal title to a particular kind of personal property may be transferred?"

In *Yunker v. Martin*, 18 Iowa, 143, the court said: "A note payable to order, to be negotiated by indorsement, must be indorsed by the payee by proper writing, and by subsequent indorsers, if any, to the holders; and, without such an indorsement, the holder cannot insulate himself from prior equities." This statement as to the necessity of indorsement by subsequent indorsees, however, is merely *dictum*, as the note in question had not been indorsed by the payee. It is one of the very few statements, however, which is sufficiently broad and definite expressly to cover the point in discussion.

In *Myers v. Friend*, 1 Rand. (Va.) 12, it was held that an indorsement to the order of a certain person was a restrictive indorsement, and mere delivery of a note bearing such an indorsement conveyed no property; but in this case the note had been stolen, and was not transferred by the indorsee.

In *Pitkin v. Clayton*, 41 App. Div. 363, 38 N. Y. Supp. 483, a note made for the accommodation of the payee after various indorsements came back into the hands of the payee, and, by him, was assigned without indorsement as collateral security for another loan; and it was held that the assignee took the note subject to all of the equities that might be urged against the assignor, as he took it by assignment rather than by indorsement. However, the assignor had notice of the fact that the paper had been originally made for accommodation; and the court held that, when the note was indorsed back to the accommodation payee, it had fulfilled its mis-

were delivered to the plaintiff. The allegations of new matter in the answer were denied in the reply, and, the cause having been tried, the defendants secured a verdict, and from the judgment rendered thereon, the plaintiff appeals.

Mr. John McCourt for appellant.

Mr. J. P. Winter for respondents.

Moore, J., delivered the opinion of the court:

It is contended that an error was committed in permitting the defendants to introduce evidence tending to show that the notes sued on were agreed to be canceled by Furnish without having first shown that Nixon, the cashier of the plaintiff bank, had

sion, and could no longer be treated as negotiable paper.

In *International Trust Co. v. Norwich Union F. Ins. Co.* 17 C. C. A. 608, 36 U. S. App. 277, 71 Fed. 88, which is an action to enforce the delivery and payment of a policy of insurance, the question at issue was whether the plaintiff had an insurable interest in certain real estate a mortgage upon which it held by assignment, together with a note secured by the mortgage. In holding that the plaintiff did have an insurable interest, the court said: "Now, while it may be true that the legal title to the paper was not vested in the trust company . . . in the sense of the law merchant, or in such way as to cut off equities of defense because it had not been indorsed by the mortgage company, nevertheless, . . . there can be no doubt that the trust company had a good equitable title to the paper."

In *Bishop v. Chase*, 156 Mo. 158, 79 Am. St. Rep. 515, 56 S. W. 1080, it was held that the transferee of a note without indorsement, although receiving it from one to whom it had been indorsed before maturity, held it subject to the equities existing in favor of the maker. While the court seems to rest the decision upon the ground that the note had been transferred without indorsement, the facts show that the assignor could not have recovered on the note, and consequently his assignee without indorsement, having no greater rights, could not have recovered.

In *Briggs v. Latham*, 36 Kan. 205, 13 Pac. 129, a woman indorsed some notes in blank, and gave them to her husband for sale. He sold the notes to a third party, and they were thereafter assigned to the plaintiff. It was held that the plaintiff was not a bona fide holder because the notes were transferred to it by assignment only. But the court said that the person to whom the original payee's husband sold them was "himself in terms only assignee." There seems to be some discrepancy in this case, as it is expressly stated that the payee indorsed the notes for the purpose of allowing her husband, as her agent, to sell them, 17 L.R.A. (N.S.)

knowledge of the alleged agreement. The order of proof is a matter within the sound discretion of the trial court, the exercise of which will not be disturbed, except for an abuse of such discretion. *Bellinger & Co. Anno. Codes and Statutes*, § 842; *Jones v. Peterson*, 44 Or. 161, 74 Pac. 661. An examination of the bill of exceptions fails to disclose any misuse of the power thus reposed.

It is maintained that the court erred in striking out, over objection and exception, Moody's testimony to the effect that the notes in question were indorsed to the plaintiff. No question seems to have been raised at the trial as to the right of the bank to maintain this action as the real party in interest. The consideration of the

and he sold them to the one whom the court afterwards speaks of as only an assignee, and this makes the case of little value.

The other view, namely, that the assignor of an indorsee holding free from equities also holds free from equities, seems to be the more scientific rule, and is supported by the language of the text writers quoted. It is sometimes overlooked that an indorsee may recover even if he has notice of defense, or if he takes after maturity, if his indorser is a bona fide holder for value before maturity, holding free from any prior equity. It is stated in 1 *Dan. Neg. Inst.* § 803, that, as soon as the paper comes into the hands of a holder, unaffected by any defect, its character as negotiable security is established, and the power of transferring it to others with the same immunity which attached in his own hands is incident to his legal right, and necessary to sustain the character and value of the instrument as property, and to protect the bona fide holder in its enjoyment; and that to prohibit him from selling as good a right and title as he has would be paradoxical.

In *Tiedeman on Commercial Paper*, p. 510, after a statement of a rule similar to that given by Daniel, the following reason therefor is given: "The principal reason for this rule, apart from the fact that a grantor always conveys whatever title he has, is that it alone enables the bona fide holder to derive full benefit from his superior title. If he could not transfer it, he could only enforce it against the prior parties."

The same reasoning would seem to apply to the question under discussion. If the character of the paper is once established, it would seem that a bona fide holder might assign to another what he himself possessed. There are many expressions in different decisions which seem to uphold this view; but in the majority of the cases the facts do not require a direct ruling upon the point under discussion.

In very many of the decisions there is apparently an indiscriminate use of a number of the terms used in connection with a transfer of commercial paper. It is fre-

exception reserved is therefore limited to an inquiry as to whether or not parol evidence was admissible to show that the indorsement of the notes to Nixon, though not designated as cashier, was such a transfer as vested the legal title in the bank, and precluded the defendants from maintaining any defense that they might have had against the payee or indorsee. We will examine the cases to which plaintiff's counsel call attention in support of the legal principle which they seek to invoke. In *Arlington v. Hinde*, 1 D. Chip. (Vt.) 431, 12 Am. Dec. 704, it was held that a note made to a town treasurer, "or his successors in office," might be sued by the town. In *National L. Ins. Co. v. Allen*, 116 Mass. 398, it was ruled that a principal might sue in his own name on a

non-negotiable promissory note, given for its benefit, but by its terms made payable to "J. T. Phelps, agent." In *Bank of New York v. Bank of Ohio*, 29 N. Y. 619, in adhering to the rule announced in the case of *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, it was determined that a bill drawn payable to "D. C. Converse, Esq., cashier," was payable to the bank of which he was the officer. So, too, in *Baldwin v. Bank of Newbury*, 1 Wall. 234, 17 L. ed. 534, it was adjudged that, where negotiable paper was drawn to a person by name, immediately after which appeared the word "cashier," but with no designation of the particular bank of which he was such officer, parol evidence was admissible to show that he was the cashier of the bank which was

quently difficult to tell whether the transfer was by indorsement or not as the words "transfer" and "assignment" are sometimes used to denote a transfer by indorsement, while in other cases they are used when there is no indorsement; and in other cases the expression "bona fide holder" is used to denote one holding free, entirely, of equities, while in other cases the same phrase denotes one holding without notice, although he may have taken the note without consideration, or not in the due course of business. In numerous other cases the facts given are not sufficiently full to show the actual condition of the note and the manner of its transfer. Because of this, it is frequently very difficult to determine the exact bearing of a case upon the question.

In *Stamper v. Hayes*, 25 Ga. 546, a note had been indorsed to the order of one who assigned it without indorsement, and it was held that, if the title of the indorsee was good, the title of his transferee was good regardless of the fact that the latter may have had notice of defenses. This case does not distinguish between a holder by indorsement and one by assignment, speaking of them both as purchasers. Thus, the court, in giving the reason why the assignee could not recover, says: "A purchaser, though with notice, if from a purchaser without notice, is protected to the same extent to which the latter is."

In *Patent Title Co. v. Stratton*, 89 Fed. 174, an instrument held by the court to be a negotiable promissory note was indorsed over to one who in turn assigned it to the plaintiff by a written assignment upon the back thereof, which merely passed the assignor's interests without recourse to him in any form. The court, without discussion of the question, held that, as the plaintiff received the paper from a bona fide holder, he acquired a good title free from prior equities in favor of the maker.

As was stated above, there are many cases which hold that a note payable to the order of the payee must be indorsed by him, or his transferee will not take the note free from equities existing against the payee. In many of these cases the facts are 17 L.R.A. (N.S.)

very complicated because of the various transactions in which the transfer of the note occurred; but the cases are so numerous and the principle so well established that it is unnecessary to do more than give the cases. *Central Trust Co. v. First Nat. Bank*, 101 U. S. 68, 25 L. ed. 876; *Waters v. Millar*, 1 Dall. 369, 1 L. ed. 180; *Omaha Nat. Bank v. Walker*, 2 McCrary, 565, 5 Fed. 399; *Osgood v. Artt*, 17 Fed. 575; *Thomson-Houston Electric Co. v. Capitol Electric Co.* 56 Fed. 849, reversed on other grounds in 12 C. C. A. 643, 22 U. S. App. 669, 65 Fed. 341; *De Hass v. Dibert*, 30 L.R.A. 189, 17 C. C. A. 79, 28 U. S. App. 559, 70 Fed. 227; *Bradley v. Trammel*, *Hempst.* 164, *Fed. Cas. No.* 1,788a; *Hull v. Planters' & M. Bank*, 6 Ala. 761; *Andrews v. McCoy*, 8 Ala. 920, 42 Am. Dec. 669; *Crayton v. Clark*, 11 Ala. 787; *Vann v. Marbury*, 100 Ala. 438, 23 L.R.A. 325, 46 Am. St. Rep. 70, 14 So. 273; *Hays v. Plummer*, 126 Cal. 107, 77 Am. St. Rep. 153, 58 Pac. 447; *More v. Finger*, 128 Cal. 313, 60 Pac. 933; *Reese v. Bell*, 138 Cal. XIX, 71 Pac. 87; *Gumaer v. Sowers*, 31 Colo. 164, 71 Pac. 1103; *Goodrich v. Stanley*, 23 Conn. 79; *Simpson v. Hall*, 47 Conn. 417; *Planters' Bank v. Prater*, 64 Ga. 609; *Farris v. Wells*, 68 Ga. 604; *Benson v. Abbott*, 95 Ga. 69, 22 S. E. 127; *Lowry Nat. Bank v. Maddox* (Ga. App.) 61 S. E. 296; *Warren v. Stoddart*, 8 Idaho, 692, 59 Pac. 540; *McConnell v. Hodson*, 7 Ill. 640; *Sullivan v. Dollins*, 13 Ill. 85; *Peck v. Bligh*, 37 Ill. 317; *Shinn v. Fredericks*, 56 Ill. 439; *Haskell v. Brown*, 65 Ill. 29; *First Nat. Bank v. Strang*, 72 Ill. 559; *Sturges v. Miller*, 80 Ill. 241; *Reynolds v. Moshier*, 24 Ill. App. 471; *Ennor v. Hodson*, 28 Ill. App. 445; *Bourdeaux v. Coquard*, 47 Ill. App. 254; *Foreman v. Beckwith*, 73 Ind. 515; *Proctor v. Cole*, 104 Ind. 373, 3 N. E. 108, 4 N. E. 303; *First Nat. Bank v. Henry*, 156 Ind. 1, 58 N. E. 1057; *Toner v. Citizens' State Bank*, 25 Ind. App. 29, 56 N. E. 731; *Younker v. Martin*, 18 Iowa, 143; *Franklin v. Two-good*, 18 Iowa, 515; *Hecker v. Boylan*, 126 Iowa, 162, 101 N. W. 755; *McCrum v. Corby*, 11 Kan. 464; *Hadden v. Rodkey*, 17 Kan. 429; *Kohn v. Watkins*, 26 Kan. 691,

plaintiff in the suit, and that in taking the paper he was acting as agent for the corporation. The rule to be extracted from these decisions has been embodied in our statute, known as the "uniform negotiable instrument law," as follows: "Where an instrument is drawn or indorsed to a person as 'cashier,' or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer." Bellinger & C. Anno. Codes & Statutes, § 4444. The clause just quoted, and the decisions adverted to, are undoubtedly based on the theory that the employment of the qualifying word "cashier" or other designa-

tion of a fiscal officer, appended to the name of a payee or indorsee of commercial paper, creates an ambiguity as to the real party intended, to explain which parol evidence is admissible to show who is the principal for whose benefit such agent received or accepted the promise to pay a stipulated sum of money. In the case at bar, however, no official designation is added to Nixon's name, and hence no uncertainty is apparent from an inspection of the indorsement made by Moody to him, and parol evidence was inadmissible to control or vary the terms of the writing. In view of the purpose for which Moody's testimony was evidently offered, no error was committed in striking it out.

It is insisted that the court erred in re-

40 Am. Rep. 336; Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129; Calvin v. Sterritt, 41 Kan. 215, 21 Pac. 103; Hale v. Hitchcock, 3 Kan. App. 23, 44 Pac. 446; Snyder v. Moon, 5 Kan. App. 447, 49 Pac. 327; Gilbert v. Nelson, 5 Kan. App. 528, 48 Pac. 207; True v. Triplett, 4 Met. (Ky.) 57; Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537; Norton v. Pickens, 21 La. Ann. 575; Calder v. Billington, 15 Me. 398; Haskell v. Mitchell, 53 Me. 468, 89 Am. Dec. 711; Allum v. Perry, 68 Me. 232; Mathias v. Kirach, 87 Me. 523, 33 Atl. 19; Hull v. Swarthout, 29 Mich. 249; Gibson v. Miller, 29 Mich. 355, 18 Am. Rep. 98; Mat-teson v. Morris, 40 Mich. 52; Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758; Bildeback v. McConnell, 48 Mich. 345, 12 N. W. 195; Dekalb Nat. Bank v. Thompson, 79 Minn. 151, 81 N. W. 765; Fredin v. Richards, 61 Minn. 490, 63 N. W. 1031; Kennedy v. Jones (Miss.) 29 So. 819; Boeka v. Nuella, 28 Mo. 180; Patterson v. Cave, 61 Mo. 439; Weber v. Orten, 91 Mo. 677, 4 S. W. 271; Sathre v. Rolfe, 31 Mont. 85, 77 Pac. 431; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Doll v. Hollenbeck, 19 Neb. 639, 28 N. W. 286; Colby v. Parker, 34 Neb. 510, 52 N. W. 693; Gaylord v. Nebraska Sav. & Exch. Bank, 54 Neb. 104, 69 Am. St. Rep. 705, 74 N. W. 415; Sackett v. Montgomery, 57 Neb. 424, 73 Am. St. Rep. 522, 77 N. W. 1083; Menzie v. Smith, 63 Neb. 666, 88 N. W. 855; Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. 473; Boody v. Bartlett, 42 N. H. 558; Southard v. Porter, 43 N. H. 379; Clark v. Whitaker, 50 N. H. 474, 9 Am. Rep. 286; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 7 L.R.A. 595, 16 Am. St. Rep. 765, 23 N. E. 180; Franklin Bank v. Raymond, 3 Wend. 69; Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, affirmed without opinion in 183 N. Y. 511, 76 N. E. 1100; Freund v. Importers' & T. Nat. Bank, 76 N. Y. 352; Gilbert v. Sharp, 2 Lans. 412; Hodges v. Sealy, 9 Barb. 214; Raynor v. Hoagland, 7 Jones & S. 11; McCarville v. Lynch, 14 Misc. 174, 35 N. Y. Supp. 383; Lackay v. Curtis, 41 N. C. (6 Ired. Eq.) 199; Spence v. Tapscott, 93 N. C. 246; Car-

penier v. Tucker, 98 N. C. 316, 3 S. E. 831; Breese v. Crumpton, 121 N. C. 122, 28 S. E. 351; Mayers v. McRimmon, 140 N. C. 640, 111 Am. St. Rep. 879, 53 S. E. 447; Keel v. East Carolina Stone & Constr. Co. 143 N. C. 429, 55 S. E. 826; Dunham v. Peterson, 5 N. D. 414, 36 L.R.A. 232, 57 Am. St. Rep. 556, 67 N. W. 293; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Massachusetts Loan & T. Co. v. Treadwell, 7 N. D. 440, 75 N. W. 786; Henninger v. Wager, 4 Ohio Dec. Reprint, 242; Seymour v. Leyman, 10 Ohio St. 283; Kyle v. Thompson, 11 Ohio St. 616; Osborn v. Kistler, 35 Ohio St. 99; Smith v. Lurry, Cooke (Tenn.) 325; Ingram v. Morgan, 4 Humph. 66, 40 Am. Dec. 626; Davis v. Sittig, 65 Tex. 407; Lebeher v. Lambert, 23 Utah, 1, 63 Pac. 628; Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414; O'Connor v. Slatter (Wash.) 93 Pac. 1078; Terry v. Allis, 16 Wis. 479; Howard v. Boorman, 17 Wis. 460; Beard v. Dedolph, 29 Wis. 136; Esau v. Greene & B. Co. 94 Wis. 8, 68 N. W. 405; Galusha v. Sherman, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197, 49 Pac. 406; Prevot v. Abbott, 5 Taunt. 786.

Some cases are to the contrary, but such cases either have been overruled, or were decided under particular statutes.

Thus, in Adams v. Robinson, 69 Ga. 627, it was held that the assignee of an accepted, but undorsed, draft payable to order takes it free from any equities existing against the payee. This decision was upon the ground that such a draft was negotiable paper, and therefore was protected by the provisions of the Code, which were construed to protect any bona fide holder for value before maturity regardless of the fact that the paper might not have been indorsed by the payee. But in Haug v. Riley, 101 Ga. 372, 40 L.R.A. 244, 29 S. E. 44, this decision was criticized, and the court said that it was clearly based upon a misinterpretation of the statute, and could scarcely be considered authoritative.

In Texas a statute provides that any person to whom a negotiable instrument has been assigned may maintain an action there-

quiring Moody to be cross-examined, over objection and exception, as to certain matters to which he had not theretofore testified. The bill of exceptions shows that this witness, on direct examination, identified the notes sued on, and stated that he sent them with other negotiable instruments to Nixon from whom he received a draft in payment therefor. On cross-examination he was required to testify as to other matters, but, as the bill of exceptions does not purport to contain all his testimony on direct examination, the error thus assigned is unavailing.

It is argued that, having taken an exception to the following part of the court's charge, an error was committed in giving it, to wit: "I instruct you, gentlemen of

the jury, that the indorsement on the notes in question, under the evidence in this case, plaintiff did not come into possession of the notes in controversy in due course, or in the ordinary and usual course of business as recognized by the law; and therefore that any defense which these defendants may have had against said notes, if in the hands of the indorsee, H. L. Moody, will be available to the defendants as against this plaintiff." The uniform practice of merchants in transferring credits, represented by commercial paper, as a means of purchasing goods or settling accounts, gave rise to certain rules, demanded by the wants and convenience of trading communities, which are known as the law merchant, and have become a part of the

on in his own name, and, should he obtain such instrument before maturity by giving for it a valuable consideration without notice of any discount or of any defenses against it, he would be compelled to allow only just discounts against himself.

In *Word v. Elwood*, 90 Tex. 130, 37 S. W. 414, it was held that, under such a statute, the form of assignment, whether written or verbal, was immaterial, as the statute extended its protection to all assignees coming within its terms, though they might not have acquired their instruments in accordance with the technical rules regulating transfers under the law merchant.

And in *Prouty v. Musquiz*, 94 Tex. 87, 58 S. W. 721, 996, it was held that the statute placed a transferee without indorsement by the payee upon the same footing as an indorsee.

And to the same effect were the decisions in *National Bank v. Kenney*, 98 Tex. 293, 83 S. W. 368, and *Elmore v. Rugely* (Tex. Civ. App.) 107 S. W. 151.

In some cases, such as *Meuer v. Phenix Nat. Bank*, 94 App. Div. 331, 88 N. Y. Supp. 83, affirmed without opinion in 183 N. Y. 511, 76 N. E. 1100, it has been held that, where a bank certifies checks when undorsed by the payee, it is liable thereafter upon the checks, as the certification releases the drawer. Such cases, however, present a different question, and are not strictly within the scope of this note.

Frequently, after paper has been transferred by the payee without indorsement, the parties seek to rectify the mistake by having the transferor subsequently indorse it. Although there are exceptions to the rule, the weight of authority is to the effect that such an indorsement does not date back to the time of the transfer, but is of the same effect as a transfer by an indorsement, taking place at the time of the indorsement.

Thus, in *Benson v. Abbott*, 95 Ga. 69, 22 S. E. 127, it was held that, where paper went into the hands of a usee without indorsement by the payee, the former took it subject to the pre-existing equities, and, though an assignment was in fact executed at the trial, this could not avail as against 17 L.R.A. (N.S.)

equities in favor of the maker, which sprang out of and inhered in the contract itself; and this was true whether the lack of indorsement occurred through inadvertence or otherwise.

And in *Clark v. Whitaker*, 50 N. H. 474, 9 Am. Rep. 286, it was held that an indorsement after notice of lack of consideration would not cut off the prior equities. And it was further held that, even if a broader view was taken, and the holder was permitted to show that the lack of indorsement was only a negligent oversight, it would still be incumbent upon the holder to show that no want of ordinary care contributed to the negligence, and the jury would hardly find that a purchaser exercises ordinary care in relying upon the validity of a negotiable note which the payee does not indorse at the time of the sale and delivery.

And in *Pavey v. Stauffer*, 45 La. Ann. 353, 19 L.R.A. 716, 12 So. 512, it was held that a transferee before maturity of a piece of commercial paper not indorsed by the payee at the date of the transfer acquired an equitable, not a legal, title thereto; and the subsequent indorsement thereof before maturity did not operate to the exclusion of equities between the maker and payee of which the transferee had notice in the meantime.

So, also, in *Clark v. Callison*, 7 Ill. App. 263, it was held that an indorsee of a promissory note, who received it by equitable assignment without indorsement before maturity and without notice and for a valuable consideration, but who, while he was holding the note and before its maturity, received notice that the maker had a defense to it, and afterwards took an indorsement of the note from the payee himself, was not protected as against any defense which the maker might have had against the payee on account of the failure of the consideration.

And in the following cases the general rule has been applied and the note held subject to prior equities, where the note was transferred by the payee without indorsement, but was subsequently indorsed after notice to the assignee of equities existing against it: *Southard v. Porter*, 43 N. H.

common law. 7 Cyc. Law & Proc. p. 520; Woodbury v. Roberts, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312. An observance of these rules requires that the property represented by a promissory note, payable to order, when transferred to a designated party before maturity for a valuable consideration and without notice, should be evidenced by an indorsement on the instrument, or on a paper attached thereto, in order to bar the equities of antecedent parties. This method of transferring such property constitutes the ordinary or usual course of business, a departure from which is equivalent to a notice of equities, and subjects the negotiable instrument to defenses in the hands of a holder who has acquired a right thereto in any other manner. Bellinger & C. Anno. Codes & Statutes, § 4433; Randolph, Com. Paper, 2d ed. § 789; Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Franklin v. Twogood, 18 Iowa, 515;

379; Clark v. Whitaker, 50 N. H. 474, 9 Am. Rep. 286; Whistler v. Forster, 14 C. B. N. S. 248; Osgood v. Artt, 17 Fed. 575.

The general rule has been applied, and the note held subject to the equities in favor of the maker, where the note was transferred before maturity, but not indorsed by the payee until after maturity. Dazey v. Jeffers, 127 Ill. App. 307; Savage v. King, 17 Me. 301; Haskell v. Mitchell, 53 Me. 468, 89 Am. Dec. 711; Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70; Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414; Beard v. Dedolph, 29 Wis. 136; Lyon, P. & Co. v. First Nat. Bank, 29 C. C. A. 45, 55 U. S. App. 747, 85 Fed. 120.

Where a note was indorsed by one without any authority from the payee, and, after suit was brought, the indorsement was ratified by the payee, it was held, in Gilbert v. Sharp, 2 Lans. 412, that the ratification after suit was brought could operate only as an original indorsement then made by the payee; and the assignment taken by the assignee was subject to all equities between the parties and all defenses existing before the actual act of ratification.

In Beard v. Dedolph, supra, it was held that a bona fide holder of negotiable paper is protected against everything subsequent to the delivery of the paper, especially if it is afterwards indorsed to him, as that indorsement relates back to the time of delivery as to equities outside of the note itself.

In Mathies v. Kirsch, 87 Me. 523, 33 Atl. 19, it was held that a bona fide holder for value of an unindorsed note taken as payment of a prior indorsed note of which he was also a bona fide holder, the maker and payee being the same in both notes, could recover upon the second note notwithstanding the fact that, as between the maker and payee, the note was void.

In Malbon v. Southard, 36 Me. 147, it was 17 L.R.A. (N.S.)

Elias v. Finnegan, 37 Minn. 144, 33 N. W. 330. In Osgood v. Artt (C. C.) 17 Fed. 575, Mr. Justice Harlan, in discussing this subject, says: "It is a settled doctrine of the law merchant that the bona fide purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law merchant, only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee." A transfer, without indorsement, of a promissory note payable to order, assigns to the holder, under the rules of the law merchant, only an equitable right, to enforce which suit was formerly required to be maintained in the name of the payee. Our statute demands

held that a negotiable note transferred without indorsement before maturity, but subsequently indorsed before maturity and before notice, was not subject to the defense of failure of consideration.

But there are other cases which hold that a subsequent indorsement of the paper will date back to the time of the transfer, and will be sufficient to cut off the prior equities.

Thus, in Baggarly v. Gaither, 55 N. C. (2 Jones, Eq.) 80, it was held that, where one takes a note without indorsement, but for a good consideration and without notice of any equities existing against it, he will be protected by securing a subsequent indorsement, although he may in the meantime have learned of the defenses.

In Watkins v. Maule, 2 Jac. & W. 244, it was held that an indorsement related back to the time of the delivery of the bill; and, where there was a bona fide transfer without indorsement before maturity, an indorsement after maturity would cut off the equity of lack of consideration, and the fact of the maker being an accommodation maker would not affect the rule.

In Ranger v. Cary, 1 Met. 374, a note payable to a certain person or order had been sold in good faith and delivered to the plaintiff before maturity and upon good consideration, but it was not indorsed until after it was overdue; and the court refused to allow the makers to set off an indebtedness of the payee to themselves, existing at the time of the delivery of the note to the plaintiff, although such a set-off was allowable in that state, as against the indorser of a dishonored note. The court, however, expressly restricted its decision to that precise state of facts.

Upon the subject, Holder of an unindorsed note as real party in interest within the meaning of statutes defining parties by whom the action must be brought, see case note to American Soda Fountain Co. v. Hogue, post, 1113.

that every action, except in certain cases not involved herein, shall be prosecuted in the name of the real party in interest. *Bellinger & C. Anno. Codes & Statutes*, § 27. In *Moore v. Miller*, 6 Or. 254, 25 Am. Rep. 518, it was ruled that the holder of a note, payable to order, which had been transferred without indorsement, could maintain an action at law thereon in his own name. That decision, however, is not based on the section of the statute last referred to, but upon the fact that the evidence showed that the plaintiff therein possessed the title to the note sued on, and had the sole right to receive the money due thereon. As illustrating the right of a holder of a negotiable promissory note, transferred without indorsement, to maintain an action thereon in his own name, see the very able opinion of Circuit Judge Gilbert in *First Nat. Bank v. Moore*, 70 C. C. A. 89, 137 Fed. 505. This legal principle is here adverted to for the purpose of showing that Moody's testimony was excluded, not on the ground of establishing a right in the plaintiff to maintain an action in its corporate name, but to prove that the bank was an indorsee, in due course, though not named in the evidence of the transfer, nor was any fiscal designation appended to the name of the indorsee from which it could be inferred that the plaintiff was the party intended by the writing. The note sued on having been delivered by Nixon, without indorsement, to the plaintiff, the bank was authorized to maintain an action thereon in its own name; but it took and held the paper subject to all equities existing in favor of the makers, and this being so, no error was committed in giving the instruction under consideration.

It is contended that the court erred in refusing to set aside the verdict and to grant a new trial, on the ground that no contract had been consummated between *Furnish* and the defendants whereby the notes in question were to be canceled. The rule is settled in this state that the action of a court in granting or denying a motion for a new trial is not a final order from which an appeal lies. This principle has so often been announced that it is unnecessary to cite the cases which uphold the doctrine.

It is argued that, as all the testimony given at the trial has been sent up, a perusal thereof will conclusively show that no contract was ever entered into between the makers and the payee of the notes whereby they were to have been canceled, and hence the judgment should be reversed, and a new trial ordered. An appellate court is created to review errors alleged to have been committed by lower courts in the 17 L.R.A. (N.S.)

trial of law actions, to which rulings exceptions have been duly reserved. No determination of a trial court can be reviewed on appeal, unless the question has been distinctly presented to that tribunal for its action. In the case at bar the court was not requested to give any instruction that involved a consideration of all the testimony, and, this being so, that exhibit attached to the bill of exceptions will not be examined.

Other alleged errors are assigned, but, believing them unimportant, the judgment is affirmed.

NORTH DAKOTA SUPREME COURT.

AMERICAN SODA FOUNTAIN COMPANY, Appt.,

v.

GEORGE M. HOGUE, Respnt.

(— N. D. —, 116 N. W. 339.)

Action — real party in interest.

1. The holder of a promissory note payable to another or order and unindorsed is the real party in interest within the meaning of § 6807, Rev. Code 1905, and may sue

Headnotes by MORGAN, Ch. J.

Case Note. — Holder of unindorsed note as real party in interest within the meaning of statutes defining the parties by whom the action must be brought.

In a note to *Stewart v. Price*, 64 L.R.A. 581, upon the general subject of who is the real party in interest within the meaning of statutes defining parties by whom an action must be brought, the earlier cases upon this subject are collected and discussed, and this note embraces only the cases decided since the preparation of that note. The present note is confined to cases in which the effect of such a statute is discussed; and cases which merely hold that such a holder may recover, without discussing the effect of the statute upon his rights, have been excluded.

As is shown in the earlier note, the old common-law rule that the assignee of a chose in action could sue only in the name of his assignor had been modified by the commercial law so as to permit the holder and indorsee of commercial paper to bring a suit in his own name; and, under statutes requiring the action to be brought by the real party in interest, the holder, by assignment of unindorsed paper, may bring an action in his own name upon such paper,—the statute giving to such holder the same privileges as were formerly given by the commercial law to the indorsee of commercial paper.

The later cases are generally in line with the former decisions, and hold that the holder by assignment of unindorsed paper is

thereon where the consideration for the note passed solely between the holder and maker, and the note was given to another person solely for the benefit of the present holder.

Evidence — conclusion.

2. Permitting a witness to answer the following question under objection, *viz.*: "Did you ever get a soda fountain from the American Soda Fountain Company?"—was erroneous, as calling for the conclusion of the witness on a matter within the province of the court or jury.

Appeal — formal verdict — omission.

3. Whether a formal verdict in writing should be required where a verdict is directed, not decided, as the question was not raised at the trial.

(April 22, 1908.)

APPPEAL by plaintiff from a judgment of the District Court for Kidder County in defendant's favor in an action brought to recover possession of personal property. Reversed.

The facts are stated in the opinion.

Messrs. Newton & Dullam, for appellant:

The person entitled to the avails of the suit is the real party in interest.

Estee, Pl. §§ 131, 132; *Cassidy v. First Nat. Bank*, 30 Minn. 86, 14 N. W. 363; *Pease v. Rush*, 2 Minn. 107, Gil. 89; *Foster v. Berkeley*, 8 Minn. 351, Gil. 310; *White v. Phelps*, 14 Minn. 27, Gil. 21, 100 Am. Dec. 190; *Hoagland v. Van Etten*, 22 Neb. 681, 35 N. W. 869; *Kinsella v. Sharp*, 47 Neb. 664,

66 N. W. 634; *Hogan v. Klabo*, 13 N. D. 319, 100 N. W. 847; *Pom. Rem. & Rem. Rights*, p. 155, § 128; *Guest v. Rhine*, 16 Tex. 549; 15 Enc. Pl. & Pr. p. 710; *Stewart v. Price*, 64 Kan. 191, 64 L.R.A. 581, 67 Pac. 553.

Answers giving the conclusions or the opinions of the witness, not the facts, are inadmissible.

Bradner, Ev. p. 359; 1 *Elliott*, Ev. § 672; *Smith v. Northern P. R. Co.* 3 N. D. 555, 58 N. W. 345; *Davis v. Hamilton*, 88 Minn. 64, 92 N. W. 512.

Messrs. Mockler & Johnson, for respondent:

It was necessary for the complaint to state not only that plaintiff was owner and holder, but how, when, and where it became the owner.

Topping v. Clay, 62 Minn. 3, 63 N. W. 1038; *Mechanics' Bank v. Donnell*, 35 Mo. 373; *Montague v. Reineger*, 11 Iowa. 503; *Eikenbary v. Clifford*, 34 Neb. 607, 52 N. W. 377; *Parke v. Kleeber*, 37 Pa. 251; *Andrews v. Bond*, 16 Barb. 633; *Gallup v. Lichter*, 4 Colo. App. 290, 35 Pac. 985; *Altman v. Fowler*, 70 Mich. 57, 37 N. W. 708; 4 *Cyc. Law & Proc.* p. 104.

Morgan, Ch. J., delivered the opinion of the court:

This is an action in claim and delivery under which the possession of a soda fountain and attachments is claimed. The plaintiff claims in its complaint to be the owner

the real party in interest within the meaning of the statutes.

Thus, in *Seattle Nat. Bank v. Emmons*, 16 Wash. 585, 48 Pac. 262, where a bank held a number of notes by assignment from another bank as security for advances made by it, it was held that the assignee bank might bring an action in its own name upon a note made payable to the assignor bank, given for the purpose of taking up one of the original notes, as the assignee was the real party in interest within the meaning of the statute.

And in *Lowrey v. Danforth*, 95 Mo. App. 441, 60 S. W. 39, it was held that a note which did not expressly state that it was given for value, although not negotiable within the purview of the Missouri statute, yet was transferable; and the assignee was the real party in interest, and might sue the maker thereon in his own name under the statute of that state.

So, the transferee without indorsement of a negotiable promissory note, who had purchased the same in the usual course of trade for value, was held, in *First Nat. Bank v. Sprout* (Neb.) 110 N. W. 713, to be the only one entitled to maintain suit thereon.

And in *First Nat. Bank v. Moore*, 70 C. C. A. 89, 137 Fed. 505, it was held that, in the absence of a statute requiring the as-

signment of notes to be in writing, an assignee by parol of a note might maintain an action in his own name and recover thereon.

So, there are other cases which hold that the assignee of an unindorsed note may bring an action thereon as the real party in interest within the meaning of such statutes. *Gladstone Baptist Church v. Scott*, 25 Ky. L. Rep. 237, 74 S. W. 1075; *Vinson v. Palmer*, 45 Fla. 630, 34 So. 276; *Gumaer v. Sowers*, 31 Colo. 164, 71 Pac. 1103; *First Nat. Bank v. McCullough* (Or.) ante, 1105, 93 Pac. 366.

In *Little v. Bradley*, 43 Fla. 402, 31 So. 342, where the declaration showed that the relation existing between the payee of a note and the plaintiff was that of principal and agent, and not that of trustee and *cestui que trust*, although the note was made payable to the payee as trustee, it was held that the plaintiff had the right to bring a suit although the note had not been indorsed to him, under a statute requiring the action to be brought in the name of the real party in interest.

In *Callahan v. Crow*, 91 Hun, 346, 36 N. Y. Supp. 225, affirmed without opinion in 157 N. Y. 695, 51 N. E. 1089, it was held that the holder of an unindorsed note presented to him as a gift had a right of action thereon in his own name.

thereof. The fountain and fixtures were sold to the defendant by one Putnam, who was the agent of the plaintiff. The written contract or order for the property was in the name of one Tufts, and each of the 33 notes was given to said Tufts as payee, and the name of the plaintiff is not given or mentioned in any of the papers as originally executed. The defendant gave said Tufts 33 promissory notes on the sale, and they and the contract provided that the title to all the property should remain in Tufts until full payment of the purchase price, and these notes and the contract gave him the right to take possession of the property on default in the payment of any of the notes. The answer was a general denial. A jury was impaneled, and at the close of plaintiff's testimony the court directed a verdict for the defendant. A motion for a new trial was made, based on a notice of intention to move for a new trial and a settled statement of the case, and denied. From the order denying a new trial, the plaintiff has appealed.

The error principally relied on for a reversal of the order is the direction of a verdict for the defendant. The ground urged before the trial court on the motion for a directed verdict was that the action was not prosecuted in the name of the real party in interest. It was, and now is, the contention of the defendant that Tufts, to whom the order and notes are given, according to their terms, is the real party in inter-

est, and the only party entitled to bring the action until properly assigned or the contract reformed. The complaint alleges unqualifiedly that the plaintiff is the owner of the property. The evidence shows that the contract with the defendant was entered into by one Putnam as agent for the plaintiff; that the plaintiff is now the owner of the notes, and entitled to the possession of the soda fountain and fixtures; that the contract and notes were made with the name of said Tufts as payee with the consent of Tufts, and for plaintiff's benefit and use; that the plaintiff was authorized by Tufts to do business in his name, and that the property involved in this suit was sold as plaintiff's property, but in Tufts' name, as plaintiff was authorized to do; that the original order was taken for the plaintiff, and mailed to it at its principal office, and there accepted by it; that said Tufts formerly was in business in his own name, and became one of the incorporators of the plaintiff company when it was organized; and that the plaintiff succeeded to his business when it was incorporated. This evidence clearly shows that the plaintiff was the owner of the notes, and had been such owner ever since their execution and delivery. It also shows that the contract was made exclusively for its benefit, and that it is entitled to the property under the conditions expressed in the same. The statute provides that all actions shall be brought in the name of the real parties in interest,

In *Stewart v. Price*, 64 Kan. 191, 64 L.R.A. 581, 67 Pac. 553, it was held that one holding by written assignment a verified, itemized account is not the real party in interest, and cannot maintain an action thereon in his own name, where it is shown by a contemporaneous oral agreement that he had agreed to pay the full amount thereof collected, to his assignor.

This decision was by a divided court, and is overruled by the later case of *Manley v. Park*, 68 Kan. 400, 66 L.R.A. 967, 75 Pac. 557, 1 A. & E. Ann. Cas. 832, where it was held that, when the owner of a note assigns it to another, thereby vesting in him the full legal title, the assignee becomes, so far as the debtor is concerned, the real party in interest, although, as between himself and the assignor, he has no beneficial interest in the proceedings. And this decision was followed in *Greene v. McAuley*, 70 Kan. 601, 68 L.R.A. 308, 79 Pac. 133, where it was held that, if a promissory note is sued upon by the holder, to whom it has been unconditionally assigned by the payee, a complete defense on the sole ground that the plaintiff is not the real party in interest can be established only by proof of facts showing that a payment to him would not be a protection to the defendant against full liability upon the note.

In some cases the courts have held that 17 L.R.A. (N.S.)

the holder of the note was not the proper party to bring suit thereon. In these cases, however, the particular facts of the cases clearly distinguish them.

One to whom promissory notes had been delivered by the secretary of the payee corporation without indorsement and without any authority from the payee, and after payment had been demanded and refused, was held, in *Barkley v. Wolfskehl*, 25 Misc. 420, 54 N. Y. Supp. 934, not to be the real party in interest, and not entitled to maintain a suit in his own name. This case, however, turns rather upon the implied powers of an agent, than upon the effect of a statute requiring a suit to be brought in the name of the real party in interest.

The payee of a note held in trust as collateral to secure payment on certain bonds was held, in *Alabama Terminal & Improv. Co. v. Knox*, 115 Ala. 567, 21 So. 495, not to be entitled to bring an action thereon in his own name under a statute requiring the real party in interest to bring suit upon promissory notes, where the trust had not terminated, nor in any wise been realized at the time when the suit was instituted.

Upon the question of right of transferee without indorsement of bill or note payable or indorsed to order of transferrer, to protection as bona fide holder, see case note to *First Nat. Bank v. McCullough*, ante, 1105.

except as therein provided. Rev. Code 1905, § 6807. The plaintiff was clearly entitled to bring this action under said section. It was the owner of the notes and contract which are the basis of defendant's forfeiture of the right to the possession of the property if payment is not made when due. Under this evidence, the plaintiff was unqualifiedly the real and only party in interest. The mere fact that the notes were made to Tufts imports nothing under this evidence, as the actual owner may bring an action thereon. They were brought into court by the plaintiff, and have always been rightfully in its possession. The contract was made for the plaintiff's sole benefit, and it was the owner of the notes, and was as much entitled to the benefit of the contract as though expressly drawn and written in its name. The object of the statute is to give the beneficial owners the right to sue in their own right without regard to the technical title as shown by the contract. The case relied upon by respondent—*Montague v. Reineger*, 11 Iowa, 503—is not in point, as the complaint in that case did not show ownership or title in the plaintiff; the question having been raised on demurrer. In this case the evidence fully explains why notes were drawn to another, and, if this evidence had been objected to, it would have been admissible as showing plaintiff's right to sue thereon. We have examined the other cases cited by the respondent, but they do not controvert the principle that a person may maintain an action for possession of personal property owned by him, although the notes on which the recovery is based show the legal title to be held by another, where the ownership is shown to be in the plaintiff as a matter of fact. In *Pomeroy's Remedies and Remedial Rights*, § 128, the general principle is stated as follows: "On the one side, it has been urged that the language of the section in all the state Codes is most general and comprehensive, containing no exceptions in terms nor by implication, and that it is in its highest degree imperative [that the action] must be prosecuted in the name of the real party in interest, except in the single case of 'the trustee of an express trust,' and that the real party in interest is the person for whose immediate benefit the action is prosecuted, who controls the recovery, and not the person in whom the mere naked apparent legal title is vested." See also *Pom. Code Remedies*, § 140; 15 *Enc. Pl. & Pr.* p. 710, and cases cited; *Stewart v. Price*, 64 L.R.A. 581, and note (64 Kan. 191, 67 Pac. 553); *Bliss Code Pl.* 3d ed. § 45; *Cassidy v. First Nat.* 17 L.R.A. (N.S.)

Bank, 30 Minn. 86, 14 N. W. 363; *Kinsella v. Sharp*, 47 Neb. 664, 66 N. W. 634.

It is unnecessary to pass upon the question argued by the appellant that the objection cannot be raised on a motion for a directed verdict, but should have been raised by special demurrer by answer. This question was objected to as calling for a conclusion from the witness: "Did you ever get a soda fountain from the American Soda Fountain Company?" The objection was overruled. We think the objection should have been sustained. The answer called for the witness's conclusion as to whether the agent Putnam was plaintiff's agent or Tufts' agent, which is a question of law if the facts are undisputed, and a question for the jury under proper instructions if the facts are in dispute. The fact that Tufts has never made any demand for the property was shown under objection. That fact was utterly immaterial under the issues in the case. Whether its admission would constitute prejudicial error we need not determine, in view of the fact that a new trial becomes necessary on another ground.

It is claimed that no verdict was rendered by the jury, and that that omission is ground for a new trial. The trial court granted the motion to direct a verdict and to dismiss the action, but the record is silent as to whether a verdict was called for or returned by the jury. The record does not affirmatively show that no verdict was returned, and no objection was made at the time, based on the fact that the jury should be required to return a formal verdict at the direction of the court. The omission was first called to the court's attention on a motion for a new trial. We think the objection comes too late. Conceding, without deciding, that the statutory requirement that verdict shall be returned in writing is mandatory, no possible prejudice could result to the plaintiff by the omission, and we are not inclined to consider an objection so technical until it is properly raised. No cases are cited by the appellant, but it has been decided that the better practice is to have formal verdicts in writing returned in such cases, but that the omission is not fatal to the proceedings, nor prejudicially erroneous. *Moore v. Petty*, 68 C. C. A. 306, 135 Fed. 668; *Cahill v. Chicago, M. & St. P. R. Co.* 20 C. C. A. 184, 46 U. S. App. 85, 74 Fed. 285.

For the error in directing a verdict for the defendant, the order is reversed, a new trial granted, and the cause remanded for further proceedings.

All concur.

CALIFORNIA SUPREME COURT.

AMERICAN DEFOREST WIRELESS
TELEGRAPH COMPANY

v.

SUPERIOR COURT OF CITY & COUNTY
OF SAN FRANCISCO et al.

(153 Cal. 533, 96 Pac. 15.)

Foreign corporation — right to defend action.

A statute denying to a foreign corporation which has not complied with the local laws the right to maintain an action in the state courts does not prevent its defending an action brought against it there.

(May 11, 1908.)

CERTIORARI to the Superior Court for the City and County of San Francisco to review a judgment striking out an answer in an action against a foreign corporation. Reversed.

The facts are stated in the opinion.

Mr. O. M. Fickert, for petitioner:

Striking the corporation's answer from

Case Note. — Right of corporation which has not complied with local laws to defend action.

The few reported cases upon this question are in harmony with the decision in the foregoing case, and hold that failure to comply with the local laws will not prevent a foreign corporation from defending an action against it.

Thus, in *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, it was held that the statutory provision prohibiting a corporation which has not obtained a certificate from the secretary of state that certain statements have been made and filed by it, from prosecuting an action in any of the courts of the state, does not apply to corporations which have been summoned into court and made to defend against actions brought by other parties; nor does it prevent such a corporation from obtaining a review and a reversal of judgments rendered against it in such actions.

And in *Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 79, 120 Fed. 893, the court said: "The statutes under consideration require foreign corporations seeking to do business in the state of Kansas to comply with the requirements there set forth. For a failure to comply with some of them, they prohibit the company from maintaining actions in the courts of the state of Kansas. But a prohibition of the commencement, or of the maintenance, of suits is not an inhibition of defending them; and the appellee is the defendant in the suit at hand. Moreover, the inhibition by a state of the maintenance of actions in its courts does not affect the right of a citizen, or of a corporation, to maintain them in the national courts."

And in *Home Forum Ben. Order v. Jones*, 17 L.R.A. (N.S.)

the files was a denial of the equal protection of the laws and a taking of property without due process of law.

Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Younger v. Superior Court*, 136 Cal. 682, 69 Pac. 485; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; *McClatchy v. Superior Court*, 119 Cal. 419, 39 L.R.A. 691, 51 Pac. 696; *Schwarz v. Superior Court*, 111 Cal. 112, 43 Pac. 580; *Tomsky v. Superior Court*, 131 Cal. 623, 63 Pac. 1020.

The statute denies foreign corporation the right to maintain an action only until it has complied with the statute.

Black v. Vermont Marble Co. 1 Cal. App. 718, 82 Pac. 1060; *Windsor v. McVeigh*, supra; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 27, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451.

Mr. G. H. Perry for respondents.

20 Tex. Civ. App. 68, 48 S. W. 219, it was held that an allegation in the petition that the appellant was a corporation doing business in the state, and had a local agent and representative in the county where the suit was filed, fixed the venue of the suit, and gave the district court of that county jurisdiction in a suit against the corporation. The court said: "The appellant, a foreign corporation, could not have instituted a suit in the courts of this state before obtaining a permit to do business here as required by the statute; but that does not affect the jurisdiction of the courts of this state in a suit against the corporation, although it may not have obtained a permit as required by law." It will be noticed that in this case the statute in question did not expressly prohibit the bringing of a suit before compliance with the law, as was the fact in the foregoing cases, but forbade the corporation doing business before such compliance.

In *Weeks v. Garibaldi South Gold Min. Co.* 73 Cal. 599, 15 Pac. 302, it was held that a section of the Code which prohibited a foreign corporation from making defense in actions in relation to its "property, its rents, issues, or profits," unless it had previously filed its articles of incorporation in the office of the clerk of the county where it had its property, did not prohibit it from defending an action instituted to recover money for work and labor done at the instance and request of the defendant.

In *Turcott v. Yazoo & M. Valley R. Co.* 101 Tenn. 102, 40 L.R.A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067, the plaintiff contended that a foreign corporation which had not filed and registered its charter as required by the statutes of the state could not plead the statute of limitations. In over-

Shaw, J., delivered the opinion of the court:

This is a proceeding in certiorari to review a judgment of the superior court of the city and county of San Francisco for the sum of \$257.75 and costs, in favor of the San Francisco Commercial Agency, a corporation. The action in which the judgment was rendered was originally begun in the justice court, and the judgment sought to be reviewed was rendered in the superior court on appeal.

The defendant in the action, petitioner here, is a corporation organized under the laws of the state of New Jersey. The complaint stated a cause of action to recover money due on contract. Summons was duly issued and the defendant appeared and filed an answer. The plaintiff therein then moved the court to strike the answer from the files, the motion was granted, and thereupon judgment was given in favor of the plaintiff therein against the petitioner as above mentioned. The motion to strike the answer from the files was made upon the ground that the defendant was a corporation of another state, that the demand sued on arose out of business transactions in this state, and that said defendant corporation had failed and neglected to comply with the statute of this state requiring a foreign corporation doing business in this state to file a certified copy of its articles of incorporation with the secretary of state. No other ground was assigned as cause for the motion, and it appears to have been granted upon the ground that a corporation so failing cannot be allowed to defend an action brought against it in the courts of this state. The statutory provisions in question are found in §§ 408 and 410 of the Civil Code. Section 408 provides that "every corporation organized under the laws of another state, territory, or of a foreign country, . . . which shall hereafter do business in this state or maintain an office

herein, or which shall enter this state for the purpose of doing business herein, must file in the office of the secretary of state of the state of California, a certified copy of its articles of incorporation, . . . and a certified copy thereof, duly certified by the secretary of state of this state, in the office of the county clerk of the county where its principal place of business is located, and also where such corporation owns property." Section 10 declares that "no foreign corporation which shall fail to comply with § 408 . . . of this Code can maintain any suit or action in any of the courts of this state until it has complied with said section."

It will not be disputed that a corporation, although organized under the laws of another state, is a "person," within the meaning of the 14th Amendment of the Constitution of the United States, providing that no state shall deprive any person of property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 225; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132. It may also be conceded, as contended by counsel for respondent, that foreign corporations have no legal existence beyond the bounds of the state or sovereignty by which they are created, and can exercise none of the functions and privileges conferred by their charters in any other state or country except by comity and consent of the latter (19 Cyc. Law & Proc. p. 1222), and that one of the privileges which a corporation receives by its charter is the privilege of maintaining or defending actions in its corporate name and as a body corporate; in other words, the privilege of being a "person" within the cognizance of the law. There is, however, no rule of the common law which forbids a corporation organized and empowered to do business in one state from doing such

ruling this contention, the court said: "While a corporation may reside beyond the state, and be out of the state, still it may, through its officers and agents, subject itself to the jurisdiction of the courts of the state. It may sue and be sued in a jurisdiction foreign to its technical residence. Nor do we think the failure to comply with the act of 1891, chap. 122, will preclude this foreign corporation from setting up the statute. It would not be a proper construction of that statute to hold that a corporation actually doing business in the state without complying with the statute could not be sued for a tort committed; and, having been impleaded upon the ground of tort, it cannot be that the failure to comply with that statute must preclude it from making any defense, for it logically fol-

lows that, if it cannot make this defense, because of its failure it can make no other. The scope and purpose of that act were to require corporations to file and register their charters in order that they might do business, own or acquire property, and be enabled to sue, but it was never intended to exempt them from suit if they disregarded the statute, nor to estop them from making defense, if so sued; otherwise their property might be taken from them, and they estopped to defend."

Upon the question of the effect upon the right of a foreign corporation to maintain a suit, of compliance with local law after suit is instituted, see *National Fertilizer Co. v. Fall River Five Cents Sav. Bank*, 14 L.R.A.(N.S.) 561.

business in another state. In the absence of any statutory inhibition, there can be no doubt that the general comity existing between the states would permit a foreign corporation which had entered this state and done business therein to maintain and defend actions arising out of such business. 19 Cyc. Law & Proc. pp. 1211, 1212. A statute of this state which purports to curtail the privilege of foreign corporations to maintain or defend actions in this state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purposes. The sections above quoted do not purport to forbid a foreign corporation which has failed to comply with its provisions from defending an action brought against it in the courts of this state. They are only forbidden to maintain actions. The order of the court, striking out the answer because of the failure of the defendant to comply with the provisions of § 408, was not authorized by the statute. Notwithstanding the provisions of that section and of § 410 imposing a penalty for a violation thereof, the foreign corporation doing business in this state was entitled to defend any action brought against it. To prevent it from doing so would be to deny it the equal protection of the laws and to deprive it of its property without due process of law. It appearing from the record that the judgment was rendered upon default, and that the default was entered for this cause alone, it follows that the judgment is void.

Sections 405 and 406 of the Civil Code purport to declare that any corporation of another state doing business within this state must file in the office of the secretary of state a designation of some person residing within the state who may be served with process issued in this state against such corporation; and that such foreign corporation cannot maintain or defend any action or proceeding in any court of this state until it has complied with this provision. The motion in the case before us was not based upon the ground that the corporation had failed to comply with this provision, and hence no authority for the action taken can be predicated upon this statute.

It is ordered that the judgment of the Superior Court in the action above mentioned, and the order striking out the answer therein, be annulled; and that the petitioner be allowed to defend the said action.

We concur: Angellotti, J.; Sloss, J.
17 L.R.A. (N.S.)

CONNECTICUT SUPREME COURT OF ERRORS.

THEODORE O. LOVELAND et al., Doing Business as the MOLINE JEWELRY COMPANY, Appt.,
v.

JOHN J. DINNAN.

(81 Conn. 111, 70 Atl. 634.)

Sale — where effected.

1. A sale of goods to be delivered to transportation companies at the place of manufacture in another state is effected there, and is not affected by a statute of the state where the order was signed, relating to the sale of goods bearing a fraudulent mark of quality.

Same — fraudulent marks.

2. That goods bought in another state for resale are fraudulently marked as to quality so as to make them unsalable under a statute of the state where the order was given, does not authorize the purchaser to rescind the contract and return them to the seller, if they comply with the order as given.

Same — unauthorized marking.

3. The unauthorized marking of goods bought in another state for resale, in such a manner that they cannot be sold in the state where the order was given and the resale intended, will justify the purchaser in rescinding the sale and returning them to the seller.

Same — departure from order — rescission.

4. A provision in an order for goods to be resold, that the seller will buy back, re-

Note. — Although there are many cases dealing with the question whether a particular sale was void and unenforceable as coming within the prohibition of statutes regulating the sale of certain commodities, as well as many cases, especially those involving the sale of intoxicating liquors, where the question was raised whether and in what circumstances a contract of sale, valid where made, may be enforced in another state where the sale of such goods is prohibited by law, including some cases where the intent of the parties that the goods should be resold in the latter state in violation of its law was an element (see note to *Brown v. Wieland*, 61 L.R.A. 417, on the conflict of laws as to sales of intoxicating liquor), an extended search fails to reveal any other cases where, as in *MOLINE JEWELRY Co. v. DINNAN*, notwithstanding the validity of the sale so far as the local statute was concerned, the question was raised whether a buyer of goods has the right to rescind merely because the goods are so marked or packed that they cannot be resold conformably to the local law, and independently of any question whether the maintenance of an action for the purchase would be contrary to the public policy of the forum.

place, or exchange goods, does not deprive the buyer of the right to rescind in case they are different in kind or quality from those ordered.

Witness — expert — identification of items.

5. A buyer of jewelry, who has attempted to rescind the order, may point out to the jury the articles covered by the different items of the order, when the order and the jewelry are before them, if it does not require an expert to do so.

Sale — quality — evidence.

6. In an action for the price of jewelry the order for which the buyer has attempted to rescind, expert evidence is admissible to show that articles in the order were marked so as to indicate that they were made of better material than that actually used.

(August 3, 1908.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for New Haven County in defendant's favor in an action brought to recover the purchase price of jewelry alleged to have been sold and delivered. Reversed.

The facts are stated in the opinion.

Messrs. George E. Beers and Fred C. Russell, for appellant:

The agreement was not a Connecticut contract.

J. & J. Eager Co. v. Burke, 74 Conn. 534, 51 Atl. 544; *Johnson County Sav. Bank v. Walker*, 80 Conn. 509, 69 Atl. 15.

There was no implied warranty of merchantability.

15 Am. & Eng. Enc. Law, 2d ed. p. 1249.

Under the circumstances, there should be an allowance for any minor defects in the articles.

Hitchcock v. Hunt, 28 Conn. 347; *Worcester Mfg. Co. v. Waterbury Brass Co.* 73 Conn. 557, 48 Atl. 422; 25 Am. & Eng. Enc. Law 2d ed. p. 560.

Messrs. William A. Wright, William S. Pardee, and Osborne A. Day, for appellee:

There was an implied warranty of merchantability.

Elgin Jewelry Co. v. Estes, 122 Ga. 807, 50 S. E. 939; *Loveland v. Steenerson*, 99 Minn. 14, 108 N. W. 831; *Bigge v. Parkinson*, 7 Hurlst. & N. 954.

The law of Connecticut governs the contract.

Beggs v. Bartels, 73 Conn. 132, 84 Am. St. Rep. 152, 46 Atl. 874.

Contracts which are in evasion of the law of the forum will not be enforced.

22 Am. & Eng. Enc. Law, 2d ed. p. 1329; *Walp v. Moorar*, 76 Conn. 515, 57 Atl. 277.

There was an actual noncompliance by the vendor with the written agreement itself.

Heilbutt v. Hickson, L. R. 7 C. P. 438. 17 L.R.A. (N.S.)

The burden of proof was upon the plaintiff to show that the goods corresponded with the contract.

Merriman v. Chapman, 32 Conn. 146.

The so-called warranty in the contract was not a warranty at all, and, if so, it was not such a warranty of quality as to exclude the implied one of merchantability.

Gardiner v. Gray, 4 Campb. 144; *Bailey v. Nickols*, 2 Root, 407, 1 Am. Dec. 83; *Benjamin, Sales*, 7th ed. p. 644; 15 Am. & Eng. Enc. Law, 2d ed. p. 1229.

Hall, J., delivered the opinion of the court:

The plaintiffs are copartners and manufacturers and wholesale dealers in jewelry in Iowa City, Iowa, with an office also in Moline, Illinois. It appeared in evidence in the trial court that, at the solicitation of the plaintiffs' agent, in this state, the defendant, who has a store at New Haven, on April 18, 1906, sent them an order for certain jewelry. The order was upon a printed form, furnished by the plaintiffs' agent, and which is made a part of the complaint. At the head of the form are these words: "Following is a list of goods and terms for our \$322.25 order." Then follows an agreement of the plaintiffs to buy back unsold goods; a list of various kinds of described jewelry, with their prices, amounting to \$322.25; "the terms of payment," either by cash or by four acceptances; a statement, under the title of "Warranty," that the plaintiffs will replace any article not wearing satisfactorily; and a provision for the exchange of goods purchased for other styles or patterns. The following is the language of the order signed by the defendant:

Moline Jewelry Co.,

Moline, Illinois.

Gentlemen:—

On your approval of this order, please deliver to us at your earliest convenience, f. o. b. transportation companies, either at distributing point or at factory point, \$250 worth the above-described goods, and no others, on the terms and conditions herein set forth, and no others (all of which I have read and found complete and satisfactory).

Under the defendant's signature was the name of the salesman who solicited the order. On April 20, 1906, the plaintiffs delivered the jewelry in conformity with the order, as they claim, addressed to the defendant at New Haven, to the United States Express Company, and on the same day sent the defendant an invoice of the same, upon which was printed: "All claims of any nature must be made on receipt of this bill.

... All bills payable at Moline, Illinois." "No freight or express charges allowed." The defendant claimed to have proved: That, after having received the goods and caused them to be examined by a competent jeweler, he, on the 12th of May, wrote the plaintiffs as follows:

The Moline Jewelry Co.
Gentlemen:—

I hold your goods subject to your disposal. The terms are not according to agreement. Consequently I don't care to have anything further to do with them. They await your instructions.

And that, upon receiving a reply from the plaintiffs that they had no orders to give, the defendant, on May 19th, reshipped the goods to the plaintiffs, who refused to receive them; and that they were returned to the defendant, who still holds them, subject to the plaintiffs' order. In his substituted answer the defendant avers that the goods sent did not comply with the order, that the plaintiffs fraudulently substituted worthless and imitation goods for those ordered, and that he refused to accept them; and he claimed to have proved that, among the goods not complying with the order, were certain rings, marked "E. 14 K," indicating that they were solid 14-karat gold, which were not solid gold, and other goods so marked, either upon the articles themselves or upon the cards to which they were attached, as to render the manufacture, sale, or possession of them a misdemeanor under § 1381 of the General Statutes of 1902 of this state.

The trial judge charged the jury regarding the effect of such claimed facts, in part as follows: "I desire to call your attention to the claim made by the defendant that the goods sent to him by the plaintiffs, or a considerable portion of them, at least, are unmerchantable for the further reason that they are of such a character, because of the marks thereon; . . . that it would be in violation of the statute law of the state for him to have them in his possession for sale; and that it was equally unlawful for the plaintiffs to sell to him such goods in the state of Connecticut, as he says was done in this case, the contract having been entered into in New Haven." The court then stated to the jury the provisions of § 1381, and said: "If, therefore, the plaintiffs sent to the defendant goods which in this state it is unlawful for one to sell or have in his possession for the purpose of sale, then such goods are unmerchantable, and the defendant would have the right, as soon as he discovered such fact, if it be a fact, to refuse to receive the same." The court further said to the jury:

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"If, therefore, the plaintiffs substantially failed to fulfil their agreement to furnish goods of the character thus agreed to be furnished; or if the defendant has shown that the goods delivered to him contained articles that could not be sold or held in one's possession with intent to sell without subjecting him to the liability of a criminal prosecution,—then the defendant had the right, upon the receipt of the goods, to hold them for the purpose of examination; and, if he found they were not in substantial conformity with the contract, or were marked in such a way as to be violative of the statute I have quoted, he had the right to return them to the plaintiffs, provided . . . the examination and return were within a reasonable time."

From this language the jury must have understood the court to hold that the contract of sale was made in New Haven, and that our statute rendered the sale by the plaintiffs to the defendant illegal if the goods were stamped or marked in the manner prohibited by § 1381. This was error. The jury should have been instructed that the sale by the plaintiffs was not made in this state, and that therefore it was not rendered illegal by the provisions of § 1381. *Johnson County Sav. Bank v. Walker*, 80 Conn. 509, 69 Atl. 15. It was also error to instruct the jury, as the court in effect did, that the defendant might return the goods, if they were not salable under § 1381, even if they were in conformity to the defendant's order. The goods themselves are not before us. Those which counsel endeavored to exhibit in this court were not properly certified or marked as parts of the evidence. If the goods received by the defendant comply with the written order in kind and quality, as well as in the stamping or marking complained of, the defendant had no right, having bought them in Iowa or in Illinois, to return them to the vendors because they could not lawfully be sold in Connecticut. If the defendant received just what he bought, he is, in the absence of fraud, liable for the agreed price. If, however, the sale was procured by the plaintiffs' fraud, or if the goods received by the defendant did not, either in kind or quality, or in being stamped or marked in the manner claimed, substantially conform to the defendant's order, the defendant could properly refuse to accept them, and would not be liable to pay for them. Even if in all other respects the goods received conformed to the defendant's order, yet if, without the authority of the order, the plaintiffs caused them, or a considerable part of them, to be so stamped or marked as to render it unlawful to sell them in this state, the defendant was justified in refusing to accept them, and in returning

them to the plaintiffs, provided he did so within a reasonable time. And, whether the goods were so marked without authority, or were deficient in kind or quality, the statements in the printed order that the plaintiffs would buy back, or replace, or exchange goods, did not deprive the defendant of the right to refuse to accept and to return the goods.

We find no error in the admission in evidence of the letters between the plaintiffs and defendant, including those written by and to defendant's attorney, for the purpose of showing the conduct of the parties, and not for the purpose of changing the written order.

The printed order and all the jewelry having been before the jury, we perceive nothing irregular in permitting the defendant, as a witness, to indicate the articles covered by the different items of the order, assuming that it did not require an expert to do so.

Expert testimony that articles of jewelry were marked so as to indicate that they were made of a better kind or quality of gold than that actually used in them was admissible to prove either that such goods were inferior in quality to those ordered, or that they were rendered unsalable from being so marked without the defendant's order.

We deem it unnecessary to discuss the ruling of the court upon the plaintiffs' motion to set aside the verdict, or the other numerous assignments of error.

There is error, and a new trial is ordered.

In this opinion the other Judges concur.

KENTUCKY COURT OF APPEALS.

DAVIESS COUNTY BANK & TRUST
COMPANY, Appt.,

v.

MARY C. WRIGHT et al.

(— Ky. —, 110 S. W. 361.)

Married woman — pledge — validity.

1. A married woman pledging her general estate, with the consent of her husband, as collateral for the debt of another, cannot defeat the lien on the ground of her coverture.

Pledge — release.

2. Property pledged as collateral for a note will be released under the same circumstances that a surety personally bound would be.

Evidence — presumption — payment.

3. The law will not presume that payment of a year's interest upon a note six months after due is to be applied partly for past and partly for future interest.

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Note — interest — payment — extension — surety.

4. Securing payment of a year's interest from the administrator of the maker of an overdue note for the purpose of indicating to the bank customers that the paper is still alive, and placing on the note an indorsement of extension for a year, are not sufficient to establish a binding contract to extend for such time, which will release sureties on the paper.

Same — authority of administrator.

5. An administrator has no authority to enter into a binding contract for the extension of time on a note executed by his intestate, so as to release sureties thereon.

Surety — indemnity — consideration.

6. A consideration is necessary to support an agreement to indemnify a surety on a note against loss which may be incurred on account of the suretyship.

(May 12, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Daviess County in plaintiffs' favor in an action brought to secure the release of notes executed as collateral security. Reversed.

The facts are stated in the opinion.

Messrs. Hayes & Johnson, for appellant:

The receipt of interest in advance does not of itself constitute an agreement to ex-

Note. — Though cases may be found dealing with the rights of a surety of a debt due to an estate, the time of payment of which had been extended by an administrator, no other case has been found presenting the question whether an administrator may enter into a binding contract for the extension of a debt due by the estate as the principal, so as to release a surety. Without entering into any extended discussion of this question, it may be remarked that the soundness of the view taken by the court in *DAVIESS COUNTY BANK & T. Co. v. WRIGHT* may be seriously questioned. It will be observed only that the court is not very happy in its selection of authority upon which to rest its decision, for there is no mutual inconsistency in the proposition that an estate is not liable on contracts made by an administrator and the proposition that such contracts will inure to the benefit of the estate and may be enforced by it; or, to put it differently, it does not lie with a contractee to question a contract entered into between himself and an administrator because such contract is not binding on the decedent's estate; and, what is more, it is hardly a fair inference from the proposition that, because a contract made with an administrator cannot be enforced as against the estate, it therefore follows that such contract may be questioned by a stranger to it. The question is by no means free from doubt, and, in the absence of direct authority, no opinion is ventured.

tend the time of payment, nor is it conclusive evidence of such an agreement, but it is only prima facie evidence.

Stearns, Suretyship, p. 118; 7 Cyc. Law & Proc. p. 890; Brandt, Suretyship, 3d ed. § 386; Preston v. Henning, 6 Bush, 556; Weaver v. Prebster, 37 Ind. App. 582, 77 N. E. 674.

The administrator had no power to bind the estate by an agreement for extension.

2 Page, Contr. § 992; 18 Cyc. Law & Proc. p. 881; Moody v. Ewing, 8 B. Mon. 521; Heasley v. Dunn, 5 B. Mon. 145; Proctor v. Terrill, 8 B. Mon. 451; Ellis v. Merri-man, 5 B. Mon. 296; Pullins v. Smith, 106 Ky. 418, 50 S. W. 833; Ky. Stat. § 3882; Bitteler v. Bitteler, 13 Ky. L. Rep. 368; Rice v. Strange, 24 Ky. L. Rep. 1945, 72 S. W. 756.

Where there is a legal impossibility of injury to the surety from an extension, the surety is not released.

United States v. Hodge, 6 How. 283, 12 L. ed. 439; 2 Dan. Neg. Inst. §§ 1313, 1319; Revell v. Thrash, 132 N. C. 803, 44 S. E. 596; Gardner v. Van Nordstrand, 13 Wis. 544.

Mr. Le Vega Clements for appellee Wright.

Messrs. Wilfred Carico and George W. Jolly, for appellees Thompson and Hawes:

A contract of guaranty, or to pay the debt of another, does not differ from other contracts, in that it must be supported by a consideration.

20 Cyc. Law & Proc. pp. 1413, 1417; Snowden v. Leight, 6 Ky. L. Rep. 118; Greer v. Clermont Distilling & Mill Co. 15 Ky. L. Rep. 237; Mason v. Collins, 9 Ky. L. Rep. 578; 6 Am. & Eng. Enc. Law, pp. 691, 692.

Contracts of this character are upheld as valid by this court when based on a sufficient consideration; and such an agreement to pay another's debt is not within the statute of frauds.

North v. Robinson, 1 Duv. 71; Williams v. Rogers, 14 Bush, 776; Garvey v. Crouch, 18 Ky. L. Rep. 84, 35 S. W. 273; Botkin v. Middlesborough Town & Lands Co. 23 Ky. L. Rep. 1964, 66 S. W. 747; 20 Cyc. Law & Proc. pp. 188, 189.

O'Rear, Ch. J., delivered the opinion of the court:

Malcolm Thompson borrowed \$2,500 from the appellant bank on February 12, 1903, on which date he executed to it a note, signed by appellee Mary C. Wright as surety, in which she pledged as collateral certain real estate notes belonging to her. The note was due twelve months after date, but was not then paid, the principal having died September, 1903, without having paid it. About a month after the execution of the 17 L.R.A. (N.S.)

above-named note, appellees Hawes and Thompson, to indemnify Mrs. Wright in her suretyship for Malcolm Thompson, executed to her this obligation:

Owensboro, Ky., Feb. 12, 1903.

Mrs Mary C. Wright has this day signed a note with Malcolm Thompson to the Daviess County Bank & Trust Company for \$2,500, due twelve months after date, and, as collateral to said note, she has placed with said bank 10 real estate notes for \$500 each and one note for \$300, given by G. W. Bell and L. G. Bell, bearing 6 per cent interest, payable annually, being the unpaid deferred payments for land sold said G. W. Bell and L. G. Bell by Mrs. Mary C. Wright. Part of the money received on the note to Daviess County Bank & Trust Company (\$2,000) was paid on account of purchase of land by Malcolm Thompson for Jeff Howard, the deed to said land being made to Malcolm Thompson, and the balance of said note, except the discount retained by the bank, Malcolm Thompson keeps for use in improvements, etc., on said land. We hereby agree to hold Mrs. Mary C. Wright harmless for signing said \$2,500 note for Malcolm Thompson and also to pay the \$2,500 indebtedness, with all interest and costs, and return the said 11 land notes to her at the maturity of the note.

[Signed.]

Malcolm Thompson.

W. S. Hawes.

J. L. Thompson.

In January, 1894, the administrator of Malcolm Thompson's estate brought his suit in equity in the Daviess circuit court to settle the estate of his intestate, procuring an injunction against creditors suing the estate in any other action, and an order requiring them to produce and file their claims against his intestate's estate in that action. Malcolm Thompson's estate was apparently not equal to its indebtedness, and there was paid on the note first named only \$1,448.13 in the distribution of the assets. While the suit to settle the estate was pending, and on September 30, 1904, the administrator of Malcolm Thompson paid to appellant bank, at the latter's solicitation, \$150. It is claimed by appellees that this payment was for one year's interest on the note, from February 12, 1904, and operated by law to extend the time of payment of the principal till February 12, 1905; and that therefore Mrs. Wright and her collateral pledge to secure the note were released from further liability to the bank. Upon the facts and the law of the case, the circuit court sustained Mrs. Wright's contention, and adjudged that she was not liable, and that

her collateral was released from liability to the bank.

Mrs. Wright was a married woman when she executed the note. She was not therefore personally bound upon it. She brought this suit to have her collateral adjudged released from its obligation. She pleaded and relied on her coverture, in bar of her personal liability. But she did not aver that the notes pledged as collateral were her general estate, or not her separate estate. She did say she was the owner of the notes, which had been executed to her as part consideration for the conveyance to their obligor of a tract of land which she had owned. Construing her petition, as it must be, most strongly against her (as she would presumably have pleaded the existence of any other facts, concerning the nature of her estate in the matter, that would have released her collateral, could she have truthfully done so), we assume, either that the notes were her separate property, and therefore within her sole power to pledge to secure the debt of another notwithstanding her coverture (*Bullock v. Com.* 96 Ky. 537, 29 S. W. 341), or if her general estate, that her husband assented to their being so pledged. In the latter event, as we apprehend that at the common law the so-called protection of the *feme covert* from liability on her executory contracts, so as to relieve her general estate pledged to secure their execution, was in reality out of consideration of the husband's marital rights, he assenting to the pledge, she will not be heard to complain, as he would have had the right, without her consent, to have reduced it to his possession and so applied it. Hence we conclude that the question of the liability of the collateral is to be determined without reference to Mrs. Wright's coverture, but as any other collateral put up to secure the debt by any other person as surety; for we think that, as the collateral is to be treated as security, it will be released under the same circumstances that a surety personally bound would have been released. *Brandt, Suretyship*, 2d ed. § 34; *Price v. Dime Sav. Bank*, 124 Ill. 317, 7 Am. St. Rep. 367, 15 N. E. 754; *Wigman v. Miller*, 98 Ky. 620, 33 S. W. 937; *New York L. Ins. Co. v. Miller*, 22 Ky. L. Rep. 230, 56 S. W. 975. It will be conceded that ordinarily any extension of time by the obligee, based upon a consideration, will operate to discharge a surety not assenting thereto, and, by a parity of reasoning, will release collateral of a surety or of a third person pledged to secure the debt.

But, in order that a surety may be released, there must be an enforceable contract between the principal and the creditor, by which the latter would be prevented from

suing on the debt when due, and, for that reason, the surety be prevented from paying off the debt that day, and thereupon, subrogated to the creditor's rights, sue or take other steps to save himself from loss. The whole doctrine is necessarily based upon the idea that the surety has been prejudiced in some substantial right which he had, as otherwise there would be no sense in releasing him because of such an act. It is true the law will presume that he has been prejudiced by such extension, and will conclusively presume the fact if the surety could, but for such extension, have paid off (that is, had the right to pay off) the principal obligation, and have sued and recovered judgment against the principal debtor upon it. In no case does mere indulgence of the principal by the creditor operate to discharge the surety, even though it be expressly assented to by the creditor, at the instance of the principal, of which the surety is ignorant, nor even if the principal has, during such indulgence, become bankrupt. Much less does the simple agreement of the creditor to indulge the principal even for a definite time work a release of the surety. Though it is sometimes stated that the payment of interest in advance to the creditor by the principal operates to discharge the surety, we apprehend that, even in such cases, the rule is really rested upon the contract, implied if not expressed, that the principal shall have a definite, further time within which to pay the debt. The whole question always comes back to this: Was there a valid contract of extension? If there was, then the creditor could not, in violation of it, take any action to sue to collect the debt before the expiration of the time fixed in the last contract; and, as he could not do so, the surety could not derive such right from him by paying off the debt. The right of the surety to pay off the debt when it is due, thereby lessening it by the amount of interest that a further extension would entail, is an incident of his contract of suretyship. If it is changed without his assent, there is a novation, so to speak; and, if he should be held in spite of his not agreeing to be so bound, it would end that he had a contract made for him, which he did not make and probably would not have made. A novation is the making of a new contract. Its elements are essentially the same as in the first contract, which are (1) parties; (2) a meeting of the minds; and (3) a consideration. Hence, the further indulgence of the principal, if the surety is to be released thereby, must be upon an agreement for such extension for a definite time (as, if it were not definite, then the creditor might immediately enforce payment of the debt, and, if he

might, the surety could pay and be as fully protected as if the agreement had not been made); and this agreement must be based upon a new consideration, as without a consideration the agreement would be unenforceable as against the creditor. *Robinson v. Miller*, 2 Bush, 179. This much has been said that a proper application of the particular facts of this case bearing upon the payment of \$150 as interest may be made.

In September, 1904, the note was past due,—what the bank termed “suspended paper.” The bank was anxious that it be made to appear at least that it was not overdue, in order that it might not be required to charge it off to profit and loss by action of the public authorities charged with periodical examinations of the bank. The administrator was applied to, and the situation explained to him. He agreed to pay, and did pay, \$150 upon the note. There was nothing said between the administrator and the bank official conducting the transaction, as to any definite time when the remainder was to be paid. They each knew that the principal was dead, and that no other action could be taken, before February 12, 1905, by either the bank or the surety, to collect the note from the estate of the principal. It was discussed that the estate would, as soon as it could, pay off the balance, or as much as it might be able to pay. The bank official, however, in crediting the \$150, using a rubber stencil, and filling out with pen and ink, made this indorsement on the note: “Extended 360 days to Feb. 6, 1905. Interest \$150, paid Sept. 30, 1904.” It is argued for appellee that this is conclusive that interest was collected in advance from the principal, in consideration of which further indulgence was granted to him for a definite time, without the consent of the surety. Were this indorsement all the evidence on this point, we would have no hesitation in holding that the fact was as claimed; but this indorsement stands no higher as evidence than any other written memorial. It is impeached as being the result of mistake. Certainly there is no evidence (other than the indorsement) that the contracting parties had so agreed; and they, in their testimony, concur that such was not the agreement. Nor is it sound that the mere payment of \$150 as interest on September 30, 1904, operated, *ipso facto*, to discharge accrued interest at 6 per cent from February 12, 1904 (the day the note was due), and the remainder of the \$150 then operated to extend the time of payment, for such additional period as, at 6 per cent per annum interest, it would buy. If the payment of \$150 interest only were shown, it would still be open to explanation whether it was a usurious rate

for the past indulgence, or to be applied partly for past and partly for future. The most natural inference would be, it is true, that the latter course was intended; but such inference is a matter of evidence, and not a presumption of law. We think the fact was established that there was no agreement to extend for a definite time; that the indorsement was by the mistake of the bank official, whose real aim was not to extend the time, but to create an appearance contrary to the actual transaction, and for a purpose wholly beside this case. Without pausing to reflect upon the nature of his motive, it is sufficient, we think, that it had no bearing upon the alleged agreement; and, as the question is, Was there a meeting of the minds of the parties as indicated by the indorsement?—we must find that there was not.

But we deem the more important and controlling question in the case to be, Had the administrator power to bind the estate by an agreement for extension? Obviously, if there was no such agreement, the question could not arise. While we are strongly inclined, as argued above, to hold that there was not an agreement, we are not quite willing to rest there. Administrators, and executors, too, for that matter, are officers of the court, appointed to settle decedents' estates. In this state administrators have not the authority to enter into contracts on its behalf, in the absence of an order of a court of competent jurisdiction, or, where they act under a will, of something in that instrument empowering them to do so, except by statute in certain rare instances not here involved.

Schouler, in his article on “Executors and Administrators,” 18 Cyc. Law & Proc. p. 881, thus states the prevailing rule: “Contracts of executors and administrators, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration moving between their promise and themselves, are their personal contracts, which do not bind the estate; and they must be sued on these contracts in their individual, and not in their representative, capacity.” This court has, in line with the rule of law just quoted, held that an administrator had not the power to bind his intestate's estate by charging and receiving usurious interest on its behalf against its creditor (*Heasley v. Dunn*, 5 B. Mon. 145); nor to discharge a debtor of the estate by compromise, except as allowed expressly by statute (*Pullins v. Smith*, 106 Ky. 418, 50 S. W. 833); nor to release a surety upon a note owing the estate, even upon a consideration that might

have supported such an agreement as between others competent to contract about the matter (*Bitteler v. Bitteler*, 13 Ky. L. Rep. 368). And in *Rice v. Strange*, 24 Ky. L. Rep. 1945, 72 S. W. 756, it was held that an executor had not the power to borrow money on behalf of the estate (there being nothing in the will authorizing it), even though the estate may have been benefited thereby. An agreement to extend the time of payment of a debt owing by the estate is, in a sense, incurring additional liability against it. The statutes allow a suit at any time by the personal representative or any creditor or heir at law to settle the estate, and to distribute its assets. Upon the filing of such a suit the chancellor directs the administration henceforth. It is not competent, then, for the personal representative, unauthorized by the court, to enter into contracts by which its jurisdiction and control in the matter might be ousted, and the statutory rights of other litigants or claimants be changed or postponed. As the administrator was without power in this case to enter into the alleged contract extending the maturity of the note, the agreement would have been void. Hence the surety, notwithstanding it was entered into as claimed, might have disregarded it, and paid off the debt at any moment.

There is a further question whether, in any event, the surety was prejudiced by the so-called agreement, had it been a valid one; but it is not now necessary to pass upon that point. The indemnitors, Hawes and Thompson, were never bound upon their contract if it was not executed coincidentally with the principal obligation, as it is not claimed that there was other consideration for it. For, if Mrs. Wright had already become bound (or her notes pledged, which is the same in principle) upon Malcolm Thompson's debt to the bank, when the agreement of indemnity was entered into, then she undertook nothing additional, parted with nothing, being moved thereto by the undertaking of Hawes and Thompson. Their agreement must have a consideration of its own to support it. There is none in this case, unless it was contemporaneous with Mrs. Wright's pledging her notes, and her agreement to do so was based, in part at least, upon that fact. Whether it was executed when or after Mrs. Wright became bound was not decided by the circuit court. That question will be for decision upon the return of the case. The whole purport of that agreement of indemnity was to indemnify Mrs. Wright, not to otherwise pay the debt.

For the reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent herewith.
17 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

MARY MILAM et al., Appts.,

v.

LULA STANLEY et al.

(— Ky. —, 111 S. W. 296.)

Will — letter — sufficiency.

A letter written by a man sentenced to death, three days before the execution, to his daughters, stating that he made two of them a deed to the house and lot, and that he did not want them to have any trouble over it, and did so because of their attention to their mother, may be probated as a will sufficient to pass title to the property.

(June 12, 1908.)

Case Note. — Sufficiency of letter as will.

This note supplements one to *Re Richardson*, 15 L.R.A. 635, where the earlier cases upon the question will be found.

This note does not cover the question whether a letter may be incorporated in a formal will by a reference thereto. (See, on that subject, note to *Bryan's Appeal*, 68 L.R.A. 353.)

The rule that an instrument is valid as a will if properly executed, whatever its form, provided the intention of the maker was to dispose of his estate after his death, is applicable to writings in the form of letters; and a letter is held valid as a will if it complies with the requirements ordinarily necessary to the execution of such an instrument; and it may be noted, in this connection, that in many jurisdictions a holographic will is not required to be witnessed. See, on this subject, case note to *La Rue v. Lee*, 14 L.R.A. (N.S.) 968.

This rule was applied in *Arendt v. Arendt*, 80 Ark. 204, 96 S. W. 982, where the following letter, found shortly after the writer had committed suicide, was held to be a valid will: "Little Rock, Ark. 2-7-1904. Mrs. Sarah Arendt, City. Dear Wife:—You will find everything all right, I hope. Whatever I have in worldly goods, it is my wish that you should possess them. I have hoped against hope that everything would come out all right, but I see that it is useless. Please mail those letters I handed you. It is all I ask of you, so good-bye, sweetheart. Yours, Will." The court said: "This will is in the form of a letter from William Arendt to his wife, but we quote the language of a distinguished author [Jarman, *Wills*, 6th ed. 21]: 'The law has not made requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and, if this appears to be the nature of its contents, any contrary title or designation

APPEAL by contestants from a judgment of the Circuit Court for Logan County admitting to probate a letter alleged to be the will of W. R. Fletcher, deceased. Affirmed.

The facts are stated in the opinion.

Mr. S. R. Crewdson, with S. J. Brown-
ing, for appellants:

The letter is not testamentary in its character, or it does not express testamentary intentions.

1 Jarman, Wills, 18; Ward v. Ward, 104 Ky. 857, 48 S. W. 411; Re Richardson, 94

Cal. 63, 15 L.R.A. 635, 29 Pac. 484; Jones v. Jones, 3 Met. (Ky.) 269.

Mr. George S. Hardy for appellee.

Hobson, J., delivered the opinion of the court:

W. R. Fletcher was convicted in the Logan circuit court of rape, and sentenced to be hung. He appealed to this court, where the judgment was affirmed. He applied to the governor for clemency, and his application was denied. The date of his execution was fixed for February 15, 1907. On Feb-

which he may have given to it will be disregarded."

So, in *Anderson v. Pryor*, 10 Smedes & M. 620, three letters received from deceased while a volunteer in the United States Army, written wholly by him, containing the following statements, were held properly admitted to probate, since they were clearly testamentary, showing an intention to make a bequest: "If I never come back ma promised my property should go to Martha Yarborough." "I wish you [to] inform Yarborough what I told you concerning my property. Ma promised me it should go as I wished it, to my niece Martha." "Your grandma promised me to let you take Jake and Nan if I should not get back."

And in *Cowley v. Knapp*, 42 N. J. L. 297, a letter in the following form was held to comply with all the essentials of a valid will, and was given effect: "My Dear Father:—In case of anything happening us, I would wish you to take charge of our property. By law, I suppose it would be divided between all my sisters. I would wish it otherwise. I wish all the property to be sold except any portion of Deal Emma would wish to retain for herself; then the money to be put in government securities, or any other sure investment. I make Emma Knapp my sole heir. I know she is just, and will give to those who need, and will be guided entirely by your advice. Your affectionate daughter, Mary Bovle. 120 East 26th Street. January 18th, 1876. Witnesses of signatures: Annie Jacob Walsh, Catherine Cloake."

And in *Buffington v. Thomas*, 84 Miss. 157, 105 Am. St. Rep. 423, 36 So. 1039, the following letter written by a married woman to a friend at her home, was held valid as a holographic will, although it was contested by her husband. B., referred to in the letter: "San Antonio, Tex., Dec. 25, 1898. Mr. Edward Drenning. Dear Friend:—This leaves me in bed with high fever. I do not know whether I shall live to see morning. I came to West Texas for my health, and did very well until lately. I was taken with fever from which I may never recover. You have from childhood always shown yourself a friend; now I am sick, I have one more favor to ask: In case that I die, see that old Buffington has nothing of mine, not even a lock of my hair. Eliza did what she could for me, and I want her to have our home in Yazoo City. Buffington has not

given me a copper. I could say more, but am too sick. Answer at once. Truly yours, Mamie Buffington." The court said: "The instrument was properly probated as a will. The acute attack of fever was the inducement to the woman to indicate her last wishes, and her dominant idea was to express them, and to say what she wanted 'in case I die,' and she gives her reason for the wish. The request to 'answer at once' perhaps indicates only the desire to know whether the letter reached its destination. There is no presumption that it was designed to alter its nature. And so of the words 'this is private.' From the purport of the whole paper, manifest reasons would militate against publication during the life of the writer."

So, in *Knowles's Estate*, 8 Pa. Dist. R. 153, the following letter was held valid as a will: "Philadelphia, March 29, 1898. My Dear Harry:—Take charge of all that I have and dispose of the same to the best ideas of your honor and conscience, with full power to sell and convey as my executor my real estate, without liability as to application of the purchase money. Mr. W. H. S. is to be left out of all consideration. To Henry Berges, Esq. [Signed] William E. Knowles. Witnessed by: J. Beyelle Thomas, Sadie Gillett." The court said: "The law does not prescribe any form which must be adhered to, or else the testamentary paper is invalid. It is sufficient if the intention of testator to dispose of his estate satisfactorily appear, and the object of his bounty be equally well ascertained. In the present instance, an absolute gift by testator of his estate is clearly indicated; the legatee is his friend to whom the letter is addressed; an ample power of sale is vested in him, and finally he is appointed sole executor. We discover no room for doubt that the paper was properly admitted to probate."

And in *Byers v. Hoppe*, 61 Md. 206, 48 Am. Rep. 89, the following, written on one side of a half sheet of paper, on the other side of which the testator had written a business letter to the proponent and her husband, was held to be complete on its face, and to possess all the requirements of a will to dispose of the personal estate: "Ann:—Don't worry yourself about this matter, as you see you are almost cut out on every side, by your father and your mother, but you have been a faithful daughter

ruary 12, 1907, he wrote the following letter:

My Dear Loving Daughters:—

I guess my last hope is gone. I don't want you all to grieve after me for I think I will be better off than to be in jail, for I think I am prepared to go and I want to ask one thing of you all is to meet me in heaven Jennie, Lula and Bettie and Mary, I want you to understand that I am as innocent of the charge which I have to die for as an angel in heaven and it does me good to know that God knows that I am not guilty. Jennie tell John to see that my body is taken home and buried in our own graveyard and get Stinson to preach my funeral. Tell him I am at rest. I want to make you and Lula a deed to that house and lot and I don't want you and her to ever have any trouble over it. Jennie I don't do this because I think more of you and Lula than I do of Mary and Bettie but I do it

because you both attended to your dear old mother so good. I hope to soon meet her in heaven. Jennie Mary has got enough of my money to bury me I guess. So this is from your loving father. W. R. Fletcher.

To Jennie and Lula may God bless you all is my prayer. Yours,

W. R. F.

He was executed on February 15th, and afterwards the letter was offered for probate as his will. The appeal before us is prosecuted from the judgment of the circuit court admitting the paper to probate. It is insisted that the paper is not testamentary in character, that it only indicates an intention to make Jennie and Lula a deed to the house and lot, and that the deceased, having died without executing this intention by making a deed, the paper cannot be probated as a will.

In determining whether the paper is testamentary or not, the court will look, not only

to me, and have obeyed me, and you have seen a great deal of trouble; don't worry yourself, but take things easy and do the best you can for the present. I have prospered and have accumulated a great — of money together, and I intend to do what I please with it; and Ann, after my death you are to have \$40,000; this you are to have, will or no will; take care of this until my death; Ann, keep this to yourself. J. Henry Hoppe. To Eliza Ann Byers."

And in *Re Spratt*, 75 L. T. N. S. 518, where the testator was engaged in active service at the time he wrote, although he afterwards returned home and for some years prior to his death was not on friendly terms with his sister, the following holographic letter to the sister was held a valid will: "Camp Te Pa Pa, Tarranga, 4th May, 1864. My Dear Robe:—This the most important part of my letter. If we remain here at Pahs for some time to come, the chances are in favor of more of us being killed, and, as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place, there is money at Cox's and over £100 in New South Wales Bank, New Zealand. Keep this until I ask you for it. Your affectionate brother, C. Spratt." The main question in this case was whether such writing was conditional.

So, in *Halford v. Halford*, 75 L. T. N. S. 520, the following letter, written just prior to the testator's starting on a voyage, was held entitled to probate together with a will and codicil, although the writer completed the voyage and lived several years thereafter: "We go on board our steamer perhaps to-morrow night, or at least on Friday morning. . . . If anything happens to us on the way, my will has been accidentally packed away in a tin box to which

I cannot now get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my executor: if I only, then in conjunction with Nan. If Nan survives me, the revenue of my estate goes to her for life; on her death £10,000 to be paid in equal proportions to George, Sam, and Lizzie, or, in the event of their death, then to their children. The residue I leave to you." The principal question here, as in the preceding case, was as to the conditional character of the instrument.

And in *Dougherty v. Holscheider*, 40 Tex. Civ. App. 31, 88 S. W. 1113, two letters to a friend, requesting him to look after the completion of the education of certain persons, etc., written wholly by the testator just prior to undergoing a surgical operation, were held sufficient as a will aside from the question of their being contingent.

In *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15, a letter to the writer's sister, containing, among other things, the following: "If I die or get killed in Texas, the place must belong to you, and I would not want you to sell it."—was held valid as a holographic will; and the custody of the sister over the writing was held to satisfy the statute providing that such a will should be lodged in the hands of some person for safe-keeping, although she was not expressly requested to preserve it as a will.

In *Re Meade*, 118 Cal. 428, 62 Am. St. Rep. 244, 50 Pac. 541, where a letter directing an undertaker to attend to the cremation of the writer's body after her decease closed as follows: "My brother Porter Sherman will take charge of my estate and be the sole administrator, without bonds, to trade, sell, or occupy as may seem to him fit,"—it was held that no executor was there-by appointed, nor any devise made. The court said: "It is not clearly apparent that it was written *animo testandi*. It is

at the language of the instrument, but at the situation of the maker and at his intention. W. R. Fletcher knew when he wrote this paper that he was to die on February 15th. His last hope of life was gone; and, knowing that he was to die on the 15th, he wrote this letter to his daughters. The letter shows on its face that it is inartificially written, but his meaning is sufficiently apparent. He did not have in mind that he was thereafter to make his daughters a deed to the house and lot. What he had in mind was that he wished them to have the house and lot, and not to have any trouble over it; for he added, "I don't do this because I think more of you and Lula than I do of Mary and Bettie but I do it because you both attended to your dear old mother so good." These words show that he had in mind, not something that he was going to do, but something he was then doing. In other words, they show that he intended them to have the house

and lot by virtue of the letter he was then writing, and not by virtue of some instrument he was thereafter to write. A will may be in any form. The words in which the intention of the testator is expressed are immaterial, if it sufficiently appears from the instrument that he was making a disposition of his property testamentary in character. In *Clarke v. Ransom*, 50 Cal. 595, the following note, written in expectation of death, was probated as a will: "Dear old Nance, I wish to give you my watch, two shawls, and also \$5,000, your old friend, E. A. Gordon." In *Byers v. Hoppe*, 61 Md. 206, 48 Am. Rep. 89, the decedent wrote on the back of a business letter, addressed to a man and his wife, the following, addressed to the wife: "After my death you are to have \$40,000. This you are to have will or no will. Take care of this until my death." *Hunt v. Hunt*, 4 N. H. 434, 17 Am. Dec. 438, the decedent indorsed on the back of a note these words: "If I am not

plain that the main question in the deceased's mind was the disposition of her body, and that she took her pen in hand to advise the undertaker upon that matter. Such being the principal purpose of the writing, it should certainly be made plain by apt words that, incidentally, she also intended the paper as her last will. . . . As to the words of this paragraph [referring to the last paragraph] possessing the importance of a devise to Porter Sherman of all her estate, it is entirely too weak and indefinite."

So, in *Re Easton*, 23 Wash. L. Rep. 789, the following two letters, written eleven and seven years, respectively, prior to the writer's death, and produced by one at whose banking house the writer kept an account, were held not to be a testamentary disposition of her estate, and therefore not entitled to probate. The first was written in the third person, as follows: "She [the writer] takes occasion to say that, in the event of anything happening to her, the amount which she has on deposit with him now, \$701, after necessary expenses are paid, will be placed to the credit of her niece Mrs. Yonge, of Georgia;" and the second contained the following: "I desire to say to him plainly what I did three years ago, that whatever I may happen to have on hand at the time of my death, bonds included, I shall wish to have transferred to my nephew's . . . widow, Mrs. Anna Bell Yonge, Savannah, Ga. I will add that I will not permit any particle of what I have with him, either on deposit or bonds, to be diverted from my own use during my lifetime, for very obvious reasons. In the first place, to guard against possible contingencies to the trust fund and to protect myself, as far as I can, from being handed over to public charity or the horrors of dependence."

So, in *Re Scott*, 21 Pittsb. L. J. N. S. 305, 17 L.R.A. (N.S.)

an instrument in form of a letter, signed by deceased and addressed to his attorney, requesting him to prepare a will in accordance with directions contained in the letter, did not show a testamentary intent; and, where the statute required that every will should be proved by two witnesses, and but one was indorsed who could prove it, the instrument was held not entitled to probate.

In *Porter v. Turner*, 3 Serg. & R. 108, where deceased was authorized by her father's will to dispose of one fifth of his estate "by any writing under hand and seal executed in the presence of two or more credible witnesses," it was held that there was a good exercise of the power where a testamentary instrument in the form of a letter was made, which was not sealed or attested, but which the writer later acknowledged as her will, and executed a codicil written on another paper, disposing of her property, which she signed opposite a seal, and then acknowledged both papers in the presence of witnesses.

In *McCutchen v. Ochmig*, 1 Baxt. 390, a letter with testamentary provisions was refused probate as a holographic will for the reason that the proof did not show a compliance with the requirement of the statute that such a will must be lodged in the hands of another for safe-keeping. The letter commenced "Dear Cousin," but did not otherwise name the writer's correspondent. It was, however, produced on the hearing with an envelope addressed to the proponent, who was the writer's cousin, and it was shown by a number of witnesses that the superscription upon the envelope and in the letter were in the handwriting of the deceased; but the connection between the envelope and the letter, or the fact that the particular letter had been actually transmitted in the envelope to the proponent, did not appear. But see *Alston v. Davis*, *supra*.

living at the time this note is paid, I order the contents to be paid to A. H.' He died before the note was paid. In *Fickle v. Snepp*, 97 Ind. 289, 49 Am. Rep. 449, the instrument was in form a promissory note. In all these cases the papers were probated as a will. Indeed, the general rule is that an instrument is a will, if properly executed, whatever its form may be, if the intention of the maker to dispose of his estate after his death is sufficiently manifested. *Babb v. Harrison*, 9 Rich. Eq. 111, 70 Am. Dec. 203.

Under these principles, the circuit court properly admitted the paper to probate as the will of W. R. Fletcher.

Judgment affirmed.

MARYLAND COURT OF APPEALS.

WINSLOW ELEVATOR & MACHINE
COMPANY, Appt.,
v.

SARAH ELIZABETH HOFFMAN et al.

(— Md. —, 69 Atl. 394.)

Contract — breach — damages — loss of profits.

One failing to perform his contract to erect in an office building an elevator which will work at its rated capacity is not liable to the owner of the building for loss of rents during the time the unsatisfactory service continues; for, even if such damages could be regarded as having been within the

Case Note. — Loss of rents as damages for breach of contract to install elevator or other equipment incidental to use of building.

This note is limited strictly to those cases which have applied the law as to loss of rent as damages for breach of contract, where the breach consisted of a failure to install an elevator or other equipment incidental to the use of a building. It therefore does not include those cases where the breach of contract consisted of a failure to complete a building within a certain time, resulting in an alleged loss of rent, or even those cases where, because of a delay or a failure to make repairs, the owner of the building was unable to lease his property.

The only case found where, as in *WINSLOW ELEVATOR & MACH. CO. v. HOFFMAN*, it was sought to recover loss of rents as damages for breach of a contract to install an elevator, is *Clifford v. Leroux*, 14 Tex. Civ. App. 340, 37 S. W. 172, 254, where it was held that, for failure to construct an elevator in an office building according to contract, damages from failure to rent the rooms are too speculative and remote to be recovered.

A case closely related to the above is *Reilly v. Connors*, 65 App. Div. 470, 72 N. 17 L.R.A. (N.S.)

contemplation of the parties, they are too uncertain and contingent to form a basis for recovery.

(April 1, 1908.)

A PPEAL by defendant from a judgment of the Superior Court of Baltimore City in plaintiffs' favor in an action brought to recover damages for breach of a contract to erect an elevator in an office building. Reversed.

The facts are stated in the opinion.

Measrs. T. Howard Embert, William S. Byran, Jr., A. de R. Sappington, and Dennis & Dennis, for appellant:

The measure of damages for the breach of a contract to furnish a chattel of a specified quality and character is the sum which it would cost to place the chattel in the condition in which it was agreed that it should be.

Central Trust Co. v. Arctic Ice Mach. Co. 77 Md. 238, 26 Atl. 493; *Marsh v. McPherson*, 105 U. S. 718, 26 L. ed. 1142; *Stillwell & B. Mfg. Co. v. Phelps*, 130 U. S. 527, 32 L. ed. 1037, 9 Sup. Ct. Rep. 601; *North Chicago Street R. Co. v. Burnham*, 42 C. C. A. 584, 102 Fed. 673; *Lane v. Lantz*, 27 Md. 211; *Clarke v. Johnson Foundry & Mach. Co.* 19 Ky. L. Rep. 973, 42 S. W. 844; *Benjamin v. Hillard*, 23 How. 150, 16 L. ed. 518; *Brown v. Foster*, 51 Pa. 165; *Mondel v. Steel*, 8 Mees. & W. 858; 1 Sedgw. Damages, p. 275; *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547, 5 Atl. 253; *Douglass Axe Mfg. Co. v.*

Y. Supp. 834, where, because of a contractor's delay in putting a heating apparatus in a house, a house owner was compelled to occupy another house, which he had already leased to third parties, much longer than he intended, and thus, because of his inability to move out and to deliver possession to his tenant, lost certain rent. In an action for work done and materials furnished, the house owner set up as a counterclaim this alleged lost rent; it was held, however, that, in the absence of notice of the circumstances concerning the agreement to rent, the alleged damages were too remote to charge the contractor.

For an exhaustive note upon the general subject of loss of profits of sale or purchase as damages, see subject note to *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 52 L.R.A. 209.

Upon the general subject of loss of profits as an element of damages for breach of contract, see subject note to *Wells v. National Life Assn.* 53 L.R.A. 33.

For loss of profits on possible sales as measure of damages for breach of contract where no contingent sales have been effected, see case note to *Winston Cigarette Mach. Co. v. Wells-Whitehead Tobacco Co.* 8 L.R.A. (N.S.) 255.

Gardner, 10 Cush. 88; Seigworth v. Leffel, 76 Pa. 476; Tuttle v. Brown, 4 Gray, 457, 64 Am. Dec. 80; Brown v. Foster, 51 Pa. 165.

The rental of the separate offices represents in reality the profits of running an office building, and is remote and purely speculative and contingent.

Wood v. State, 66 Md. 61, 5 Atl. 476; Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co. 65 Md. 73, 3 Atl. 108.

Messrs. Richard B. Tippet & Brother and W. S. Bansemer, for appellees:

When a contract is made under special communicated circumstances, the damages resulting from the breach of the contract are the amount of the injury which would ordinarily follow from a breach under such special circumstances.

Arctic Ice Mach. Mfg. Co. v. Maryland Ice Co. 79 Md. 107, 29 Atl. 69; Webster v. Woolford, 81 Md. 331, 32 Atl. 319; Livermore Foundry & Mach. Co. v. Union Compress & Storage Co. 105 Tenn. 204, 53 L.R.A. 482, 58 S. W. 270; Boutin v. Rudd, 27 C. C. A. 529, 53 U. S. App. 525, 82 Fed. 685; New York & C. Min. Syndicate & Co. v. Fraser, 130 U. S. 622, 32 L. ed. 1035, 9 Sup. Ct. Rep. 665; Gaslight Co. v. Colliday, 25 Md. 1; Furstenburg v. Fawsett, 61 Md. 187; Colvin v. McCormick Cotton Oil Co. 66 S. C. 66, 44 S. E. 380; Laufer v. Boynton Furnace Co. 84 Hun, 311, 32 N. Y. Supp. 362; The Nimrod, 141 Fed. 215; Dixon-Woods Co. v. Phillips Glass Co. 169 Pa. 168, 32 Atl. 432; Accumulator Co. v. Dubuque Street R. Co. 12 C. C. A. 37, 27 U. S. App. 364, 64 Fed. 70; Swain v. Schieffelin, 134 N. Y. 471, 18 L.R.A. 385, 31 N. E. 1025; Berkey & G. Furniture Co. v. Hascall, 123 Ind. 507, 8 L.R.A. 65, 24 N. E. 336; Hexter v. Knox, 63 N. Y. 566; Stewart v. Lanier House Co. 75 Ga. 582.

The loss of rentals was not speculative and contingent so as not to be cognizable.

Abbott v. Gatch, 13 Md. 333, 71 Am. Dec. 635; Arctic Ice Mach. Mfg. Co. v. Maryland Ice Co. 79 Md. 108, 29 Atl. 69; Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 14 L. ed. 157; Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 212, 54 Am. Rep. 676, 4 N. E. 264; Trigg v. Clay, 88 Va. 335, 29 Am. St. Rep. 723, 13 S. E. 434; Lanahan v. Heaver, 79 Md. 422, 29 Atl. 1036; Simpson v. London & N. W. R. Co. L. R. 1 Q. B. Div. 277; Baltimore & O. R. Co. v. Stewart, 79 Md. 500, 29 Atl. 964; Lavens v. Lieb, 12 App. Div. 487, 42 N. Y. Supp. 902; Stewart v. Lanier House Co. supra; Viles v. Barre & M. Traction & P. Co. 79 Vt. 312, 65 Atl. 104. 17 L.R.A. (N.S.)

Burke, J., delivered the opinion of the court:

The appellees, in August, 1904, began the erection upon their lot No. 11 East Lexington street a six-story office building. This building was completed and occupied about the 1st of April, 1905. On the 7th day of October, 1904, the parties to this appeal entered into a contract by which the appellant, the Winslow Elevator & Machine Company, in consideration of the sum of \$1,600, agreed to furnish and erect in a workmanlike and substantial manner in said office building one electric combined passenger and freight elevator in accordance with certain specifications set out in the contract. The elevator was to be furnished and in working order, according to these specifications, by the 15th day of January, 1905, subject to limitations of strikes, lockouts, accidents, and other unavoidable causes. Incorporated in this contract was this guaranty: "We guarantee all the labor and material furnished to be of the best grade and free from defects, and will replace defective apparatus within two years, provided an inspection proves such claim; and also that the apparatus will work to its rated capacity, and will do its work when kept clean, dry, and in good condition, provided you employ competent attendants." On January 14, 1907, the appellees sued the appellant in the superior court of Baltimore city for a breach of the contract. The declaration contains the six common counts and one special count, which alleged the breach for which the suit was brought to be that the appellant did not erect the elevator in a good and workmanlike manner in accordance with the proposal and specifications embraced in the contract. The count further averred that, as a result of the unsafe and defective construction of the elevator and its unsatisfactory operation and working, the appellees "lost large sums of money by the loss of tenants in the said building, who removed therefrom, and from others who refused to rent the offices in said building by reason of the general complaint of said elevator due to its improper, defective, and dangerous construction; and sustained much other loss and damage." To the six common counts the appellant pleaded the general-issue plea, and traversed the seventh plea. Issue was joined, and the case proceeded to trial before a jury, resulting in a verdict and judgment for the appellees for the sum of \$7,000. From this judgment the appeal now before us was taken.

The testimony appearing in the record is very conflicting; but it is not necessary for us to discuss it at length, or to decide upon which side of the case is found the weight or preponderance of evidence. The defendant

insisted that it had performed all its obligations under the contract, and it offered evidence, if the jury had found it to be true, to have justified a verdict in its favor. On the other hand, the evidence adduced by the plaintiffs proved the breach alleged in the declaration. It was exclusively the province of the jury to decide upon the weight and sufficiency in fact of the evidence, and, as they accepted the evidence of the plaintiffs as to the defective workmanship and construction of the elevator, we are bound by their finding upon these questions, and therefore a minute examination of the evidence, in the absence of any question as to its legal sufficiency, becomes unnecessary. There is only one question in the case, and that is, Were the plaintiffs entitled to recover for the loss of rents claimed in the declaration? According to the evidence of Mr. Hoffman, the direct loss sustained in the purchase of a new elevator, for repairs, etc., was \$1,565. The jury, therefore, allowed \$5,435 for loss of rents. The evidence, some of which was taken subject to exception, showed that the building was one of the first erected after the fire of February, 1904, and that there was then a great demand for offices, and that rents were high. The building has forty-five office rooms, and one large room on the first floor, which was at first rented for \$3,000 per year, but was subsequently reduced to \$2,000. It is also shown that, following the completion of other office buildings, rents began to decline, and the plaintiffs were obliged, in consequence, to make material reductions in the rent. There were forty-five offices in the building, and upon each Mr. Hoffman fixed a certain rental value. According to this schedule of prices the estimated yearly income from these rooms was \$10,800, or \$900 per month. Before the building was completed seven or eight offices had been rented, and Mr. Hoffman was diligent in his efforts to rent all the rooms. There was evidence tending to show general complaint about the elevator; that in some instances reduction in rents was made on account of the bad elevator service; and that this bad service was a great objection to tenants and to others who might otherwise have rented offices in the building. Much of the testimony on the question as to what extent the elevator did in fact prevent people who would have otherwise rented from becoming tenants is inconclusive and conjectural, and we have been unable to find any reasonably definite evidence upon which the jury could have found such a great loss of rents. This circumstance strikingly demonstrates the necessity of applying the correct rule for the measurement of damages in cases like the present. In the leading case of *Hadley v. Baxendale*, 9 Exch. 17 L.R.A. (N.S.)

341, Baron Alderson stated the rule of damages in cases for breach of contract to be this: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them." The court granted a new trial in that case upon the ground that "the judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages." The second branch of this rule, like the famous judgment of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, which declared that an act of Congress contrary to the Constitution was void, was an *obiter dictum*, still it has been consistently followed in later cases, and, as said by Judge Pearce in the *Western U. Teleg. Co. v. Lehman*, 105 Md. 442, 66 Atl. 266, "remains the law of England, and has been generally approved in this country, and has been too often recognized in this state to be departed from, even if we were so disposed." It was approved in *United States Teleg. Co. v. Gildersleeve*, 29 Md. 233, 96 Am. Dec. 519; *Maryland Ice Co. v. Arctic Ice Mach. Mfg. Co.* 77 Md. 203, 26 Atl. 493; *Webster v. Woolford*, 81 Md. 329, 32 Atl. 319, and in the recent case of *Russell v. Stoops*, 106 Md. 138. 66 Atl. 698. In *Webster v. Woolford*, *supra*,

Judge Robinson said that "the first part of the rule as thus laid down applies to cases in which the damages are the direct and natural result of the breach of the contract, and which the law presumes to have been in the contemplation of both parties. The latter part of the rule applies in cases where special damages are claimed under special circumstances made known by the plaintiff to the defendant at the time the contract was made; and in such cases the plaintiff is entitled to recover such damages as may reasonably be supposed to have been in the contemplation of both parties in view of the circumstances thus disclosed." It must be admitted that the loss of rents cannot be recovered upon the ground of interruption or destruction of the plaintiffs' business, because there was no established business to be injured or destroyed. It is well settled that, before a recovery can be had upon this ground, it must appear that the business which is claimed to have been injured was an established one, and that it had been conducted successfully for such a length of time that the profits thereof could be ascertained with reasonable certainty. But "where a new business or enterprise is floated, and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation." 13 Cyc. Law & Proc. p. 59.

Damages for losses sustained for injury to business may be recovered in that class of cases to which the cases of *Brown v. Werner*, 40 Md. 16, and *Lawson v. Price*, 45 Md. 123, belong. Nor is it contended that the loss of rents claimed can be recovered under the first part of the rule in *Hadley v. Baxendale*, because obviously such losses are not the direct and natural result of the breach alleged. They are special or consequential damages, for which recovery is sought under the second part of that rule which is expressly relied upon by the appellees. In the statement of this rule it will be observed that general language is used, and it has been found that its application to the facts of particular cases has given rise to questions of great nicety and difficulty. While the rule has been universally recognized, the instances of its application present some confusion. It is true that in this case the appellant knew at the time it made the contract that the elevator was to be installed in an office building; but it would seem to be clear, both upon reason and authority, that mere knowledge of that fact would not be sufficient to render it liable for the special

losses claimed in this suit. To fix such a liability upon it upon that ground alone,—and in this case there is no other upon which it can rest,—would be a startling and dangerous proposition. Under such a rule, the plumber, the gas fitter, the stair builder, or the machinist who defaulted in his contract to do certain work upon any of the great office buildings might be held liable for enormous special damages simply because he knew his contract had reference to such a building. Certainly no support can be found in *Hadley v. Baxendale* for such a position, and we have discovered none elsewhere. Where a recovery is asked under the second part of the rule stated in that case, which constitutes an exception to the general rule upon the measure of damages, the evidence must show that the "special circumstances, being in view of both parties to the contract, constituted its basis." The rule is never applied unless the evidence warrants the conclusion that the contract was to some extent based upon the special circumstances out of which the injury arose. To apply this rule, the evidence must show that "the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition." *British Columbia & U. I. Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 509. In *Globe Ref. Co. v. Landa Cotton Oil Co.* 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754, special damages were sought to be recovered for a breach of contract, and in which, upon the facts, there were much stronger reasons than in this case for the application of the rule for which the appellees here contend. In that case the defendant had defaulted in his contract to deliver certain tanks of crude oil to the plaintiff. By the terms of the contract the oil was to be delivered f. o. b. buyer's tanks at seller's mill. The plaintiff sought to recover as part of his damages the cost of transporting tanks to the defendant's mill to receive the oil, and also for loss of the use of the tanks, etc., upon the ground that these losses were in the contemplation of the parties at the time the contract was made. But it was held that these losses could not be recovered. In the course of its opinion the court said: "The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage v. Genning*, 1 Rolle Rep. 368; *Hulbert v. Hart*, 1 Vern. 133. It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out

by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind." There is nothing in the contract or in the evidence that would make the appellant responsible for these special losses. It would be most unreasonable to presume that he would have assented to the contract upon such a condition, and it does not appear that the appellees believed at the time that the appellant assumed liability for such losses. But, assuming *ex gratia* that the contract is one which falls within the rule contended for, the losses claimed could not be recovered, because they are too uncertain and contingent. We must apply to damages such as are sued for in this case the same principles which govern in cases where profits are sought to be recovered for a breach of contract. The real thing claimed here is the income or profit which the owners might have received from the rent of the building had the appellant performed the contract. There are cases in which such damages have been recovered, and cases in which such a recovery has been denied. The distinction between the two groups or classes of cases, which is broad and obvious, was clearly stated by Chief Justice Nelson in *Masterton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38. The principle of that case has been generally approved by the courts. It was adopted by the Supreme Court of the United States in *Philadelphia W. & B. R. Co. v. Howard*, 13 How. 307, 14 L. ed. 157, and is the settled rule in this state. *Abbott v. Gatch*, 13 Md. 334, 71 Am. Dec. 635; *Lawson v. Price*, 45 Md. 123; *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 611. 57 Am. Rep. 318, 3 Atl. 306, 9 Atl. 126; *Shafer v. Wilson*, 44 Md. 268; and many other cases. In *Lanahan v. Heaver*, 79 Md. 419, 29 Atl. 1036, Judge McSherry states the rule to be that, "whenever it is purely problematical whether any profits would have been realized at all by reason of contingencies which might never happen, or where the profits have reference to dependent and collateral engagements entered into on the faith of the performance of the principal contract, there, without regard to any uncertainty as to mere amounts, probable profits cannot be recovered, because 17 L.R.A. (N.S.)

too speculative, indefinite, and remote." This principle is in no manner affected by the second part of the rule in *Hadley v. Baxendale*, 9 Exch. 341. In *Wolcott v. Mount*, 36 N. J. L. 271, 13 Am. Rep. 438, the court said: "It must not be supposed that, under the principle of *Hadley v. Baxendale*, mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the *quantum* of his loss by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty." When the claim of the plaintiffs for the recovery of lost rent is considered in the light of these rules, it certainly must be denied. What rent they might have received from the building was not only dependent upon collateral engagements with persons who might rent the rooms, but upon many other considerations, such as location, desirability of rooms, the amount of rent asked, light and air, competition of other buildings, the number of tenants, the ability of the owners to keep the rooms occupied, and the general character of the management of the building. There are so many elements of uncertainty which enter into and affect the question that any estimate of loss could be little short of a guess. The special damages sued for in this case are so uncertain and incapable of reasonable ascertainment that they cannot be recovered.

It follows that the court erred in refusing to strike out the testimony referred to in the first and second bills of exception, and in granting the plaintiffs' second prayer. The portion of that prayer which allows a recovery for loss of rents is alone objectionable. The other part is conceded to be correct. We find no error in the ruling upon the defendant's prayers. Its fourth and fifth prayers announce correct principles of law, but are inapplicable to the facts of the case. Its sixth and seventh prayers do not express as clearly and accurately the measure of damages as applied to the facts as does the earlier part of the plaintiffs' second prayer, and that

part of the prayer may be taken upon the retrial of the case as expressing the true measure of damages.

Judgment reversed and new trial awarded, the appellees to pay the costs.

NEBRASKA SUPREME COURT.

CHARLES N. OGDEN et al., Appts.,
v.

ARTHUR GARRISON.

(— Neb. —, 117 N. W. 714.)

Appeal — equity — motion for new trial.

1. To secure a review of an equity case in this court, the filing of a motion for a new trial in the court below is not required.

Vendee — tenant's rights — possession — notice.

2. A purchaser is chargeable with notice of a tenant's rights when the latter is in the actual possession of the real estate at the time it is sold.

Fixtures — new lease — reservation.

3. The execution of a new lease, in which the tenant does not expressly reserve fixtures or improvements erected by him under a preceding lease, does not deprive him of the right to remove them.

(September 16, 1908.)

APPEAL by plaintiffs from a judgment of the District Court for Harlan County in defendant's favor in an action brought to restrain the defendant, a tenant, from removing certain buildings from the demised premises. Affirmed.

The facts are stated in the opinion.

Mr. John Everson, for appellants:

The defendant having admitted the execution of the lease with the covenants to sur-

Headnotes by EPPERSON, C.

Note. — The effect of renewing tenancy without reserving right to remove fixtures is treated in a subject note to Wadman v. Burke, 1 L.R.A. (N.S.) 1192, in supplement of which, attention is directed to the following recent decisions:

In Bergh v. Herring-Hall-Marvin Safe Co. 70 L.R.A. 756, 69 C. C. A. 212, 136 Fed. 368, it was held that entering under a renewal lease which does not reserve the right to remove trade fixtures consisting of chattels which may be removed without injury to the building does not destroy that right.

In Crandall Invest. Co. v. Ulyatt, 40 Colo. 35, 90 Pac. 59, it was held that a tenant holding over under an agreement that he might do so for a few days upon payment of rent, amounting simply to an extension of his former lease, did not thereby lose his right to remove fixtures.

In Daly v. Simonson, 126 Iowa, 716, 102 17 L.R.A. (N.S.)

render all the improvements of every kind thereon, which improvements were all upon the premises when the lease was signed, is now estopped in laying claim to them as owner.

Taylor, Land. & T. § 552; Ewell, Fixtures, p. 174; Bowman v. Wright, 65 Neb. 662, 91 N. W. 580, 92 N. W. 580; Sanitary Dist. v. Cook, 169 Ill. 184, 39 L.R.A. 369, 61 Am. St. Rep. 161, 48 N. E. 461; Carlin v. Ritter, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301; Tibbetts v. Horne, 65 N. H. 242, 15 L.R.A. 56, 23 Am. St. Rep. 31, 23 Atl. 145.

Messrs. J. G. Thompson and Keester & Myers, for appellee:

At the time of the erection of the buildings, by agreement between the lessor and lessee, these were to be and remain personal property, and have so remained; and the making of the lease did not change the character of them.

Daly v. Simonson, 126 Iowa, 716, 102 N. W. 780; McCarthy v. Trumacher, 108 Iowa, 284, 78 N. W. 1104; Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195; Wall v. Hinds, 4 Gray, 256, 64 Am. Dec. 64; Elwes v. Mawe, 3 East, 38, 2 Smith, Lead. Cas. 244; District Twp. v. Moorehead, 43 Iowa, 466; Mickle v. Douglas, 75 Iowa, 78, 39 N. W. 198; Wright v. Macdonnell, 88 Tex. 140, 30 S. W. 907.

When a tenant is in actual possession of real estate at the time it is sold by the landlord, the purchaser is chargeable with notice of the tenant's rights.

Friedlander v. Ryder (Friedlander v. Hewitt) 30 Neb. 783, 9 L.R.A. 700, 47 N. W. 83.

Epperson, C., filed the following opinion:

The defendant objects to the jurisdiction of this court, for the reason that the plaintiffs filed no motion for a new trial in the court below. This was a proceeding in

N. W. 780, it is held that a tenant placing improvements on land under a lease authorizing him to remove them does not lose his improvements by taking a lease from a subsequent purchaser of the premises, which, though containing no reservations or exceptions, is practically a renewal of the leases theretofore executed.

On the other hand, in Precht v. Howard, 187 N. Y. 136, 9 L.R.A. (N.S.) 483, 79 N. E. 847, it was held that the omission from a renewal lease of a provision reserving title to a building erected upon the premises by the lessee for purposes other than trade destroys his right thereto; and an agreement entered into at the expiration of the term, extending for a short period the time within which the lessor should exercise the option to grant a further lease or purchase the building, as provided by the lease, is immaterial,

term, if he holds under a new lease, in which no provision for the removal of the fixtures is made, he is treated as having abandoned his right thereto." See also *Radey v. McCurdy*, 209 Pa. 306, 67 L.R.A. 359, 103 Am. St. Rep. 1009, 58 Atl. 558. In *Sanitary Dist. v. Cook*, 169 Ill. 184, 39 L.R.A. 369, 61 Am. St. Rep. 161, 48 N. E. 461, it was held that trade fixtures erected by a tenant during the term of the original lease cannot be removed after the expiration of a new lease which contains no reservation of any right or claim of the tenant to the fixtures, and does not recognize his right to remove them. This also was the holding in *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301, wherein a review of many decisions is given, and wherein Judge Cooley's opinion in *Kerr v. Kingsbury*, supra, is criticized. The reasons for the rule imposing an estoppel upon the execution of a new lease, stated briefly, seem to be upon the theory that the fixtures on the premises at the time of the renewal lease have become a part of the thing demised, and the tenant, by accepting a lease of this kind without reserving the fixtures, has acknowledged the right of his landlord to them. This, it occurs to us, means that, by a failure to reserve his own property upon a renewal of the lease, the tenant is conclusively presumed to have presented it to his landlord.

We find in many decisions holding that the creation of a new lease may operate as an estoppel, that the rule is not carried to the extent of holding that a renewal which, in fact, continues the former tenancy, will operate as an estoppel. And in the case at bar it appears that the renewal lease was but a continuation of his tenancy. It does not appear that it provided for the payment of less rent, nor that it lengthened the tenancy. Under the law he was, in the absence of such renewal lease, entitled to possession of the land until the end of the period fixed by it. He was a tenant from year to year. We presume, in the absence of evidence, that such tenancy had not been terminated when the renewal lease was made. It covered a period of one year only. It is quite apparent that it was executed for the purpose of terminating the defendant's existing tenancy, and that it did not create a new one. Defendant had not yielded possession. Nothing appears in the renewal lease indicating an intention to give the buildings in controversy to the landlord. The buildings referred to in the lease were the other buildings upon the land which were in fact a part of the realty, and placed there before defendant's tenancy commenced or thereafter by the landlord. It is not sound reasoning to hold, under the evidence 17 L.R.A. (N.S.)

of this case, that the defendant intended to make a present to the landlord. He erected the buildings. They were his property. He never received anything for them. It is difficult to see how the renewal lease, which may better be termed an extension lease, in which defendant agreed to protect the plaintiffs' buildings, can operate as a transfer of the defendant's chattels to plaintiffs' grantor. It would seem better reasoning to hold that the renewal lease was intended by the landlord as an extension of the time in which the defendant was privileged to avail himself of all the rights secured to him by the tenancy. Again, the buildings in controversy never became fixtures in the sense that they were affixed to the freehold. In *Carlin v. Ritter*, supra, the rule there announced, and above referred to, was applied to a bakehouse and oven, an awning attached to the house, a furnace, window shutters, counters, shelving, etc. But it was there also held that a "wooden structure or building merely resting by its own weight on flat stones laid upon the surface of the ground, and having no other foundation, is not a fixture." Although we have in this opinion, for convenience, referred to the buildings in controversy as "fixtures" and "improvements," yet in the law controlling landlords and tenants they are in fact not such, but are chattels.

The judgment of the district court was right; and we recommend that it be affirmed.

Duffie and Good, CC., concur.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment of the District Court is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ROSARIO NOTTO

v.

ATLANTIC CITY RAILROAD COMPANY,
Plff. in Err.

(— N. J. —, 69 Atl. 968.)

Mortality tables — admissibility — foundation.

A mortality table printed in a law book is not admissible in evidence, where it is

Headnote by SWAYZE, J.

Case Note. — Method of authenticating mortality tables.

It is a generally recognized rule that mortality tables as published in standard encyclopedias are admissible in evidence with-

not shown to have been in actual use for the purpose for which such tables are intended, or to have acquired a reputation for accuracy, unless the authenticity is established by competent evidence.

(June 15, 1908.)

out further proof of their authenticity. *Had- den v. Sioux City & P. R. Co.* 99 Iowa, 735, 48 N. W. 733; *Worden v. Humeston & S. R. Co.* 76 Iowa, 310, 41 N. W. 26; *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380, 49 N. W. 990; *Pearl v. Omaha & St. L. R. Co.* 115 Iowa, 535, 88 N. W. 1078; *Atchison, T. & S. F. R. Co. v. Ryan*, 62 Kan. 682, 64 Pac. 603.

In *Gorman v. Minneapolis & St. L. R. Co.* 78 Iowa, 509, 43 N. W. 303, mortality tables were admitted as properly authenticated where, in addition to the fact that the tables offered were contained in Johnson's *New Universal Encyclopedia*, there was the testimony of one who had "had something to do with the book," that he considered it a standard and scientific work.

Life tables printed pursuant to legislative authority, as in a Code supplement, and there stated to be based upon the actuaries and combined experience tables, are sufficiently authenticated to be admitted in evidence. *Clark v. Van Vleck*, 135 Iowa, 194, 112 N. W. 648.

A printed excerpt purporting to contain life tables is inadmissible in evidence without proper authentication; but a text-book on Pleading and Practice, showing the Carlisle tables of the expectation of life, is admissible, where the latter is an authority of general acceptance in the courts, and the Carlisle table therein contains a brief history of its construction from vital statistics collected by its author. *Sellers v. Foster*, 27 Neb. 118, 42 N. W. 907.

The evidence of an insurance agent touching life tables, when it appeared that he was expert enough to have been employed for years about the business of life insurance and to know what tables were used, was held a sufficient authentication of the tables to warrant their admission as evidence, in *Central R. Co. v. Richards*, 62 Ga. 306.

The Iowa court, in *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059, while declining to hold that evidence of authenticity must be offered before the American mortality tables are receivable in evidence, decides that, if such evidence is required, it is furnished by showing that the table is a standard used by leading life insurance companies.

In *Pearl v. Omaha & St. L. R. Co.* supra, a life-insurance manual containing the American experience tables was received in evidence after it was shown that the tables therein contained were in general use by insurance men throughout the state, and accepted as authority. This was considered sufficient authentication, though the witness giving the testimony had no knowledge of the way the tables were in fact made up, or the class of persons included in the estimate.

17 L.R.A. (N.S.)

ERROR to the Supreme Court to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

An insurance manual was properly admitted in evidence to show an expectancy of life, in *Missouri, K. & T. R. Co. v. Ransom*, 15 Tex. Civ. App. 692, 41 S. W. 823, where there was proof that the manual was published in the United States, and used by nearly all insurance men, and considered reliable and standard authority among them; and that it was the American experience table showing the expectancy of life.

Standard mortality tables are admissible in evidence; but the authenticity of the writings produced as such tables should be established by proof satisfactory to the court, as by the testimony of a witness familiar with them and with their use. *Camden & A. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634.

Where witnesses testified that they were life-insurance agents, and that the tables offered in evidence were those generally used and relied upon in the life-insurance business, and that they show the life expectancy of men without regard to their avocation, there was a sufficient foundation for the admission of the tables, although the witnesses had no personal knowledge of their correctness. *Gulf, C. & S. F. R. Co. v. Johnson*, 10 Tex. Civ. App. 254, 31 S. W. 255.

A life table shown to have been in use by all insurance companies as a basis for life expectancy was held, in *Gulf, C. & S. F. R. Co. v. Smith* (Tex. Civ. App.) 26 S. W. 644, sufficiently authenticated to be received in evidence.

A contention that the American mortality tables could be admitted only on proof of universal adoption as authority for life expectancy was overruled in *Mississippi & T. R. Co. v. Ayres*, 16 Lea, 725, the court holding that any mortality tables, English or American, shown to be used by reputable insurance companies, are admissible without further proof as to their authenticity.

Where it was shown that a mortality table was used by the majority of the life insurance companies of America, there was sufficient proof to render it proper evidence, notwithstanding the fact that the particular table used in evidence was prepared for the private use of the agents of a particular company. *San Antonio & A. P. R. Co. v. Morgan* (Tex. Civ. App.) 40 S. W. 672.

Where a life-expectancy table was offered in evidence, and it did not appear that the table was in any respect standard, or that it was well established or recognized authority, or even that it was in general use by life insurance companies; and a witness examined with reference thereto had no other information concerning the table than that contained in the book itself,—it was not sufficiently authenticated to warrant its being received in evidence. *Banks v. Brame*, 195 Mass. 97, 80 N. E. 799.

Messrs. Thompson & Cole for plaintiff in error.

Messrs. Andrew J. King and Carrow & Kraft for defendant in error.

Swayze, J., delivered the opinion of the court:

The only assignment of error that we think we need consider is that which challenges the admission in evidence of volume 20 of the American & English Encyclopædia of Law to prove the Carlisle Mortality Tables.

That mortality tables are admissible in a proper case has been decided by this court. *Camden & A. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634. We there said that the authenticity of the paper produced as the table should be established by proof satisfactory to the court, as by the testimony of a witness familiar with it and with its use, and that its office and use should be explained by a competent witness.

The only proof in this case was by the testimony of one of the counsel for the plaintiff, who produced the volume of the Encyclopædia and testified that the tables represented the reasonable expectancy of life as shown from the experience gathered by insurance companies in America and England, and was known as the "Carlisle table." Upon cross-examination he said he knew nothing other than what he saw in the book, and had not compared the table there given with a table recognized and established as the Carlisle table. There was no preliminary proof as to his knowledge or use of the Carlisle table, and we cannot assume that a lawyer is necessarily competent to testify as to the accuracy of a mortality table. That he was not familiar with the subject seems to be fairly inferable from his statement that the Carlisle table is based on American as well as English experience. His knowledge of the character of the table was derived from what appeared on its face, and it did not purport to be the Carlisle table, but a table based on American experience.

We do not doubt that cases may arise in which the court will take judicial notice of the accuracy of mortality tables. They may be found in books in constant use by the courts for making calculations necessary to ascertain the value of annuities, or rights of dower and curtesy, or may be adopted by rule of court. But, before the court will take judicial notice of such tables, it ought to know, either by its own experience or the general use of the table by lawyers or actuaries, or its reputation, that it is accurate. We have no knowledge that the table printed in the book in question has ever been used in such a way that we may fairly as-

sume it to be accurate. It seems to have been in print only since 1902, and, as far as we know, has never been actually used for the purpose for which such tables are intended. If it is, as it purports to be, correctly copied from a table authorized by statute in New York, a different question might be presented; but as the case now stands this table was not admissible. That it may have been harmful appears from the reference made to it by the judge in his charge.

For this error the judgment must be reversed.

TEXAS SUPREME COURT.

EX PARTE F. M. DAVIS.

(— Tex. —, 111 S. W. 394.)

Contempt — refusal to pay alimony — imprisonment for debt.

A commitment for contempt for wilful refusal to obey an order to pay suit money and temporary alimony pending a divorce suit is not an unconstitutional imprisonment for debt.

(June 17, 1908.)

Case Note. — Imprisonment for failure to pay alimony as violation of the constitutional provision against imprisonment for debt.

In a note to *Carr v. State*, 34 L.R.A. 634, upon the general question of the constitutionality of imprisonment for debt, the earlier cases upon this subject are collected and discussed at page 665; and this note includes only cases which have been decided since the preparation of the earlier note.

It is stated in the earlier note that the majority of the cases are in favor of the theory that alimony is not a debt within the meaning of the state Constitutions inhibiting imprisonment for debt, and therefore the defendant's imprisonment is not contrary to the constitutional provisions,—the commitment being regarded as an imprisonment for the wilful contempt of the court's order, and in the nature of a punishment therefor rather than as a means of enforcing payment of a debt. The later cases are generally to the same effect.

Thus, in *Bronk v. State*, 43 Fla. 461, 99 Am. St. Rep. 119, 31 So. 248, it was held that alimony was to be regarded more in the light of a personal duty due, not alone from the husband to the wife, but from him to society, that courts of equity have the power to enforce by detention of the person of the husband in cases where he can discharge it, but will not.

And in *Re Popejoy*, 26 Colo. 32, 77 Am. St. Rep. 222, 55 Pac. 1083, it was held that a man who, upon failure to comply with an order of the court to pay a certain sum as alimony, had been committed to jail, was not

APPPLICATION for a writ of habeas corpus to secure the release of petitioner from custody to which he had been committed for contempt in refusing to obey the court's order to pay alimony. Dismissed.

The facts are stated in the opinion.

Mr. F. D. Cosby for relator.

Mr. Charles A. Rasbury, for respondent:

The amount allowed as alimony is largely within the discretion of the trial court, and will not be disturbed unless some abuse of the discretion of the court is apparent; and in this proceeding no complaint is made along that line.

14 Cyc. Law & Proc. p. 762; *Lytle v. Galveston*, H. & S. A. R. Co. 41 Tex. Civ. App. 112, 90 S. W. 316.

The imprisonment of the husband as a result of contempt proceedings in the divorce suit did not violate a constitutional provision against imprisonment for debt.

Ex parte Latham, 47 Tex. Crim. Rep. 208, 82 S. W. 1046; *Hurd v. Hurd*, 63 Minn. 443, 65 N. W. 728; *Lewis v. Lewis*, 80 Ga. 706, 12 Am. St. Rep. 281, 6 S. E. 918; *Carlton v. Carlton*, 44 Ga. 216; *Wightman v. Wightman*, 45 Ill. 167; Ex parte Perkins, 18 Cal. 60; Ex parte Todd, 119 Cal. 57, 50 Pac. 1071; *Lyon v. Lyon*, 21 Conn. 185; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817; *Haines v. Haines*, 35 Mich. 138.

imprisoned for a debt, but because of his refusal to obey the lawful order of the court with reference to the debt represented by the judgment in favor of his wife.

So, in a proceeding to require the defendant to show cause why he should not be attached for failure to pay alimony as directed by the court, it was held, in *Barclay v. Barclay*, 184 Ill. 375, 51 L.R.A. 351, 56 N. E. 636, that the commitment of a defendant for refusing to pay alimony is not an imprisonment for debt; and the liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. And the same doctrine was reiterated when the case came before the court again on an appeal from an order committing the defendant to jail, in 184 Ill. 471, 56 N. E. 821.

And in *State ex rel. Huber v. King*, 49 La. Ann. 1503, 22 So. 887, in an application for a writ of habeas corpus by a husband who had been committed for failure to pay alimony, the court said: "An order for alimony in a divorce suit is nothing more than the judicial sanction and enforcement (under abnormal conditions), through the judiciary, of the duty by the husband to support the wife."

So, there are numerous other decisions which hold that a decree or order for alimony in a divorce proceeding is not a debt within the meaning of that term as used in the Constitution. *State v. Cook*, 66 Ohio St. 566, 58 L.R.A. 625, 24 N. E. 567; *Hoff-*

Brown, J., delivered the opinion of the court:

The relator presented to this court his petition for writ of habeas corpus, praying that he be discharged from the custody of the sheriff of Dallas county, by whom he is held under commitment for contempt of the district court, forty-fourth district, in Dallas county. It will appear from the statement that the order of commitment was entered in a civil proceeding. The application was granted, and the case submitted to this court, on the following undisputed facts:

Mrs. S. J. Davis, the wife of relator, instituted a suit in the forty-fourth district court of Dallas county against relator for a divorce from the bonds of matrimony and for the custody of their two minor daughters. Prayer was also made for alimony and for an allowance for attorneys' fees. Upon application for alimony and attorneys' fees, made before the presiding judge of that court, it was shown that Mrs. Davis was without means to support herself and children, and that relator was earning \$212 per month. There was no contest over the fact that Davis was able to pay the amount which was allowed by the court. Upon a hearing, to which Davis was duly notified and appeared, the court entered an order allowing the plaintiff \$100 attorneys' fees, and it was also ordered that Davis pay into

man v. Hoffman, 28 Ohio C. C. 658; *Kaderabek v. Kaderabek*, 3 Ohio C. C. 419; *Mowry v. Bliss*, 28 L.R.A. 114, 65 Atl. 616; Ex parte Morey, 28 R. I. 242, 66 Atl. 575; *Daly v. Daly*, 80 Conn. 609, 69 Atl. 1021; *Re Cave*, 26 Wash. 213, 90 Am. St. Rep. 736, 66 Pac. 425.

In *Lubbering v. State*, 19 Ohio C. C. 658, it was held that, while failure to comply with an order to pay alimony might be punished by imprisonment, the order must be limited to the alimony only, and could not be made to include costs.

The earlier note above mentioned cites but one case, *Coughlin v. Ehlert*, 39 Mo. 285, which holds that alimony is a debt within the meaning of the constitutional prohibition against imprisonment for debt. There appears to be but one case holding this view, among the later decisions.

In *Ex parte Gerrish*, 42 Tex. Crim. Rep. 114, 57 S. W. 1123, it was held that a judgment rendered in a divorce proceeding for an amount of alimony agreed upon between the parties was a judgment for debt, and an imprisonment for failure to pay such judgment would be contrary to the Texas Bill of Rights, which provides that no person shall ever be imprisoned for debt. The court said that the judgment received no greater dignity for having been rendered in a divorce proceeding. It, however, held that there was no authority in the court to grant permanent alimony, and this may have influ-

the court \$80 per month for each month, to be paid over to Mrs. Davis for the support of herself and her minor children during the pendency of the suit. Defendant refused to pay the alimony or attorneys' fees, and plaintiff in the case filed a motion before the court, upon which defendant was duly cited and appeared, in which motion it was alleged that Davis had refused to pay the sum adjudged by the court to be by him paid for alimony, and it was prayed by the motion that he be adjudged to be in contempt of court, and that he be committed to prison until he should comply with the order of the court. At this hearing Davis offered no excuse for his failure and refusal to pay the money allowed by the court, but simply contended that the allowance was a debt against him, and that the court had no power to commit him for contempt for a refusal to pay the debt. After hearing the evidence and arguments upon the motion, the honorable court made the following order: "And it further appearing to the court that, since the entry of the above order requiring the payment of alimony, the defendant has earned \$1,272, and has contributed nothing to the support and maintenance of his family, and offers no excuse for so doing other than that by law he is not required to do so, and yet refuses and declines to pay the amount of alimony set out in said order, and has not to the date of this order paid any portion of the alimony directed to be paid, it is the opinion of the court that the defendant is in contempt of the orders and decrees of this court. It is therefore ordered, adjudged, and decreed by the court that the defendant, said F. M. Davis, is in

contempt of this court in refusing to obey its mandate and decree, and he is therefore hereby held and decreed to be in contempt of this court, and in punishment therefor is hereby committed to the county jail of Dallas county, Texas, and shall be confined therein until such time as he shall purge himself of such contempt by complying with the order of this court. It is further ordered, adjudged, and decreed, and the sheriff of Dallas county is hereby commanded and directed to seize and take charge of said defendant, F. M. Davis, and hold and confine him in the county jail of Dallas county, Texas, subject to the further orders of this court." Davis still refused to pay the sum adjudged against him as alimony for his wife, as well as attorneys' fees, and, on the 21st day of May, 1908, a commitment was duly issued against the said Davis, directed to the sheriff of Dallas county, under which he was arrested and confined.

The relator submits his case upon this proposition: "The judgment rendered in favor of Mrs. Davis for alimony is a debt, and cannot be collected by a proceeding for contempt, nor can the defendant be imprisoned therefor." In support of his proposition that he cannot be imprisoned because of his refusal to pay the amount assessed against him as alimony for his wife and children, relator cites *Ward v. Ward*, 1 Paschal's Dig. Decisions (Tex.) § 1837; *Ex parte Gerrish*, 42 Tex. Crim. Rep. 114, 57 S. W. 1123; *Ex parte Ellis*, 37 Tex. Crim. Rep. 539, 66 Am. St. Rep. 831, 40 S. W. 275; *Lott v. Kaiser*, 61 Tex. 665. *Ward v. Ward* was decided by Associate Justice J. H. Bell of the supreme court of this state

enced the determination; but the decision stands as an exception to the general rule.

Some other cases, while not strictly in point, may be cited as bearing somewhat upon the question.

Thus, in *Carnahan v. Carnahan*, 143 Mich. 390, 114 Am. St. Rep. 660, 107 N. W. 73, 8 A. & E. Ann. Cas. 53, a decree of divorce was granted to the complainant, but she was ordered to pay over to her husband a certain sum which she had in her possession. Upon petition of the husband and his trustee in bankruptcy, she was found guilty of contempt of court in refusing to make the payment ordered. It was held that a commitment for such contempt was in violation neither of the constitutional prohibition against imprisonment for debt, nor of a statute which provided that, with some exceptions not bearing on this case, no female should be imprisoned on any process in any civil action.

So, in *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, in discussing the question whether alimony was provable or not in bankruptcy, the court said: "Alimony does not arise from any

business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction."

The obligation of a wife to pay money for the support of her husband under an order of the court within Civil Code, § 176, was held, in *Livingston v. Superior Court*, 117 Cal. 633, 38 L.R.A. 175, 44 Pac. 836, not to be a debt within the provision in the Constitution against imprisonment for debt.

And imprisonment for failure to pay a sum ordered by the court in an action against the husband for support was held, in *Perry v. Pernet*, 165 Ind. 67, 74 N. E. 609, 6 A. & E. Ann. Cas. 533, not to be imprisonment for debt within the meaning of the Constitution. And to the same effect was the decision in *Stonehill v. Stonehill*, 146 Ind. 445, 45 N. E. 600, where a father disobeyed an order of the court to pay a certain sum for the support of a child. Cases of this character, however, are without the scope of this note.

upon a writ of habeas corpus, at chambers, in the year 1861. There is no report of the case, and we have not been able to ascertain the facts upon which the decision was based. Under these conditions, it can have no weight as authority. In *Lott v. Kaiser* the contest was over a conveyance which had been made by one of the parties to defeat the claim of his wife for alimony; the deed being made during the pendency of the suit for divorce. In deciding the case the supreme court, speaking by Judge Stayton, said: "It seems to be well settled that, pending a divorce suit, a wife asserting a just claim for alimony is, within the meaning of the statutes prohibiting fraudulent conveyances, to be deemed a creditor." This does not establish the proposition that her claim was a debt within the meaning of the Constitution, nor that she was a creditor, but that, under the circumstances, she was entitled to the same protection against the fraudulent conveyance that a creditor would be. *Ex parte Gerrish* was a writ of habeas corpus before Judge Brooks of the court of criminal appeals. In a suit for divorce against Gerrish, by agreement between himself and his wife, judgment was entered, in the entry of the judgment granting a divorce, that he should pay \$20 per month for the support of his child until it had arrived at a certain age or should marry. Upon his refusal to pay, the judge of the district court adjudged Gerrish to be guilty of contempt of court and directed his imprisonment until he should comply with the judgment. Judge Brooks very properly held that the original judgment was not entered by the court as an allowance for alimony, but was a judgment for money upon an agreement between the parties, which was a debt within the terms of the Constitution, and therefore the failure to pay the judgment did not subject Gerrish to the procedure for contempt and imprisonment, and he was discharged. In *Ex parte Ellis* a writ of habeas corpus was granted by Judge Henderson of the court of criminal appeals, and the facts appear to be that in a suit for divorce between Ellis and his wife a divorce was awarded and the custody of the child was given to the mother, and the court, reciting the fact that the mother was unable to support the child and that the father was in good circumstances, made an order that he should pay to the mother \$5 a month until the child should arrive at the age of eight years. Ellis having failed to pay the sum adjudged against him, the court cited him to appear, and, upon a hearing, adjudged him to be in contempt of the court, and directed that he be committed to jail until he should comply with the order. This order was made in vacation, 17 L.R.A. (N.S.)

and Judge Henderson held that the district judge had no authority in vacation to make such an order, and therefore discharged the prisoner from custody. The position of the relator seems to be sustained by *Coughlin v. Ehlerl*, 39 Mo. 285, as also by *Goodwillie v. Millimann*, 56 Ill. 523.

Under the statutes of this state, the filing of a suit for divorce gives to the district court jurisdiction over the husband and wife and their minor children, and over the community estate of the parties. In order to enable the court to compel the husband to perform the natural and legal duty to support his wife, the district judge is empowered by the following articles of the Revised Statutes to assess alimony against the husband:

"Art. 2985. Pending any suit for a divorce, the court, or the judge thereof, may make such temporary orders respecting the property and parties as shall be deemed necessary and equitable.

"Art. 2986. If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case."

Mrs. Davis being without the means of support for herself and her children, and Davis having ability to support them, it was both his natural and legal duty to do so, notwithstanding the pendency of the suit for divorce. The wife had a claim upon Davis for the performance of his duties toward her and her children, and the court, having jurisdiction of all the parties, had the power to compel the husband to discharge his obligation to his wife and children. Davis having refused to obey the order of the court, and it appearing that he was able to comply with the order and that he had no excuse for the refusal to do so, the district court had authority to order him into confinement until he should comply with its mandate. 1 Enc. Pl. & Pr. p. 439; 14 Cyc. Law & Proc. p. 760; *Carlton v. Carlton*, 44 Ga. 220; *Lewis v. Lewis*, 80 Ga. 706, 12 Am. St. Rep. 281, 6 S. E. 918; *Chase v. Ingalls*, 97 Mass. 527; *Lyon v. Lyon*, 21 Conn. 196; *Andrew v. Andrew*, 62 Vt. 498, 20 Atl. 817; *Haines v. Haines*, 35 Mich. 144; *Pain v. Pain*, 80 N. C. 322.

It is claimed by the relator that the order of the court assessing against him a sum as alimony to be paid to his wife for the support of herself and her children was a judgment, and, being a judgment, it was a debt, for the enforcement of which he could not be imprisoned, under the Consti-

tution of this state. We have cited only a portion of the authorities which sustain the action of the court. We might have added many others, for, so far as we have been able to find, the decisions of the courts upon the question are unanimous. The claim of Mrs. Davis for support of herself and children was not a debt. She could not have maintained an action against her husband to enforce that duty, except in the manner in which it was done in the proceedings for divorce. The Constitution of this state does not prohibit the imprisonment of a man except for the collection of a debt, and the proceeding in this case, being for the enforcement of a duty, natural and legal, due from Davis to his wife and children, all of whom were subject to the jurisdiction of the court, does not come within the prohibition of the Constitution.

Neither was the order of the court directing the payment of the sum by Davis into court for the benefit of his wife and children a debt. The order was in fact not a final judgment. It was limited to the time when the final judgment should be entered in the suit, and, under our statute, could not go beyond that. The order was interlocutory strictly, and collateral to the proceeding for divorce,—a method by which the court would enforce its jurisdiction over the parties and compel the doing of an act in the discharge of a duty from one to the other. There are many instances in the proceedings of the courts where the performance of an act may be enforced by imprisonment and would not come within the prohibition of the Constitution, although it might involve the payment of money. The order made in this case was not a final judgment; for it was subject at any time to modification, or even to be set aside and annulled by the judge who entered it, and the performance of it could be, by the judge, excused at any time, upon a showing of inability or other good reason why it should not be performed. The order could not be enforced, except in that proceeding for divorce. If it were not complied with the plaintiff in the case could not maintain an action in any other court in this state to enforce the payment. 4 Enc. Pl. & Pr. pp. 432, 433. It seems to us clear that the order entered by the court did not in any sense constitute a debt against the defendant, Davis.

The judgment of the District Court, commanding that the relator be confined in jail until he shall comply with the order of the court, is not void; and therefore it is ordered by this court that the relator be remanded to the custody of the sheriff of Dallas county, to be by him confined under the order of the District Court, and that the relator pay all costs of this proceeding.

IOWA SUPREME COURT.

SARAH D. ROE

v.

NATIONAL LIFE INSURANCE ASSOCIATION, Appt.

(—Iowa, —, 115 N. W. 500.)

Insurance — examiner's report — conclusiveness.

1. An insurance company is bound by the act of its medical examiner in reporting an applicant to be a fit subject for insurance, unless he was purposely misled by the applicant, and inveigled into recommending him as a fit subject for insurance when but for such deception he would not have done so.

Same — untrue answers — innocence.

2. An applicant for insurance who, after producing, at the request of the agent, a policy written previously, from which answers to the questions are copied, and, upon being told that the application is prepared

Case Note. — Effect of stipulation in application or policy of life insurance that it shall not become binding unless delivered to assured while in good health.

Life-insurance policies and applications therefor frequently contain the stipulation that the policy shall not take effect unless delivered to insured while he is in good health, or unless he is in good health at the date of the policy or date of issuance, or unless he is in good health at the time of the payment of the first premium. It may be said generally that such stipulations are valid and binding, and that there can be no recovery if the policy is delivered to assured while he is in ill health, provided that neither the insurer nor any authorized agent had knowledge thereof; and this is true, by the weight of authority, even if the illness arose before the time of the application and medical examination. This is likewise true if the policy is delivered after death, but in ignorance thereof, or even with knowledge on the part of an agent without authority. Still more is it true if never delivered because of the illness or death of applicant. In actions involving such stipulations the principal points litigated involve questions of waiver or estoppel, and of what constitutes good health, and whether assured was in good health at the stipulated time. These questions are discussed more at length in the cases given below.

Effect of assured's ill health at time of application.

In Metropolitan L. Ins. Co. v. Moore, 117

according to the rules and regulations of the association, signs it, cannot be charged with bad faith merely because some of the answers are untrue at the time of the signature.

Same — estoppel of company.

3. An insurance company whose agent prepares an application by securing his information from other applications which had been signed by the applicant, is estopped from setting up the falsity of the answers in defense to its liability on the policy, where the applicant, without knowing what the answers are, signs the application at the request of the agent upon being assured that it is prepared according to the rules and regulations of the insurer.

Evidence — insurance — estoppel.

4. Evidence as to the manner in which an application for life insurance was prepared is admissible in an action on the policy, to estop the company from availing

itself of the falsity of statements contained therein as a defense.

Insurance — false answers — immateriality.

5. False statements in an application for life insurance will not defeat liability on the policy on the theory that they misled the medical examiner, where he testifies that he made his report on his own examination, and paid no attention to such answers.

Evidence — hypothetical.

6. When the actual effect produced on the medical examiner by erroneous answers given by an applicant for insurance to questions propounded to him is shown, evidence is not admissible as to what weight might have been given by physicians generally to the answers had they been correct.

Same — false answers — effect.

7. Evidence of the examining physician that his recommendation of an applicant

Ky. 651, 79 S. W. 219, it was held that a condition in a life policy that it is not binding unless, on the date of delivery, the insured is in sound health, applies only to unsoundness of health arising after the application and medical examination; that, when the unsoundness existed before the application and medical examination, the company must rely on the statements in the application to avoid a recovery on the policy, not upon the clause in question.

But the contrary is expressly held in *Gallant v. Metropolitan L. Ins. Co.* 167 Mass. 77, 44 N. E. 1073, *infra*; *Barker v. Metropolitan L. Ins. Co.* 188 Mass. 542, 74 N. E. 945, *infra* (stipulation was that assured must be in good health on date of policy); and impliedly held in *Austin v. Mutual Reserve Fund Life Asso.* 132 Fed. 555; *Metropolitan L. Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560; *Volker v. Metropolitan L. Ins. Co.* 1 Misc. 374, 21 N. Y. Supp. 456, (good health on date of policy); *Thompson v. Metropolitan L. Ins. Co.* 90 N. Y. Supp. 1006, *infra*; *Carmichael v. John Hancock Mut. L. Ins. Co.* 116 App. Div. 291, 101 N. Y. Supp. 602, *infra* (good health on date of policy).

The effect of such condition is not avoided because assured was ignorant of his unsound condition. *Carmichael v. John Hancock Mut. L. Ins. Co.* *supra*. Nor is insurer estopped by the report of its examining physician that assured was in sound health at the time of his physical examination. *Gallant v. Metropolitan L. Ins. Co.* *supra*.

Good health.

"The term 'good health,' when used in a policy of life insurance, means that the applicant has no grave, important, or serious disease, and is free from any ailment that seriously affects the general soundness or healthfulness of the system. A mere temporary indisposition, which does not tend to weaken or undermine the constitution, at the time of taking membership, does not 17 L.R.A. (N.S.)

render the policy void." *Barnes v. Fidelity Mut. Life Asso.* 191 Pa. 618, 45 L.R.A. 264, 43 Atl. 341. To like effect, see *Plumb v. Penn Mut. L. Ins. Co.* 108 Mich. 94, 65 N. W. 611; *Packard v. Metropolitan L. Ins. Co.* 72 N. H. 1, 54 Atl. 287; *Genung v. Metropolitan L. Ins. Co.* 60 App. Div. 424, 69 N. Y. Supp. 1041; *Metropolitan L. Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908; *Woodmen of the World v. Locklin*, 28 Tex. Civ. App. 486, 67 S. W. 331.

And the question whether the insured was in good health at the stipulated time is usually for the jury. *Plumb v. Penn Mut. L. Ins. Co.*; *Packard v. Metropolitan L. Ins. Co.*; *Genung v. Metropolitan L. Ins. Co.*; and *Barnes v. Fidelity Mut. Life Asso.*,—*supra*.

The liability of the insurer depends on the actual, not the apparent, good health of the assured at the time the policy is to take effect. *Barker v. Metropolitan L. Ins. Co.* *supra*; *Thompson v. Travelers' Ins. Co.* 13 N. D. 444, 101 N. W. 900.

And the liability of the insurer does not depend upon the knowledge by insured of his unsoundness, but upon the fact itself. *Metropolitan L. Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908, also S. C. on subsequent appeal 68 Ohio St. 614, 68 N. E. 4; *Thompson v. Traveler's Ins. Co.* *supra*.

Effect of incontestable clause.

In *Mutual Reserve Fund Life Asso. v. Austin*, 6 L.R.A. (N.S.) 1064, 73 C. C. A. 498, 142 Fed. 398, it was held that a provision in an insurance policy that, if the policy shall have been in continuous force for three years, it shall thereafter be incontestable, cannot be held to be inapplicable to a policy delivered when the insured was not in good health, on the theory that, because the policy provided that it should not take effect until delivered while the insured was in good health, it never was in force.

Effect of cancellation.

In *Ray v. Security Trust & L. Ins. Co.*

for insurance would not have been prevented by knowledge that his attending physician thought he had heart disease, since he would have relied on his own examination, is admissible in an action upon the policy, as pertinent to the issue whether or not he was misled by answers in the application.

(March 17, 1908.)

APPEAL by defendant from a judgment of the District Court for Polk County in plaintiff's favor in an action brought to recover the amount alleged to be due on a life-insurance certificate. Affirmed.

Statement by Ladd, Ch. J.:
The National Life Insurance Association

126 N. C. 166, 35 S. E. 246, it was held that a provision in an application that the policy was not to take effect until the delivery of the policy to, and payment of the first premium by, the applicant while in good health, was not illegal, nor against public policy; and the insurer did not waive it by accepting a portion of the first premium at the time of the application, and sending applicant a letter stating that the application had been received, since, conceding that, by approving the application, the minds of the parties had met, yet the agreement was subject to the condition attached; and hence there is no liability of insurer on the policy when it was canceled by insurer while in the hands of its agent before delivery, even though at such time the applicant was in good health, and did not consent to the cancellation, but shortly thereafter died.

Effect of delivery to agent as delivery to assured.

In *Mutual L. Ins. Co. v. Sinclair*, 24 Ky. L. Rep. 1543, 71 S. W. 853, when the insurer had two local agents, and one solicited the insurance, but, by an understanding among the parties, it was agreed that the application should be forwarded in the name of the second agent, and it was accepted and the policy mailed to such second agent, which was, during his absence and with his consent, taken from the postoffice by the first agent, but never delivered to applicant because, subsequently to the application, which stipulated that the policy was not to be in force until the first premium had been paid while applicant was in good health, the applicant had received a pistol shot wound,—it was held that the first agent was the agent of insurer, and not of applicant; and therefore that delivery to the first agent was not delivery to the applicant, and that the insurer was justified in withholding the policy because of the illness of applicant, and could not be compelled to deliver it to him.

In *Neff v. Metropolitan L. Ins. Co.* 39 Ind. App. 250, 73 N. E. 1041, it was held that, though delivery of a policy to an agent unconditionally, to be delivered by him to as-

issued its certificate insuring the life of Thomas S. Roe, October 7, 1903, naming his wife, Sarah D. Roe, as beneficiary. The insured died September 4, 1904, and in this action the beneficiary seeks to recover the indemnity promised. The defense interposed was that the insured procured the medical examiner of the defendant company to report him as a fit subject for insurance, by fraud, and that the certificate never took effect owing to a condition therein that it should not become operative until delivered to the applicant in good health. The reply asserted that the defendant's agent prepared the application and procured the insured's signature thereto without reading it to him, or allowing him to read it, and, by reason thereof, the association was es-

sured, is a delivery to assured, and such agent's failure or refusal to deliver will not prejudice the assured's rights, yet, that there could be no presumption, in the absence of evidence, that the principal had instructed an agent to deliver a policy without the payment of the first premium or while the applicant was sick, in plain violation of the stipulations of the policy and of the application.

In *Kilcullen v. Metropolitan L. Ins. Co.* 108 Mo. App. 61, 82 S. W. 966, a receipt accompanying the application, and given on part payment of the first premium, stated that no insurance is in force until a policy is issued thereon and delivered according to its terms; and the policy stipulated that "no obligation is assumed by this company upon this policy until the first premium is paid and the policy duly delivered, nor unless, upon the date of delivery, the insured is alive and in sound health." When the policy reached the local agent applicant was ill and subsequently died, for which reason the agent refused to deliver. The court held that delivery to the local agent was not delivery to the applicant, although the policy provided that the party filling out the application (which was done by said agent) should be the agent of the applicant, because his agency for the applicant was limited to the particular act of filling out the blanks, and did not affect his agency for the company for the purpose of delivery.

Effect of refusal to deliver because of illness or death of assured.

In *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 689, the application stipulated that the contract of insurance should not take effect until the first premium was paid and the policy delivered during the lifetime and good health of applicant. The policy was not issued because applicant became ill and died. It was held that the delivery of the application to the local agent was a mere proposal to become insured, that the death of the applicant revoked the offer, that thereafter there could be no contract because one of the parties was

topped from questioning the truthfulness of the statements contained therein. After the evidence had been introduced, the court directed a verdict for plaintiff and entered judgment accordingly. The defendant appeals.

Messrs. Carr, Hewitt, Parker, & Wright and Sullivan & Sullivan for appellant.

Messrs. Clark & Byers, Roe & Roe, and A. A. McLaughlin for appellee.

Ladd, Ch. J., delivered the opinion of the court:

The insured may not have been in good health at the time the certificate was issued to him by the defendant, but that

dead, because the subject-matter of the contract had ceased to exist, and because there was no communication of the acceptance of the offer.

In *Neff v. Metropolitan L. Ins. Co.* supra, the application and policy contained the stipulation that the policy should not be in force until actual payment of premium and its acceptance by the company during the lifetime and good health of applicant; and the policy also provided that no obligation was assumed until delivery, nor unless, upon the date of delivery, the insured was alive and in sound health; that premiums were payable at the home office. The application was made November 29, 1901; it was received by the home office, December 6: it was executed and mailed to the local agent on December 11, and received by him December 16. Applicant became ill December 14, and died December 15. The policy was never delivered because of the death of the applicant. It was held that there was no liability on the policy.

In *Clark v. Mut. L. Ins. Co.* 129 Ga. 571, 59 S. E. 283, the application and policy contained the stipulation that the policy should not become binding upon the insurance company until the first premium had been paid during the good health of the applicant. The policy was issued and forwarded to the agent, but, before delivery, assured died, and it was never delivered. The court held that "the actual payment of the first premium during the good health of the applicant was a condition precedent to the liability of the insurance company upon said policy." Hence a nonsuit was properly directed.

In *St. Louis Mut. L. Ins. Co. v. Kennedy*, 6 Bush, 450, the application provided that the insurance should not be binding until the amount of the premium should be paid in the lifetime and good health of assured. The premium was not paid, and delivery was refused by the agent because of the illness of applicant, which had occurred after the making of the application, and from which he subsequently died. It was held that there was no liability on the part of the insurer.

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alone constitutes no defense. The association was not prohibited from carrying such a risk, nor did the insured owe it the duty of warning it against such an undertaking. It was purely a matter of contract between the parties, and, if each acted in good faith toward the other in making it, there is no reason for relieving either from performance, even though the association may rue its bargain. Insurance companies and associations necessarily act through agents, and their medical examiners are the agents whose duty it is to inquire into the insurability of the applicants for insurance. Unless this association's agent was purposely misled by the deceased and inveigled into recommending him to the association as a fit subject for insurance, when but for such

In *Hills v. Penn. Mut. L. Ins. Co.* 28 Ky. L. Rep. 790, 90 S. W. 544, the application stipulated that the company should incur no liability until the application had been received, approved, the policy issued by the company, and delivered and paid for during the lifetime and good health of applicant. The policy was issued and sent to the agent, but not delivered because the agent learned of the illness of assured, of which he subsequently died. It was held that the contract was not completed, and a verdict for the company was properly directed.

In *Provident Sav. Life Assur. Soc. v. Elliott*, 29 Ky. L. Rep. 552, 93 S. W. 659, an application providing that the company "shall incur no liability under this application until it has been received, approved, and a policy issued thereon and the premium actually paid . . . during my [assured's] lifetime and good health," was rejected for certain defects, and a policy issued and sent to the agent with instructions to have the assured sign new applications, and not to deliver the policy until the new applications, which also contained the above condition, were signed. At the time the policy was issued, and when it reached the agent's post-office, assured was ill, and, as he died the same day, the policy was never delivered. It was held that, the condition not having been complied with, there could be no recovery.

In *Schwartz v. Germania L. Ins. Co.* 18 Minn. 448, Gil. 404, it was held that, if the head office instructed its agent not to deliver the policy unless the assured was in good health, and the assured was not in good health, and the agent, for that reason, refused to deliver the policy, there was no completed contract on which the company was liable.

In *Kilcullen v. Metropolitan L. Ins. Co.* supra, the court held that a policy containing the stipulation that no obligation is assumed by insurer unless, on date of delivery assured is alive and in sound health, never became effective when the local agent refused to deliver it because, when it reached him, the applicant was ill, and subsequently died.

deception he would not have done so, it is estopped from putting in issue whether, at the time of the issuance or delivery of the certificate, he is a fit subject for insurance or not. Code, § 1812; *Weimer v. Economic Life Asso.* 108 Iowa, 451, 79 N. W. 123; *Nelson v. Nederland L. Ins. Co.* 110 Iowa, 600, 81 N. W. 807; *Stewart v. Equitable Mut. Life Asso.* 110 Iowa, 528, 81 N. W. 782; *Peterson v. Des Moines Life Asso.* 115 Iowa, 668, 87 N. W. 397. In other words, the insurer, having elected to investigate the physical condition of the insured, is bound by the conclusion of its authorized agent and specialist, unless this has been induced by fraud or deceit on the part of the insured, notwithstanding any warranties in the contract to the contrary. This mere-

ly requires the parties to deal "at arm's length" when contracting, and without reservation on the part of the insurer of the right to reinvestigate the same subject, after the insured has departed this life, with the design of depriving the beneficiary of the bounty intended. This much is said in response to counsel's animadversions on the character of the risk undertaken by the association in issuing its certificate of insurance to the deceased. A company or association is entitled to no more consideration than an individual in being compelled to suffer the consequences of bad bargains; and, if an applicant for insurance, without practising deception either by false representations or concealing facts he should disclose, can obtain a policy of insurance on

In *Oliver v. Mutual L. Ins. Co.* 97 Va. 134, 33 S. E. 536, it was held that the agreement in the application that the policy should not take effect until the first premium was paid and the policy delivered during assured's continuance in good health created a condition precedent to the company's liability; and hence there could be no liability on a policy executed in accordance with the application and sent to the local agent for delivery, but which delivery was in good faith held up by the company to give it time to examine into the truth of a material warranty in the application, during which time assured was killed while hunting, and the policy never delivered.

In *Girard v. Metropolitan L. Ins. Co.* Rap. Jud. Quebec, 20 C. S. 532, the application provided that the policy, if issued, should be in force only when the premium should have been actually paid whilst assured was alive and in good health. A portion of the premium accompanied the application, and, the medical examination being satisfactory, a policy was issued in New York on March 8, and placed in the post-office addressed to its Montreal agent March 9, and reached him March 10. March 8, assured became ill, and died on the morning of March 10. Subsequently plaintiff (wife and beneficiary) tendered the balance of the premium to the agent, who refused to deliver her the policy. It was held that, if the acceptance of the application constituted a valid contract to insure, yet this acceptance was subordinate to the aforesaid condition, which having failed, no insurance existed; and that, in view of the aforesaid condition, the placing of the policy in the postoffice in New York did not constitute a delivery of it to assured.

Effect of assured's knowledge of his condition.

In *Carmichael v. John Hancock Mut. L. Ins. Co.* 116 App. Div. 291, 101 N. Y. Supp. 602, the policy provided that it should not be binding unless, upon its date, assured was alive and in good health. Unknown to insurer, the insured was not in good health at the time of the application, nor upon the

date of the policy. A recovery was not allowed.

It was held in *Metropolitan L. Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908, that a provision in a statute that incorrect answers to interrogatories will not avoid the policy unless it is clearly proven that such answers were wilfully false, has no application to a condition that no obligation is assumed unless, upon the date of the policy, the insured is alive and in sound health; and it was error to refuse the charge that, if assured "was not in sound health on the dates of the policies, you must find for the defendant," even if assured did not know of the unsoundness. And in 68 Ohio St. 614, 68 N. E. 4, a refusal to give a similar instruction, asked, was held error.

It was held in *Packard v. Metropolitan L. Ins. Co.* 72 N. H. 1, 54 Atl. 287, that the ignorance by insured that he was not in sound health had no effect upon a condition that no obligation was assumed unless, upon the date of the policy, the assured was in sound health.

Effect of statutes relieving policy holders from representations and warranties.

It was held in *Barker v. Metropolitan L. Ins. Co.* 188 Mass. 542, 74 N. E. 945, that a statute relating merely to an "oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance" had no relation to a condition in the policy itself including one that "no obligation is assumed by the company" "unless, upon [its] date the insured is alive and in good health."

A statute providing that it is no defense to a policy that false answers were made to interrogatories, unless the answers were wilfully false, has no application to a condition in the policy that no obligation is assumed unless, upon its date, insured is alive and in sound health. *Metropolitan L. Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908.

In *Hood v. Prudential Ins. Co.* 22 Pa. Super. Ct. 244, it was held that noncompliance with a statute relieving policy holders from warranties contained in their applications,

his life, even though not a good risk, we know of no reason for not enforcing performance of its conditions.

1. The insured was not a fit subject for insurance, but, as said before, this did not prevent the defendant from promising indemnity upon his death. He did not knowingly mislead the medical examiner as to his physical condition, nor was such examiner deceived. The deceased was examined by a physician, acting for the defendant, who recommended the risk. It is estopped, then, from setting up as a defense "that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the . . . [report of the physician] was procured by or through the fraud or deceit

unless they are attached to the policy, did not prevent insurer from proving by the medical examiner substantive facts, not connected with the representations contained in the application, showing that assured was not in sound health at the date of the policy, within the meaning of a stipulation therein that no claim shall be paid on the policy unless, on its date, the assured is in sound health.

Waiver—who may waive?

In *Metropolitan L. Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560, it was held that a provision that the "contract shall not be binding upon the company unless, upon its date and delivery, the insured is alive and in sound health," may be waived by an agent who has authority to write applications and collect the premiums and turn them over to the company; that his knowledge must be imputed to the company.

In *Connecticut Indemnity Assn. v. Grogan*, 21 Ky. L. Rep. 717, 52 S. W. 959, the application stated that the policy should not be valid unless the premium was paid by the insured when in good health. At the time of the delivery of the policy and payment of the premium the insured was ill to the knowledge of the agent who made the delivery and received the policy. It was held that the condition could be waived by the company, and that "an agent who has authority to take applications for insurance, and power to collect the premium and remit the same to the company, as was done in this case, clearly has the power to determine as to whether the insured is entitled to receive the policy, and to waive any question as to sound health."

A general agent to take applications and deliver policies may waive the condition requiring delivery of the policy when assured is in good health, by delivering with knowledge of bad health. *Ames v. Manhattan L. Ins. Co.* 31 App. Div. 180, 57 N. Y. Supp. 759, affirmed without opinion in 167 N. Y. 584, 60 N. E. 1106; *Genung v. Metropolitan L. Ins. Co.* 60 App. Div. 424, 69 N. Y. Supp. 1041.

It was held in *Ormond v. Fidelity Life* 17 L.R.A. (N.S.)

of the assured." Code, § 1812. To constitute such fraud or deceit, there must have been an intention to deceive, and the examiner must have relied on false statements or representations made by the assured, or been misled by the concealment of facts which good faith required him to disclose. *Boddy v. Henry*, 126 Iowa, 81, 101 N. W. 447; *Ley v. Metropolitan L. Ins. Co.* 120 Iowa, 203, 94 N. W. 568. Had the negotiations for insurance continued after the application had been made, and the health of the applicant become impaired in the meantime, good faith might have required that he disclose the fact. See *Equitable Life Assur. Soc. v. McElroy*, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631; *Cable v. United States L. Ins. Co.* 49 C. C. A. 216, 111 Fed.

Asso. 96 N. C. 158, 1 S. E. 796, that a provision that, under no circumstances, shall the policy be in force until the actual payment of the annual dues during the lifetime and good health of the applicant, "constitutes a condition precedent," and that "no agent can dispense with its requirement."

—effect of provision that only certain officers may waive.

A stipulation in an application or policy that no one other than certain general officers named shall have power to make, alter, or discharge contracts or waive forfeitures is valid; and no other agent can bind the company by waiving the condition that the policy is not to take effect unless the insured is in good health at the time of delivery or date of policy, or when the first premium is paid. *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 689; *Powell v. Prudential Ins. Co. (Ala.)* 45 So. 208; *Reese v. Fidelity Mut. Life Assn.* 111 Ga. 482, 36 S. E. 637; *Neff v. Metropolitan L. Ins. Co.* 39 Ind. App. 250, 73 N. E. 1041; *McClave v. Mutual Reserve Fund Life Assn.* 55 N. J. L. 187, 26 Atl. 78; *Bowen v. Mutual L. Ins. Co.* 20 S. D. 103, 104 N. W. 1040. *Contra*, *National L. Ins. Co. v. Tweddell*, 22 Ky. L. Rep. 881, 53 S. W. 699.

But in *Northwestern Life Assn. v. Findley*, 29 Tex. Civ. App. 494, 68 S. W. 695, it was held that, notwithstanding a stipulation in the policy that "agents or collectors have no authority to alter or discharge any contract in relation to this insurance, or to waive any forfeiture thereof," a provision that the policy shall not become operative until the first premium is paid and the policy actually delivered to the insured while in good health may be waived by an agent having authority to collect premiums, and vested with discretion to withhold delivery of the policy if he finds insured is not in good health; and that the stipulation relates only to mere clerks having no authority to collect premiums, or to withhold delivery if insured is not in good health.

It was held in *Hancock Mut. L. Ins. Co.*

19. But there was no showing of any delay or of any impairment of his health subsequent to the examination and before the delivery of the certificate. Undoubtedly, some of the statements in the application were not correct. For instance, it was said in answer to questions, that he had never had any illness, that he had not consulted physicians, that he had no disease of the heart, and that he was in good health. He had been consulting a physician for several months, and, according to the testimony of the doctor, was then afflicted with a fatal disease of the heart; but the evidence that Roe was not aware of the nature of these answers is conclusive. The defendant's agent prepared the application from information obtained from another application the

insured had made to another company some time previous, and, by representing to him that the application was prepared according to the association's requirements, induced him to sign it. The application was prepared in connection with many others, and the manner of doing so was with the consent of the secretary of the defendant association. The only evidence that Roe may have known where the agent obtained the information was that of the latter, who stated: "I asked him to bring down his old policy that I could just copy from the policy I had written him up in the Northwestern Fraternal Reserve, and that I had permission from Mr. Pyle to do so." From this, deceased could not well have inferred that the agent intended to make use of the

v. Schlank, 175 Ill. 284, 51 N. E. 795, that an agent with power to solicit insurance, receive the application, forward it to the insurer, receive the policy when issued, collect the premium, and deliver the policy, has authority to waive a condition in the policy, including one that it shall not take effect until delivered and the first premium paid during the good health of the insured, even though the policy provides that no one except the president or secretary is authorized to make alterations, discharge contracts, or waive forfeitures.

—effect of delivery while assured is ill.

In *Cable v. United States L. Ins. Co.* 49 C. C. A. 216, 111 Fed. 19, reversed on jurisdictional grounds without prejudice, in 191 U. S. 288, 48 L. ed. 188, 24 Sup. Ct. Rep. 74, the application, which, by its terms, was made a part of the policy, stipulated that the policy should take effect only upon payment of the first premium and delivery of the policy while insured was in sound health and insurable condition. After the application, but before delivery, the applicant became seriously ill, and, while in this condition, the company's agent delivered the policy to assured's agent, and received from him the first premium, after being told of the illness of assured, but without its seriousness being disclosed. It was held that the provision that the application is to be considered as a part of the policy makes the statements therein as to health, warranties, which speak from the time of delivery; and hence, the assured's health having changed at the time of delivery, they were broken as soon as made; that, independently of this provision, an absolute duty rested upon the assured to disclose any change of health after the application; that, full disclosure of assured's health not having been made to the agent of the company, there was no waiver of the condition and warranty.

In *Reese v. Fidelity Mut. Life Asso.* supra, the application and policy stipulated that the policy should not become binding on insurer until the first payment had been actually received by insurer during the life-
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time and good health of assured. The policy was issued and sent to the local agent while the assured was in good health, but was not delivered, nor the first payment paid, until assured had become seriously ill. The court held the insurer not liable, saying: "It is clear from these explicit and unambiguous terms of the contract between the applicant and the association that the latter merely entered into an executory agreement, the performance of which absolutely depended upon the contingency that the first premium on the policy should be actually paid during the applicant's good health. This prerequisite had to be complied with before the policy could become effectual." And this was true although the local agent knew of the illness at the time he delivered the policy and received the first premium.

In *Anders v. Life Ins. Clearing Co.* 62 Neb. 585, 87 N. W. 331, a policy containing this provision: "This policy shall not take effect until the first premium thereon shall have been paid . . . in accordance with the premium receipt accompanying the same, and while the insured is in good health, as evidenced by the health certificates properly executed and furnished to the company,"—was wrongfully delivered by the agent to the assured, who, after the application, had become ill, without requiring payment of the premium or the execution of the health certificates. It was held that the payment of the premium and the execution of the health certificates were conditions precedent to the insurer's liability, and, these not having been complied with, there could be no recovery notwithstanding the delivery. It was further held that, although the blank certificate was never delivered to assured, yet, from the provision of the policy above mentioned and also a stipulation in the application that the policy should not take effect until the first premium should be paid during the good health of applicant, that assured was bound to take notice that the policy did not take effect until he had paid the premium and given some sort of certificate that he was in good health at the time of payment of the premium and delivery of the policy.

In *Maloney v. Northwestern Masonic Aid*

application, instead of the policy; and, further, that it was his purpose to copy the answers made in that application of the year previous. The physician testified on direct examination that he looked over the answers, and that to his inquiries the applicant said he understood them, and that they were correct; but, on cross-examination, the witness admitted that he did not remember whether he asked him if the answers were true or not, and explained that if he did not it was through oversight. As the applicant knew nothing of the contents of the application, he could hardly have made these statements to the medical examiner, and the latter's testimony as a whole shows conclusively that he had no recollection of the deceased having said that the

answers were correct, but had testified in reliance on his custom. Without knowledge of what the application contained, and having signed it on the assurance of the agent that he had prepared it according to the rules and regulations of the association, how can it be said that he acted in bad faith toward the insurer? If the association was deceived, this was owing to the neglect or wrongful manner of its agent in the preparation of the application under the sanction of its secretary, and not because of any deception practised by the deceased. For this reason, the defendant is estopped from setting up the falsity of the answers in the application as a defense. *Stone v. Hawkeye Ins. Co.* 68 Iowa, 738, 56 Am. Rep. 870, 23 N. W. 47; *Donnelly v.*

Asso. 8 App. Div. 575, 40 N. Y. Supp. 918, it was held that a provision of a policy that it should not take effect until payment of the first premium and delivery of the policy while the insured was in good health, was not waived by the agent's receipt of the premium from, and delivery of the policy to, a third person, who informed the agent of assured's illness, but did not state its seriousness,—especially when, two days before, assured sent a statement to insurer stating that he was in good health.

In *Grier v. Mutual L. Ins. Co.* 132 N. C. 542, 44 S. E. 28, the application was made February 26, the policy was executed March 9, but dated February 26, applicant became ill March 6, the policy was delivered by the agent March 14 with knowledge of applicant's illness, and the premium was then tendered him, but, for convenience of the agent, was not then paid, but was paid a little later, and sent to the district agent on March 16. On March 18, applicant died. Both the policy and the application provided: If the application is approved and a policy is issued, it shall be in force from the date of the application. The application alone (which, so far as appears, is not made a part of the policy) provided: The contract shall not take effect until the first premium shall have been paid during the applicant's continuance in good health; and further recited that the agent had given the insured a binding receipt "signed by the secretary of the company, making the insurance in force from this date, provided this application shall be approved and the policy signed by the secretary at the head office of the company and issued." The court held: "The provision in the application that the contract shall not take effect until the first premium shall have been paid during the applicant's continuance in good health is only a provisional agreement authorizing the company to withhold the delivery of the policy until such payment in good health; but, when the company actually delivers the policy, then it is estopped, in the absence always of fraud, to assert that its solemn contract is void either on account of nonpayment of premium, or of ill health, which stipulations were as-

serted in the application as conditions to excuse it from such delivery, and are not grounds to invalidate the policy after it has been delivered."

In *Metropolitan L. Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908, a policy containing the stipulation that "no obligation is assumed by this company upon this policy until the first premium has been paid, nor prior to the date of the policy, nor unless upon said date the insured is alive and in sound health," was delivered while assured was in poor health, but, so far as appears, without knowledge of such ill health on the part of the company. It was held that the company was entitled to an unconditional charge that the jury must find for insurer if, on date of the policy, or when it was delivered, assured was not in sound health. A similar ruling was made in 68 Ohio St. 614, 68 N. E. 4.

A general agent, with power to take applications and deliver policies, by delivering the policy to assured with knowledge of his ill health, thereby waives a condition therein that it is not valid unless issued during the good health of the person insured (*Ames v. Manhattan L. Ins. Co.* 31 App. Div. 180, 52 N. Y. Supp. 759, affirmed without opinion in 167 N. Y. 584, 60 N. E. 1106); or one that "no obligation is assumed . . . until the first premium has been paid and the policy duly delivered, nor unless, upon the date of delivery, the insured is alive and in sound health" (*Genung v. Metropolitan L. Ins. Co.* 60 App. Div. 424, 69 N. Y. Supp. 1041).

In *Packard v. Metropolitan L. Ins. Co.* 72 N. H. 1, 54 Atl. 287, the application and policy contained the stipulation that "no obligation is assumed by the company prior to the date hereof, nor unless, on said date, the insured is alive and in sound health." On the date of the policy and of the delivery assured suffered from a heart disease. After quoting the above provision, the court said: "The defendant's promise was not absolute, but conditional. The existence of life and sound health in the insured was a condition precedent to the promise of in-

Cedar Rapids Ins. Co. 70 Iowa, 693, 28 N. W. 607. The above are fire-insurance cases, but the same rule is applicable to companies or associations insuring lives as well. *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; *Temminck v. Metropolitan L. Ins. Co.* 72 Mich. 388, 40 N. W. 469. Of course, Roe was aware that he was not in good health; but there is not a word in this record to indicate that he knew that he was afflicted with a fatal disease, or that his malady was other than temporary. The physician who treated him testified that, though he cautioned him to be careful of himself, he avoided discouraging him. There is no showing that anything was done to obviate the fullest inquiry and examination.

insurance." And it accordingly held that the insurer was not liable.

It was held in *Thompson v. Travelers' Ins. Co.* 13 N. D. 444, 101 N. W. 900, that delivery of the policy and acceptance and retention of the premium while assured is ill do not estop the insurer from relying on the condition that the policy shall not take effect unless the premium is paid while assured is in good health, when insurer has no knowledge of the facts constituting the breach.

The delivery of a policy with notice of the insured's illness will not preclude the company from asserting that it shall take effect only upon delivery and payment of the first premium during the good health of assured, when the serious nature of the illness is concealed from the insurer. *Cable v. United States L. Ins. Co.* 49 C. C. A. 216, 111 Fed. 19; *Powell v. Prudential Ins. Co. (Ala.)* 45 So. 208, supra; *Thompson v. Metropolitan L. Ins. Co.* 99 N. Y. Supp. 1006.

But see *Northwestern Life Assn. v. Findley*, 29 Tex. Civ. App. 494, 68 S. W. 695, holding that an agent, having authority to collect premiums and vested with discretion to withhold delivery of the policy if he finds assured is not in good health, by delivering a policy and accepting the first premium with knowledge of the ill health of the applicant thereby waives the provision that the policy shall not become operative until the first premium is paid and the policy actually delivered to assured while in good health.

—effect of delivery after death of assured.

In *Powell v. Prudential Ins. Co.* supra, the application stipulated that the policy should not take effect until delivered and the first premium paid while the health of the applicant was in the same condition as described in the application, and that the application should be a part of the policy. The premium was paid by a third party, without the knowledge of applicant, while he was very ill, and without informing the agent of his condition, and the policy was not delivered until after the death of ap-

As the agent prepared the application and represented it to be in accord with rules and regulations of the association, Roe was not bound to ascertain its contents, but might rely upon the association having correctly stated the facts. *Donnelly v. Cedar Rapids Ins. Co.* supra. The association was charged with knowledge of facts brought to the attention of its agent; and, therefore, as it issued the certificate with knowledge of how the application was filled out and signed, it cannot be heard to complain that through the acts of its own agent it had been misled and deceived. See *Gurnett v. Atlas Mut. Ins. Co.* 124 Iowa, 547, 100 N. W. 542; *Helm v. Anchor F. Ins. Co.* 132 Iowa, 177, 109 N. W. 605.

2. The evidence concerning the prepara-

plicant. When the illness began, does not appear. The court said: "Here we find that two absolute conditions precedent of the contract of insurance were set aside or annulled in what the friends of the deceased attempted to do, in that the first premium was never paid by the assured nor anyone for him, and if, by any possible construction, it could be held that it was paid, it is not pretended that the assured was not fatally sick at the time, of which fact the company was ignorant; and, further, it is not denied that the policy was never delivered—if what was done could possibly amount to a delivery—until after the death of the assured. To hold that the policy was good under such circumstances would be to abrogate and set aside the contract of insurance, and hold the company liable for a payment of the policy against the very terms of its contract."

In *Reserve Loan L. Ins. Co. v. Hockett*, 35 Ind. App. 89, 73 N. E. 842, the application and policy contained the stipulation that the policy "shall not take effect until the first premium is paid, . . . nor unless the insured is in good health at the time of its delivery to him." The first premium was paid at the time of the application, and a receipt given saying that the payment should not create any liability until a policy had been issued. Thereafter assured died and a policy was issued dated as of the time of application and mailed to assured after his death, but in ignorance thereof. The court held that there were two conditions precedent to the contract of insurance taking effect, that the condition as to payment of premium was complied with, that "the second—as indispensable to the taking effect of the policies as the first—was never complied with, and could never be complied with, because the life of the applicant had ended before the policies were written and issued."

McClave v. Mutual Reserve Fund Life Assn. 55 N. J. L. 187, 26 Atl. 78, held that a policy providing that it would not be binding until delivered to assured during his life and while in good health had no validity when not delivered until after the death of assured; nor was such provision waived by the knowledge of the death by the agent

tion of the application was received, not to vary or contradict a written instrument, but for the sole purpose of estopping the association from availing itself of the falsity of the statements contained therein as a defense, and was admissible. *Parno v. Iowa Merchants' Mut. Ins. Co.* 114 Iowa, 132, 86 N. W. 210, and cases cited.

3. Nor was the physician shown to have been deceived. He testified, in substance, that he paid no attention to the statement in the application that the insured was in good health, and would not had the answer been in the negative, and the same was true of the answer that he had "no palpitation or disease of the heart;" that he did not rely on statements contained in the application as to the applicant's general condition of

health, but did rely upon the investigation he made by actual examination; that this, with the family history and deceased's statement that he suffered from rheumatism, furnished the basis for his report. He admitted, however, that, had the insured stated that he was being treated by a physician, he would have consulted the latter before reporting to the company, and would have respected his opinion, but would have relied on his own examination; and, further, that, even though that physician had said that the applicant had the heart disease, as he did at the trial, he would have concluded that he was mistaken; that, independent of what he might have ascertained from the physician treating him, taking into consideration the careful physical exam-

who delivered the policy, when such policy said that no agent had authority to make, alter, or discharge contracts without the written consent of certain general officers named. It was further held that the approval and acceptance of an application which provided that the policy should not be in force until the actual payment of the first annual dues and delivery of the policy during the lifetime and good health of assured gave merely a right to tender such annual dues while in good health, and demand a policy; but, when such tender was not made, no right of action accrued.

In *Roblee v. Masonic Life Assn.* 38 Misc. 481, 77 N. Y. Supp. 1098, an application for membership in a benefit society provided that it should not be in force until a certificate of membership had been delivered to the applicant during his life and while in good health. After application, assured sickened and died. Thereafter, in ignorance of the death, the certificate was mailed to assured, and later, but still without knowledge that death had occurred before delivery, an unpaid assessment was received. It was held that no contract was ever consummated, hence there could be no forfeiture of a contract which never existed, and therefore no waiver of forfeiture. Neither was there estoppel, since insurer did not intend to make a new contract, but to carry out a supposed old contract in ignorance of the facts making it never effective.

In *Ormond v. Fidelity Life Assn.* 96 N. C. 158, 1 S. E. 796, the application provided that, under no circumstances, should the policy be in force until the actual payment of the annual dues during the lifetime and good health of applicant. Soon after the application, the assured became ill and died. At the time of application the agent told applicant he could pay the premium then, or on delivery of the policy; and the latter time was chosen by applicant. In ignorance of the physical condition of applicant, the policy was issued while insured was ill, and mailed to insured after his death without demanding payment of premium. The agent, with knowledge of death, 17 L.R.A. (N.S.)

accepted the annual dues, which were later returned without prejudice. It was held that the provision in question, made by the policy a part of it, "constitutes a condition precedent;" that "no agent can dispense with its requirement;" that "the waiver relied on does not dispense with it;" and hence there is no liability under the policy.

—delivery for examination.

In *Northwestern Mut. L. Ins. Co. v. Amos*, 136 Mich. 210, 98 N. W. 1018, it was held that a policy containing the provision that it "shall not take effect until the first premium shall have been actually paid while the insured is in good health," which was handed to applicant for examination only, and on which the premium was never paid, but which was retained until after applicant's death, was never delivered, and therefore never in force. See also *McDonald v. Provident Sav. Life Assur. Soc.* 108 Wis. 213, 81 Am. St. Rep. 885, 84 N. W. 154. *infra*.

—effect of acceptance of first premium while assured is ill.

It was held in *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862, that the stipulation that a policy is not to take effect until a health certificate is furnished, is waived by acceptance of the premium without requiring the certificate.

In *Langstaff v. Metropolitan L. Ins. Co.* 69 N. J. L. 54, 54 Atl. 518, a policy provided that "no obligation is assumed by the company until the first premium has been paid, nor prior to this date, nor unless upon this date the insured is alive and in sound health." It was held that the policy did not become binding by a tender, or even payment, of the premium, while assured was ill and before the delivery of the policy to assured.

In *British Equitable Ins. Co. v. Great Western R. Co.* 38 L. J. Ch. N. S. 314, a receipt for the first premium, given at the time of delivery, had indorsed thereon the condition that, if any variation should have taken place in the health of the assured since the date of the medical examination and

ination made, he would have recommended Roe to the association as a fit subject for life insurance. This evidence is uncontradicted, and shows conclusively that any misstatements contained in the application did not mislead, and, had the answers been correct, his report to the association would not have been different. In the face of such a record, it is idle for counsel to contend that the recommendation of the medical examiner was the product of active fraud, or of fraudulent concealment.

4. But it is said that, because of a condition in the certificate that it should not be-

come operative until "delivered to the insured named herein while in good health," the certificate never took effect, for that the insured was never in good health subsequent to the signing of the application. This contention is disposed of by the statute providing that the association shall be estopped by its examiner's report from setting up in defense to an action on such a certificate that the insured "was not in the condition of health required by the policy at the time of the issuance or delivery thereof." Code, § 1812. This language is conclusive as to the point raised.

before actual payment of the premium, the receipt should be void. A change in health for the worse had taken place, which was not disclosed. It was held that the non-communication to the company of the change in health was fraudulent, and vitiated the policy.

Also, under head, "Effect of delivery while assured is ill," see the following cases: *Cable v. United States L. Ins. Co.* 49 C. C. A. 216, 111 Fed. 19; *Reese v. Fidelity Mut. Life Asso.* 111 Ga. 482, 36 S. E. 637; *Maloney v. Northwestern Masonic Aid Asso.* 8 App. Div. 575, 40 N. Y. Supp. 918; *Thompson v. Travelers' Ins. Co.* 13 N. D. 444, 101 N. W. 900; *Northwestern Life Asso. v. Findley*, 29 Tex. Civ. App. 494, 68 S. W. 695; also *Powell v. Prudential Ins. Co. (Ala.)* 45 So. 208.

—effect of acceptance of first premium after assured's death.

In *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 689, the application stipulated, *inter alia*, that the contract should not take effect until the first premium was paid during the lifetime and good health of applicant. It was held that this provision could not be waived by the agent receiving a portion of the first premium in trade after the death of the applicant.

In *Stringham v. Mutual Ins. Co.* 44 Or. 447, 75 Pac. 822, the application, which, by its terms, was made a part of the proposed contract, stipulated that the contract "shall not take effect until the first premium shall have been paid, during my [applicant's] continuance in good health; and the policy shall have been signed by the secretary of the company and issued." At the same time assured gave a sixty-day note to the agent, and received a receipt saying that the note, "if paid when due, will be in full for the first annual premium, . . . provided a policy is issued on his application made this day." Soon thereafter assured took sick and died. After the illness of assured and in ignorance thereof, but before his death, the application was approved, the policy executed and mailed to the agent, who received it seven days after the death of the assured, but never delivered it. Two days after the death of the assured the amount of the note was paid to the agent, but the 17 L.R.A. (N.S.)

fact of the death was not disclosed. The court held: (1) That the term "issued" meant the signing and execution of the policy, and did not include delivery; (2) that the application and the receipt, construed together, mean that the premium is considered paid when, and only when, the note is paid during assured's continuance in good health, and that, as this had not been done, there was no liability on the policy; (3) that the condition as to good health was not waived by the insurer executing the policy in ignorance of ill health of assured, nor by acceptance of the premium without knowledge of the death.

See also *Ormond v. Fidelity Life Asso. supra*.

—effect of acknowledgment of payment of premium.

It was held in *Grier v. Mutual L. Ins. Co.* 132 N. C. 542, 44 S. E. 28, that, if the premium in fact is not paid, the acknowledgment of payment in the policy, so far as it is a receipt for money, is only *prima facie*, and the amount can be recovered; but, so far as the acknowledgment is contractual, it cannot be contradicted so as to invalidate the contract.

—acceptance of subsequent premiums.

In *Metropolitan L. Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560, it was held that an agent who had authority to write applications and collect the money and turn it over to the company, by accepting premiums for two years after learning that assured was ill, when the policy was delivered, thereby waived a stipulation that the contract should not be binding unless upon its date and delivery assured was in sound health.

—effect of approval of application after breach.

An insurance company does not waive its right to insist on such provisions as a defense to its liability on the policy by approving the application in ignorance of the fact that assured is then ill (*Stringham v. Mutual Ins. Co. supra*); or dead (*Paine v. Pacific Mut. L. Ins. Co. supra*).

5. Defendant sought to show what weight would have been given ordinarily by an examining physician to correct answers to inquiries in an application for insurance such as those involved in this case. The evidence was excluded, and rightly so. It was wholly immaterial, as the incorrect answers were shown not to have influenced the examiner's report. The actual effect having been shown without dispute, the consideration which physicians might have given to the matters if correct was of no importance.

6. Exception is also taken to the admis-

sion of evidence of what weight the examining physician would have given to the diagnosis of the doctor attending deceased had he been aware of it. This evidence was elicited on cross-examination, and was pertinent to the issue as to whether the physician had been misled by the answers contained in the application.

Some other rulings are discussed, but none which could have influenced the conclusion reached, and for this reason they are not reviewed.

Affirmed.

—effect of giving option to accept policy.

In *Mutual L. Ins. Co. v. Sinclair*, 24 Ky. L. Rep. 1543, 71 S. W. 853, it was held that the giving by an insurer to an applicant, of an option of sixty days in which to decide whether to accept a policy, is not a waiver of a condition in the application that the policy shall not be in force "until the first premium shall have been paid during my (applicant's) continuance in good health;" and hence, if, after the application and before the expiration of the sixty days, the applicant received a severe pistol-shot wound, he cannot, by tendering the first premium, compel the insurer to accept the same and deliver the policy.

—effect of giving time to pay premium.

In *Neff v. Metropolitan L. Ins. Co.* 39 Ind. App. 250, 73 N. E. 1041, at the time of the application it was agreed between the applicant and the agent that the agent would pay the premium to the company, and that the applicant would later reimburse the agent; but the applicant died before this was done, and the policy was never delivered. It was held that the mere unfulfilled promise of the agent to pay the premium was not payment, and, payment not having been made during the lifetime of assured, there was no liability.

In *Mutual L. Ins. Co. v. Lucas*, 25 Ky. L. Rep. 2052, 79 S. W. 279, the application and policy provided that the policy should not take effect until the first premium had been paid during assured's continuance in good health. It was issued and delivered to the agent, but not delivered to assured. The agent and assured agreed that the first premium should be paid on a future day named, but that the insurance should be in force from the date of the policy, then past. Before the day set for the payment of the premium, assured was killed. It was held that the agreement was not sufficient to waive prepayment of premium, but was only an agreement to hold the policy until the day named, and then deliver upon condition of payment; that, this contingency having never happened, the policy never became effective.

—effect of retention of first premium.

In *Thompson v. Travelers' Ins. Co.* supra, 17 L.R.A. (N.S.)

it was held that retention of the first premium by the company after the receipt of proofs of death showing the cause of death did not operate as an estoppel; the rights of the parties being fixed by the death of the assured.

Retention of the first premium until the assured's death, six weeks after delivery of the policy, without attempting to repudiate the agent's act in accepting the premium while assured was ill, is a waiver of condition that it is not binding until the first premium is paid and the policy delivered during the good health of the assured. *Northwestern Life Asso. v. Findley*, supra.

—effect of delay in issuing.

In *McLendon v. Woodmen of the World*, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36, it was held: That no recovery can be had against a fraternal and beneficial order on the death of an applicant before the delivery to him of the benefit certificate, where the delivery thereof to him while in good health was, by the terms of the application, certificate, constitution, and by-laws, made a condition precedent to its taking effect; (2) that mere delay in executing and delivering the benefit certificate, during which the applicant died, will not give any right of recovery on such certificate when the delay was not unreasonable or caused by bad faith, and there was no time prescribed within which the delivery should be made.

See also *Oliver v. Mutual L. Ins. Co.* 97 Va. 134, 33 S. E. 536, supra.

—effect of initiation.

In *McLendon v. Woodmen of the World*, supra, it was also held that the initiation as a member of a local camp of an applicant for membership in a fraternal and beneficial order before the receipt by such camp of a certificate from the sovereign camp, if unauthorized by the constitution and by-laws, is not a waiver of a condition precedent, contained in the policy and the by-laws, that the policy shall not take effect until it is delivered to assured while in good health; but it can, at most, make him a fraternal member.

—agreement by agent to deliver policy when issued.

An agent having no authority to bind the

company to issue a policy or to make a binding contract with assured cannot, by verbally agreeing to deliver the policy when issued, waive a condition that the policy shall not take effect until the first premium is paid and the policy delivered during assured's continuance in good health. *Oliver v. Mutual L. Ins. Co.* supra.

—acceptance of note, or something other than money, in payment of the first premium.

The fact that a local agent agreed to take, and did take, a portion of the first premium in trade, in no way modifies or affects the clearly expressed terms of the application whereby it was agreed that the contract should not take effect until the first premium was paid and the policy delivered during the life and good health of the applicant. *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 689.

In *Hancock Mut. L. Ins. Co. v. Schlank*, 175 Ill. 284, 51 N. E. 795, the policy contained this provision: "This policy shall not take effect until delivered and the first premium thereon paid during the lifetime and good health of the assured." A portion of the first premium, greater than the company's share, was paid in cash, the balance, which was less than the agent's commission on such first premium, was received in other than money. It was held that, "although the policy required the premium to be paid in cash [the agent] had the right, so far as his commission was concerned, to waive the policy and accept his commission in property, if he saw proper to do so."

In *St. Louis Mut. L. Ins. Co. v. Kennedy*, 6 Bush, 450, the application provided that the insurance should not be binding until the amount of the premium should be paid in the lifetime and good health of assured; and a stipulation in the policy provided that it would not be binding until the advanced premium was paid. A note was given as a mere memorandum of the amount of the premium. The policy was not delivered by the agent because of the subsequent illness and death of assured. It was held that there was no liability on the part of the company: (1) Because the application required payment of the cash premium as a condition precedent, and the note, being a mere memorandum, was not payment nor waiver thereof; (2) because, by agreement, the policy was not to be delivered until the cash payment was made in the lifetime of assured, and when he was in good health; (3) as no legal right to demand the delivery of the policy has been shown, its recitals of the payment of the cash premium cannot be used as evidence to sustain the suit, for it is but an escrow in the hands of the local agent.

In *National L. Ins. Co. v. Tweddell*, 22 Ky. L. Rep. 881, 58 S. E. 699, a stipulation in an application that the contract should not take effect until the first pre-

mium should be actually paid during the good health of assured was held to be complied with by the giving and acceptance of a ninety-day note in lieu of cash, in payment of the first premium while assured was in good health, and that the acceptance of such note was within the implied authority of the agent; and the policy, subsequently delivered after assured had contracted a fatal illness, was binding, though it provided that agents were not authorized to modify any contract in behalf of the company and could not extend the time of payment of any premium, or any note given therefor, or waive forfeiture.

The mere giving of a note for the first premium is not payment thereof, within the meaning of a provision in a policy that "this contract shall not take effect until the first premium shall actually have been paid during the good health of assured," where it was understood that it was to be discounted to raise the money to pay the premium. *Hills v. Penn Mut. L. Ins. Co.* 28 Ky. L. Rep. 790, 90 S. W. 544.

It was held in *McDonald v. Provident Sav. Life Assur. Soc.* 108 Wis. 213, 81 Am. St. Rep. 885, 84 N. W. 154, that the presumption is that the mere giving of a note for the amount of the first premium was not payment thereof, within the meaning of a provision that the policy shall not become binding unless the first premium is paid during the lifetime and good health of the applicant; and the presumption is not sufficiently overthrown, nor waiver of payment shown, to send the case to the jury by proof, *inter alia*, that a memorandum was indorsed on the note to the effect that it was to be returned if the application was not accepted, that the note was taken to "tie up" the applicant, that the agent, who was conceded to have authority to waive the provision in question, tendered the policy and customary receipt for the first premium to applicant and demanded payment of the note, that, excuse for nonpayment having been given, the agent manually delivered the policy, but retained the receipt and note, and left the note at the bank for collection with directions to deliver the receipt when the note was paid, that the time of payment of the note was extended, but such extension was made as an extension of time for payment of the premium; and hence, the applicant having died before paying the note, a verdict for the company should have been directed.

See also *Stringham v. Mutual Ins. Co.* 44 Or. 447, 75 Pac. 822, *supra*.

KANSAS SUPREME COURT.

CITY OF TOPEKA

v.

ROY CRAWFORD, Appt.

(— Kan. —, 96 Pac. 862.)

Municipal corporation — revised ordinance — publication.

1. Where the revised ordinances of a city

of the first class are published in a book by authority of the city, an ordinance embraced in such book, in which it is provided that it shall take effect upon such publication, is sufficiently published, and will take effect accordingly, if more than fifty copies of such book are issued.

Pleading — Sunday law — violation — date.

2. A complaint for the violation of an ordinance relating to labor on Sunday, which alleges that the defendant committed on the — day on the first day of the month called Sunday, is sufficient.

Sunday labor — what.

3. To keep open, manage a theater and sell tickets on Sunday is labor, within the meaning of the ordinance which prohibits labor on Sunday. A person who shall either labor or perform any work of the kind prohibited on Sunday shall be "deemed guilty."

(July 3,

Headnotes by BENSON

Case Note. — Keeping Sunday as violation

In *Quarles v. State*, 5. 192, 17 S. W. 269, it was held that a statute prohibiting a theater, giving a theater, therein, and selling tickets on Sunday, within the meaning of the ordinance prohibiting "laboring" on Sunday.

In *Moore v. Owen*, 5. 191, 17 Y. Supp. 585, it was held that a law which prohibited works of necessity or prohibited entertainments on Sunday which involved labor was not in violation of the statute.

In *State v. Ryan*, 80. 190, 17 S. W. 536, it was held that a statute which prohibited a moving picture show in an opera house on Sunday, within the meaning of the ordinance prohibiting business or labor, and within the meaning of the ordinance prohibiting Sunday law prohibiting business or labor, or engaging in any work of the kind prohibited that day, except works of necessity or mercy, where the statute prohibited a penal offense to be performed on Sunday, was not in violation of the statute.

In *Wirth v. Calhoun*, 64 Neb. 316, 89 N. W. 785, it was held that a statute which prohibited "sporting" or doing "common labor" on Sunday did not include entertainments consisting of music, dancing, and feats of a professional contortionist, given in a music hall.

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APPEAL by defendant from a judgment of the District Court for Shawnee County convicting him of violating a city ordinance prohibiting Sunday labor. Affirmed.

The facts are stated in the opinion.

Messrs. Z. T. Hazen and R. H. Gaw, for appellant:

The gist of the offense sought to be charged pertains only to Sunday labor, of which the defendant was not guilty.

1144-1156

In *Poulous v. Bingham*, 109 N. Y. Supp. 728; *United Vaudeville Co. v. Zeller*, 58 Misc. 16, 108 N. Y. Supp. 789; and *Gale v. Bingham*, 110 N. Y. Supp. 12, —a contrary view was taken; and it was held that the operation of a moving picture exhibition was the operation of a "show," within the meaning of the statute.

Mo. 331, 33 S. W. 784; *State v. Frederick*, 45 Ark. 348, 55 Am. Rep. 555; *Com. v. Waldman*, 140 Pa. 89, 11 L.R.A. 563, 21 Atl. 248; *Bernard v. Lüpping*, 32 Mo. 341.

Benson, J., delivered the opinion of the court:

The defendant was convicted under a city ordinance which provides: "Every person who shall either labor himself, or compel his apprentice, servant, or any other person in his charge or control to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and, on conviction thereof, fined in any sum not less than \$2 nor more than \$25 for each offense: Provided, this section shall not extend to any person who is a member of any religious society by whom any other than the first day of the week is observed as the Sabbath, so that he observes such Sabbath." The complaint was: "That, on the — day of October, 1907, in the city of Topeka, in the county of Shawnee and state of Kansas, one Roy Crawford did wilfully, wrongfully, maliciously, and unlawfully open, superintend, and manage a public theater, and give dramas, comedies, tragedies, burlesque, minstrel, and vaudeville shows, and various other theatrical entertainments and performances, and did sell tickets of admission therefor varying in price from 10 cents to \$1.50,

and, as such manager of such public theater, did compel his servants and employees under his charge and control, to wit, stage carpenters, stage hands, janitors, ushers, and ticket sellers, to labor and to perform work, and such labor and work performed was other than the household offices of daily necessity, or other work of necessity or charity, on the first day of the week, commonly called Sunday."

An objection is made to the ordinance that it was never published as required by law. The facts concerning the publication are that, preparatory to the compilation and publication in book form of the ordinances of the city the mayor and council revised certain ordinances and enacted others, each containing a provision that it would take effect upon publication in such ordinance book. Among these was ordinance No. 2,615, defining certain public offenses, known as the misdemeanor ordinance, prescribing penalties for a large number of offenses usually classified under that name. Section 102 of that ordinance defines the offense upon which appellant was tried, and is quoted above. A former revision and publication, known as the "revised ordinances of 1888," contained a misdemeanor ordinance, § 65 of which was substantially the same as § 102 of the present ordinance, with a change in the penalty and omitting a clause relating to ferrymen. This ordinance, No. 2,615, was passed June 30, 1905, and approved July 6, 1905. On October 6,

In *State v. Ran*, supra, it was held that a moving picture show came within the meaning of a statute which forbade anyone to "be present at any concert of music, dancing, or other public diversion on Sunday."

In *Com. v. Alexander*, 185 Mass. 551, 70 N. E. 1017, it was assumed that a vaudeville entertainment on Sunday was within the terms of a statute prohibiting any "public diversion;" but the defendant was acquitted upon the ground that it was "an entertainment given by a religious or charitable society," within such exception to the statute.

In New York a statute which prohibited any dramatic performance or any other entertainment on the stage on Sunday was held clearly constitutional as dealing with and having respect to, the Sabbath as a civil and political institution, and not affecting to interfere with religious belief or worship. *Neuendorff v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235; *Lindenmuller v. People*, 33 Barb. 548; *People v. Hoym*, 20 How. Pr. 76; *Re Hammerstein*, 57 Misc. 52, 108 N. Y. Supp. 197.

In *State v. Herald*, 47 Wash. 538, 92 Pac. 376, it was held that a statute which provided for the punishment of "any person who shall keep open any playhouse 17 L.R.A. (N.S.)

or theater" on Sunday should be construed as prohibiting the opening of theaters and playhouses on Sunday for the purpose of giving theatrical plays or dramatic performances, and, as so construed, would not infringe upon the right of the owner to open his theater building on Sunday for religious or other quiet, legitimate, and orderly exercises.

In *Ex parte Donnellan* (Wash.) 95 Pac. 1085, it was contended that the statute mentioned in the preceding case was unconstitutional on the ground that it was unreasonable, arbitrary, unjust, and unnecessary for the protection of the public health, safety, or morals. It was held that it was not subject to these objections, nor was it class legislation, since the state has the right to prohibit amusements on Sunday, in order to preserve peace and order, and it must necessarily follow that any particular kind of amusement may be singled out and prohibited on that day.

In *La Crandall v. Ledbetter*, 159 Fed. 702, the court seems to have assumed that the Texas statute which forbids the keeping open of theaters on Sunday was valid when, because of this statute, it refused to enforce a contract providing for the appearance and exhibition of plaintiffs as performers in theaters on Sunday.

1905, another ordinance providing for the publication of the revised ordinances of the city in book form was duly published, and took effect, and the book containing the ordinances of the city of a general nature was published accordingly. Among the ordinances contained therein was the misdemeanor ordinance No. 2,615, containing the revised § 102, under which defendant was prosecuted. An edition of 500 copies was thus printed by authority of the city and turned over to the city clerk on or before December 1, 1905, at which date that officer certified that such revised ordinances, not previously published in the official city paper, took effect. This certificate appears in the book. The law governing cities of the first class provides: "That, when the council of said city shall order a revision of the ordinances of said city, a publication in the book of ordinances shall be deemed a publication under this act: Provided, further, that no less than 50 copies of such book shall be published." Part of § 191, chap. 122, p. 240, Laws 1903. "All ordinances of the city may be proved by the certificate of the clerk, under the seal of the city, and, when printed or published in book form, and purporting to be published by authority of the city, shall be read and received in evidence in all courts and places without further proof. The city may from time to time authorize the revision of the ordinances and their publication in book form, and may cause to be published in connection therewith the laws relating to cities of the first class, and such forms and instructions as may be deemed advisable." Part of §§ 194, 195, chap. 122, p. 242, Laws 1903. The Civil Code contains this provision: "Printed copies of the ordinances, resolutions, rules, orders, and by-laws of any city or incorporated town in this state, published by authority of such city or incorporated town, and manuscript copies of the same certified under the hand of the proper officer, and having the corporate seal of such city or town affixed thereto, shall be received as evidence." Gen. Stat. 1901, § 4827. The precise contention of the defendant is that ordinance No. 2,615 is not a revision, but an original ordinance, and therefore not within the purview of § 195, above quoted. This is a mistaken view. The ordinance is a revision; but, if it were not, when the city undertook to revise and compile its ordinances generally, a new ordinance designed to be included in and to be a part of such general revision would have been within the statute, and, when published in the book of ordinances, would thereupon take effect and be in force.

Objection is also made to the complaint because the precise date of the alleged of-
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fense is not stated. It was stated, however, that it was committed on Sunday and in the month of October, 1905. The precise date is immaterial. Gen. Stat. 1901, § 5547. The gravamen of this offense is laboring on Sunday, and that is charged definitely. *State v. Brooks*, 33 Kan. 708, 7 Pac. 591; *State v. Nesbit*, 8 Kan. App. 104, 54 Pac. 326. The complaint is sufficient.

The defendant contends that the evidence was insufficient because it did not prove the charge that he himself labored on Sunday, nor that he compelled his employees to do so. The complaint charges that the defendant opened and managed a theater, gave shows and entertainments therein, and sold tickets therefor on Sundays, and does not otherwise charge that he performed labor himself, although it does directly allege that he compelled his servants and employees to labor on that day. The appellant does not question the authority of the city to enact the ordinance, and he does not dispute its validity otherwise than in questioning its proper publication. We have, therefore, only to consider whether he has violated it. To this end we must inquire in what sense the word "labor" is used in the ordinance, and incidentally in the state statute which it follows. Similar statutes have been enacted in other states. They differ in phraseology, and this must account in part for an apparent diversity in the decisions. Some prohibit ordinary business or following usual vocations as well as labor. This ordinance only refers to labor. The sense in which this word is used in statutes depends upon the legislative intent in view of the object to be accomplished, as well as upon the particular language employed. In *Missouri, K. & T. R. Co. v. Baker*, 14 Kan. 563, it was held that a timekeeper was not a laborer within the purview of a statute requiring railroad companies to give bonds to pay laborers, and in *State ex rel. Ives v. Martindale*, 47 Kan. 147, 27 Pac. 852, it was decided that the restrictions of the statute making it unlawful for laborers, workmen, mechanics, and others employed by the state to work more than eight hours a day did not apply to the warden, clerks, and other officers of the penitentiary. Other courts have held that the exemption of the wages of a laborer protected only the earnings of those engaged in toilsome occupations. The object of this ordinance is quite different. It is to secure that opportunity for rest which, from the experience of mankind and the consensus of opinion, is believed to be for the highest good of the individual and the state. This matter was under consideration in an early case in Pennsylvania, where in the court said: "All agree that to the well-being of society periods of rest are ab-

solutely necessary. To be productive of the required advantage the periods must recur at stated intervals, so that the mass of which the community is composed may enjoy a respite from labor at the same time. They may be established by common consent, or, as is conceded, the legislative power of the state may, without impropriety, interfere to fix the time of their stated return and enforce obedience to the direction. When this happens, some one day must be selected; and it has been said the round of the week presents none which, being preferred, might not be regarded as favoring some one of the numerous religious sects into which mankind are divided. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction. *Specht v. Com.* 8 Pa. 312, 323, 49 Am. Dec. 518. A statute of Ohio prohibited "common labor" on Sunday. Commenting on this statute, Thurman, J., said: "Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require this cessation of labor, and to name the day of rest. It did so by the act referred to, and, in accordance with the feelings of a majority of the people, the Christian Sabbath was very properly selected." *Bloom v. Richards*, 2 Ohio St. 387, 391. In the same opinion, after saying that the word "labor" is usually employed to signify manual exertion of a toilsome nature, and holding that it did not embrace the simple making of a bargain, the court was careful to add: "It is not to be understood, however, that, because a Sunday contract may be valid, therefore business may be transacted upon that as upon other days; as, for instance, that a merchant, not of the excepted class, may lawfully keep open store for the disposition of his goods on the Sabbath. To wait upon customers, and receive and sell his wares is the common labor of a merchant, and there is a broad distinction between pursuing this avocation and the case of a single sale out of the ordinary course of business." Page 402.

The evidence shows that the defendant regularly kept open and managed his theater, gave orders and directions to the employees on and about the stage, and to drivers in his employ, who received from and returned to the railroad stations the baggage, scenery, and paraphernalia of the traveling troupes, and that he sold the tickets for exhibitions on Sunday. These manifold duties necessa-

rily required some manual labor, although not of the kind usually classed as toilsome within the meaning of statutes such as those first referred to. If to keep open a store and receive and sell wares therein is the common labor of a merchant, it is fair to say that to keep open, manage, and superintend a theater and sell tickets therein is the labor of such manager; and, if we keep in mind the object of these regulations, we will see that the reason of the rule applies quite as forcibly to the theatrical manager as to the merchant.

Under a statute prescribing a penalty for engaging in any labor on Sunday except works of necessity, charity, or mercy, the selling of liquor on that day was held to be prohibited in a very vigorous opinion, affirmed on rehearing. *Cortsey v. Territory*, 6 N. M. 682, 19 L.R.A. 349, 30 Pac. 947. It should be noticed that the prosecution was not for violation of the liquor or dramshop act, but for engaging in labor on Sunday. In New York the usual duties of an attorney's clerk were held to be embraced within the statute prohibiting "working" on Sunday. *Watts v. Van Ness*, 1 Hill, 76. In the Federal Supreme Court, where the question arose whether an overseer who was charged with the general control and direction of the work and development of a mine was within the protection of a statute of Utah giving a lien to persons who should "perform any work or labor" upon a mine, it was decided that he was entitled to the lien. *Flagstaff Silver Min. Co. v. Cullins*, 104 U. S. 176, 26 L. ed. 704. The court said: "He was the overseer and foreman of the body of miners who performed manual labor upon the mine. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. His duties were similar to those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor. They require the personal attention and supervision of the foreman, and occasionally in an emergency, or, for an example, it becomes necessary for him to assist with his own hands." While this case may go farther than this court has gone in the application of similar provisions, the language above quoted is quite pertinent to the present case. Our attention has been directed to but one case where the labor was of the precise nature of that performed by the appellant. In *Quarles v. State*, 55 Ark. 10, 14 L.R.A. 192, 17 S. W. 269, the defendant was charged with violat-

ing a statute providing a penalty for any person "who shall, on Sunday, be found laboring," etc. The proof was that he performed the same duties as those charged and proven against the appellant, and it was held that opening, superintending, and managing a public theater, giving a theatrical entertainment, and selling tickets therefor was labor within the meaning of the statute, and the conviction was affirmed. Many decisions have been made upon the general subject, and they may not all be in perfect harmony, but we hold, in accord with those quoted above, that the defendant, in managing his theater, selling tickets, and performing the work on Sunday charged in the complaint and proven on the trial, violated the ordinance. It is not necessary to inquire whether, in employing and directing the work of laborers in and about the theater, he "compelled" them to labor, within the meaning of the ordinance.

The judgment is affirmed.

LOUISIANA SUPREME COURT.

FRANK A. CRISTADORO et al., Appts.,
v.
FERDINAND VON BEHREN'S HEIRS et al.

(119 La. 1025, 44 So. 852.)

Negligence — collapse of wharf — liability.

1. The owner of a wharf which was collapsed while being put to the use for which it was intended is responsible in damages to those who were legitimately on it at the time, and were injured.

Same — injury to guest of lessee.

2. It makes no difference that the person injured was on the wharf as a guest or visitor of the lessee of the wharf.

(October 21, 1907.)

Headnotes by PROVOSTY, J.

Case Note. — Liability of owner for injury to tenant's guests or employees by defect in premises.

The earlier cases upon this subject are collected and discussed in a note to *McConnell v. Lemley*, 34 L.R.A. 609. This note includes only cases which have been decided since the preparation of the earlier note, and is confined to cases involving the liability of the owner to guests or employees of the tenant, and does not include the landlord's liability to members of the tenant's family, or to his licensees.

The cases for the most part hold that, as a general proposition, the landlord is not liable for injuries to the tenant's guests or 17 L.R.A. (N.S.)

A PPEAL by plaintiffs from a judgment of the Civil District Court for the Parish of Orleans dismissing on exception of no cause of action a suit brought to recover damages for personal injuries alleged to have been caused by the negligence of defendants' ancestor. Judgment set aside and exception overruled.

The facts are stated in the opinion.

Messrs. Carroll, Henderson, & Carroll for appellants.

Messrs. Frank McGloin and Charles Ferdinand Claiborne for appellees.

Provosty, J., delivered the opinion of the court:

The petition alleges that Von Behren, of whom the defendants are the heirs, was owner of a so-called "camp," consisting mainly of a platform and a house built over the waters of Lake Pontchartrain, at Milneburg, intended to be used as a place of resort and recreation, and which would be leased for that purpose to all persons desiring to rent it; that Von Behren "employed Mrs. Schmitt, the mother of plaintiff Mrs. Cristadoro, to take care of said camp, rent out the same, and collect the revenues therefrom for him; and, in return and consideration for her service, he agreed and contracted with her that she should live in and occupy and use the said camp as a summer home at all times when the same was not leased to other parties, when she should temporarily go to other quarters, and that she should have the right to receive as visitors at said camp all such friends and relatives as should see fit to visit her there;" that, under this agreement, Mrs. Schmitt, with the full knowledge and consent of the said Von Behren, received at said camp all persons who saw fit to visit her there; that the sole passage to and from said camp was a wharf connecting it with the wharf of the Pontchartrain Railroad; that the plaintiff Mrs. Cristadoro, having gone on a visit to Mrs. Schmitt, her mother, at said camp,

employees caused by defects in the leased premises in the possession of the tenant, in the absence of a breach of some duty on the part of the landlord to keep them in repair for the benefit of the person injured; and such duty cannot be implied from the mere fact that the premises are leased. But, if the defects are in the construction of the leased buildings, or were in existence at the time of the lease; and the landlord knew, or ought to have known, of such defects,—the cases generally hold him liable for injuries caused by them to the tenant's guests or employees,—especially if he concealed the true condition of the premises from the tenant fraudulently or otherwise. The mere breach of the landlord's contract to repair

was passing upon the said connecting wharf on her return, when the same collapsed, causing her serious injury; that the purpose of plaintiff in leaving was to secure quarters for her mother for the following Sunday, for which day said camp had been leased and her mother would have to find other quarters under her agreement with Von Behren; "that plaintiff Mrs. Cristadoro was lawfully and properly upon said connecting wharf, and was guilty of no negligence or carelessness, and went to said camp as the relative and guest of said Mrs. Schmitt, who had the right, under her contract with Von Behren, to have plaintiff visit her at the said camp; that said connecting wharf, to the knowledge of said Von Behren, was being used, from day to day, by

persons who visited said Mrs. Schmitt at said camp with the view of hiring the same, and by the public generally; that said Von Behren held out and offered for rent the said camp, with said connecting wharf, as a place of resort and recreation, and it was his duty to have and keep said wharf in good and proper condition; that the same was not in such order and condition, but that the planks, beams, sills, supports, and other timbers and parts of said connecting wharf were rotten, decayed, defective, and in bad order and condition; that the fall and destruction of said connecting wharf were due to the negligence of said Von Behren and to his failure to have and keep the same and all parts thereof in proper order and condition; and that he became liable and

does not render him liable to a stranger for injuries caused by the lack of repair.

Landlord not generally liable.

As was said, the landlord is not generally liable for injuries to the tenant's employees or guests.

Thus, in *Ocean S. S. Co. v. Hamilton*, 112 Ga. 901, 38 S. E. 204, it was held that a landlord was not liable for personal injuries to a servant of his tenant, arising from a defect in the rented premises of which the landlord had no knowledge, and which he had not been notified to repair.

And in *Andrus v. Bradley-Alderson Co.* 117 Mo. App. 322, 93 S. W. 872, the court said: "It is a familiar law that a landlord is under no obligation to repair leased premises unless he has contracted to do so; and he is therefore not liable for injuries resulting from nonrepair. In such instances the tenant would be liable to all those to whom he owed a duty to maintain a reasonably safe place."

The lessor of a pulp mill was held, in *Whitmore v. Orono Pulp & Paper Co.* 91 Me. 297, 40 L.R.A. 377, 64 Am. St. Rep. 229, 39 Atl. 1032, not to owe to the servants of the lessee the duty of making the requisite examination and communicating the results thereof, as to the safe condition of a digester in the mill, before turning the same over to the lessee.

And in *Wheeler v. Pullman Palace Car Co.* 131 Ill. App. 262, appeal dismissed in 228 Ill. 28, 81 N. E. 789, it was held that the owner of premises leased for a grocery store was not liable to one who accompanied her sister to the store upon business, and stepped off a platform running the whole length of the store, under the impression that the steps also ran the whole length of it. The court said that, if the accident occurred in the daytime, the defect was obvious, and the plaintiff was negligent, while, if it occurred in the nighttime, the duty was upon the tenant, and not upon the landlord, to furnish light enough to make the entrance or exit to his building safe for his customers.

And in *King v. Creekmore*, 117 Ky. 172, 77 S. W. 689, it was held that the lessor 17 L.R.A. (N.S.)

of a steam sawmill which had been removed from the premises, who had surrendered possession and control thereof to the lessee, was not liable for injuries to the latter's servant for failing to inspect and keep the same in reasonable repair. And to the same general effect was the decision in *Lovitt v. Creekmore*, 26 Ky. L. Rep. 234 80 S. W. 1184, which case arose out of the same state of facts.

In an action against the owner of a theater for injuries received in falling from a doorway marked by a red light, it was held, in *McCain v. Majestic Bldg. Co.* 120 La. 308, 45 So. 258, that, in alleging that the theater was leased and operated by the lessee, the plaintiff, in effect, alleged that the defendant had no right to enter it, and no authority to regulate the manner in which it was run, and was not liable for the injuries received.

Defect in construction, or in premises when let.

Numerous cases hold that the landlord is liable for injuries to guests or servants of his tenant where the injury is due to defects in the construction of the building, or which existed when the property was leased.

Thus, in *Leithman v. Vaught*, 115 La. 249, 38 So. 982, the court affirmed the judgment of the lower court which held the landlord liable to his tenant's servant for injuries caused by the defective construction of the building, of which he had knowledge.

And in *Ross v. Jackson*, 123 Ga. 657, 51 S. E. 578, it was held that a landlord, while not an insurer, was liable in damages to an invited guest of the tenant, who received injury while lawfully upon the premises, which injury arose because of the defective construction of a building on the premises.

And in *Copley v. Balle*, 9 Kan. App. 465, 60 Pac. 656, it was held that a landlord who leased premises for hotel purposes, with a dangerous excavation thereon, was negligent in not providing for the protection of the

responsible to the plaintiffs for all the damage that they have suffered."

The suit was dismissed on exception of no cause of action. In our opinion a cause of action is shown. Mrs. Cristadoro was rightfully on this wharf, and was injured without any contributing fault on her part, and as the result of the negligence of the person whose duty it was to see to the safety of the wharf; that is to say, of the owner of the wharf, Von Behren.

So plain is this that without another word we might proceed to render judgment, were this court expected simply to administer justice, and not also to expound the jurisprudence of the state.

The reason, then, why Mrs. Cristadoro was rightfully on the wharf is that she

was a guest of her mother, Mrs. Schmitt, and that Mrs. Schmitt had secured by contract with Von Behren the right to receive visitors; and the reason why, she being rightfully on the wharf, the owner of the wharf is responsible to her for the injury she suffered, is that "the owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction" (Civil Code, art. 2322),—this provision of the Code being nothing more than an application of the principle that "every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill" (Civil Code, art. 2316).

hotel patrons from the danger of injury by reason of the excavation.

And in *Patterson v. Jos. Schlitz Brewing Co.* 16 S. D. 33, 91 N. W. 336, the court said: "If, when let, the premises are in a condition dangerous to the public, or with a nuisance thereon, the owner may be liable to strangers for the injuries resulting from such condition or nuisance, if he had notice of the dangerous condition of the building, or could, by the exercise of ordinary care and diligence, have ascertained its dangerous condition. By renting the premises and receiving rent therefor he is to be regarded as authorizing the continuation of the nuisance." And to the same general effect was the decision in *Schwalbach v. Shinkle, W. & K. Co.* 97 Fed. 483.

Where the plaintiff was subpoenaed as a witness to attend a trial before a justice, who was a tenant in defendant's building, and was injured because of the defective conditions of the building resulting from faulty construction, it was held, in *Edwards v. Rissler*, 26 Ohio C. C. 428, affirmed in 69 Ohio St. 572, 70 N. E. 1129, that the owner was liable for the injury; as the rule was that where, at the time of the leasing, the property was in an unsafe or defective condition resulting from faulty construction, the landlord is held responsible to such persons as are rightfully on the premises, even after the lease of such premises to a tenant.

But in *Lane v. Cox* [1897] 1 Q. B. 415, it was held that the landlord, in the absence of a covenant to repair, was not liable to the workman employed by his tenant, even though the premises were let in a dilapidated condition,—the court holding that there was no duty resting on the landlord not to let the premises in an unsafe condition.

When it is tenant's duty to repair.

Where the tenant is under obligation to make the repairs, and his guest or employee is injured because of failure to repair, or negligence in making the repairs, the landlord is not liable.
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Thus, in *Mayer v. Schrupf*, 111 Mo. App. 54, 85 S. W. 915, it was held that the landlord was not liable for the negligent way in which a tenant repaired a floor in the leased premises, where it was the tenant's duty to make such repairs.

And in *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956, the court said: "A mere defect caused by a failure to repair after letting, where the premises were in proper repair at the time of letting, and where the duty to repair devolves upon the tenant, imposes no liability on the landlord, even though the lack of repair might in time create a nuisance."

So, a lease of a building which has a door opening at considerable height into space, and unprovided with bars and guards, was held in *Texas Loan Agency v. Fleming*, 92 Tex. 458, 44 L.R.A. 279, 49 S. W. 1039, not to render the landlord liable to a person who is injured in consequence of the failure of the lessee or other person, during the lease, to keep the door properly fastened.

Where a tenant was bound to make all repairs to the premises, and they were in good condition when he took possession thereof, it was held, in *Leaux v. New York*, 87 App. Div. 398, 84 N. Y. Supp. 514, that the landlord was under no obligation to the tenant or his employees to keep the property in repair; and he was not liable to them for any injury due to the defective condition of the premises.

A lessor who was not in possession or control of an elevator well in a leased building which the tenant had covenanted to repair was held, in *Henson v. Beckwith*, 20 R. I. 165, 38 L.R.A. 716, 78 Am. St. Rep. 847, 37 Atl. 702, not to be liable for the death of a person who fell into it while delivering goods to the tenant on the latter's invitation, although there was a dangerous defect in the elevator.

Effect of breach of landlord's contract to repair.

Some cases have held that a guest or employee of a tenant cannot recover from the landlord for injuries due to defects in

The learned counsel for defendants very properly say that there must be a duty before there can be negligence; but, when they say that Von Behren did not owe Mrs. Cristadoro the duty to see to it that this wharf was maintained in proper condition for its ordinary use, they fail to take the foregoing articles of the Code into consideration.

True, in *McConnell v. Lemley*, 48 La. Ann. 1433, 34 L.R.A. 609, 55 Am. St. Rep. 319, 20 So. 887, this court said that the owner's responsibility under that article is restricted to "neighbors and passengers," and does not extend to visitors, or guests,—in other words, to those outside, not to those inside, of the house; but that construction was departed from in the more recent case

of *Schoppel v. Daly*, 112 La. 202, 36 So. 323, where the court held the owner responsible to the wife of the lessee.

The reasoning of the *Lemley Case* is that visitors must be treated as persons to whom "the ordinary rule of trespass or contract would apply;" that is to say, who, as trespassers, have no recourse, and, as contractors, have recourse only on their contract. But it stands to reason that a visitor is neither a trespasser nor a contractor.

The court seems to have thought that the recourse of the guest was against the lessee. But what if the lessee has not been in fault? Nay, what if, injured by the same accident, he himself has a cause of action? Would the legal situation be that he would have to respond in damages to the guest,

the building, simply because of his breach of covenant to repair.

Thus, in *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855, it was held that the covenant of the landlord to repair did not inure to the benefit of a guest of the tenant. And to the same effect was the decision in *Sherlock v. Rushmore*, 99 App. Div. 598, 91 N. Y. Supp. 152.

And in *Moulliet v. Anderson*, 29 Ohio C. C. 723, it was held that an owner's contract to repair does not inure to the benefit of others towards whom the owner sustains no relations growing out of the contract.

In *May v. Ennis*, 78 App. Div. 552, 79 N. Y. Supp. 896, it was held that one seeking to enter a hotel to become a guest, who was injured because of the defective condition of a platform surrounding the hotel, of the defective condition of which the landlord had notice, might recover damages of the latter for such injuries. The fact that the landlord was, by the lease, required to repair the sidewalk, did not affect his liability, as it did not rest on the contract in any way, but upon a breach of his duty.

Portion of building retained by landlord.

If a guest or employee of a tenant, or a person going upon the premises to do business with the tenant, is injured by the defective condition of a portion of the premises over which the landlord retains control, the cases generally hold that the landlord is liable for such injuries.

It has been so held where a tenant's guest or servant was injured by the defective condition of an elevator, or elevator well, used by a number of tenants in common, but the control of which was retained by the landlord. *B. Shoninger Co. v. Mann*, 219 Ill. 242, 3 L.R.A. (N.S.) 1097, 76 N. E. 354; *Rhodium v. Johnson*, 24 Ind. App. 401, 56 N. E. 942; *Hamilton v. Taylor*, 195 Mass. 68, 80 N. E. 592; *Andrus v. Bradley-Alderson Co.* 117 Mo. App. 322, 93 S. W. 872; *Olson v. Schultz*, 67 Minn. 494, 36 L.R.A. 790, 64 Am. St. Rep. 437, 70 N. W. 779; *Wagner v. Welling*, 84 N. Y. Supp. 979; *Bogendoerfer v. Jacobs*, 17 L.R.A. (N.S.)

97 App. Div. 355, 89 N. Y. Supp. 1051; *Burner v. Higman & S. Co.* 127 Iowa, 580, 103 N. W. 802; *Wright v. Perry*, 188 Mass. 268, 74 N. E. 328.

Or by a defective hoisting apparatus used by several tenants. *O'Malley v. Twenty-Five Associates*, 170 Mass. 471, 49 N. E. 641.

Or by defects in a common hallway that was unusual and dangerous if unlighted. *Brugher v. Buchtenkirch*, 39 App. Div. 502, 57 N. Y. Supp. 314, reversed upon ground of contributory negligence in 167 N. Y. 153, 60 N. E. 420.

Or by defects in a stairway used by various tenants. *Harrison v. Jelly*, 175 Mass. 292, 56 N. E. 283; *Miller v. Hancock* [1893] 2 Q. B. 177.

Or in the outside steps and platform of a tenement house. *Coupe v. Platt*, 172 Mass. 458, 70 Am. St. Rep. 293, 52 N. E. 528.

So, where the landlord retained a qualified possession of the entire building, and exercised general supervision over it, it was held, in *Monahan v. National Realty Co.* 4 Ga. App. 680, 62 S. E. 127, that he would be liable for injuries caused by defective window weights, to one who was in the building for the purpose of being treated by her dentist.

And in *McCarvell v. Sawyer*, 173 Mass. 540, 73 Am. St. Rep. 318, 54 N. E. 259, the plaintiff, a stranger, asked a tenant standing at the doorway of a tenement building whether a certain person lived in the building, and was told she might go in and find out for herself. She did so, and was injured because of an open elevator well in the building. It was held that the reply of the tenant did not make the plaintiff a guest so as to render the landlord liable for her injuries.

And a provision in a lease that the landlord should not "be liable for any damages occasioned by failure to keep the elevator in repair" was held, in *Springer v. Ford*, 189 Ill. 430, 52 L.R.A. 930, 82 Am. St. Rep. 464, 59 N. E. 953, not to be binding on the tenant's employees; and the landlord would be liable to such employees

and the owner to him? If so, the absurd result would be that he would have to turn over to his guest whatever he might have recovered from the owner. Under the doctrine of this *Lemley Case*, if, through gross vice of construction, or the gross negligence of the owner, one of the so-called "skyscrapers" of this city were to collapse, the heirs of a person who had been visiting one of the tenants at the time of the disaster and had perished therein could have no recourse against the culpable owner, but only, if any at all, against the heirs of the innocent and unfortunate tenant.

It may be that, with regard to all those who derive through the lessee the right to be on the leased premises, the lessor may by contract shift from himself to the lessee the

if he had not exercised the highest degree of care and diligence.

In *Dood v. Rothschild*, 31 Misc. 721, 65 N. Y. Supp. 214, it was held that, even where the obligation rests upon the landlord to keep demised premises in repair, his failure to do so does not subject him to damages for personal injuries caused by the defective condition of the premises, except as to such portions of the premises, if any, over which he retains control.

In *Harkin v. Crumbie*, 20 Misc. 568, 46 N. Y. Supp. 453, it was held that the owner of an apartment house was not to be deemed negligent in failing to remove all the ice and snow from the approaches to the house, where the only danger lay in the inherent slipperiness of the ice and snow. And the court said that such a case was clearly distinguishable from those cases in which the landlord retained control over a portion of the premises, and incurred liability because of their defective condition.

Effect of concealment by landlord.

If the landlord has in any way acted in bad faith toward his tenant, and concealed from him defects in the premises of which the landlord had knowledge, the cases very generally hold that the landlord is responsible to the tenant's guests or servants for any injuries caused by such defects.

Thus, in *Anderson v. Hayes*, 101 Wis. 538, 70 Am. St. Rep. 930, 77 N. W. 891, it was held that a landlord was liable for the injuries to an employee of his tenant caused by a concealed defect in the demised premises known to the landlord, but not known or disclosed to the tenant, or capable of being ascertained by him by a reasonably careful examination of the premises.

And in *Morgan v. Sheppard* (Ala.) 47 So. 147, in an action by a guest of the tenant, it was held that, in order that the complaint might show a breach of duty on the part of the landlord to the tenant or his servants or guests, the defects causing the injury must have been latent or concealed, and not disclosed by the landlord to the tenant.

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duty of seeing to the safety of the building, and may in that way absolve himself from all duty towards the guests of the lessee; but, so long as he does not do this, but retains to himself the duty of seeing to the safety of the house, he plainly and manifestly owes that duty as much to those who are rightfully in the house as to those who may happen to be passing by it.

In this *Lemley Case* the court would restrict article 2322 to neighbors and passers-by, on the score of its being a police regulation of the safety of houses; but, if it is of that character *a fortiori* ought it to apply to those inside of the house.

The French writers, interpreting article 1386, Code Napoleon, which is the article corresponding with our above-quoted article

The lessor of a boarding house was held, in *Towne v. Thompson*, 68 N. H. 317, 46 L.R.A. 748, 44 Atl. 492, not liable to the lessee's boarders for illness caused by the unsanitary condition of the premises, in the absence of any misrepresentation, concealment, or wrongful failure of the lessor to disclose the defect.

Under a lease whereby the tenant was to keep the premises in repair, it was held, in *Oriental Invest. Co. v. Sline*, 17 Tex. Civ. App. 692, 41 S. W. 130, that the landlord could be held liable only for injuries to tenant's servants caused by defects which existed at the time of the lease, and then only when he had practised deceit or fraud on the tenant.

Rights of tenant's guests or employees no greater than his own.

A number of cases hold that, where a guest of a tenant is injured because of alleged defects in the premises, under circumstances that would not entitle the tenant himself to recover, the guest cannot recover, as the latter is entitled to no greater rights than the tenant. *Coupe v. Platt*, supra; *Roche v. Sawyer*, 176 Mass. 71, 57 N. E. 216; *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 909; *Towne v. Thompson*, supra; *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855; *Anderson v. Hayes*, supra.

So, in *Dalton v. Gibson*, 192 Mass. 1, 116 Am. St. Rep. 218, 77 N. E. 1035, it was held that an employee of a tenant has no greater rights in the premises than the tenant has, and cannot recover for injuries due to lack of repairs which the tenant is under obligation to make.

And in *Dood v. Rothschild*, supra, it was held that the owner out of possession owed no duty to his tenant where the latter had agreed to make all repairs; and consequently the owner owed no duty to those coming upon the premises by the tenant's invitation.

Miscellaneous cases.

Other cases, presenting features somewhat unusual, may be noted.

The holder of a privilege from an ex-

2322, say that the responsibility imposed by the article applies only to neighbors and passers-by, and not to those whose relations to the owner are governed by contract. Larombiere on art. 1386, vol. 5, No. 3, p. 794; Demolombe, vol. 31, No. 659, p. 568; Laurent, vol. 20, No. 644, p. 696; 3 Fuzier-Hermann, p. 917, No. 16; Id. p. 918, No. 32. We suspect the organ of the court in the Lemley Case understood this to mean that the responsibility imposed by article 1386 (our article 2322) is absolutely restricted to neighbors and passers-by—i. e., to those outside of the house,—and does not extend to those inside. But such is not the idea intended to be conveyed. What is meant is simply that the relations of those who have a contract are governed by the contract, and the relations of those who have no contract

are governed by the general principles of the law embodied in this and other articles of the Code. In other words, the line of cleavage is between those who have and those who have not a contract, and not between those who are outside and those who are inside of the house. These writers certainly do not mean to say that the visitor has a contract with the lessor, or that he may recover from the tenant when it is the owner that is in fault.

True, these writers do not say expressly anywhere that in such a case the visitor may recover from the owner; but the reason of their silence on that point is that the proposition is too plain to need to be expressed. And it is for that same reason the courts of France have been called upon so seldom to express an opinion in the matter.

hibition association of selling refreshments was held, in *Marshall v. Industrial Exhibition Assn.* 1 Ont. L. Rep. 319, to have no cause of action against the lessor of the exhibition grounds for an injury caused by a defective walk which the lessor was under no obligation by contract or law to repair.

In *Barman v. Spencer* (Ind.) 44 L.R.A. 815, 49 N. E. 9, it was held that the lessor, who removes the platform from a well in order to put it in proper condition as required by his lease, and leaves the well open and unguarded at a distance of about 3 feet from the kitchen door near a path that leads to a closet, is liable to a guest of the tenant who falls into the well in the night while attempting to go to the closet, without knowing that the platform has been taken from the well.

In *Wilcox v. Zane*, 167 Mass. 302, 45 N. E. 923, it was held that one who went on a roof at the request of a tenant, although going gratuitously, could recover from the landlord for injuries due to the defective condition of the roof, where the tenant himself had a right to use the roof in common with others.

In *Barrett v. Lake Ontario Beach Improv. Co.* 174 N. Y. 310, 61 L.R.A. 829, 66 N. E. 968, it was held that the owner of a structure to be used as a toboggan slide at a bathing resort is liable for injuries in case a person attempting to use it falls from it by reason of the insufficiency of a railing, although it is in the possession of a tenant, if the railing intended for the protection of persons upon it is no faulty in construction that such accidents are likely to happen. And to the same general effect was the decision in *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, affirmed without opinion in 163 N. Y. 559, 57 N. E. 1109, where a person attending a race track, having regularly purchased a ticket, was injured by the falling of a grand stand.

In *Burger v. Johnson*, 6 Ohio N. P. 252, it was held that a man employed by a for-

mer tenant, several months after the tenancy had expired, to remove a stove from the attic of the leased premises, was a bare licensee, who assumed all the risks of the premises.

One who goes onto premises solely for his own business, and not on any business in which the tenant is engaged, cannot recover for injuries due to defects in the premises. *Ganley v. Hall*, 168 Mass. 513, 47 N. E. 416.

In *Capen v. Hall* (R. I.) 43 Atl. 847, it was held that, while it was the duty of landlords and owners of buildings who retained control of the hallways and stairways to see that they were in all respects inherently safe and convenient, yet it was not their duty to see that the same were properly lighted at all times when they might be rightfully used.

If, while a person is acting as a *de facto* officer of a corporation, he also engages in other duties not naturally incident to his office, and without any special agreement or compensation therefor, such performance does not constitute him an employee of the company; and, if he is injured while assisting in operating a hand hoist, he is chargeable with his own negligence, and the owner of the building is not liable to him as an employee of the lessee. *Welker v. Anheuser-Busch Brewing Assn.* 103 Minn. 189, 114 N. W. 745.

Of course, if the guest or employee is himself negligent, and such negligence contributes to the injury, the well-known rule of contributory negligence applies; and the plaintiff cannot recover regardless of any violation of the landlord's duty. *Pascieszny v. Boydell Bros. White Lead & Color Co.* 146 Mich. 223, 109 N. W. 417; *B. Shoninger Co. v. Mann*, 219 Ill. 242, 3 L.R.A. (N.S.) 1097, 76 N. E. 354; *Wheeler v. Pullman Palace Car Co.* 131 Ill. App. 262, appeal dismissed in 228 Ill. 28, 81 N. E. 789. Such cases, however, are not strictly in point, as they turn upon the general doctrine of contributory negligence, and not upon the duty of the landlord.

We do find, however, the following in stances:

In the Case of Grosclaude C. Chaubard, the court of appeal of Paris (8 Feb. 1896, *Journal de Palais*, 1899, part. 2, 215) held that the owner of the house was liable to a visitor of the tenant for an injury sustained from the unsafe condition of the premises. Says the court: "Considérant qu'en leur qualité de bailleurs, Le Boucher et Grosclaude répondaient de toute faute commise par eux en cette qualité ou par leurs préposés, non seulement vis-à-vis des locataires, mais encore de toute personne habitant avec ces locataires, au vu et su des bailleurs ou de leurs préposés, et sans opposition de leur part que, restreindre le droit d'invoquer la responsabilité contre les bailleurs à ceux des habitants quo sont liées à ceux-ci par un contrat de bail, serait méconnaître le principe général posé dans l'art. 1382, C. civ.; que ce droit n'appartient pas seulement, comme dans l'espèce, à tout habitant de la maison où la faute a été commise, mais même aux personnes, visiteurs, fournisseurs et autres, dont la présence peut s'expliquer par un motif légitime, et n'a rien d'abusif," etc.

Again, in the case of *Carrien v. Prefet Hautes-Pyrénées*, *Journal de Palais*, 1900, 2 part. p. 265, the court of appeal of Paris held a municipality responsible for the unsafe condition of its building to the guests of a choral society, to which it had lent a hall for a concert. The defendant sought to take the case from under the operation of article 1386 (our article 2322) by arguing that there was a contract of loan of the building, and hence that the relations of the parties to the suit had to be governed by contract; but the court curtly said that, true, there was a contract with the society, but none with the guests.

In a note to this same decision, as reported in *Dalloz, Juris. Gen.* 1900, p. 265, 2d partie, we find the following: "Tenons, donc, pour certain que l'art. 1386 ne doit pas recevoir application lorsque la partie lésée est liée avec le propriétaire du bâtiment par un contra ayant ce bâtiment pour objet. Ce n'est pas à dire cependant que l'art. 1386 ne puisse être invoqué par les passants. Il est conçu en termes généraux et doit recevoir application toutes les fois que la chute du bâtiment a causé dommage à des tiers, c'est-à-dire à des personnes qui n'étaient liées par aucune convention avec le propriétaire du bâtiment. Comment, par exemple, refuser la protection de cet article à la personne qui aurait été blessée par le chute de la voûte d'une église? Tous ceux qui entrent dans un edifice public et qui sont lésés par sa ruine nous semblent dans une 17 L.R.A. (N.S.)

situation aussi favorable que de simples passants."

It is to be noted, moreover, that what was thus said in the *Lemley Case*, about the responsibility of the owner not extending to a guest of the lessee was really in the nature of an *obiter*; for the balcony which gave way in that case did not do so as the result of a vice in construction or want of repair, but as the result of a crowd of persons rushing out upon it and bearing it down by a load such as it was not designed to support. The real ground of the decision was, not that the owner, though in fault, was not responsible, but that upon the evidence he was not at fault.

The case of *Brodman v. Finerty*, 116 La. 1103, 41 So. 329, has no application. The principle of that decision is that, where the injury results from the failure to make a trifling repair, which the tenant himself should have made, the owner is not responsible, especially to the wife of the tenant.

The learned counsel for defendants argue that, if the condition of the wharf answered the description of it in plaintiff's petition, plaintiff could not have failed to see the danger, and that, if she saw the danger and voluntarily incurred it, she has no cause of action. This contention is without merit.

Judgment set aside, exception overruled, and case remanded, to be proceeded with according to law. Defendants to pay costs of appeal.

Petition for rehearing denied November 18, 1907.

MISSOURI SUPREME COURT. (Division No. 1.)

IDA PHILLIPS, Appt.,
v.

ST. LOUIS & SAN FRANCISCO RAIL-
ROAD COMPANY, Respt.

(211 Mo. 419, 111 S. W. 109.)

Hospital — negligence — liability.

1. A hospital maintained by a railroad for the benefit of its employees, to which they are required to contribute, is not a

Case Note. — Liability for negligence of attendants furnished by relief department toward which employees contribute.

The duty of an employer with respect to relief furnished through a department toward which his employees contribute appears to be governed by the nature of the arrangement under which such department is constituted. Where such arrangement is substantially a contract, whereby, in consideration of the sums held back from the

charitable institution within the rule which exempts such institutions from liability for negligence.

Same — competent attendants.

2. The mere employment of competent attendants does not exempt a hospital maintained by a railroad company for the benefit of its employees, to which they are compelled to contribute, from liability for injuries caused by the negligence of such attendants.

Same — railroad — liability.

3. A corporation organized by the officers of a railroad company to operate a hospital for the benefit of employees of the road, to which they are compelled to contribute, is not a separate institution, for the acts of which the railroad company is not responsible, where it is organized for the benefit of the road, and the beneficiaries are

employee's wages, the employer undertakes to provide him with medical attendance, etc., the employer seems to be regarded as liable for any injury resulting from want of care or improper treatment; but, where the expenses of the relief department are not wholly covered by the amounts contributed by the employees, or such funds are held by the employer as a trust fund, and the employer retains the administration of the department, he is charged only with the duty of using reasonable care to select competent and skilful assistants.

And, as demonstrated by the case reported, and by *Illinois C. R. Co. v. Buchanan*, *infra*, both where the furnishing of attendance is in performance of a contractual obligation, and where it is furnished in the course of administering the relief fund as a trust fund, if such administration is in fact in the hands of the employer, he cannot escape liability by reason of the fact that the relief department is a separate corporate entity.

Where an employer derives no profit from the retention of the hospital fund from its employees, it is liable only for failure to exercise ordinary care to select, employ, and retain a competent physician. *Poling v. San Antonio & A. P. R. Co.* 32 Tex. Civ. App. 487, 75 S. W. 69; *Galveston, H. & S. A. R. Co. v. Hanway* (Tex. Civ. App.) 57 S. W. 695 (writ of error denied in 94 Tex. 76, 58 S. W. 724); *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 102 Am. St. Rep. 839, 45 S. E. 740; *Richardson v. Carbon Hill Coal Co.* 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012, also, on subsequent appeal, 10 Wash. 648, 39 Pac. 95; *Union P. R. Co. v. Artist*, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Pierce v. Union P. R. Co.* 13 C. C. A. 323, 32 U. S. App. 48, 66 Fed. 44.

In *Illinois C. R. Co. v. Buchanan*, 31 Ky. L. Rep. 722, 11 L.R.A. (N.S.) 711, 103 S. W. 272, a railroad company which maintained for the benefit of its injured employees a hospital in which they were entitled to treatment, requiring them to contribute towards its expense and appointing the assistants, was held liable for injury to

determined by its officers, and the surgeons of the hospital and the road are the same.

Evidence — letter — report.

4. A letter written by the surgeon in charge of a railroad hospital to the head of the department who sent an employee to the institution, that the employee was insane, which fact, according to the rules, deprived him of the right of treatment in the hospital, and asking that his family be requested to protect him, is admissible in evidence in a suit against the railroad company to recover for the death of the employee, alleged to have been due to the negligence of the hospital authorities in permitting him to leave the hospital without attendants.

Hospital — insane patient — negligence — liability.

5. A hospital which has assumed to treat

an employee through its failure to exercise reasonable care in selecting competent and skilful assistants, although the hospital was operated under an independent charter, and no profit or gain was derived by the railroad company therefrom; the court saying: "As the selection or appointment of persons in charge of the hospital is lodged entirely in the railroad company, they should be charged with the duty of exercising reasonable care in their selection, and held responsible for a failure in this respect."

A greater liability will rest upon the employer if it conducts a hospital for the purpose of deriving a profit therefrom, or if it has contracted with its employees to provide suitable and skilful medical treatment. *Richardson v. Carbon Hill Coal Co.* 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012.

In *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642, 50 S. W. 173, it was held that a corporation maintaining a relief department, exacting deductions for its support from the wages of its employees, to whom it undertook to furnish medical treatment in case of injury or sickness while working for the company, the money so paid by the employees affording the company a profit above all expenses, which went to its credit in the bank and which did not constitute a trust fund in which the employees had a permanent or substantial interest, must bear the loss of improper treatment.

Where the employer deducted regularly \$1 a month from the pay of each of its laborers, which was generally understood to be for the purpose of maintaining a hospital and employing a physician, and there was evidence that, when the plaintiff was injured, the general foreman sent for the company's surgeon to come and attend him; and it also appeared that, upon complaint of the way in which such surgeon treated plaintiff, the superintendent of the company refused to send for another surgeon.—there was, under all the circumstances, sufficient proof to go to the jury as tending to establish the liability of the company for the unskilful treatment given by such surgeon. *Richardson v. Carbon Hill Coal*

a person who is discovered to be insane is liable for his death in case it permits him to leave the hospital unattended and without notice to his friends, if he is killed because of inability to care for himself.

(April 13 1908.)

A PPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis, Division 7, in defendant's favor in an action brought to recover damages for the death of her husband, which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. Joseph A. Wright, for appellant:

The injury in the precise form which it in fact occurred need not have been foreseen;

it is sufficient if it now appears to have been a natural and probable consequence.

Hoepper v. Southern Hotel Co. 142 Mo. 378, 44 S. W. 257; Harrison v. Kansas City Electric Light Co. 195 Mo. 608, 7 L.R.A. (N.S.) 293, 93 S. W. 951; Graney v. St. Louis, I. M. & S. R. Co. 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 246; Miller v. St. Louis, I. M. & S. R. Co. 90 Mo. 389, 2 S. W. 439; Dixon v. Scott, 181 Ill. 116, 54 N. E. 897; Hill v. Winsor, 118 Mass. 251; 1 T.omp. Neg. ¶ 59.

Defendant was negligent, as a common carrier of passengers for hire, in not extending to the deceased that degree of care and protection demanded on account of his known and apparent insane condition.

Atchison, T. & S. F. R. Co. v. Parry, 67

Co. 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012.

In *Sawdey v. Spokane Falls & N. R. Co.* 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972, it was held that, where there was no special contract entered into between a railroad and its employee, defining its undertaking in consideration of the deductions made from his wages for the hospital fund; but it appeared that the employee understood that he was entitled, in consideration thereof, to hospital accommodations and medical and surgical treatment at the company's expense for any sickness he should have, or injury he should receive, while in the company's employ; and it was shown that the deductions made by the railroad from the wages of its employees exceeded by a considerable sum the amount expended in the care of its sick and injured employees, that, while a separate account of the fund was kept on the books of the company, the fund itself was mingled with the company's general funds, and that the amount of the account as shown on its book was reduced by it at one time, and that it had treated others of its employees who had become sick or injured while in its employ without question as to the cause of the sickness or injury,—the question whether treatment of an employee injured while returning home from work was gratuitous, or by reason of contractual relations, was for the jury.

The force of the circumstance that a relief department is supported wholly or in part by deduction from the wages of employees, to deprive it of its charitable character, is discussed in *Union P. R. Co. v. Artist*, *supra*, as follows: "The test which determines whether such an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit, it is not a charitable enterprise. If it is to heal the sick and relieve the suffering, without hope or purpose of getting gain from its operation, it is charitable. Tried by this test, the hospitals and medical department of this company are a great public charity. They are supported by the voluntary contributions of this great corporation and of its employees, without the purpose to profit 17 L.R.A. (N.S.)

thereby. We say by their 'voluntary contributions' not unadvisedly. We have not failed to notice that the defendant in error testified that the contribution of 25 cents a month, made by each employee, was a compulsory assessment, and that the company took it out of the pay of such employee. But how it could be compulsory does not appear. If it was a part of the pay of the employee, the company could not lawfully take it out without his consent. If he did not consent, then he did not contribute, and the company still owes him the amount of his assessment. If he did consent, he voluntarily contributed the amount of his assessment. Whatever may be said of the contributions of the employee, there is no question whatever but that the gift of \$2,000 to \$4,000 per month, made by the company, was purely voluntary and charitable. These contributions of 25 cents per month from each employee, and of from \$2,000 to \$4,000 per month from the company, constituted a trust fund devoted to the purpose of furnishing hospital accommodation, physicians, and surgeons for the relief of the sick and injured employees without charge or expense to them. For this purpose this fund was intrusted to this company to administer. There is no evidence that there ever was any purpose or intention on the part of the company of making any profit through the operation of this hospital or the supplying of these physicians. The sole purpose that this record discloses was to relieve these employees from sickness and suffering."

In *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 424, 74 S. W. 456, it was held that a railroad company could not escape liability for unskillful treatment of an employee by a surgeon employed by its relief department, upon the theory that such relief department was a charity, where employees desiring membership in the relief department had to agree that, in consideration of the amounts paid by the railroad for the maintenance of the relief department, the acceptance of benefits from the said relief fund for injury or death should operate as a release and satisfaction of all

Kan. 515, 73 Pac. 105; *Wells v. New York C. & H. R. R. Co.* 25 App. Div. 365, 49 N. Y. Supp. 510; *Eidson v. Southern R. Co.* (Miss.) 23 So. 369; *Foss v. Boston & M. R. Co.* 66 N. H. 256, 11 L.R.A. 367, 49 Am. St. Rep. 607, 21 Atl. 222; *Croom v. Chicago, M. & St. P. R. Co.* 52 Minn. 296, 18 L.R.A. 602, 38 Am. St. Rep. 557, 53 N. W. 1128; *International & G. N. R. Co. v. Gilmer*, 18 Tex. Civ. App. 680, 45 S. W. 1028; *Hutchinson, Carr.* 1906, 3d ed. 992; 3 *Thomp. Neg.* ¶ 2934.

Defendant failed and omitted to give deceased the care and protection contracted for.

Ward v. St. Vincent's Hospital, 39 App. Div. 624, 57 N. Y. Supp. 784; *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A. (N.S.) 496, 45 Atl. 190; *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642, 50 S. W. 173; *Brown v. La Société Française*, 138 Cal. 475, 71 Pac. 516; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 676.

The hospital association is the general agent of defendant in caring for its sick employees, supported by their contributions, and has none of the essential elements of a charity.

Haggerty v. St. Louis, K. & N. W. R. Co. 100 Mo. App. 424, 74 S. W. 456; *Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966; *Brown v. La Société Française*, supra; *Miller v. Chicago, B. & Q. R. Co.* 65 Fed. 305; *Texas & P. Coal Co. v. Connaughten*, supra.

The hospital association is not exempt from liability as a charity.

Hiatt v. Fraternal Home, 99 Mo. App. 105, 72 S. W. 463; *Re St. Louis Institute*, 27 Mo. App. 633; *Franta v. Bohemian Roman Catholic Cent. Union*, 164 Mo. 304, 54 L.R.A. 723, 86 Am. St. Rep. 611, 63 S. W. 1100; *Re Globe Mut. Ben. Asso.* 135 N. Y. 280, 17 L.R.A. 547, 32 N. E. 122; *State ex rel. Atty. Gen. v. Central Ohio Mut. Relief Asso.*

claims for damages against said company. The court said: "In our judgment the relief department organized by the defendant company, in view of the regulations provided for its government, cannot be classed as a charity without doing violence to every significance that word bears either in popular or legal usage. It is not a charity within the definition of Justice Gray, above quoted, because the fund administered is not a gift by the employees who make contributions; much less by the railroad company, which does not make any unless a deficit occurs. The fund is made up from sums contributed by members for their mutual benefit, and is to be enjoyed by them if they suffer from sickness or accident. It is, in effect, a provision made by the employees to insure a stipend for them to live on if they are disabled, and a benefit to their families if they die. In 17 L.R.A. (N.S.)

29 Ohio St. 399; *Bacon, Ben. Soc.* 3d ed. ¶ 62; *Angell & A. Priv. Corp.* ¶ 126.

The letter from the chief surgeon to the department chief was admissible.

McDermott v. Hannibal & St. J. R. Co. 87 Mo. 287; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 356, 61 L.R.A. 464, 96 Am. St. Rep. 615, 73 S. W. 645; *Nickell v. Phoenix Ins. Co.* 144 Mo. 420, 46 S. W. 435; *Malecek v. Tower Grove & L. R. Co.* 57 Mo. 17; *Hill Bros. v. Bank of Seneca*, 100 Mo. App. 230, 73 S. W. 307; *Sisk v. American Cent. F. Ins. Co.* 95 Mo. App. 710, 69 S. W. 687; *Kirkstall Brewery Co. v. Furness R. Co.* L. R. 9 Q. B. 468; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Hall v. Union Cent. L. Ins. Co.* 23 Wash. 610, 51 L.R.A. 288, 83 Am. St. Rep. 844, 63 Pac. 505; *Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 348, 9 L.R.A. 754, 3 *Inters. Com. Rep.* 387, 22 Am. St. Rep. 593, 26 N. E. 159; *Louisville Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. 563; *International Trust Co. v. Norwich Union F. Ins. Soc.* 17 C. C. A. 608, 36 U. S. App. 277, 71 Fed. 81; 2 *Wharton, Ev.* ¶ 1177.

Messrs. W. F. Evans and John G. Egan, for respondent:

The defendant is not liable for negligence, if any, of the physicians of the hospital association.

Union P. R. Co. v. Artist, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Pierce v. Union P. R. Co.* 13 C. C. A. 323, 32 U. S. App. 48, 66 Fed. 44; 15 Am. & Eng. Enc. Law, 2d ed. p. 763.

One who employs a physician to attend another is bound to exercise only ordinary care in selecting the physician.

Union P. R. Co. v. Artist and Pierce v. Union P. R. Co. supra; *Quinn v. Kansas City, M. & B. R. Co.* 94 Tenn. 713, 28 L.R.A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036; *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 424, 74 S. W. 456; *Pittsburgh,*

in addition to this, if disabled by accident, their medical attendance is paid out of the fund. This strikes us as a purely business arrangement on the part of the employees of the railroad company. But to call the enterprise a charity on the part of the company itself is extravagant, when we note that one of its purposes, as carved in high relief on the face of the regulations, is to prevent damage suits."

In connection with this subject, attention may also be directed to the case of *Eighmy v. Union P. R. Co.* 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056, in which it is held that a railroad company is not liable to employees for negligence of physicians and surgeons in a hospital which it voluntarily maintains for the gratuitous accommodation of injured employees to whom the company owes no statutory or contractual obligation in the matter.

C. C. & St. L. R. Co. v. Sullivan, 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; Atchison, T. & S. F. R. Co. v. Zeiler, 54 Kan. 340, 38 Pac. 282; Richardson v. Carbon Hill Coal Co. 10 Wash. 648, 39 Pac. 95; South Florida R. Co. v. Price, 32 Fla. 46, 13 So. 638; Eighth v. Union P. R. Co. 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056; Galveston, H. & S. A. R. Co. v. Hanway (Tex. Civ. App.) 57 S. W. 695; Second v. St. Paul, M. & M. R. Co. 5 McCrary, 515, 18 Fed. 221; 3 Elliott, Railroads, § 1388; Pearl v. West End Street R. Co. 176 Mass. 177, 49 L.R.A. 826, 79 Am. St. Rep. 302, 57 N. E. 339; Big Stone Gap Iron Co. v. Ketron, 102 Va. 23, 102 Am. St. Rep. 839, 45 S. E. 740.

The duty of the defendant was performed when it discharged James B. Phillips safely at his destination.

Hendrick v. Chicago & A. R. Co. 136 Mo. 548, 38 S. W. 297.

The burden is upon the plaintiff to prove that some negligence of the defendant was the proximate cause of the death of Phillips.

Harper v. St. Louis Merchants Bridge Terminal Co. 187 Mo. 575, 86 S. W. 99; Warner v. St. Louis & M. River R. Co. 178 Mo. 125, 77 S. W. 67.

The liability of a party for his negligence is limited to injuries which he could have foreseen as a probable consequence, and which are the direct consequence of his negligence.

Haley v. St. Louis Transit Co. 179 Mo. 30, 64 L.R.A. 295, 77 S. W. 731; Henry v. St. Louis, K. C. & N. R. Co. 76 Mo. 288, 43 Am. Rep. 762; Saxton v. Missouri P. R. Co. 98 Mo. App. 494, 72 S. W. 717; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Daniels v. New York, N. H. & H. R. Co. 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424; Korn v. Chesapeake & O. R. Co. 63 L.R.A. 872, 62 C. C. A. 417, 125 Fed. 897; Nash v. Southern R. Co. 136 Ala. 177, 96 Am. St. Rep. 19, 33 So. 932; Gaukler v. Detroit, G. H. & M. R. Co. 130 Mich. 666, 90 N. W. 660; Brown v. Louisville & N. R. Co. 103 Ky. 211, 44 S. W. 648; Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; Hamilton v. Pittsburg & L. E. R. Co. 183 Pa. 638, 38 Atl. 1085; Hullinger v. Worrell, 83 Ill. 220; Adkins v. Columbia L. Ins. Co. 70 Mo. 27, 35 Am. Rep. 410; Streeter v. Western Union Mut. Life & Acci. Soc. 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779.

The letter to Mr. Newton was not authorized by the defendant, and was not a part of the *res gestæ*.

Koenig v. Union Depot R. Co. 173 Mo. 698, 73 S. W. 637; Redmon v. Metropolitan Street R. Co. 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26; Devlin v. Wabash, St. L. 17 L.R.A. (N.S.)

& P. R. Co. 87 Mo. 545; Aldridge v. Midland Blast Furnace Co. 78 Mo. 559; Rogers v. McCune, 19 Mo. 557.

Graves, J., delivered the opinion of the court:

This is an action brought by the widow to recover the sum of \$5,000 for the alleged negligent killing of her husband, James B. Phillips, who died April 11, 1904. The trial court having given a peremptory instruction to find for the defendant, the plaintiff took an involuntary nonsuit, with leave, and, after unsuccessful motion to set aside the nonsuit so taken, perfected her appeal to this court.

Phillips, the deceased, was an employee of defendant in its auditor's department. As such employee, there had been taking out of his wages a small monthly hospital fee, which entitled him to be admitted and treated in a certain hospital system alleged, upon the one hand, to be maintained by the defendant for that purpose, and, upon the other hand, to be a separate and distinct corporation from the defendant, and maintained by certain employees of defendant, and not by the defendant itself. Shortly prior to his death, Phillips had been furnished a pass by the defendant over its line from St. Louis to Springfield and return, and, using such employee's pass, he went from St. Louis to Springfield to take treatment for his ailments in the hospital there, which was a part of the hospital system above mentioned. For a time he was treated, and on a certain morning took passage upon one of defendant's trains at Springfield bound for St. Louis, his home. This train arrived about 7 o'clock that evening, and deceased left the train unharmed. About 9 o'clock of the same evening, a man, partially undressed and in a condition to retire for the night, was lying across one of the many street car lines of the city and was run over and killed by a passing car. Some two weeks later, the body was exhumed and identified as that of James B. Phillips. Plaintiff had no knowledge of the peculiar and untimely death until about the latter date. The claim is that Phillips was mentally unbalanced, which fact was known to defendant, and defendant was remiss in duty in not notifying his family of his departure from the Springfield hospital before his arrival in St. Louis, and, further, in turning loose upon the streets of said city, unattended, a man in that known mental and helpless condition. There are several peculiarly interesting questions, which, together with the incident facts, will be duly noted.

1. Plaintiff having been cast upon her proof, rather than upon the pleadings, the legal questions involved must be entwined with all pertinent facts shown. In such case

the facts proven by her are established facts for the purposes of this review. At the threshold of the inquiry is the relationship between defendant and the Employees' Hospital Association of the Frisco Line, a corporation, separately incorporated by the leading officials of defendant. The hospital at which plaintiff's husband was treated was part and parcel of the hospital system managed by the association above named. Defendant contends that it is in no sense responsible for the negligent acts, if such there were, of the Employees' Hospital Association of the Frisco Line; that it is a distinct corporate entity, not under control of defendant; and that it is responsible for its own acts of negligence. This relationship between the defendant and the hospital association is important on the question of excluding certain evidence, in addition to the point now in review. The charter of this association was in evidence. By article 1 thereof the corporation is named. Articles 2, 3, and 4 read thus:

"Art. 2. The purposes for which this association is formed are the support of a benevolent and charitable undertaking in this: To provide medical and surgical treatment and care for the employees of the St. Louis & San Francisco Railroad Company, and of its associated companies, who may be injured or disabled by accident or sickness while in such employ, and in the line of duty, to such extent only, and under such rules and regulations, as may be prescribed from time to time by the trustees hereinafter provided for; and to furnish such employees with additional privileges and benefits, not inconsistent or interfering with the main object of the association, as may from time to time be directed for the said trustees; and to that end purchase, acquire, erect, and maintain suitable buildings with necessary land and appurtenances for hospital and other purposes within the purview of these articles; and to sell, convey, encumber, and transfer any such property whenever said trustee shall direct.

"Art. 3. All the powers of the association, and of any corporation into which it may be merged, shall be vested in and exercised by five trustees, who shall manage and conduct the business and control all its property; the names and residences of those who shall be trustees until their successors shall be chosen as hereinafter provided, are as follows: B. F. Yoakum, of St. Louis, state of Missouri; L. F. Parker, of St. Louis, state of Missouri; A. J. Davidson, of St. Louis, state of Missouri; C. C. Mills, of Monett, state of Missouri; Charles Huffschnitt, of St. Louis, state of Missouri. Their successors shall be chosen at such time and in such manner as may be provided by the by-laws which the 17 L.R.A. (N.S.)

trustees shall adopt for the government of the affairs of the association, and which they shall make for the government of the affairs of the association, and which they may amend as shall seem best to them.

"Art. 4. The association shall not engage in business for pecuniary profit in any form, and shall not have any capital stock; the funds necessary for carrying out its purpose shall be raised in such manner as may be provided by the by-laws."

Article 5 provides the place of business for the corporation, and article 6 provides the term of fifty years as the life of the corporation. By the rules adopted and promulgated by B. F. Yoakum, president of the board of trustees, it is provided, among other things, as follows: "Rules and Regulations. It being contemplated that, for the consideration of the contribution paid monthly by the members of the Employees' Hospital Association of the Frisco Line, a home and medical attention for the sick and injured of said association will be provided, in accordance with the following rules and regulations, it is directed: (1) Medical relief will only be furnished at the hospital of the association, except as hereinafter designated. (2) Only those who have become sick or injured while in the employ of the St. Louis & San Francisco Railroad System, and in the line of their duty, will be entitled to gratuitous treatment. Those suffering from any complaint which existed, or the cause of which existed, before the party last entered the employ of the railroad company, will not be entitled to treatment. (3) Employees of the railroad system taken sick or injured while at any point on the line of the St. Louis & San Francisco Railroad, on temporary lay-off, are entitled to treatment: Provided, said sickness was contracted while in course of his employment prior to such lay-off: And provided, further, that they have become liable for dues for the month during which their sickness originated or injury occurred. . . . (5) Any member who may be too seriously ill or injured to be removed with safety to his life may receive temporary aid along the line of the railroad when authorized by the chief surgeon. . . . (11) Any member of the association who desires medical treatment must take to his physician a written or printed notice from his employer that he is entitled to such treatment, and no employer will be allowed to furnish such notice unless he is fully satisfied that the patient is entitled to same. All such printed or written notices are good only for the months in which they are issued, or for a single spell of sickness. . . . (16) When a patient is too seriously ill or injured to be promptly sent to

the association hospital, the attending physician or surgeon shall at once wire a full report to the chief surgeon and must act under instructions of rule No. 5 until further advised. However, at the earliest possible moment consistent with the patient's safety, he must be sent to the hospital."

Upon the organization of the hospital association, or shortly thereafter, the defendant in this case sent out rules to employees as follows: "The Employees Hospital Association of the Frisco Line, having agreed to furnish necessary medical, surgical, and hospital treatment to such employees of the St. Louis & San Francisco Railroad System as may become sick or injured while in the service of said companies, and to erect and maintain a hospital for the use of such sick and injured, and the employees of said system having agreed to contribute to a fund to be paid to said hospital association, to be used and expended by the association for such purpose, the following rules for the guidance of employees are hereby promulgated: (1) Mail carriers at stations where carrying the mail is the only duty performed by them for the company, are exempt from assessment, and are not entitled to the services and benefits of the hospital association. (2) The sick and injured employees above mentioned are entitled to hospital care and treatment free of charge so long as they require surgical or medical attention and obey the rules established for their protection, but not for a term longer than one year continuously unless by permission of the board of trustees of said hospital association. (3) Heads of departments and foremen will be furnished with blank certificates, and will issue them, properly signed, to such employees as are entitled to the benefit of the hospital association, and every employee receiving such certificate will be entitled to receive from the head of his department free transportation over the company's lines to the hospital, which, in case of emergency, when delay may be dangerous, will be provided by telegraph on application to the proper officer. These certificates are good only in the month for which they are issued. (4) The company hereby donates to the hospital association the use of its telegraph lines to facilitate the care and treatment of sick or injured employees, and therefore all persons in the service of said companies, and all others are hereby notified that no bills for medical or surgical services, nursing, drugs or funeral expenses, will be paid by these companies unless first authorized by the general claim agent. (5) In every case of personal injury to an employee, the conductor or foreman of the department in which the party is employed must report particulars as soon as 17 L.R.A. (N.S.)

possible by wire to division superintendent or head of department in which the accident occurs. State whether a surgeon has been summoned to attend, and, if so, give such surgeon's name, and state further whether the injured man will be transported to general hospital. It will be the duty of the above officers to see that such telegraphic advice is promptly given them, and they will at once telegraph full particulars to superintendent, chief surgeon, and general claim agent. (6) If such injured employee can be moved, send him to general hospital by first train and notify chief surgeon and general claim agent. If the injured employee cannot be moved, place him in care of the nearest local agent and summon the most available local surgeon to attend him. If possible, he should be taken to the nearest emergency hospital, to be transported to general hospital when able. In case of absolute necessity, when life or limb is involved, secure the nearest competent surgeon to give attention to the injured person until the local surgeon can reach the spot, or the injured person can be transported to general hospital or to one of the emergency hospitals. Be particular to notify such surgeon that his services are required for first attention only, and that any differences in the amount to be paid him by the hospital association for such service shall be decided by the chief surgeon or the hospital association as final arbiter. Notify the chief surgeon by wire at once of such employment, and also as to whether amputation or surgical operations are immediately necessary. (7) Stretchers for use of injured men will be placed at each station where division of local surgeons are located, and in cabooses and train baggage cars. (8) The conductor in charge of train having patients for general hospital will at once report that fact by wire to chief surgeon and to general claim agent, and state whether ambulance is required. In case such patients are for emergency hospitals, the division surgeon at the point where the emergency hospital is located must be similarly notified by wire. (9) In cases of wrecks or accidents when a number of persons, either passengers or employees, are injured and require immediate attention, summon at once the nearest competent surgeon, summon at the same time the nearest division or local surgeon who can reach the scene of the accident most quickly, and, in addition to the notice to be given division surgeon, superintendent, or head of department, notify by wire, promptly, the chief surgeon, superintendent, and general claim agent, giving full particulars as to the names and whereabouts of the injured persons, names of surgeons in attendance, and state what further attention is re-

quired for the relief of the injured. . . . (13) The persons who have been, or may hereafter be, appointed by the hospital association chief surgeons, assistants, hospital dispensary, division and local surgeons and physicians, are hereby appointed chief surgeon, assistants, division and local surgeons and physicians, as the case may be, of the St. Louis & San Francisco Railroad Company, and its leased and operated lines (while they hold such positions in connection with said hospital association), for the care and treatment, under the rules above established, of all passengers, citizens, and nonemployees, who may be injured on the line of this company, and as such will be respected and assisted in the discharge of their professional duties when called upon. B. F. Yoakum, Vice President and General Manager."

The defendant likewise sent out an official circular of date June 29, 1899, as follows: "A large majority of the employees of this company have requested the establishment of a railway-hospital system on the line of the St. Louis & San Francisco road, similar to the system in vogue and successfully carried on by many railroad companies and their employees, with which the employees of this company are generally familiar, and have agreed to contribute to a fund for the proper care of such of their number as may become sick or be injured while in the service of the company. The benefits and advantages secured under this system by employees who unfortunately become disabled through illness or injury from following their usual avocation, and thereby sustain consequent loss, have been conclusively demonstrated. The further fact that the employees secure hospital benefits, including medical and surgical attention, at a much less cost yearly than by any other assessment or insurance plan for that object, will commend to all concerned the establishment of the system on this company's lines. In pursuance to above, the Employees' Hospital Association of the Frisco Line has been duly organized and incorporated and a suitable building for the general hospital, for the treatment of sick and injured employees, erected at Springfield, Missouri, which is owned by the association, and will be in charge of its chief surgeon. This building will be ready for occupancy August 1, 1899. Arrangements will be made with hospitals at St. Louis, Missouri, Ft. Smith, Arkansas, Paris, Texas, Joplin, Missouri, Pittsburg, Kansas, and Wichita, Kansas, for treatment in cases of emergency, until the patient can be safely removed to Springfield. Supply stations for dispensing purposes will be established at such convenient points on the line as shall be found necessary. Patients received at the 17 L.R.A. (N.S.)

hospital will be provided, free of charge, with everything necessary for their careful and comfortable treatment, including the services of the hospital surgeons or physicians, so long as they require surgical or medical attention and obey the rules established for their protection, but not longer than one year, without special authority from the trustees. For the purpose of carrying into effect the above system, and to enable all the employees to become members of and entitled to all the benefits and privileges of said association, notice is hereby given to all concerned that, commencing with the wages for month of July, 1899, which are payable in August, an assessment will be made on the pay rolls (including salary vouchers), as follows: Thirty-five cents per month from the pay of each employee whose monthly wages amount to less than \$50 per month; 50 cents per month from the pay of each employee whose monthly wages amount to \$50 and less than \$100; 75 cents per month from the pay of each employee whose monthly wages amount to \$100 and less than \$125; \$1 per month from the pay of each employee whose monthly wages amount to \$125 and more. Deductions to apply to time checks as well as pay rolls. No deduction will be made from the earnings of an employee whose month's earnings do not amount to \$5. No deduction will be made from the wages of any employee who is discharged or quits the service of this company on or before the 31st day of July, 1899. After that date no exception will be made. Heads of departments, foremen, and all others who issue time checks, will see that the proper deduction is made on the first time check issued in the month designated 'Hospital.' In case an employee returns to service in the same month and after having drawn pay by time checks, and receives another time check in the same month, the person issuing the time check will note on the second check: 'Hospital fees paid on previous check.' This company will pay to said hospital fund as an assessment the sum of \$500 annually, in monthly instalments. All employees of the St. Louis & San Francisco Railroad System are entitled to hospital benefits under such rules and regulations as may be established for the government of the hospital. Rules and regulations governing the disposition and treatment of ill and injured employees will be issued, and all employees should become familiar with those regulations, as they are established for the benefit of all. The surgeons and physicians of the St. Louis & San Francisco Railroad Company will, on and after August 1, 1899, be under the control and direction of the chief surgeon of the hospital association, and all ill or injured employees will, on

and after that date, be under the care and treatment of the hospital association. B. F. Yoakum, Vice President and General Manager."

From this circular it appears that no option is left an employee; but, on the other hand, defendant appropriates a certain amount of his wages and furnishes him medical treatment. From oral evidence, it appears that the officers of this hospital association were officers of the defendant; the treasurer was the same; the employees made no formal application for admission as members, but only signed pay rolls with the deductions made as provided for in the foregoing documents.

We have set out this evidence, perhaps, in more detail than should have been done; but the relationship between these two corporations is an important one, and not confined to this case alone. To our mind it is immaterial as to the true character of the hospital association as indicated by its charter provisions. It has, however, but few, if any, of the earmarks of a voluntary benevolent association. Nor are there any earmarks of a public charity. What is received is paid for by the recipients. Under the weight of authority it cannot be held to be a charitable institution. *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 424, 74 S. W. 456; *Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966; *Brown v. La Société Française*, 138 Cal. 475, 71 Pac. 516; *Miller v. Chicago, B. & Q. R. Co.* (C. C.) 65 Fed. 305; *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642, 50 S. W. 173. So that the rule that exempts such institutions from liability, as announced in *Murtaugh v. St. Louis*, 44 Mo. 480, does not apply. Nor are institutions of the character of the one disclosed by this record exempted from liability by the mere employment of competent servants. They must go further and competently treat the patients received. In such case they occupy the position of ordinary physicians and surgeons and are bound by the same rules, which are too familiar for repetition here. If they undertake to furnish the treatment, not as a charity, they stand in no different light from the ordinary physician. But this question is really beside the issues in this case. No one can read this record without concluding that, if the thin corporate shell of the hospital association is broken, the yolk therein contained is the defendant. By rule 1 above quoted, defendant exempts certain mail carriers from assessment, and excludes them from benefits. By rule 3, the heads of the departments and the foremen of the defendant are furnished with blank certificates, which they fill and issue to employees, entitled to receive benefits, and such heads of departments and foremen, the 17 L.R.A. (N.S.)

alter ego of defendant, thus decide who shall be treated by the hospital association. By rule 5, the defendant's chief surgeon and general claim agent must be notified, and, by rule 6, if the employee injured can be moved to the hospital, the chief surgeon and general claim agent must be notified. Why notify the general claim agent of defendant if the two corporations were separate and distinct entities in fact? That the hospital association is operated for the benefit of defendant as much or more than for the benefit of the employees is too apparent from this record. Rule 8, above, breathes the same thought, as also do rules 9 and 10. But, beyond all is rule 13, which makes the chief surgeon, and other surgeons of the hospital association, the chief surgeon and the local and division surgeons of the defendant. Eliminating all other matters, this rule 13 makes the chief surgeon and other surgeons the agent and employees of the defendant. But further showing that the hospital association, or its several surgeons, is but the *alter ego* of defendant, we have circular No. 35, supra, by which defendant says to all employees that they will be assessed to pay for this medical attention. No option is given an employee. By force of this rule, defendant says to an employee: "We will take so much of your monthly earnings, and in the event you are hurt or become sick, and, in the judgment of the heads of the departments and the foremen in our employ, you are entitled to medical treatment, we will furnish it to you through the hospital association." So that it becomes unnecessary in this case to break the extremely thin and attenuated corporate shell of the hospital association, and expose to open view the yolk therein contained. The hospital association, whether it in fact be a separate corporate entity, or in fact the defendant itself, masquerading under an assumed name, is at least the agent and employee of the defendant to perform these particular services. The defendant pays its said agent \$500 annually, and, in addition, it requires of its employees that they pay to it the remainder, and by it such sum is paid to the agent for these services. To say the least, this hospital association, together with all its surgeons and physicians, are but agents of defendant, and made so by express words in rule 13, supra. The negligence of these agents is the negligence of the defendant. As said in the case of *Orcutt v. Century Bldg. Co.* 201 Mo. 424, 8 L.R.A. (N.S.) 929, 99 S. W. 1062, the defendant holds the purse strings of the hospital association. Not a dollar does it get save through defendant. Defendant pays for itself \$500, and the remainder is paid by the tribute which defendant levies upon its em-

ployees, which is collected and paid through defendant. The hospital system is a worthy one, and a well-taken, advance step; but, under the record in this case, such hospital association is but the agent of the defendant.

2. We come now to the competency of the following letter:

St. Louis & San Francisco Railroad Company.

G. W. Cale, Jr. Chief Surgeon,
Springfield, Mo., Apr. 13, 1904.

Mr. W. P. Newton,
Assistant General Auditor,
St. Louis, Mo.

Dear Sir:—

Mr. J. B. Phillips, who was in the hospital, is mentally unbalanced and should be sent to an asylum for treatment. Won't you please advise his family or friends so that necessary steps can be taken to protect him?

Yours truly,

G. W. Cale, Jr.

Stamped on back: "Vice Pres't & Gen'l Auditor, Apr. 14, 1904. St. L. & S. F. R. Co."

The writer of this letter was the chief surgeon of the hospital association, and, by rule 13 hereinabove discussed, was the chief surgeon of the defendant. He was therefore the agent of defendant, having in charge the treatment of the deceased. Under rule 13, *supra*, defendant seems to have had a chief surgeon, division surgeons, and local surgeons, and Dr. Cale was the head of this line of medical agents under the appointment of defendant by force of this rule. The letter was written to the assistant of the head of another department. It conveyed the facts which Dr. Cale had learned in the course of his official duties as the chief surgeon of defendant, under rule 13, *supra*. It was at least partly for the information of a co-ordinate department of the defendant railway company's service. This letter was written two days after the death of plaintiff's husband, but at a time when neither the plaintiff, the defendant, nor the writer knew of such fact. The letter was excluded by the learned trial judge. Was his action in this respect correct? We think not. Rule 4 of the hospital association reads: "The association will not furnish treatment for contagious, chronic, incurable, or venereal diseases, nor cases of insanity, nor injuries or diseases the result of intemperance, vicious habits, personal difficulties." By rule 3 of the defendants, hereinabove fully set out, the deceased, being at work in the auditor's department of defendant, could not even gain admission to the hospital without a certificate from the head of that department, nor could he get transportation to which he

was entitled, save through that department. Under these rules, when taken and considered together, it became and was the duty of the chief surgeon, or what we might term the head of the medical department of defendant, to inform the head of the department issuing the certificate to deceased, under rule 3 of the defendant, that such party was insane, and, under rule 4, quoted last above, he was not such a person to whom medical attention was due. This letter therefore is but one written by the chief surgeon of defendant in the line of his duty, as such duty appears from the uncontradicted record evidence. It in effect notified the auditor's department that the man was insane, and should be sent to a proper asylum, that he was not entitled to further treatment in the hospital under the rules thereof, and that no further certificates should be given him. If Dr. Cale was the agent of the defendant, as we have seen that he is, then such an admission, made pertaining to things occurring and being done by him in the course of the performance of that duty, is an admission of the defendant. The letter head upon which the letter was written shows him to be defendant's chief surgeon, as well as the chief surgeon of the hospital. This was the third time that the deceased had been under the treatment of the hospital force, and, if he was insane, it was the duty of defendant's chief surgeon, who was also chief surgeon of the hospital, to make known that fact under the rules above mentioned. His duties had not yet terminated, and when he wrote the letter he was simply in the performance of such duties. Under such circumstances, this letter is in the nature of a report made by one official to another, and is not in the same line as a statement made, after an accident, but too late to be recognized as a part of the *res gestæ*. The cases usually applying the *res gestæ* doctrine have no application here.

We think that this letter is in the nature of an official report from one of the chief officials of defendant to another of such officials, and a report which was contemplated by the rule. It stands in the nature of an admission by an agent, whilst acting in the line of duty, and as such is an admission of defendant. *Malecek v. Tower Grover & L. R. Co.* 57 Mo. loc. cit. 21; *McGenness v. Adriatic Mills*, 116 Mass., loc. cit. 180; 2 Wharton, Ev. 3d ed. § 1177. In the Missouri case cited, it was said: "The evidence of the admissions of Buell, the company's superintendent, was certainly admissible to prove that it recognized the assault, etc., of its driver, and justified it upon the ground of the nonpayment of fare. Corporations can only act and speak through their authorized agents. The acts and admissions of Buell,

in this regard, were those of the corporation." The Massachusetts court, in the case cited, speaks tersely in this language: "The remaining question is in reference to the admission in evidence of the statement of the superintendent. The defendant is a corporation, and can only act through agents, and, in the absence of any evidence to the contrary, the superintendent in charge of the mill must be deemed the proper person to whom to make complaint and to have authority to give information and direction in regard to the drainage from it. His recognition that it was a matter that required to be attended to, and should be, was therefore properly put in evidence. *Morse v. Connecticut River R. Co.* 6 Gray, 450. The expression used by him that he 'would not have it around his place as it was around there for \$500' was a mere mode of stating that the nuisance existed, and could not have been considered as an admission that this sum was the amount of the damages; nor do we understand that it was put in evidence as such." And Dr. Wharton, in his most excellent work, couches the rule thus: "As has been already incidentally seen, a party who commits the management of his whole business, or of a particular line of his business, to an agent, is bound by the admissions of the agent, as to his entire business committed to him; nor, when the agent is a general agent, representing his principal continuously, is it necessary for the admission of such declarations that they should either have been part of the *res gestæ*, or should have been specially authorized. Eminently is this the case with corporations." [2 Whart. Law of Ev. 3d ed. § 1177.] Other cases are cited in the briefs, and others not cited could have been cited; but these suffice to illustrate the rule. Said letter is at least admissible to show that Dr. Cale, defendant's chief surgeon and agent, had knowledge of the fact that deceased was unbalanced in mind, when he permitted him to be placed upon the train unattended. *McDermott v. Hannibal & St. J. R. Co.* 87 Mo. 285. To what was said by Henry, Ch. J., in that case we can add nothing, for the proposition is fully discussed and the cases reviewed. There was error in refusing to admit this letter.

3. It is next contended that defendant is liable only for such injuries which could have been reasonably expected to have been foreseen; that is to say, if it be granted that defendant was negligent, yet it is only liable for such injuries as would reasonably be expected to follow from such negligence, and not for mere remote contingencies. In this we think the defendant is correct. But apply the rule to this case. In the view we have just expressed, the de-

fendant, by and through its agent, had assumed the duty of treating the deceased. The evidence tended to show that the patient was insane, and that defendant had knowledge of that fact. Now, if the patient was insane, and the defendant had knowledge of that fact, then might it not have reasonably presumed that accident might befall a man in that condition? The freaks of a wandering mind are varied, it is true; but none knew them better than the skilled chief surgeon, who represented the defendant, when he had the deceased conveyed to the train. We are not saying that the act of placing his practically undressed body across a street-railway track was the result of his insane condition; but there are sufficient circumstances to authorize the submission of the question, under properly guarded instructions, to a jury for its decision. It cannot be said that such an act was not one that could not have been reasonably anticipated by defendant's surgeon when he placed an insane man aboard of a train, unattended, and without notice to his family, knowing that he would have to find his home in a populous city, filled with a network of street-railway lines. The rule is properly stated by Thompson, in his work on the Law of Negligence (§ 59), thus: "It is not necessary," says the supreme court of Minnesota, following the supreme judicial court of Massachusetts, 'that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence.' In other words, it is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him. It is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault,—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question." This rule has found full recognition in this state. *Miller v. St. Louis, I. M. & S. R. Co.* 90 Mo. loc. cit. 394, 2 S. W. 439. A case very much in point is the case of *Atchison, T. & S. F. R. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105. In the *Parry* Case the passenger became mentally unbalanced whilst on the train, and was, by the conductor, placed in charge of the depot master after being taken from the train. The depot master permitted him to leave the depot and his custody while in that condition. He wandered some 5 miles, and, placing himself across the track, was killed. The case before us is much stronger. Here the deceased occupied a double relationship to the defendant. He was not only a passenger, but he was likewise a patient being

treated by defendant's agent. Defendant's agent had full knowledge, if the evidence be true, that deceased was insane. Defendant, through its agent, had that knowledge when deceased was placed on the train, and this exclusive of the evidence tending to show the condition and actions of deceased whilst on the train. Of course, if the deceased was not insane, it matters not what means he used to end his life. If he was not insane there can be no liability upon the part of defendant. Defendant's liability must be bottomed on the facts that deceased was insane, that defendant knew such fact, and that his death was occasioned by reason of such fact. It must be found that the act of lying down upon the railroad track was the result of his mental condition aforesaid. In his unfortunate death there are some circumstances tending to show that a perverted mind might have been attempting to place a tired body to rest for the night. For instance, the taking off of the outer garments.

Under proper instructions, this cause should have been submitted to the jury, and the trial court erred in giving the peremptory instruction for the defendant.

The cause is reversed and remanded, to be proceeded with in accordance with these views.

All concur.

Petition for rehearing denied April 13, 1908.

NEBRASKA SUPREME COURT.

MARSHALL WEBB

v.

ROSINA WHEELER, Appt.

(— Neb. —, 114 N. W. 636.)

Covenant — title — breach.

1. A covenant in a deed that "I hold said premises by good and perfect title," if untrue, is broken when made; and right of action at once accrues thereon.

Same — damages — value of improvements.

2. When the plaintiff is in possession of the premises, and can recover the value of his improvements under the "occupying claimant's act," he cannot recover the value thereof in such action for damages.

(January 8, 1908.)

APPEAL by defendant from a judgment of the District Court for Nemaha County in plaintiff's favor in an action brought

Headnotes by SEDGWICK, Ch. J.
17 L.R.A. (N.S.)

to recover damages for breach of warranty. Reversed.

The facts are stated in the opinion.

Messrs. Stull & Hawxby and H. A. Lambert, for appellant:

There must be an actual eviction to sustain an action for breach of covenant.

Scott v. Twiss, 4 Neb. 133; Troxell v. Stevens, 57 Neb. 329, 77 N. W. 781; Great Western Stock Co. v. Saas, 24 Ohio St. 542; Stambaugh v. Smith, 23 Ohio St. 585; Cheney v. Straube, 35 Neb. 521, 53 N. W. 479; Hampton v. Webster, 56 Neb. 628, 77 N. W. 50.

This case was brought too soon, and no damages can be recovered.

Lundgren v. Kerkow, 1 Neb. (Unof.) 66. 95 N. W. 501; Kellog v. Platt, 33 N. J. L. 328; Zerfing v. Seelig, 12 S. D. 25, 80 N. W. 140; Hampton v. Webster, 56 Neb. 628, 77 N. W. 50; Brady v. Spurek, 27 Ill. 478; Hannah v. Henderson, 4 Ind. 174; Wright v. Nipple, 92 Ind. 310; Troxell v. Stevens, supra.

Messrs. Neal & Quackenbush for appellee.

Sedgwick, Ch. J., delivered the opinion of the court:

Three important questions are presented in this case. Two of them have been very much discussed by the courts of the country generally, and the authorities are somewhat at variance thereon. In the decisions of this court there appears to be a diversity of expression at least, and perhaps it may be

Case Note. — Necessity of eviction to maintenance of action for breach of covenant of warranty of title or of seisin.

As to when cause of action for breach of warranty of title will accrue so as to set in operation the statute of limitations, see Re Hanlin, and note, post, 1189.

The covenants of title which will be considered in this note are general warranty of title and the covenant of seisin and right to convey. These are the only covenants as to which the question here under consideration could be raised besides, possibly, the covenant for quiet enjoyment, which is sometimes regarded as synonymous with the general covenant of warranty. Cases where it is so treated will be included. While, as will be hereafter shown, originally covenants of title and seisin were dissimilar in character, scope, and time of enforcement, and this dissimilarity is still very generally recognized by the courts as a theoretical proposition, yet as a practical proposition in most of the jurisdictions the former distinctions between these covenants have to a great extent been obliterated and confused, so that at the present time there is very little, if any, practical distinction between them. To illustrate, while the gen-

said a conflict in principle. The real estate in controversy was conveyed to this defendant by a deed with general covenants of warranty executed jointly by one Emma Carse, widow of Henry Carse, deceased, and her daughter, Alice V. McCandless; the husband of Mrs. McCandless joining also in the deed. Henry Carse, in his lifetime, was the owner of the premises, and had good title thereto. The said deed to this defendant recited that the grantors were the heirs of Henry Carse. The defendant conveyed the land to this plaintiff; the deed of conveyance containing covenants of title and warranty. Afterwards the plaintiff discovered that Mrs. Carse and her daughter were not the only heirs of Henry Carse; that an adopted child was an equal heir

with Mrs. McCandless, and so the title conveyed to the defendant and by her conveyed to this plaintiff was an undivided one-half interest in the land, together with the widow's dower estate. Upon discovering this defect in the title, the plaintiff brought this action. The plaintiff took possession of the land under his deed, and had not been disturbed in his possession when this action was begun. The two important questions above referred to, which arise upon these facts, are: First, Can an action be maintained for damages for breach of covenant of title to real estate before eviction, and, in such case, what is the measure of damages? A further question also arises in the case in determining the measure of damages from a consideration of the following facts:

eral covenant of title, or general warranty of title, is almost universally held to be breached only by an actual or constructive eviction, the covenant of seisin is said to be broken at the time it is made, if at all. Yet it will be found that the later cases, as a general thing, do not give any material recognition to this distinction, and, without reference to whether a covenant is called a general covenant of title, or a covenant of seisin, if at the time it was made the covenantor had neither title nor possession, it is held to be broken *eo instanti*, and substantial damages are allowed for the breach. If, however, the covenantor, at the time of making the covenant, was in actual possession of the premises under claim of title, and the covenantee entered into such possession, by the weight of authority, whether the covenant be treated as a general covenant of title or a covenant of seisin, it is not broken, so that substantial damages may be recovered, until there has been an eviction either actual or constructive; and, so long as the covenantee remains in the undisturbed possession, he is at the most entitled only to nominal damages.

Cases involving general covenants of title and general warranty of title, including covenants for quiet enjoyment, will be treated together, as also will cases involving covenants of seisin and right to convey.

Warranty of title.

A covenant of warranty of title has often been said to be dissimilar to a covenant for quiet enjoyment, and, while a distinction exists between these two covenants, at least as used at the present time, yet for the purposes of this note this distinction is immaterial. The present covenant of warranty of title combines many of the features of the ancient covenants of seisin, as well as the ancient covenant of warranty. It is a product of this country, and is in general use throughout the United States at the present time. In general language it is very similar to the ancient covenant of warranty, but it is much broader in its scope and extent. It is believed, however, that the courts, in enforcing this covenant, have 17 L.R.A. (N.S.)

been largely influenced by the ancient covenant of warranty, and especially so as to the time when a cause of action accrues for a breach of it. The ancient covenant of warranty as used in feudal times was in effect a covenant on the part of the lord of the fief that he would protect his vassal in the enjoyment of the property, in consideration of which the vassal was to render homage to the lord; and it was therefore purely prospective in its character, and was not broken until the lord of the fief failed to give to the vassal the protection covenanted for. It was later much used to avoid the effect of restrictions on the alienation of real property, and, as so used, was a covenant binding upon the heir of the covenantor to the extent of any assets which might by law descend to him as such heir, and required the heir, to the extent mentioned, as well as the covenantor, to warrant and defend the title conveyed. In this manner the owner of a life estate in property entailed to his heirs was able to dispose of the same, and, to the extent of his descendable estate, bind his heirs by this warranty; and to the present day the warranty of title is prospective in its character, and requires the covenantor and his heirs to warrant and defend the title conveyed. As a general rule it is not broken until an eviction either actual or constructive. The mere existence of a paramount title does not constitute a breach of it; and the existence of an outstanding paramount title will not authorize the covenantee to refuse to take possession when it is tendered him, or when he can do so peacefully; neither will it justify him in abandoning the possession after once acquired before either a demand or claim for possession has been made to him by the one holding the real title, as his possession is not disturbed by the mere existence of such title, and he cannot assume that it ever will be until it is asserted against him.

As stated by the court in *Morrow v. Baird*, 114 Tenn. 552, 86 S. W. 1079, 4 A. & E. Ann. Cas. 974, in considering the right of a covenantee under such a covenant: "Though the title may be defective, though

The defendant made lasting improvements upon the property in good faith, while she held, as she supposed, full title to the property, and also the plaintiff, after he received his warranty deed from the defendant and went into possession of the property, made lasting and valuable improvements thereon. Should the value of these improvements—both those made by the plaintiff and by the defendant—be taken into consideration in determining the amount of plaintiff's damages?

1. The decisions of this court are not as clear and satisfactory as might be wished upon the first question above suggested. It seems to be conceded in the briefs that all of the courts of this country, including the Supreme Court of the United States, but

he may be constantly liable to be evicted, though his warrantor may be in doubtful circumstances, yet he can bring no action on the covenant till he is actually evicted, for till then there has been no breach of the covenant, no damage sustained."

Considering the same subject, it was said by the court in *Carter v. Denman*, 23 N. J. L. 260: "It is not enough that there is a defect of title, or that the grantor had not a right to convey, or that there are outstanding encumbrances. There must be an eviction, or what is tantamount to an eviction, by title paramount to the plaintiff's, originating before or at the time of the grant to the plaintiff."

And in *Wilson v. Cochran*, 46 Pa. 229, of such a covenant, it is said: "It binds the grantor to defend the possession against every claimant of it by right, and is consequently a covenant against rightful eviction. To maintain an action for breach of it, an eviction must be laid and proved."

In *King v. Kerr*, 5 Ohio, 154, 22 Am. Dec. 777, it is said: "The covenant of warranty in a deed conveying land, or any interest in land, is an undertaking by the warrantor that, on the failure of the title which the deed purports to convey, either for the whole estate or for a part only, by the setting up a superior title, that he will make compensation in money for the loss sustained by such failure of title. It is commonly, in express terms, extended to the heir and assignee of the grantee; but this is immaterial. This covenant is not broken until the grantee, his heir or assignee, is evicted from, or disturbed in the enjoyment of, the premises, or a part of them, by the setting up of a superior or paramount title."

While it is settled that an eviction, actual or constructive, is necessary in order to enable a covenantee or his assigns to maintain an action for a breach of the warranty of title, yet it is not so clear as to just what is comprised within these terms, as language amounting to a covenant of seisin is included in the terms "general warranty of title," or "general covenant of title;" and even courts of the same state

excepting the courts of Ohio, Wisconsin, and Nebraska, hold that a covenant in a deed that the grantor has perfect title is broken when made if the title is not perfect, and that an action at once accrues thereon for damages. In Ohio it is held "that a seisin in fact of the grantor at the time the deed was executed is a sufficient compliance with the covenant of seisin in the deed." In this holding it would appear that the word "seisin" is construed to mean a claim of title accompanied with possession, and therefore in Ohio, under a covenant of seisin, an action cannot be maintained for damages on account of failure of title if the grantee is in undisputed possession of the premises. In *Scott v. Twiss*, 4 Neb. 133, Mr. Justice Maxwell adopted

have construed covenants of title in similar language differently. Thus, in *WESS v. WHEELER* a covenant: "I hold said premise by good and lawful title,"—followed by the general covenant of warranty, was construed as a covenant of seisin, and, as such, was held to have been broken when made, because of the existence of an outstanding paramount title, although no hostile claim had been asserted by the holder of this title.

While in *Merrill v. Suing*, 66 Neb. 404, 92 N. W. 618, a covenant of title that "we do hereby covenant . . . that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same," etc., followed by general warranty of title,—was treated as a general warranty or covenant of title merely, and not as a covenant of seisin. And as to such covenants the court said that the plaintiff "must allege and prove an actual eviction or a surrender to a paramount title which was outstanding at the date of the covenant sued upon." Pursuing the same subject, the court further said: "The rule is thoroughly settled in this state that, in an action on a warranty deed for a breach of the covenant of title or for quiet enjoyment, the plaintiff must allege and prove that he had been turned out of the possession of the premises, or some part thereof, or has yielded the possession thereof to the paramount title."

According to the statement of Judge Barnes in *Merrill v. Suing*, supra, the usual covenants of warranty as used in Nebraska are similar to those used in the foregoing case. In *Troxell v. Stevens*, 57 Neb. 329, 77 N. W. 781, the only statement as to the covenants is that they were the usual covenants of warranty. It is presumable, therefore, the covenant was the same as used in *Merrill v. Suing*. As to such a covenant, the court said: "This court is unalterably committed to the doctrine that no recovery can be had on the covenant of warranty, unless there has been an actual eviction, surrender, or attorning by reason of the paramount title. . . . The wisdom and soundness of this rule may well be doubted,

this principle and declared it to be the law of this state. It is plain that in this opinion the word "seisin" was understood as in the Ohio case: A covenant for seisin then only meant that the covenantor was in peaceable possession of the premises under a claim of right, and covenanted that the same estate was transferred to the grantee. Of course, the covenant that the grantee should have peaceable possession under a claim of right was not broken until that possession was terminated, and, under such a covenant, it does not seem to have been necessary to have discussed the common-law rules of conveyance, except so far as it was necessary to determine the meaning of the word "seisin," and of the covenant in which the word was used. Perhaps the real dif-

ference between the Ohio court and the Supreme Court of the United States and other courts of this country is in the force and effect given by construction to the various covenants considered. It would seem reasonable to say that the spirit of our law, which deals with the substantial rights of parties, rather than with antiquated forms, would require the courts to inquire as to the real meaning of the covenant involved and being construed. What did the grantor agree to do? Has he broken that agreement? If he has, what actual damage has he caused to the grantee by so doing? A satisfactory answer to these questions ought to dispose of the case. If, in framing his covenants, the grantor sees fit to use the word "seisin" or other technical terms,

but it has been so often announced and applied by this court as to become a settled rule of property, and should be adhered to by the court until the rule is changed by appropriate legislation."

Language to similar effect may also be found in *Lundgren v. Kerkow*, 1 Neb. (Unof.) 66, 95 N. W. 501; *Troxell v. Johnson*, 52 Neb. 46, 71 N. W. 968; *Cheney v. Straube*, 43 Neb. 879, 62 N. W. 234; and *Real v. Hollister*, 20 Neb. 112, 29 N. W. 189, original opinion in 17 Neb. 662, 24 N. W. 333.

Language very similar to that used in the foregoing Nebraska cases has been similarly construed by the courts of other states, and the doctrine applied that, if the vendee is in possession under a deed containing such warranties or covenants of title, there must be an eviction, either actual or constructive, under a paramount title, to enable him to maintain an action for the breach of such a covenant. Among such cases are the following: *Mitchell v. Warner*, 5 Conn. 497; *Giddings v. Canfield*, 4 Conn. 482; *Oliver v. Bush*, 125 Ala. 534, 27 So. 923; *Brady v. Spurck*, 27 Ill. 478; *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488; *Snell v. Iowa Homestead Co.* 59 Iowa, 701, 13 N. W. 848; *Reed v. Pierce*, 36 Me. 455, 58 Am. Rep. 761; *Gilman v. Haven*, 11 Cush. 330; *Leet v. Gratz*, 92 Mo. App. 422; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284 (general statutory warranty); *Carter v. Denman*, supra; *Coster v. Monroe Mfg. Co.* 2 N. J. Eq. 467 (covenant to defend, and the owner has good right to convey); *Callis v. Cogbill*, 9 Lea. 137; *Stipe v. Stipe*, 2 Head, 169; *Morrow v. Baird*, supra.

In the following cases the same conclusion was reached, but the exact form of the warranty does not appear other than that it was a general warranty of title, and a general covenant to defend, etc.: *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; *Thompson v. Brazile*, 65 Ark. 495, 47 S. W. 299; *Evans v. Lewis*, 5 Harr. (Del.) 162; *Leary v. Durham*, 4 Ga. 593; *McMullen v. Butler*, 117 Ga. 845, 45 S. E. 258; *Clements v. Collins*, 59 Ga. 124; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Scott* 17 L.R.A. (N.S.)

v. Kirkendall, 88 Ill. 465, 30 Am. Rep. 562; *Harding v. Larkin*, 41 Ill. 413; *Jones v. Warner*, 81 Ill. 343; *Hannah v. Henderson*, 4 Ind. 174; *Hooker v. Folsom*, 4 Ind. 90; *Woodford v. Leavenworth*, 14 Ind. 311; *Snell v. Iowa Homestead Co.* supra; *Chapel v. Bull*, 17 Mass. 213; *Hamilton v. Cutts*, 4 Mass. 348, 3 Am. Dec. 222; *Emerson v. Land in Minot*, 1 Mass. 464, 2 Am. Dec. 34; *Allis v. Nininger*, 25 Minn. 525; *Hoy v. Taliaferro*, 8 Smedes & M. 727; *Dennis v. Heath*, 11 Smedes & M. 206, 49 Am. Dec. 51; *Witty v. Hightower*, 12 Smedes & M. 478; *Dyer v. Britton*, 53 Miss. 270; *Burrus v. Wilkinson*, 31 Miss. 537; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *Kellog v. Platt*, 33 N. J. L. 328; *Blydenburgh v. Cotheal*, 1 Duer, 176; *Greenvault v. Davis*, 4 Hill, 643; *Vanderkarr v. Vanderkarr*, 11 Johns. 122; *Miller v. Watson*, 5 Cow. 195; *Mead v. Stackpole*, 40 Hun, 473; *Fowler v. Poling*, 6 Barb. 165; *Kent v. Welch*, 7 Johns. 258, 5 Am. Dec. 266; *Rea v. Minkler*, 5 Lans. 196; *Rindskopf v. Farmers' Loan & T. Co.* 58 Barb. 36; *Wiggins v. Pender*, 132 N. C. 628, 61 L.R.A. 772, 44 S. E. 362; *Johnson v. Nyce*, 17 Ohio, 66, 49 Am. Dec. 444; *King v. Kerr*, 5 Ohio, 154, 22 Am. Dec. 777; *Wilson v. Cochran*, 46 Pa. 229; *Stewart v. West*, 14 Pa. 336; *Knepper v. Kurtz*, 58 Pa. 480; *McGrew v. Harmon*, 164 Pa. 115, 30 Atl. 265, 268; *Patton v. McFarlane*, 3 Penn. & W. 419; *Clarke v. McAnulty*, 3 Serg. & R. 364; *Chambers v. Reinhold*, 33 Pa. Super. Ct. 267; *McGregor v. Tabor* (Tex. Civ. App.) 26 S. W. 443; *Williams v. Wetherbee*, 1 Aik. (Vt.) 233; *Park v. Bates*, 12 Vt. 381, 36 Am. Dec. 347; *Boyd v. Bartlett*, 36 Vt. 9; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Harr v. Shaffer*, 52 W. Va. 207, 43 S. E. 89.

While, as has been seen, the general rule as to general warranties or covenants of title is that, where the covenantor or his grantee is in possession, eviction under a paramount title is necessary in order that an action may accrue for a breach of the covenant, while this does not necessarily mean an actual, forcible eviction, yet a mere outstanding paramount title is not sufficient. *Scott v. Kirkendall*; *Oliver v.*

it is reasonable to suppose that he intended that the recognized technical meaning of such expressions should be given them in construing his contract; and so in *Scott v. Twiss*, supra, the grantor having agreed to protect the grantee in his seisin of the premises, the court assumed that his covenant was not broken as long as the grantee obtained that which it is there agreed for him to have, to wit, the seisin (possession with claim of right) of the premises. Perhaps all courts do not agree in this definition of the word "seisin;" but, when the word is so defined, as it appears to have been in *Scott v. Twiss*, then the conclusion reached upon this point in that case is unavoidable. In *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479, the rule was announced

in this language: "A cause of action on a covenant of warranty, or for a quiet enjoyment, does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title." The language of the covenant sued upon in this case was: "And I covenant to warrant and defend the said premises against lawful claims of all persons whomsoever." And the court said: "This covenant is considered to be tantamount to that for quiet enjoyment, and what will amount to a breach of the latter is also a breach of the former." With this construction of the meaning of the covenant, there can be no doubt of the correctness of the conclusion. If the agreement of the grantor with the grantee was that the grantee should remain in quiet enjoyment

Bush; and *Hannah v. Henderson*,—supra; *Pharr v. Gall*, 108 La. 307, 32 So. 418.

It is not, however, necessary that the covenantee, after a hostile paramount title has been asserted against him, should remain in possession and resist eviction; but, under such circumstances a voluntary surrender of possession to such outstanding paramount title will amount to an eviction. *Hamilton v. Cutts*; *Harr v. Shaffer*; *Clements v. Collins*; *Blydenburgh v. Cotheal*; *Copeland v. McAdory*; *Lambert v. Estes*; *Callis v. Cogbill*; *Knepper v. Kurtz*; *Dyer v. Britton*; *Morrow v. Baird*; *Allis v. Ninger*; and *Fowler v. Poling*,—supra.

But in *Dennis v. Heath and Witty v. Hightower*, supra, it was held that the mere voluntary surrender by the covenantee of the possession of the property to the holder of the adverse paramount title after its assertion did not amount to an eviction.

The purchase by the covenantee of such outstanding paramount title after the same has been asserted, where the purchase is necessary in order to retain possession, will amount to an eviction. *Snell v. Iowa Homestead Co.* supra; *Harding v. Larkin*, 41 Ill. 413; *Boyd v. Bartlett*, 36 Vt. 9; *Hall v. Bray*, 51 Mo. 288; *Loomis v. Bedel*, 11 N. H. 74; *Hauck v. Single*, 10 Phila. 551; *Brown v. Thompson* (S. C.) 62 S. E. 440; *Kenney v. Norton*, 10 Heisk. 384.

But, where the covenantee incites or induces the holder of an outstanding paramount title to assert a hostile claim, he cannot thereafter, by purchasing such claim, claim an eviction. *Hester v. Hunnicutt*, 104 Ala. 282, 16 So. 162; *Munford v. Keet*, 154 Mo. 36, 55 S. W. 271.

In *Burrus v. Wilkinson*, supra, it was held that the purchase, by the covenantee in possession, of an outstanding adverse title which had been asserted against him, did not amount to an eviction.

But a judgment of eviction or ejectment rendered in an action against the covenantee, who had given notice to the vendor to defend the rendition of such judgment, amounts to an eviction. *Olmstead v. Rawson*, 188 N. Y. 517, 81 N. E. 456; *Park v. Bates*, 17 L.R.A. (N.S.)

supra; *Hubbard v. Stanaford*, 30 Ky. L. Rep. 1044, 100 S. W. 232.

And an adverse judgment in a proceeding in equity against the covenantee is sufficient breach of the covenant. *Coster v. Monroe Mfg. Co.* 2 N. J. Eq. 467.

The fact that a dower right has been assigned in the land covered by the covenant is a sufficient eviction. *Leary v. Durham*, 4 Ga. 593.

But in *Miller v. Watson*, supra, it was held that a promise by the covenantor to pay damages to the covenantee because of a defect in title, made after the defect in the title was established in an action of ejectment against the covenantee by the holder, was void because not based on a valuable consideration, since there had been no actual eviction.

In many jurisdictions in which the rule that an eviction is necessary under such warranties or covenants of title is applied, an exception is generally noted of cases where, at the time of the making of the covenants, the covenantor had neither title nor possession of the property. In such a case the covenant or warranty of title was broken when made, and an action for a breach of the covenant may be maintained at once, and substantial damages awarded. *Fortesque v. Columbia Real Estate Co.* (N. J. L.) 67 Atl. 1024; *Bull v. Beiseker*, 16 N. D. 290, 14 L.R.A. (N.S.) 514, 113 N. W. 870; *Pinckard v. American Freehold Land Mortg. Co.* 143 Ala. 568, 39 So. 350; *Smith v. Scribner*, 59 Vt. 96, 7 Atl. 711; *Sheffey v. Gardiner*, 79 Va. 313; *Blydenburgh v. Cotheal*, supra; *McMullen v. Butler*, 117 Ga. 845, 45 S. E. 258; *Jones v. Paul*, 59 Tex. 41.

In Texas the vendee in possession, in an action against him for the purchase price of land, may obtain a deduction from the purchase price because of an outstanding paramount title, although there is no eviction. *Groesbeck v. Harris*, 82 Tex. 411, 14 S. W. 850. Rule stated in *Cassidy's Succession*, 40 La. Ann. 827, 5 So. 292.

In commenting upon this doctrine in *Rancho Bonito Land & Live Stock Co. v. North*, 92 Tex. 72, 45 S. W. 994, the court

of the premises, that agreement would not be broken until the grantee was deprived of possession. In *Hampton v. Webster*, 56 Neb. 628, 77 N. W. 50, the second paragraph of the syllabus is as follows: "In an action to recover damages for breach of covenants of warranty of title it is essential to allege in the petition that plaintiff has been evicted by title paramount." Substantially the same language is used in *Troxell v. Stevens*, 57 Neb. 329, 77 N. W. 781. The language of the covenant involved is not stated in either of these opinions; but as *Real v. Hollister*, 20 Neb. 112, 29 N. W. 189, is cited as authority in both of these cases, it is presumed that the covenant was in the language discussed in that case. The covenant there discussed was: "They

do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever." And the court said that this is equivalent to a covenant for quiet enjoyment. The distinction may, perhaps, be a little fine, and yet it will be noticed that the covenant is to defend the title against the claims of other people, and not that the grantor had a good and perfect title at the time that he made the conveyance. Under a covenant to defend, it may well be urged that the covenantor was entitled to an opportunity to defend before he should be called upon to respond in damages. The court, however, upon the point under discussion in the case last named, quoted the following language from Mr. Greenleaf: "The covenant for

said: "The cases in which the vendee has been allowed in this state to defend against or cancel purchase-money notes by showing the existence of a superior outstanding title have been decided upon principles of equity.

They proceed upon the principles that a court of equity will not ordinarily lend its aid to compel the vendee to perform his contract by paying over the purchase money when it appears that the vendor conveyed him no title. Whether the doctrine is based upon failure of consideration, in which case it would seem to apply whether there be a warranty or not, or whether it is based upon a constructive breach of warranty, equity assuming that the outstanding title will be asserted and offsetting the note with the warranty to avoid circuity of action, we are not called upon in this case to determine. The rule is conceded not to be in accord with the weight of authority elsewhere." This doctrine was held to have no application to the facts in this case, as the entire purchase money had been paid, and it was accordingly held that an outstanding paramount title under such circumstances was not a breach of the covenant of warranty.

In South Carolina the doctrine is well settled that a covenantee under a general covenant of warranty of title may maintain an action for a breach of the covenant because of an outstanding paramount title which has not been asserted against him, although he may be in possession of the premises. *Pringle v. Witten*, 1 Bay, 256, 1 Am. Dec. 612; *Bell v. Huggins*, 1 Bay, 326; *Sumter v. Welsh*, 2 Bay, 558; *Moore v. Lanham*, 3 Hill, L. 304.

Seisin or right to convey.

—doctrine that such a covenant is a covenant of title.

According to the rule adopted by the majority of the courts of this country, a covenant of seisin is a covenant to the purchaser that the grantor is seised in fee of an indefeasible title to the property conveyed. As so defined, it is said to be synonymous with covenants of right to convey,

and, while these covenants are not of the same purport in all respects, yet, in so far as the question here under consideration is concerned, they are synonymous and will be treated together. In *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139, it is said that the technical and legal import of the term "seisin" as used in a covenant of seisin is that the grantor is seised of the legal title; that "complete legal title is the *juris et seisinæ conjunctio*, —the title and possession united." In *Kincaid v. Brittain*, 5 Sneed, 119, this covenant is defined to be "an assurance to the purchaser that the grantor has the very estate, in quantity and quality, which he purports to convey." It is also similarly defined in *Pecare v. Chouteau*, 13 Mo. 527; *De Long v. Spring Lake & Sea Girt Co.* 65 N. J. L. 1, 47 Atl. 491; *Howell v. Richards*, 11 East, 633; *Brandt v. Foster*, 5 Iowa, 287; *Lockwood v. Sturdevant*, 6 Conn. 373; and *Real v. Hollister*, 20 Neb. 112, 29 N. W. 189.

Referring to this covenant in *Richardson v. Dorr*, 5 Vt. 9, the court said: "To satisfy its words, the defendant must show that, when he made this covenant, he had not only an estate in fee in the land which he deeded, but also that he was seised of the same, and had a right to the possession." Such a covenant means that the covenantor is seised of an indefeasible estate, and is therefore a covenant for the title. *Greenby v. Wilcocks*, 2 Johns. 1, 3 Am. Dec. 379; *Hastings v. Webber*, 2 Vt. 407; *Thomas v. Perry*, Pet. C. C. 49, Fed. Cas. No. 13,908; *Pollard v. Dwight*, 4 Cranch, 421, 2 L. ed. 666.

In jurisdictions wherein the foregoing doctrine is recognized, it is said that the covenant of seisin is broken at once if broken at all; and the existence of an outstanding paramount title is said to amount to a breach of it without eviction. *Anderson v. Knox*, 20 Ala. 156; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Abbott v. Rowan*, 33 Ark. 593; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Bird v. Smith*, 8 Ark. 368; *Benton County v. Rutherford*, 33 Ark. 640; *Lawrence v. Montgomery*, 37

quiet enjoyment goes to the possession, and not to the title; and therefore, to prove a breach, it is ordinarily necessary to give evidence of an entry upon the grantee, or of expulsion from, or some actual disturbance in, the possession; and this, too, by reason of some adverse right existing at the time of making the covenant, and not of one subsequently acquired." [2 Greenl. Ev. § 243.] He also quoted from Mr. Chancellor Kent as follows: "But the covenant of warranty and the covenant for quiet enjoyment are prospective, and an actual ouster or eviction is necessary to constitute a breach of them." [4 Kent, Com. 471.] From this last quotation it appears that formerly, when the word "warranty" was used without other qualification, it had a

prospective meaning; that is, it was construed to mean that the grantor agreed to defend the rights of the grantee in the property conveyed, and should only be called upon to respond in damages when he had failed to make good such defense. In 8 Am. & Eng. Enc. Law, 2d ed. p. 90, note 1, it is said: "In Nebraska the Ohio doctrine was followed in *Scott v. Twiss*, 4 Neb. 133, but discarded without notice of that case in *Real v. Hollister*, supra." This statement seems to be hardly warranted from a careful comparison of the two decisions, if the distinction between a covenant for quiet enjoyment and a covenant that the grantor then has perfect title and right to convey is considered.

In the case at bar the covenant contained

Cal. 183; *Salmon v. Vallejo*, 41 Cal. 481; *Seyfried v. Knoblauch* (Colo.) 96 Pac. 993; *Mitchell v. Warner*, 5 Conn. 497; *Brady v. Spurek*, 27 Ill. 478; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Baker v. Hunt*, 40 Ill. 264, 89 Am. Dec. 346; *Jones v. Warner*, 81 Ill. 343; *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 280; *Brandt v. Foster*, supra; *Camp v. Douglas*, 10 Iowa, 586; *Mitchell v. Kepler*, 75 Iowa, 207, 39 N. W. 241; *Scoffins v. Grandstaff*, 12 Kan. 467; *Bolinger v. Brake*, 4 Kan. App. 180, 45 Pac. 950, affirmed as to measure of damages in 57 Kan. 663, 47 Pac. 537, affirmed on rehearing in 58 Kan. 818, Appx. 51 Pac. 290; *Dale v. Shively*, 8 Kan. 276; *Scantlin v. Allison*, 12 Kan. 85; *Fitzhugh v. Croghan*, supra; *Kimball v. Bryant*, 25 Minn. 496; *Cockrell v. Proctor*, 65 Mo. 41; *Evans v. Fulton*, 134 Mo. 653, 36 S. W. 230; *Jones v. Haseltine*, 124 Mo. App. 674, 102 S. W. 40; *Coleman v. Clark*, 80 Mo. App. 339; *Tapley v. Labeaume*, 1 Mo. 550; *Adkins v. Tomlinson*, 121 Mo. 487, 26 S. W. 573; *Hall v. Bray*, 51 Mo. 288; *Dickey v. Weston*, 61 N. H. 23; *Morrison v. Underwood*, 20 N. H. 369; *Chapman v. Holmes*, 10 N. J. L. 20; *Carter v. Denman*, 23 N. J. L. 260; *Abbott v. Allen*, 14 Johns. 248; *Nichols v. Nichols*, 5 Hun, 108; *Bingham v. Weiderwax*, 1 N. Y. 509; *McCarty v. Leggett*, 3 Hill, 134; *Eames v. Armstrong*, 142 N. C. 506, 55 S. E. 405; *Wilson v. Cochran*, 46 Pa. 229; *Johnson v. Veal*, 3 M'Cord, L. 440; *Kincaid v. Brittain*, 5 Sneed, 119; *Westrope v. Chambers*, 51 Tex. 178; *Williams v. Wetherbee*, 1 Aik. (Vt.) 233; *Garfield v. Williams*, 2 Vt. 327; *Koepke v. Winterfield*, 116 Wis. 44, 92 N. W. 437; *Pollard v. Dwight*, supra.

Under this doctrine, mere possession of the property by the covenantor is not sufficient; and, even though the covenantee enters into possession of the property, it is said that he may maintain an action for breach of the covenant, if there is an outstanding paramount title. *Fitzhugh v. Croghan*, supra; *Mercantile Trust Co. v. South Park Residence Co.* 94 Ky. 271, 22 S. W. 314; *Partridge v. Hatch*, 18 N. H. 494; *Catlin v. Hurlburt*, 3 Vt. 403; *Rich-* 17 L.R.A. (N.S.)

ardson v. Dorr and Lockwood v. Sturdevant, supra; *Clapp v. Herdman*, 25 Ill. App. 509.

In other jurisdictions it has been asserted that, if the covenantor has neither title nor possession, his covenant is broken without proof of eviction. *Craig v. Donovan*, 63 Ind. 513; *Rombough v. Koons*, 6 Wash. 558, 34 Pac. 135; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Morrison v. McArthur*, 43 Me. 567; *Bacon v. Lincoln*, 4 Cush. 210, 50 Am. Dec. 765; *Kimball v. Bryant*; *Anderson v. Knox*; and *Abbott v. Rowan*,—supra; *Zent v. Picken*, 54 Iowa, 535, 6 N. W. 750; *Greenby v. Wilcocks*, supra.

This doctrine has also been stated where the covenantor had no title to the property in reference to which he made the covenant. *Sayre v. Sheffield Land, Iron & Coal Co.* 106 Ala. 440, 18 So. 101; *Daisy Realty Co. v. Brown*, 18 Ky. L. Rep. 155, 35 S. W. 637; *Hooker v. Folsom*, 4 Ind. 90; *Burton v. Reeds*, 20 Ind. 87; *Axtel v. Chase*, 77 Ind. 74; *Tone v. Wilson*, 81 Ill. 529.

It has, however, been held that a mere outstanding equitable right or title is not sufficient to amount to a breach; thus, an outstanding inchoate right of dower. *Whisler v. Hicks*, 5 Blackf. 100, 33 Am. Dec. 454; *Tuite v. Miller*, 10 Ohio, 382; *Building, Light & Water Co. v. Fray*, 96 Va. 559, 32 S. E. 58.

Neither is an outstanding tax deed a breach. *Zerfing v. Seelig*, 12 S. D. 25, 80 N. W. 140, affirmed on rehearing in 14 S. D. 303, 85 N. W. 585.

The covenant does not apply to an adverse paramount title already vested in the covenantee. *Horrigan v. Rice*, 39 Me. 49, 38 N. W. 765.

Without passing upon the question whether or not the covenant of seisin is broken by an outstanding paramount title without eviction, it was held in *Hayden v. Patterson*, 39 Colo. 15, 88 Pac. 437, that a decree made in a case in which the covenantee was a party, establishing an adverse title to that conveyed to him by his covenantor, was a sufficient eviction to amount to a breach of the covenant.

And in *Long v. Sinclair*, 40 Mich. 569, it

four express promises: "That I hold said premises by good and perfect title; that I have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and encumbrances whatsoever; and I covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever."

The last promise is undoubtedly the form of covenant considered in the cases of *Real v. Hollister*, *Hampton v. Webster*, and *Troxell v. Stevens*. Such a covenant is not broken until the covenantor fails to defend the premises against the lawful claims of other persons; and there is some reason for saying, as was said by Judge Cobb in *Real v. Hollister*, *supra*, that such a covenant is construed to be a covenant for quiet enjoy-

ment. But there appears to be no reason whatever for so construing the covenant "that I hold such premises by good and perfect title." If this covenant is not broken when it is made, in case the title is not good and perfect, then it cannot be broken by dispossessing the covenantee. We see no reason to resort to the technicalities of the rules of common-law conveyancing to ascertain the meaning of a contract couched in ordinary, simple language, as is this covenant. No technical words are used, and the rule of the Code that common words are to be used in their ordinary sense is applicable. Very many of the cases from which it is commonly supposed that there is an irreconcilable conflict of authorities upon this question involved the construction of

was held that the payment by the covenantee of a judgment against him for the value of the land covered by the covenant, rendered in an action of ejectment, was a sufficient eviction to warrant an action under a covenant of seisin.

While it may be said to be well established in the majority of the jurisdictions of this country that a mere outstanding paramount title will amount to a breach of the covenant of seisin, yet, in view of the fact that in some jurisdictions this doctrine is denied, it is worthy of note that the doctrine has been established almost entirely by the *obiter* statements of courts. Generally the doctrine has no practical value because it is also held that, unless there is an eviction, actual or constructive, or some substantial loss other than the mere fact that there is an outstanding paramount title, the covenantee is entitled only to nominal damages for the breach of the covenant.

Of the cases previously cited as declaring that a covenant of seisin is broken by the existence of an outstanding paramount title without eviction, the declaration was unnecessary in the following cases because there had been a constructive eviction by the necessary purchase of the outstanding title: *Brandt v. Foster and Dale v. Shively*, *supra*; *Kenney v. Norton*, 10 Heisk. 384; *Anderson v. Knox and Pate v. Mitchell*, *supra*.

In the Missouri cases cited, the doctrine was not applied, the courts holding that a covenant of seisin is both *in presenti* and prospective, and is breached only upon eviction.

In *Baxter v. Bradbury and M'Carty v. Leggett*, *supra*, the adverse title had been acquired by the covenantor.

In *Westrope v. Chambers*, *supra*, the covenantee had surrendered possession of the premises to the owner of the paramount title prior to claiming a breach of the covenant.

In *Lockwood v. Sturdevant*, 6 Conn. 373; *Frazer v. Peoria County*, 74 Ill. 282; *Wheeler v. Hatch*, 12 Me. 389; and *Daisy Realty Co. v. Brown*,—*supra*, while the covenantor

was in possession of the premises covered by his covenant, yet his possession was not under a claim of title.

Hacker v. Storer, 8 Me. 228; *Abbott v. Allen*; *Carter v. Denman*; *Williams v. Wetherbee*; and *Greenby v. Wilcocks*,—*supra*, involved the question whether or not the covenant of seisin was a chose in action, and, therefore, not passing to the grantee of the covenantee; or whether it related to realty, and was a covenant running with the land.

Lawrence v. Montgomery, 37 Cal. 183, was an action of deceit for fraud in a sale of real estate; *Ingram v. Morgan*, 4 Humph. 66, 40 Am. Dec. 626, was a bill for injunction; *Bingham v. Weiderwax*, *supra*, involved the jurisdiction of equity to retain a suit for damages for breach of covenant of seisin where there was an adequate remedy at law; and *Ballard v. Child*, 34 Me. 355; *Matteson v. Vaughn*, 38 Mich. 373; *Johnson v. Veal*; and *Kenney v. Norton*,—*supra*, involved the question as to when a cause of action for a breach of the covenant of seisin would accrue so as to set in motion the statute of limitations.

As stated, many courts hold that the existence of an outstanding paramount title is a sufficient breach of the covenant of seisin to enable the covenantee to maintain an action because thereof; but he is limited in his recovery to nominal damages merely, so long as he remains in undisturbed possession of the premises covered by the covenant.

This doctrine was enunciated in the following cases: *Anderson v. Knox*, 20 Ala. 156; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Holman v. Creagmiles*, 14 Ind. 177; *Overhiser v. McCollister*, 10 Ind. 41; *Axtel v. Chase*, *supra*; *Brandt v. Foster*, 5 Iowa, 287; *Nosler v. Hunt*, 18 Iowa, 212; *Boon v. McHenry*, 55 Iowa, 202, 7 N. W. 503; *Hencke v. Johnson*, 62 Iowa, 555, 17 N. W. 766; *Norman v. Winch*, 65 Iowa, 263, 21 N. W. 598; *O'Meara v. McDaniel*, 49 Kan. 685, 31 Pac. 303; *Hammerslough v. Hackett*, 48 Kan. 700, 29 Pac. 1079; *Prescott v. Truceman*, 4 Mass. 627; 3 Am. Dec. 246; *Ogden v. Ball*, 38 Minn. 237, 36 N. W.

contracts to convey. When the contract is to execute a conveyance with the usual covenants of warranty, or with the usual covenants of seisin, or like expressions, and contains no other language from which it can be determined in what sense these expressions are used, it becomes necessary to consider the technical meaning of such expressions; and the courts of different jurisdictions have, under such circumstances, declared the general expression, "with usual covenants of seisin," or "with usual covenants of warranty," to be generally understood in the locality where they are used, as having a certain specified meaning; and

it is not surprising that, under such circumstances, varying meanings should be given in different jurisdictions to the same form of words. But, when the contract to convey, or the deed that has been executed in pursuance thereof, contains covenants in such plain language as to leave no doubt of their meaning, there can be no necessity for a resort to conflicting authorities. The petition in this case alleged all of these four covenants, and alleged the breach thereof. The proof failed to show that the covenant "to warrant and defend the premises against the lawful claims of all persons whomsoever"—that is, the covenant for peaceable

344; *Eagan v. Martin*, 81 Mo. App. 676; *Mumford v. Keet*, 65 Mo. App. 502; *Collier v. Gamble*, 10 Mo. 467; *Reese v. Smith*, 12 Mo. 344; *Mosely v. Hunter*, 15 Mo. 322; *Cockrell v. Proctor*, 65 Mo. 41; *Conklin v. Hannibal & St. J. R. Co.* 65 Mo. 533; *Pence v. Gabbert*, 63 Mo. App. 302; *Murphy v. Price*, 48 Mo. 247; *Dickson v. Desire*, 23 Mo. 151, 66 Am. Dec. 661; *Bowne v. Wolcott*, 1 N. D. 415, 48 N. W. 336; *Morrison v. Underwood*, 20 N. H. 369; *Kincaid v. Brittain*, 5 Sneed, 119; *Rombough v. Koons*, 6 Wash. 558, 34 Pac. 135 (covenantee may elect either to take nominal damages, or to surrender property to covenantor and have judgment for purchase price); *Noonan v. Ilsley*, 22 Wis. 27; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653; *Bardeen v. Markstrum*, 64 Wis. 613, 25 N. W. 565.

Considering this subject, the court, in *Boon v. McHenry*, supra, said: "It would not be just to allow the plaintiff to recover the consideration money and interest and retain the land also. Upon the other hand, it would not be just to put the plaintiff off with a recovery of nominal damages if such recovery would be a bar to an action for actual damages if a substantial loss shall occur. In this state the English rule has been recognized, that the covenant of seisin runs with the land, and is for the benefit of the party who may be the owner when a substantial breach occurs. . . . It is a corollary of this doctrine that, until some substantial loss occurs, there can be no recovery beyond nominal damages, and that the person who is owner at the time such loss occurs may recover the actual damage sustained. As no loss has yet been visited upon the grantee, the breach is merely technical."

In *Hacker v. Blake*, 17 Ind. 97, the court said: "Where a deed is made and accepted, and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase money, or recover more than nominal damages on his covenants, while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of the defect of title. This is, in many of the cases, because the purchaser's possession, being under the color of title, may continue un-

disturbed for twenty years, and thus become perfect, and he be uninjured. And he may rely on the covenants in his deed for redress, if injury occurs. . . . The entire want of title was a breach of the covenant of seisin, but for such breach, while the purchaser retains possession, he can only recover nominal damages."

In *O'Meara v. McDaniel*, supra, it was said: "As the plaintiff has never been evicted from the premises, and has never paid anything to remove an encumbrance therefrom, or to perfect his title, but is still in the quiet and peaceable possession of the property, enjoying and collecting the rent and profits thereof, he can recover at most only nominal damages; and this upon whatever covenant the action may be considered as having been commenced."

Upon the same subject, the court, in *Pence v. Gabbert*, supra, said,—*"The rule is that there must be an actual eviction, or something which is equivalent thereto, before substantial damages can be sustained on account of a paramount title; for, while the mere existence of the paramount title is a breach of the covenant, for which nominal damages can be allowed, yet, before substantial damages can be allowed, there must be an actual loss of the land, the title to which was warranted."*

In approving of the doctrine, the court, in *Mecklem v. Blake*, supra, said: "The possession of the land, or seisin in fact, under the deed, by the covenantee or those claiming through him, is considered such an estate as carries the covenant along with it; and, whilst some of the cases hold that such possession or seisin, so long as it remains undisturbed, satisfies the covenant, so that no action can be maintained until a right of substantial recovery exists, consequent upon an eviction or other actual loss, it is, or seems to be, the opinion of the courts in others that there may be an action by the covenantee for the formal breach, in which only nominal damages can be recovered. It is not required of us here to express an opinion as to which of these views may be the more correct; since the result in this action would be the same whichever view was taken. It is enough that both result in establishing the same proposition, which is that the covenant is

possession and quiet enjoyment—had been broken. The plaintiff was still in undisturbed possession of the land; but the proof showed beyond question that the covenant that the grantor held "said premises by good and perfect title" was broken when made. The grantor did not then have a good and perfect title, and there can be no reason for refusing the plaintiff his action to recover his damages caused by the breach of this covenant as soon as he ascertained the facts.

2. The second question as to the measure of damages in such case has also been much discussed and presents some difficulty.

a covenant of indemnity against actual damage arising from want of lawful title, and that it runs with the land until such damage has actually arisen to the party holding possession under the deed."

—doctrine that the covenant of seisin is a covenant for possession merely.

In some jurisdictions the doctrine is established that a covenant of seisin relates to the possession of the covenantor, and that, if possession is given by him to the covenantee, the covenant is satisfied. As stated by the court in *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61, it is not necessary to show a seisin under an indefeasible title. A seisin in fact is sufficient, whether he gained by his own disseisin, or whether he was under a disseisor. If, at the time he executed the deed, the grantor had the exclusive possession of the premises claiming the same in fee simple by a title adverse to the owner, he was seised in fee, and had a right to convey. This doctrine was approved by that court in *Bearce v. Jackson*, 4 Mass. 408; *Twambly v. Henley*, 4 Mass. 441; *Slater v. Rawson*, 1 Met. 458; and *Raymond v. Raymond*, 10 Cush. 134.

It was also approved and followed in *Backus v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585, wherein, in speaking of the holding of the court in *Marston v. Hobbs*, supra, that a seisin in fact of the grantor at the time the deed was executed was a sufficient compliance with the covenant of seisin, the court said: "This determination appears to us to be founded on sound and correct principles. If the grantor is in the exclusive possession of the land at the time of the conveyance, claiming a fee adverse to the owner, although he was in by his own disseisin, his covenant of seisin is not broken until the purchaser, or those claiming under him, are evicted by title paramount. He has a seisin in deed as contradistinguished from a seisin in law, sufficient to protect him from liability under his covenant so long as those claiming under him may continue so seised. . . . No breach of such covenant will have taken place if the grantor was seised in deed at the time of the conveyance, however that seisin may have been acquired. If the grantor, at the

More than a century and a quarter ago the courts of England established the principle that, upon a contract for the purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the purchaser is not entitled to any compensation for the loss of his bargain. *Flureau v. Thornhill*, 2 W. Bl. 1078. This case appears to have been generally followed in England since that time, and the questions discussed in regard to it have been as to exceptions to the rule. A discussion of this matter may be found in a somewhat extensive note to *Kirkpatrick v. Downing*, in 17 Am. Rep. 678, 58 Mo. 32. In the principal case the

time of executing this conveyance, was in possession of the land, either as disseisor or under color of title, it cannot be said that he was not seised of an estate in the premises." The doctrine of this case was followed by the courts of that state in *Robinson v. Neil*, 3 Ohio, 525; *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Gest v. Kenner*, 2 Handy (Ohio) 86; and *Great Western Stock Co. v. Saas*, 24 Ohio St. 542.

Considering the same subject, the court, in *Willard v. Twitchell*, 1 N. H. 177, said: "The covenants in our deeds, 'that the grantor is the lawful owner, that he is seised in fee, and that he has good right to sell and convey,' have always received a construction that makes them merely synonymous. Each of them amounts only to a stipulation that the grantor has such seisin that the land will pass by his deed. If the grantor, at the time of the conveyance, has actual seisin, whether by right or by wrong, whether under a valid title or by disseisin, the land will pass by his deed, and neither of these covenants is broken." (In this case, as the grantor had neither possession nor title, the covenant was held to be broken.)

This doctrine was reasserted by that court in *Breck v. Young*, 11 N. H. 485; but seems, however, not to have been followed in the later cases of *Partridge v. Hatch*, 18 N. H. 494, and *Dickey v. Weston*, 61 N. H. 23.

Aside from the foregoing cases holding that possession under color of title is sufficient to satisfy the covenant of seisin, this doctrine finds support and is recognized in the following cases: *Hacker v. Storer*, 8 Me. 228; *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76; *Griffin v. Fairbrother*, 10 Me. 91; *Boothby v. Hathaway*, 20 Me. 251; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Wilson v. Widenham*, 51 Me. 566; *Montgomery v. Reed*, 69 Me. 510; *Scott v. Twiss*, 4 Neb. 133; *Bartholomew v. Candee*, 14 Pick. 167; *Coit v. McReynolds*, 2 Robt. 655; *Fowler v. Poling*, 6 Barb. 165; *Bottorf v. Smith*, 7 Ind. 673; *Peters v. Bowman*, 98 U. S. 56, 25 L. ed. 91.

It was also recognized and applied in *Watts v. Parker*, 27 Ill. 224. But in this case the covenantor had been in possession of the property for a long period prior to the making of the covenant in question.

Missouri court discusses the matter somewhat at length, and, referring to the authorities in this country, and after quoting from the opinion of the Supreme Court of the United States in *Hopkins v. Lee*, 6 Wheat. 109, 5 L. ed. 218, which it appears to follow, the Missouri court said: "The rule [of the United States court] commends itself for its intrinsic justice. It conforms to the varying circumstances of each particular case, and is equitable and just. The arbitrary and unbending rule, that the purchase money and interest shall in all cases be taken as the criterion of damages, will in the majority of instances do injustice either to the seller or purchaser. No reason is perceived why it should be adhered to and enforced when one more consistent with equity is found and which is easily administered. The rule for which we contend is just to both parties. It gives to the purchaser precisely what he has lost in consequence of the breach of contract committed by his vendor, and it makes the latter responsible for the violation of his agreement in the full amount to which he has occasioned injury." In *Beck v. Staats* (Neb.) 114 N. W. 633, which is decided with this case, the law is said to be in this state that "the measure of damages for the breach by the vendor of an executory contract for the conveyance of real estate, where the breach is caused either from the refusal or the inability of the vendor acting in good faith, is the difference between the value of the land at the time of the breach and the price he contracted to receive; and, in addition thereto, the vendee may recover the amount advanced upon the purchase price." The opinion in the case was carefully prepared by Mr. Commissioner Epperson, and we feel satisfied with the conclusion reached. It is shown in that opinion that this court is thoroughly committed to the doctrine there announced by a long line of decisions. We cannot perceive any basis for a different rule as to the measure of damages upon a breach of covenant that the grantor has good title and the measure of damages upon a breach of a contract to convey and give such title. The supreme court of errors and appeals of New Jersey, in *Gerbert v. Sons of Abraham*, 59 N. J. L. 160, 69 L.R.A. 764, 59 Am. St. Rep. 578, 35 Atl. 1121, speaking of this question, said: "The injury in both cases is the same,—the loss of the property, the loss of such profit as would have been incident to increased value. The loss in both cases arises from the breach of the vendor's covenant on account of the defect in his title. There can, therefore, be no solid basis for diversity in the rule of damages applicable to the two conditions, and the rule should be unified if there is no seri-

ous obstacle in the way." And it is equally clear that, while there is some diversity in the language used in the various opinions, this court is thoroughly committed to the rule of damages that is announced in *Beck v. Staats*, supra, in the cases arising upon contracts to convey real estate.

We think that whether we are bound by the earlier decisions of this court to observe a different rule in the case of breach of a similar covenant in a deed of conveyance it is unnecessary now to discuss, further than to illustrate the rule that should be applied to a case like the one at bar. In this case there was not an entire failure of title. The plaintiff contended and the trial court appears to have held, as stated in 11 Cyc. Law & Proc. p. 1163, that, "where the breach is only as to an aliquot and undivided part of the land attempted to be conveyed, the damages are in proportion to the whole consideration paid as that aliquot part of the land is to the whole thereof." We think that in any view of the proper measure of damages in ordinary cases of the breach of such covenants the rule above quoted, if correct (which we do not decide), has not been properly applied in this case. After the defendant had obtained her title from Mrs. Carse, she put valuable and lasting improvements upon the land, and this plaintiff has also made valuable improvements as before stated. Under our occupying claimant's act, this plaintiff could not be deprived of the land without payment for the improvements made both by himself and by his grantor, who held under the same title. What, then, could the adopted child of Mr. Carse, whose interest in the land has not been conveyed, claim in this land? The failure of title which this plaintiff obtained through his deed is only as to the interest of this adopted child. It is true that, in an action like this, for damages for a breach of covenant of title, difficulties and uncertainties are involved as to the real value of the interest in the land not conveyed to this plaintiff in his deed. These difficulties and uncertainties the plaintiff himself has brought to the court, by not first bringing an action to determine and have adjudicated the interest involved in the outstanding title; and he should not be allowed in this action to recover the value, or any part of the value, of those improvements that were placed upon these premises by himself or his grantor, since he cannot be deprived of these improvements through this outstanding title, and therefore has not lost the value thereof through this defect in his title. The measure of his damages in this case, then is the value of the outstanding title at the time that the plaintiff obtained his deed,—

that interest in the land of which he might be deprived through this outstanding title.

The plaintiff insists that this issue is not presented in the pleadings, but we think that this objection is not well taken. The plaintiff, in his petition, alleged "that, after the purchase of said premises from said defendant, and prior to plaintiff's knowledge of said defect in the title and the interest of said Avis Darleen Carse in and to said premises, the plaintiff had expended in permanent improvements and betterments on said premises the sum of \$350." The answer was a general denial. The court allowed the plaintiff to recover one half of the improvements placed thereon by himself. This he was not entitled to on any theory of the rule of measure of damages in such case. The plaintiff, being still in possession of the land and in use of these improvements, has not lost the value thereof through the defect in his title.

The judgment of the District Court is therefore reversed, and the cause remanded.

WISCONSIN SUPREME COURT.

RE MARGARET HANLIN'S ESTATE.

HENRY J. KILLILEA, Admr. of Margaret Hanlin, Deceased, Appt.,

v.

R. BRUCE DOUGLAS, Respnt.

(133 Wis. 140, 113 N. W. 411.)

Mortgagor — death — foreclosure — parties.

1. In case of the enforcement of a mortgage by foreclosure suit after the decease of the mortgagor and the appointment of an administrator of his estate, the latter is not a proper party for the purpose of establishing liability of such estate for the

Headnotes by MARSHALL, J.

Case Note. — *Accrual of cause of action for breach of covenant of seisin or of warranty, so as to set in motion the statute of limitations.*

As pointed out in the note to Webb v. Wheeler, ante, 1178, there is little, if any, practical distinction between the actual accrual of a cause of action for damages for breach of covenant of seisin and one for breach of covenant of title, the weight of authority holding that a cause of action accrues as to either, for substantial damages, at the time of making, only where the grantor at the time of the covenant was not in fact seised of the premises to which the covenant related. Where he was so seised, and the grantee obtained the benefit of that seisin, and entered into possession of the premises, the weight of authority denies his

mortgage indebtedness; such liability being enforceable only in the proper county court.

Judgment — foreclosure — res judicata.

2. The administrator of the estate of a deceased person having been made a defendant in a foreclosure action to enforce a mortgage given by the decedent with the owner of the mortgaged premises by a deed with full covenants from the deceased; and a judgment having been rendered, among other things, decreeing the administrator to be personally liable in his representative capacity for the mortgage indebtedness; and he having appealed, resulting in such decree being reversed as to him because of it not being proper in the action to settle the question of the liability of the estate for the indebtedness; and subsequently the cause having been, accordingly, dismissed as to the administrator,—the liability of the estate for the mortgage indebtedness, and to the covenant under the deed aforesaid in case of his paying off the same for his protection, is left wholly unadjudicated.

Statute of limitations — when operative.

3. The statute of limitations (§ 3860, Stat. 1898) bears on a right from the time there is a cause of action to enforce it.

Same — action — accrual.

4. A cause of action does not accrue until the party owning it is entitled to begin and prosecute an action thereon. It accrues at the moment when he has a legal right to sue on it, and no earlier.

Same — covenant — breach — nominal damages.

5. There is a technical breach of the covenant against encumbrances in a conveyance of real estate, in case of there being an outstanding mortgage upon the property, as soon as the deed is delivered; but it only gives rise to an action by the covenantee for nominal damages.

Same — substantial damages.

6. In case of a conveyance of land with full covenants, and there being an outstanding mortgage, no action lies for substantial damages in advance of an eviction, or the owner of the land entitled to the benefit of the covenant paying off the encumbrance

right to maintain an action on his covenant, whether of seisin or of title, and recover substantial damages, so long as his possession was not interfered with and he suffered no substantial loss in any other way. Although recognizing in many cases that there was a technical breach of the covenant of seisin because of an outstanding paramount title, the weight of authority, and especially the more modern cases, hold that the statute of limitations does not run against a right of action for damages for a breach of either covenant of title or seisin, until eviction, or at least the suffering of some substantial loss.

Covenants of warranty.

As to general covenants of title, or general warranty of title, the doctrine is well

Same — eviction — actual damages.

7. The covenant against encumbrances runs with the land, and inures to the owner who suffers ouster, or who is damaged by being compelled to extinguish the encumbrance. Such covenant is not breached, except technically, in advance of eviction or the suffering of actual damages; hence no right of action for such a breach accrues until such time.

Same — breach of covenant — technical — substantial.

8. The right of action for substantial damages for breach of a covenant against encumbrances, which runs with the land, is regarded as distinct from the technical breach occurring at the time of the delivery of the deed. The time when the cause of action to remedy one accrues, bears no relation to the time when the cause of action arises to remedy the other.

settled that eviction, actual or constructive, is necessary to set in motion the statute of limitations. This doctrine was recognized and applied in the following cases, wherein it was held that the statute of limitations did not commence to run against a right of action for the breach of a general covenant of title or warranty of title until there had been an eviction, either actual or constructive; *Northern P. R. Co. v. Montgomery*, 30 C. C. A. 17, 56 U. S. App. 579, 86 Fed. 251; *Moore v. Vail*, 17 Ill. 185; *Babin v. Winchester*, 7 La. 460; *Thomas v. Clement*, 11 Rob. (La.) 402; *Heath v. Whidden*, 24 Me. 383; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Watkins v. Gregory*, 69 Miss. 469, 13 So. 696; *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479; *Eustis v. Fosdick*, 88 Tex. 615, 32 S. W. 872; *Huff v. Riley*, 26 Tex. Civ. App. 101, 64 S. W. 387.

In *Bray v. Fletcher*, 132 Mich. 272, 93 N. W. 624, the statute of limitations against a right of action for breach of a general covenant of warranty, because of a tax title, was said to run from the time of the recording of the tax title, as, by statute, the recording of the tax title was constructive eviction of the covenantee.

Where the breach of a general covenant of title depends upon whether or not a former grantor, who is a minor, disaffirms his deed upon arriving at his majority, a breach of covenant does not occur, nor a cause of action accrue, until such disaffirmance. The statute of limitations, therefore, does not commence to run against a cause of action for the breach until the disaffirmance. *Pritchett v. Redick*, 62 Neb. 296, 86 N. W. 1091.

An adjudication adjudging an outstanding title to be paramount amounts to a constructive eviction; and the statute of limitations will run against a right of action for a breach of the covenant from the time of such adjudication. *Finton v. Egelston*, 61 Hun, 246, 16 N. Y. Supp. 721.

In *Kramer v. Carter*, 136 Mass. 504, a covenant of warranty was held to be breached when judgment was satisfied by 17 L.R.A. (N.S.)

Same — deceased mortgagor — covenant — actual damages.

9. A cause of action for breach of covenant against encumbrances made by a person subsequently deceased does not arise, so as to be enforceable against his estate, until the covenantee, or some person entitled to the benefit of the covenant, shall have suffered actual damages.

(October 15, 1907.)

APPPEAL by the administrator of the estate of Margaret Hanlin, deceased, from an order of the Circuit Court for Milwaukee County allowing a claim against the estate. Affirmed.

Statement by Marshall, J.:

Appeal from a judgment allowing a claim against the estate of Margaret Hanlin.

the grantee; and from that date the statute of limitations commenced to run against the right of action for the breach.

A defect in a title, caused by the grantor's having conveyed to a third person a prior right to remove a building located on real estate conveyed by general covenant of title, was held, in *Stewart v. West*, 14 Pa. 336, not to be breached, so as to set the statute of limitations running against an action thereon, until the building was actually removed.

A general warranty in a sale, of the right to cut timber, was held, in *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927, not to be breached until the right to cut the timber was interfered with by the true owner.

Where, however, the land to which the covenant relates is not in the possession of the covenantor at the time of making the covenant, but is in the possession of a third person under paramount title, it is well settled that the covenant is broken when made; and a cause of action accrues at once because of such breach, and the statute of limitations against the same will commence to run. *Durand v. Williams*, 53 Ga. 76; *Pevey v. Jones*, 71 Miss. 647, 42 Am. St. Rep. 486, 16 So. 252; *Watson v. Heyn*, 62 Neb. 191, 86 N. W. 1064; *Eustis v. Cowherd*, 4 Tex. Civ. App. 343, 23 S. W. 737; *Isley v. Wilson*, 42 W. Va. 757, 26 S. E. 551.

In Vermont the statute of limitations is not a defense to a covenant of warranty, as such a covenant runs with the land. *Wilder v. Davenport*, 58 Vt. 642, 5 Atl. 753.

Covenant of seisin.

RE HANLIN contains so thorough a discussion of the reasons why the statute of limitations will not commence to operate against a right of action for a breach of covenant of seisin until some substantial damage is suffered—generally eviction, actual or constructive—that no discussion of that proposition herein is deemed necessary. The proposition is also thoroughly dis-

The facts of the case are these: R. Bruce Douglas is the owner of lot 14, block 223, Cambridge's subdivision No. 2, in the eighteenth ward of the city of Milwaukee, Wisconsin. He obtained his title by deed with full covenants from Mary Jane Hayes and Thomas E. Hayes, her husband, September 3, 1898, the deed being duly recorded September 6, 1898. The grantee, Mary Jane Hayes, obtained title from the deceased by deed with full covenants, January 15, 1898, which deed was duly recorded. When the deceased made such deed, part of the premises was under mortgage made by her and her husband, dated November 25, 1891, and duly recorded. There was a pretended release of the mortgage, but it was fraudulently obtained and placed upon record. The mortgage was duly foreclosed, judgment

being rendered November 26, 1904, in which the indebtedness secured was fixed at \$1,580.16. In the foreclosure action the administrator of the estate of the deceased and R. Bruce Douglas were made defendants. No issue was joined in the action by the pleadings as regards the liability of the administrator for the indebtedness secured by the mortgage. Nevertheless, at the request of R. Bruce Douglas, findings were made to the effect that he was so liable. The administrator appealed from the judgment. In the proceedings upon the appeal Douglas did not participate. The appeal resulted in the court holding that the question of whether the estate of Margaret Hanlin was liable for the indebtedness secured by the mortgage was not one proper to be settled in the action. The judgment was therefore

cussed, and a like conclusion reached, in *Brooks v. Mohl*, post, 1195. These two cases indicate the undoubted trend of the later decisions. Both hold that an action for a breach of covenant of seisin for the recovery of substantial damages will not lie until there has been an actual, as distinguished from a technical, breach of the covenant, as by eviction, or, perhaps, in some cases, where some substantial loss can be shown.

This doctrine is also well established in Missouri. It was enunciated and applied by the courts of that state in the following cases: *Chambers v. Smith*, 23 Mo. 174; *White v. Stevens*, 13 Mo. App. 240; *Jones v. Haseltine*, 124 Mo. App. 674, 102 S. W. 40.

In *Leet v. Gratz*, 124 Mo. App. 394, 101 S. W. 696, the question arose whether or not, where there were successive breaches of a covenant of seisin,—which in Missouri is also a covenant of title,—the cause of action accrued for each breach at the time thereof, or whether the first breach caused a right of action for breaches in futuro. The facts were these: A grantor with covenants of seisin had conveyed certain real estate in which a number of heirs had a paramount interest. Some of these heirs were of age, and some not. Those of age asserted their title; the covenantee satisfied it and sued and recovered damages from the covenantor for the breach. Later, when the minor heirs reached their majority, the covenantee had to, and did, purchase their titles, and again sued for this breach. His right to do so was sustained, the court holding that, where there were successive breaches of that character, a cause of action as to each breach did not accrue until the actual breach.

This doctrine was also applied by the court in *Foshay v. Shafer*, 116 Iowa, 302, 89 N. W. 1107; and it was held that a cause of action for substantial damages for a breach of the covenant of seisin did not accrue until an eviction or its equivalent, because, prior to that time, there was merely a technical breach of the covenant, which

did not entitle the covenantee to recover substantial damages.

In *Wood v. Dubuque & S. C. R. Co.* 28 Fed. 910, following the Iowa rule, it was held that a covenant of seisin was not breached until substantial damages were suffered; and therefore a cause of action for such damages did not accrue, so as to put in motion the statute of limitations, until a substantial loss had been suffered.

In *Blondeau v. Sheridan*, 81 Mo. 545, a covenant of seisin was held to be breached when made, where the covenantor did not have possession of the property to which the covenant related when it was executed, and the covenantee obtained no possession thereunder.

A different rule was, however, applied in *Jewett v. Fisher*, 9 Kan. App. 630, 58 Pac. 1023; and it was held that, although the covenantee had not been disturbed in his possession until about the time of the bringing of the suit, yet that the cause of action for a breach of the covenant of seisin because of a defect in title at the time of the making of the covenant accrued at once. The action was not commenced until eviction, and was accordingly held barred by the statute of limitations, computing the time from the date of the instrument.

In *Sherwood v. Landon*, 57 Mich. 219, 23 N. W. 778, where a covenantee entered into possession of the land to which the covenant related, and remained in possession thereof until after the eviction, his right to maintain an action for damages for breach of covenant of seisin was held to be barred because not commenced within the statutory period after it was made on the theory that such a covenant, if broken at all, was broken when made, even though no substantial damage was caused at that time. To the same effect are *Matteson v. Vaughn*, 38 Mich. 373; *Pierce v. Johnson*, 4 Vt. 247; *Johnson v. Veal*, 3 M'Cord. L. 449. The warranty involved in the last case was a general warranty of title, which was also claimed to be a special warranty of seisin; but, as there had been no eviction or its equivalent, the court said that it was

reversed as to the administrator and remanded to the trial court, where the complaint as to him was dismissed. Thereafter Douglas was obliged to, and did, redeem the mortgaged premises from the judgment of foreclosure. The redemption was made February 16, 1906, the amount paid being \$1,721.23. Mr. Douglas reasonably expended in resisting the foreclosure \$187.77. The time for filing general claims against the estate of the deceased expired the 1st day of January, 1902. Douglas filed his claim February 26, 1906.

Upon findings of the court as to the facts corresponding with the foregoing statement, the legal conclusion was reached that the claimant's demand accrued and became absolute after the time limited for general creditors to present their demands; that it was seasonably filed; and that there was justly due thereon \$1,909.50, with interest from February 16, 1906. Judgment was rendered accordingly, from which this appeal was taken.

Mr. Adolph Huebschmann, for appellant:

A cause of action accrues from the time a right to sue for the breach attaches.

Eising v. Andrews, 66 Conn. 58, 50 Am. St. Rep. 75, 33 Atl. 585; *Fowlkes v. Nashville & D. R. Co.* 9 Heisk. 829; *Kennedy v. Burrier*, 36 Mo. 128; *Winneconne v. Winneconne*, 122 Wis. 348, 99 N. W. 1055; *Amy v. Dubuque*, 98 U. S. 470, 25 L. ed. 228; *Barry v. Minahan*, 127 Wis. 570, 107 N. W. 488; *Rice v. United States*, 122 U. S. 611, 30 L. ed. 793, 7 Sup. Ct. Rep. 1377.

"To accrue" is synonymous with "to become due and payable."

Mundt v. Sheboygan & F. du L. R. Co. 31 Wis. 451; *Schifferstein v. Allison*, 123 Ill. 662, 15 N. E. 275; *Allen v. Armstrong*, 58 App. Div. 427, 68 N. Y. Supp. 1079; *Fay v. Holloran*, 35 Barb. 295; *Cutcliff v. McAnally*, 88 Ala. 507, 7 So. 331.

A claim, demand, or debt may be absolute

though payable or enforceable at a subsequent time.

Edwards v. Roepke, 74 Wis. 571, 43 N. W. 554; *Becker v. Becker*, 112 Wis. 24, 87 N. W. 830; *Foster v. Singer*, 69 Wis. 392, 2 Am. St. Rep. 745, 34 N. W. 395.

A covenant against encumbrances in a warranty deed is broken when made, if encumbrances exist on the land when the deed is delivered.

Pillsbury v. Mitchell, 5 Wis. 17.

A cause of action exists for a breach of the covenant against encumbrances as soon as the deed is delivered.

Eaton v. Lyman, 30 Wis. 41.

The judgment in the *Franklin* suit is *res judicata*.

Schneider v. Reed, 123 Wis. 488, 101 N. W. 682; *Franklin v. Killilea*, 126 Wis. 88, 104 N. W. 993; *Pereles v. Leiser*, 119 Wis. 347, 96 N. W. 799.

Where the answer contains allegations which are sufficient to raise an issue between the answering defendant and a codefendant, such an issue is raised; and the court can adjudicate the difference between the defendants although the answer is not even served on the codefendant.

Kollock v. Scribner, 98 Wis. 104, 73 N. W. 776; *Schneider v. Reed*, 123 Wis. 495, 101 N. W. 682.

Mr. J. V. Quarles, Jr., with Messrs. **Quarles, Spence, & Quarles**, for respondent:

A covenant against encumbrances is a covenant or indemnity, and the action accrues upon payment of the encumbrance.

Rawle, Covenants, 1st ed. p. 134; *Pillsbury v. Mitchell*, 5 Wis. 17; *Eaton v. Lyman*, 30 Wis. 41; *Noonan v. Ilsley*, 21 Wis. 139; *Nichol v. Alexander*, 28 Wis. 118; *Messer v. Oestreich*, 52 Wis. 695, 10 N. W. 6; *Bardeen v. Markstrum*, 64 Wis. 615, 25 N. W. 565; *Semple v. Whorton*, 68 Wis. 634, 32 N. W. 690; *Johnson v. Brice*, 102 Wis. 575, 78 N. W. 1086; *South Milwaukee Co. v. Murphy*, 112 Wis.

the settled rule that an action could not be maintained for the breach of a general warranty of title until after eviction; but, if the covenant is construed as a covenant of seisin, then it was broken as soon as it was made, and the cause of action therefore accrued at that time, and would therefore have been barred by the statute of limitations at the time the action was commenced.

The same conclusion was also reached in *Turner v. Moon* [1901] 2 Ch. 825. In this case, even at the time of the bringing of the action, there had been no eviction or its equivalent, or substantial loss to the covenantee, and he therefore, at the time of bringing his suit, had no other or different claim for damages than he had at the time of the technical breach of the covenant. 17 L.R.A. (N.S.)

In *Westrope v. Chambers*, 51 Tex. 178, a covenant of title and right to convey was treated as a covenant of seisin, and was said to be broken on delivery of the deed, when the grantor had no title; and a cause of action for the breach then accrued, so as to set the statute of limitations in operation against it.

In *Mitchell v. Kepler*, 75 Iowa, 207, 39 N. W. 241, where a covenantee did not enter into possession of the land to which the covenant related, the covenant of seisin was held to be broken when made; and a cause of action for the breach against the covenantors accrued, so as to set the statute of limitations in motion against it.

622, 58 L.R.A. 82, 88 N. W. 583; Ernst v. Nau, 63 Wis. 134, 23 N. W. 492; German American Sav. Bank v. Fritz, 68 Wis. 396, 32 N. W. 123; Barth v. Graf, 101 Wis. 38, 76 N. W. 1100; Taylor v. Coon, 79 Wis. 76, 48 N. W. 123; Thompson v. Taylor, 30 Wis. 68.

A claim may be filed which accrues or becomes absolute after the time limited for filing claims under § 3860, Stat. 1898.

Ernst v. Nau, supra; Mann v. Everts, 64 Wis. 372, 25 N. W. 209; C. & J. Michel Brewing Co. v. Wightman, 97 Wis. 657, 73 N. W. 316; South Milwaukee Co. v. Murphy, 112 Wis. 614, 58 L.R.A. 82, 88 N. W. 583.

A judgment between parties is conclusive only as to the matter which might have been decided under the pleadings and the issues joined in the action.

Eastman v. Porter, 14 Wis. 40; Shepardson v. Cary, 29 Wis. 34.

Marshall, J., delivered the opinion of the court:

The point is made by the learned counsel for appellant that the judgment in the foreclosure suit is *res judicata* of whether the estate is liable to pay the indebtedness which was the ground of respondent's claim. As indicated in the statement, no issue was raised in the foreclosure suit on that subject, though at the request of respondent the trial court therein made findings that the administrator of the estate of the deceased was personally responsible for the mortgage indebtedness, and judgment was so rendered, and it was afterwards, in due proceedings to that end, reversed and the cause dismissed as to him. It seems quite plain that the question of whether the estate of Margaret Hanlin was liable for the mortgage indebtedness was thus effectually removed from the case, and that it necessarily carried with it all opportunity for litigating whether the estate was liable over to respondent in case of his paying off the indebtedness.

Whatever liability there was of the estate on account of the mortgage indebtedness, from any point of view, was manifestly enforceable only by proper proceedings in the county court, and, after the reversal of the judgment in the foreclosure action, there was nothing left in that case passing upon respondent's rights in any way whatever. The administrator was not a necessary or proper party to the foreclosure as regards the liability of the estate for any claim enforceable in the county court, and for that reason, as plainly appears by the decision of this court, he was dismissed from the suit.

The point above treated being disposed of, 17 L.R.A. (N.S.)

the case comes down to this: Was respondent's demand extinguished by the statute of nonclaim, § 3860, Stat. 1898, before the claim was filed in the county court? Such section provides that, "if the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims, the person having such claim may present it to the county court, and prove the same at any time within one year after it shall accrue or become absolute. . . ."

It must be conceded, as the fact is, that, if respondent's cause of action did not accrue till he paid off the encumbrance, then his claim was seasonably filed; that the statute of limitations operates upon a claim only from the time there is a complete cause of action to enforce it, and that, if respondent had no such cause till he extinguished the encumbrance, he was entitled to recover.

When did the respondent's cause of action mature? That would seem to be so plainly ruled by Pillsbury v. Mitchell, 5 Wis. 17, Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68, Eaton v. Lyman, 30 Wis. 41, and Johnson v. Brice, 102 Wis. 575, 78 N. W. 1086, that we need not go elsewhere for authority.

True, an action for nominal damages accrues in the circumstances of this case as soon as the deed is given. The authorities are all in harmony to that extent, but, until eviction in such a case, there is no opportunity to recover substantial damages such as, in this instance, the amount paid to remove the encumbrance, till payment occurs. In Johnson v. Brice, supra, the court said in harmony with previous adjudications and authorities generally: "While a covenantor is not bound to discharge the encumbrance before bringing suit for a breach of it, unless he suffers actual damages by effecting such a discharge before suit, he can recover only nominal damages."

While the rule is universally and freely conceded that the statute of limitations commences to run only from the time the cause of action accrues, there is often a controversy as to when that time arrives. The unfailing test is, in the absence of some statute to the contrary, whether the party asserting the claim can successfully maintain an action to enforce it.

The rule is stated tersely, and with many supporting authorities, in 19 Am. & Eng. Enc. Law, 2d ed. p. 193, thus: "A cause of action does not accrue until the party owning it is entitled to begin and prosecute an action thereon; it accrues at the moment when he has a legal right to sue on it and no earlier." That covers the whole subject. Nothing can be gained by multiplying words in respect to it.

Manifestly, a statute of limitations does not bear on a right until there is a right of action; a judicial remedy of some sort which the owner of that right can invoke to vindicate it. So, as said, the unfailing test is to decide upon the precise point of time when the owner of the right could have instituted a suit to enforce it and prosecute the same to a successful result. That time does not arise in the circumstances of this case, as we have seen, until the person entitled to the benefit of the covenant against encumbrances is actually damaged by paying off the encumbrance. The right to have the encumbrance paid off by the covenantor, the breach of that right by failure to do so, and the compulsory payment by the covenantee of the one entitled to the benefit of the covenant, form the circumstances creating the cause of action.

There is some conflict of authority on the precise point involved here, of whether the statute of limitations commences to run to recover substantial damages in an action of this sort till the encumbrance is paid off; but it would seem that the principle that one cannot maintain an action for damages till they actually are suffered by payment, and that the statute of limitations runs only from the time an action may be maintained, settles the question for this court. On the point that only nominal damages are recoverable prior to the extinguishment of the encumbrance, or eviction, the authorities are all in harmony. On the precise point here, that the statute of limitations commences to run on the demand for the damages suffered only from the time the encumbrance is paid off, the authorities are in substantial harmony. We cite the following: *Spoor v. Green*, L. R. 9 Exch. 99; *Yancey v. Tatlock*, 93 Iowa, 386, 61 N. W. 997; *Jenkins v. Hopkins*, 9 Pick. 543; *Post v. Campau*, 42 Mich. 90, 3 N. W. 272; *Hunt v. Marsh*, 80 Mo. 396; *Blondeau v. Sheridan*, 81 Mo. 545; *Wyatt v. Dunn*, 93 Mo. 459, 2 S. W. 402, 6 S. W. 273.

The few authorities conflicting with the above, we need not refer to. Some of those cited are not entirely satisfactory, but the following from *Hunt v. Marsh*, supra, not only fits the case before us very closely, but shows the ground of the rule; the reason why the cause of action for substantial damages does not relate to the date of the creation of the covenant: "It has long been settled that these covenants run with the land, and inure to the owner who suffers ouster, or who is compelled to extinguish the encumbrance to save his estate. No substantial injury happens before this, and no right of action accrues before."

It was formerly a controverted question here whether a covenant against encum-

brances runs with the land, and such controversy was settled in the affirmative in *Mecklem v. Blake*, supra. There the authorities on both sides of the question were examined, and it was held, adopting the English rule, as was said, that the covenant is one of indemnity, and, as to substantial damages, runs with the land, the action therefor not accruing till the damages are suffered. The court recognized two rights of action, the one for mere nominal damages accruing at the instant of the delivery of the deed and becoming a mere chose in action, enforceable by the covenantee or his assignee, and the right of action for substantial damages; that the conveyance as to the latter damages is "intended for the security of all subsequent grantees, until the covenant is finally and completely broken; . . . that no such right of action accrues to the covenantee on the mere nominal breach, which always happens the moment the covenant is executed, as is sufficient to merge or arrest the covenant in the hands of the covenantee, or to deprive it of the capacity of running with the land for the benefit of the person holding under the deed when an eviction takes place or other real injury is actually sustained."

Mr. Justice Dixon, who wrote the opinion in *Mecklem v. Blake*, supra, in a very able dissenting opinion in *Eaton v. Lyman*, supra, contended that the mere shadow of a claim entitling the owner to nominal damages, which was recognized when it was held that the covenants were for the benefit of the covenantee only, should not, in view of the position of the court that the covenant for substantial damages runs with the land, be further recognized; that no action should be maintained for mere nominal damages, and no action for the breach of the covenant against encumbrances should be held to exist in advance of actual damages accruing.

A careful reading of the opinion in *Eaton v. Lyman* shows that a breach of the covenant against encumbrances which accrues immediately upon the delivery of the deed, giving rise to a cause of action for nominal damages, and a breach occurring at the time of paying off the encumbrance, are recognized as distinct, giving rise to two separate causes of action; though the court declined to decide whether, if the one for the first breach were enforced, the covenantee could subsequently sue for a second breach; but it was quite distinctly held that, if the action for a substantial breach of the covenant is brought by a remote grantee, the covenantor has no reason to complain because of a former recovery by the covenantee for nominal damages.

It follows that the cause of action for

the recovery of substantial damages, as in this case, is so far distinct from the right to recover nominal damages as to be grounded on a separate breach happening at the time the damages are actually suffered. It does not relate to the delivery of the deed. That is conclusive as to the right of respondent to the judgment appealed from.

The judgment is affirmed.

MINNESOTA SUPREME COURT.

SUSAN E. BROOKS et al., Respts.,
v.

FRED MOHL et al., Appts.,

(104 Minn. 404, 116 N. W. 931.)

Deed — broken covenants — superior title.

1. If, at the date of the execution of a warranty deed, a superior title is outstanding in a third person, the covenants of that deed are broken whenever that title is actually asserted against the covenantee, the premises are claimed under it, and the covenantee is compelled to yield and does yield his claim to the superior title.

Statute of limitations — broken covenants.

2. The vendee's right of action against the warrantor does not date from the time when the deed was delivered, so as to be barred by the statute of limitations at the end of six years thereafter.

Vendee — paramount title — purchase.

3. The vendee in such a case may extinguish the paramount title by purchase.

Damages — breach of covenants — warranty deed.

4. The ordinary measure of damages on breach of the covenants of a warranty deed is the consideration paid, with interest, together with costs and expenses, including an attorney's fee, reasonably and in good faith incurred in defending title and resisting the eviction.

Same — purchase of paramount title.

5. Where the vendee buys the paramount title, the measure of damages is the amount paid therefor, and interest, provided the sum does not exceed the consideration money and interest.

Same — partial loss.

6. If the purchaser has been actually de-

Headnotes by JAGGARD, J.

Note. — As to when the statute of limitations will commence to run against a right of action for damages for breach of warranty, see note to *Re Hanlin*, ante, 1189.

As to whether eviction is necessary in order that a cause of action for a breach of covenant shall accrue, see note to *Webb v. Wheeler*, ante, 1178.

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prived of part only of the subject of his bargain, his damages correspond.

(June 12, 1908.)

APPPEAL by defendants from a judgment of the District Court for Nobles County in plaintiffs' favor in an action brought to recover damages for breach of covenant. Affirmed.

The facts are stated in the opinion.

Messrs. George W. Wilson & Son, for appellants:

The covenant of seisin was broken as soon as the deed was delivered.

2 Devlin, Deeds, 889, 942; Ogden v. Ball, 40 Minn. 94, 41 N. W. 453; Kimball v. Bryant, 25 Minn. 496; Allen v. Allen, 48 Minn. 462, 51 N. W. 473; Wood, Limitation of Actions, § 173; Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Hamilton v. Wilson, 4 Johns. 72, 4 Am. Dec. 253; M'Carty v. Leggett, 3 Hill, 134; Bingham v. Weiderwax, 1 N. Y. 509; Mott v. Palmer, 1 N. Y. 564; Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452; Bellamy v. Chambers, 50 Neb. 146, 69 N. W. 770; Chapman v. Kimball, 7 Neb. 399.

Therefore this action is barred under our statute of limitations.

Statute 1905, § 4076; Matteson v. Vaughn, 38 Mich. 373, 39 Mich. 758; Sherwood v. Landon, 57 Mich. 219, 23 N. W. 778; Burke v. Beveridge, 15 Minn. 205, Gil. 160; Bruns v. Schreiber, 48 Minn. 366, 51 N. W. 120; Yancey v. Tatlock, 93 Iowa, 386, 61 N. W. 997; Mitchell v. Kepler, 75 Iowa, 207, 39 N. W. 241; 8 Am. & Eng. Enc. Law, 2d ed. p. 91, note B; Kern v. Klocke, 21 Neb. 529, 32 N. W. 574.

Eviction must be alleged and proved to entitle a recovery for breach of the covenant of warranty.

Waldron v. M'Carty, 3 Johns. 471; Hunt v. Amidon, 1 Hill, 147; Moore v. Frankenhield, 25 Minn. 540; Wagner v. Finnegan, 54 Minn. 251, 55 N. W. 1129; Burke v. Beveridge, supra; Prestwood v. McGowin, 128 Ala. 267, 86 Am. St. Rep. 136, 29 So. 386.

In the absence of an eviction, in no case would the plaintiff be entitled to anything except nominal damages only, and that for a breach of a covenant of seisin.

Ogden v. Ball, 38 Minn. 237, 36 N. W. 344, 40 Minn. 94, 41 N. W. 453; Kimball v. Bryant, supra; Sable v. Brockmeier, 45 Minn. 248, 47 N. W. 794; Devlin, Deeds, 894; Boon v. McHenry, 55 Iowa, 202, 7 N. W. 503.

The court erred in not requiring plaintiffs to elect upon which of the covenants in the deed they expected to rely.

Prestwood v. McGowin and Hamilton v. Wilson, supra; 2 Devlin, Deeds, 942; 11 Cyc. Law & Proc. p. 1101, e; Rawle, Covenants, 88, 318-328.

Messrs. Town & Jones, for respondents:

The right of action of the plaintiffs did not accrue until there was an assertion of a superior title.

Jones, Real Prop. § 987; *Allis v. Nininger*, 25 Minn. 525; 11 Cyc. Law, & Proc. p. 1134; *Ganser v. Ganser*, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18.

The judgment in the former suit was a constructive eviction for the purposes of this trial.

Allis v. Nininger, supra; *Ogden v. Ball*, 40 Minn. 94, 41 N. W. 453; Jones, Real Prop. § 919; *Wagner v. Finnegan*, 65 Minn. 115, 67 N. W. 795.

The measure of damages is the consideration agreed upon between the parties, with interest and costs.

Jones, Real Prop. 968; *Sutherland, Damages*, 609.

Plaintiff is entitled to recover not only damages for the loss of the land, but also costs reasonably and in good faith incurred in defending the title and resisting the eviction.

Sutherland, Damages, 2d ed. §§ 605, 617, p. 1370; *Allis v. Nininger*, supra; Jones, Real Prop. §§ 983, 984, p. 774; 11 Cyc. Law & Proc. p. 1104; *Morris v. Rowan*, 17 N. J. L. 304.

Jaggard, J., delivered the opinion of the court:

On December 25, 1890, defendants made and delivered to Samuel Brooks, now deceased, a warranty deed in the usual form conveying 160 acres of land. Defendants had never been in actual possession of the land or any part thereof. At the time of the delivery of the deed the land was vacant and unoccupied. Within a few months after the delivery of the deed, the grantee, Samuel Brooks, took the actual possession of the land under the deed, and resided upon the land up to the day of his death. Since that, and up to the present time, his heirs at law, the plaintiffs have continued such actual possession, and some of them now reside upon the land. On January 17, 1903, an action in partition was brought by a plaintiff, claiming to own an undivided nine-fifteenths interest in the premises, against the heirs of Samuel Brooks, as the owners of an undivided two-fifteenths, and against two other defendants, each alleged to own an undivided two-fifteenths interest. The ownership of such respective undivided interests was found as a fact by the court. On August 9, 1905, the present plaintiffs procured conveyances from other cotenants of their interests for a total sum of \$1,729.80. Of this sum only \$1 was paid to one cotenant for a two-fifteenths interest, and the remainder to the other cotenants. 17 L.R.A. (N.S.)

Notice of the pendency of the partition suit was served by Brooks on Fred Mohl, one of the defendants in this suit, but not on the other defendant, his wife. This was an action brought by plaintiffs on July 30, 1906, for damages for the breach of covenant contained in the deed. The trial court in this case found these facts. It also found that plaintiffs had accounted for the rental value of said lands to the original owners thereof, as determined in probate proceedings previously referred to.

The defendants urge that the complaint is one for damages for breach of the covenant of seisin only; that this covenant was broken as soon as the deed was delivered, to wit, on December 25, 1890; and that, inasmuch as this action was not brought until July 30, 1906, it was barred by the six-year statute of limitations. § 4076, Rev. Laws 1905. This position is not tenable. Undoubtedly, for some purposes, the covenant for seisin is regarded as broken by failure of title as soon as the deed is delivered: but for the present purpose that rule is not properly invoked. It is the settled law of this state, in conformity with the general opinion on the subject, that "if, at the date of the covenant, there is a superior title outstanding in a third person, whenever that title is actually asserted against the covenantee, and the premises are claimed under it, and the covenantee is obliged to yield, and does yield, his claim to the superior title, the covenant is broken." *Allis v. Nininger*, 25 Minn. 525, per Gilfillan, Ch. J.: Jones, Real Prop. § 987; 11 Cyc. Law & Proc. p. 1134. The judgment in the partition suit was a sufficient eviction to constitute a breach of covenant, and the purchase out of the outstanding title by the covenantee, after resistance in good faith, in no wise affected the sufficiency of the eviction. It was not necessary that the covenantee should go through the formality of surrendering possession and of immediately re-entering upon the premises. The purchase is equivalent to an entry of the claimant. *Parker, Ch. J., in Loomis v. Bedel*, 11 N. H. 74; *Ogden v. Ball*, 40 Minn. 94, 41 N. W. 453; *Cf. Wagner v. Finnegan*, 65 Minn. 115, 67 N. W. 795; Jones, Real Prop. § 919. That is to say, the vendee may extinguish the paramount title by purchase. *Galbreath v. Doe*, 8 Blackf. 368; *Loomis v. Bedel*, supra. This is not only clear on authority, but is obviously necessary on principle. Otherwise the covenantee, in unopposed possession for six years without notice of adverse claim of title, might be evicted and have no remedy against his grantor. His cause of action would be barred before he would know of its existence.

The breach of the covenants of the war-

ranty deed and the failure of title, admitted both in the pleadings and in the proofs, deprive of legal significance the failure to serve notice upon Mrs. Mohl.

Defendants assert, by way of "set-off and recoupment," the fair market value of the use of said premises, or at least six fifteenths thereof, as the result of which they ask for judgment against the plaintiffs in the sum of \$2,030. We are at a loss to understand by what sophistry an appearance of reason can be given to making a breach of a warranty so profitable to the party violating his covenant. Plaintiffs were entitled to the use of two fifteenths of the land as owners by purchase from defendants. They were liable to the owners of the thirteen-fifteenths interest for the market value of that portion of the premises until the time of settlement, which was found to have been made. From that time they were entitled to possession as owners of the whole. This was the proper conclusion of the trial court.

Defendants object, also, to the court's assessment of damages and of costs incurred or paid. It is elementary that in actions for a breach of the covenants, where there has been an eviction, actual or constructive, the plaintiff is entitled to recover for the loss of the land, usually measured by the consideration paid, with interest (*Devine v. Lewis*, 38 Minn. 24, 35 N. W. 711; *Devlin, Deeds*, § 894), and, in case of partial breach, damages *pro tanto* (*Downer v. Smith*, 38 Vt. 464; *McNally v. White*, 154 Ind. 163, 54 N. E. 794, 797, 56 N. E. 214), and also costs and expenses and an attorney's fee reasonably and in good faith incurred in defending the title and resisting the eviction (*Allis v. Nininger*, *supra*; *Sutherland, Damages*, 2d ed. § 617). The trial court ordered judgment for the plaintiffs in the sum of \$559.98, with interest for not more than six years prior to the eviction, at the rate of 6 per cent. This was less than six fifteenths, of the purchase price, and was obviously unobjectionable from that point of view.

Defendants also insist, however, that plaintiffs could only recover what they paid for the four-fifteenths outstanding interest, provided the amount was fair and reasonable, or worth what they paid, and that for the remaining interest only \$1 could be recovered. This position involves a misapplication of the ordinary rule of damages, and is not tenable under the rule applying to cases in which a vendee has bought in a paramount outstanding title. In the latter case the measure of damages is the amount paid therefor and interest, provided the sum does not exceed the consideration money and interest. In the case of a partial breach, the damages awarded correspond. *Lawless v. Collier*, 19 Mo. 483; *Hutchins* 17 L.R.A. (N.S.)

v. Roundtree, 77 Mo. 500; *Dale v. Shively*, 8 Kan. 277, 281, per *Brewer, J.* Within this rule, the trial court's finding was obviously correct.

The court also ordered judgment for \$458.42 in pursuance of the previous finding that in fact plaintiffs had necessarily expended various sums for the purpose of defending the action described in the complaint and were liable for other necessary expenses of the same kind not then actually paid. Here, again, objection is made to paying the plaintiffs for money expended in perfecting title of the cotenant whose two fifteenths was purchased for \$1. There is no merit in this objection. The conclusion of law follows from the findings of fact. The findings of fact were fully justified by the evidence.

Other assignments of error have been examined, and have been found to be without merit. They call for no special discussion.

Affirmed.

NEW HAMPSHIRE SUPREME COURT.

NAPOLEON B. FRYE, *Ext.*, etc., of John M. Wakefield,

v.

ABBIE A. HUBBELL.

(74 N. H. 358, 68 Atl. 325.)

Limitation of actions — executor.

1. A statute suspending, in favor of an executor, the running of the statute of limi-

Note. — The question as to partial payment of an indebtedness as a consideration for the discharge of the whole debt is discussed at length in a note to *Fuller v. Kemp*, 20 L.R.A. 785, and in a case note to *Melroy v. Kemmerer*, 11 L.R.A. (N.S.) 1018. As there shown, the courts in general have reluctantly followed the doctrine that the part payment of a liquidated and undisputed indebtedness will not, in the absence of any other consideration, uphold a promise to release the remainder, when the case in hand could not be taken out of the operation of that rule by some distinction, real or fanciful. It will be observed that in the above case of *FRYE v. HUBBELL* the court, following the example of the Mississippi supreme court, repudiates the doctrine itself, instead of assuming to take the case out of the operation of the rule by a forced distinction.

The question as to the validity of a promise of additional compensation for completing an executory contract other than a contract for the payment of money is discussed in a case note to *Linz v. Schuck*, 11 L.R.A. (N.S.) 789.

tations as to all rights of action existing in favor of the deceased at his death if suit is brought within two years, does not prevent the bringing of a suit after that time if the limitation period is not complete.

Mortgage — presumption of payment — acknowledgment.

2. The presumption of payment of the debt upon twenty years' undisturbed and unexplained possession of mortgaged land by the mortgagor may be repelled by any act recognizing the validity of the mortgage.

Same — foreclosure — possession — mortgagor.

3. The retention of mortgaged premises for one year after foreclosure by the mortgagee, so as to complete the foreclosure proceedings under the statute, is not established, as matter of law, where the occupation was by one of the mortgagors, and there is a controversy as to the character of such occupation.

Payment — part of debt.

4. Payment of part of a matured mortgage debt may constitute a consideration for release of the whole of it.

(Chase, J., dissents.)

(November 5, 1907.)

TRANSFER by the Superior Court for Sullivan County for the opinion of the Supreme Court upon exceptions by defendant, Abbie A. Hubbell, after the granting of a nonsuit in favor of her husband and the direction of a verdict against her, of an action brought to foreclose a mortgage. Exceptions sustained.

On December 16, 1879, Abbie A. and William W. Hubbell executed a mortgage to John M. Wakefield to secure a note for \$600 signed by them, William W. signing as surety. The mortgage was made subject to a prior one in favor of the Newport Savings Bank. The savings-bank mortgage was transferred for value, suit brought thereon, and on May 13, 1886, the administrator of the purchaser was put into possession of the premises under the foreclosure proceedings. On November 18, 1890, the administrator quitclaimed the property to a sister of Abbie A. Hubbell, who in turn quitclaimed to her. Abbie A. was never actually put out of possession of the premises, but continued to collect the rents and treat the property as her own, paying interest on the bank mortgage up to the time of conveyance of the property to her. Wakefield's administrator brought suit on his mortgage January 16, 1905. The Wakefield mortgage had been further secured by a mortgage of real estate in Enfield which was discharged 17 L.R.A. (N.S.)

on November 23, 1893, upon payment of a sum realized from the sale of the premises. The amount so received was indorsed upon the note, and there was evidence that William W. Hubbell had made two small payments thereon, and that Abbie A. paid \$300 about November 28, 1893, upon Wakefield's agreement to accept such payments in full satisfaction of the debt.

Further facts appear in the opinion.

Mr. George R. Brown, for defendant:

Twenty years' unexplained possession by the mortgagor bars the right of the mortgagee to the land upon a presumption that the mortgage debt has been discharged.

Clark v. Clough, 65 N. H. 78, 23 Atl. 526; Munroe v. Wilson, 68 N. H. 580, 41 Atl. 240; Stanton v. Thompson, 49 N. H. 279; Hathaway v. Noble, 55 N. H. 508; Green v. Cross, 45 N. H. 584.

The right of action is barred by the special statute of limitations.

Pub. Stat. chap. 191, § 6; Sugar River Bank v. Fairbanks, 49 N. H. 144; Forest v. Jackson, 56 N. H. 362; Walker v. Cheever, 39 N. H. 420; Clark v. Clough, *supra*.

Part payment was not sufficient to avoid the bar of the statute of limitations.

Smith v. Wells, 70 N. H. 49, 46 Atl. 51; Clough v. McDaniel, 58 N. H. 201; Wheeler v. Robinson, 50 N. H. 303; Marshall v. Daniels, 18 N. H. 364; Brown v. Latham, 58 N. H. 30, 42 Am. Rep. 568; Rossiter v. Colby, 71 N. H. 386, 52 Atl. 927.

When land is subject to two mortgages held by different persons, a quitclaim deed of the first mortgage after foreclosure operates as an assignment, and not as a discharge, of it.

Green v. Currier, 63 N. H. 563, 3 Atl. 428; Bacon v. Goodnow, 59 N. H. 415; Stanton v. Thompson, 49 N. H. 272; Bell v. Woodward, 34 N. H. 90.

The payments made by the surety could not operate to take the case out of the statute of limitations against the principal.

13 Am. & Eng. Enc. Law, p. 756; Exeter Bank v. Sullivan, 6 N. H. 124; Batchelder v. Batchelder, 48 N. H. 23, 97 Am. Dec. 569; Holt v. Gage, 60 N. H. 541; Shepherd v. Thompson, 122 U. S. 231, 30 L. ed. 1156, 7 Sup. Ct. Rep. 1229.

Mr. Hosea W. Parker also for defendant.

Mr. F. O. Chellis, for plaintiff:

Part payment on the mortgage debt revived the mortgage.

Peak v. Mallams, 10 N. Y. 509; Howard v. Hildreth, 18 N. H. 106; Tripe v. Marcy, 39 N. H. 439; Jackson ex dem. People v. Wood, 12 Johns. 242, 7 Am. Dec. 315; New York L. Ins. & T. Co. v. Covert, 3 Abb. App.

Dec. 35; *Hough v. Bailey*, 32 Conn. 289; *Wood Limitation of Actions*, pp. 498, 512; *Martin v. Bowker*, 19 Vt. 526; *Hoffman v. Harrington*, 33 Mich. 392; *Whitney v. French*, 25 Vt. 663.

The action was properly brought though not within two years after the original grant of administration.

Morse v. Whitcher, 64 N. H. 591, 15 Atl. 217.

Part payment did not release the whole debt.

Pinnel's Case, 5 Coke, 117; *Mathewson v. Strafford Bank*, 45 N. H. 107; *Grant v. Porter*, 63 N. H. 229; *Fitch v. Sutton*, 5 East, 230; *Cumber v. Wane*, 1 Strange, 426; *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Wheeler v. Wheeler*, 11 Vt. 60; *McDaniels v. Lapham*, 21 Vt. 234; *Ellsworth v. Fogg*, 35 Vt. 355; *Draper v. Hitt*, 43 Vt. 440, 5 Am. Rep. 292; *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95; *Donohue v. Woodbury*, 6 Cush. 150, 52 Am. Dec. 777; *Perkins v. Lockwood*, 100 Mass. 249, 1 Am. Rep. 103; *Curran v. Rummell*, 118 Mass. 482.

Parsons, Ch. J., delivered the opinion of the court:

The only questions of law transferred are those raised by the exceptions to the denial of the motion for a nonsuit and verdict in favor of Abbie A. Hubbell, to the verdict directed for the plaintiff against her, and to the final instructions given the jury as to the effect of evidence that certain sums were paid and accepted in full satisfaction of the debt.

There was no error in the denial of the motion for a nonsuit and verdict. Section 6, chap. 191, Pub. Stat. 1901, suspends in favor of the executor the running of the statute of limitations as to all rights of action existing in favor of the deceased at his death, if suit is brought within two years. It does not bar an action otherwise maintainable, brought after two years from the date of administration. *Morse v. Whitcher*, 64 N. H. 591, 15 Atl. 207. As to the two other grounds upon which the motion for a nonsuit was placed,—that the action was not brought within twenty years after the right of action accrued, and the alleged foreclosure of the prior bank mortgage,—the most favorable view of the case for the defendant is that the evidence presented questions of fact upon which a jury might find for her. Although twenty years' unexplained and undisturbed possession by the mortgagor bars the right of the mortgagee to the land, upon the presumption that the mortgage debt has been paid or had no valid existence, this presumption is repelled by any act recognizing the validity of the mortgage. *Tripe v. Marcy*, 39 N. H. 439, 449, 450; *Green v.*

Cross, 45 N. H. 574, 584; *Clark v. Clough*, 65 N. H. 43, 78, 23 Atl. 526; *Martin v. Bowker*, 19 Vt. 526, 527. Whatever the legal conclusion might be, if the only evidence of payment was the indorsement of the sum received from the proceeds of other property mortgaged to secure the same debt, the case does not rest on this evidence. There was other evidence as to this payment, and the defendant claimed to have made other payments. Whether they were made, and whether either was so made as to constitute a recognition of the validity and existence of the mortgage, was a question upon which the evidence was not conclusive in favor of the mortgagor. As to the remaining ground, the evidence conclusively established the entry of the prior mortgagee and that possession was taken by him for the purpose of foreclosure. *Wendell v. Mugridge*, 19 N. H. 109; *Lewis v. Blair*, 1 N. H. 68. Whether the foreclosure was completed by a year's possession, by the occupation of Abbie A. Hubbell under the mortgagee, was a question of fact dependent upon the purpose and intentions of the parties. *Ross v. Leavitt*, 70 N. H. 602, 604, 50 Atl. 110; *Thompson v. Paris*, 63 N. H. 421, 423; *Hall v. Hall*, 46 N. H. 240, 243; *Howard v. Handy*, 35 N. H. 315, 325; *Deming v. Comings*, 11 N. H. 474, 479; *Downer v. Clement*, 11 N. H. 40; *Gibson v. Bailey*, 9 N. H. 168, 172; *Gilman v. Hidden*, 5 N. H. 30; *Kittredge v. Bellows*, 4 N. H. 424. Without reference to the soundness of the plaintiff's contention that foreclosing possession by the mortgagee could not be found from the evidence, the admitted fact that the occupation was by one of the mortgagors instead of by the mortgagee, and the controversy as to the character of such occupation, prevents the conclusion that, as matter of law, the mortgagee retained possession for one year so that the foreclosure became complete. No question is raised as to the right of Abbie A. Hubbell to possession under the bank mortgage if it was not foreclosed. The statement that the plaintiff's mortgage was subject to the bank mortgage qualifies the covenants of warranty on the part of the grantors, and establishes that the grantee had notice that his security covered only an equity of redemption. *Lawrence v. Towle*, 59 N. H. 28, 30. The original title of the two mortgagors is not stated. No facts appear as to the transfer of the bank-mortgage interest in the property from Ida E. Brigham to the defendant, Abbie A. Hubbell, except that it was by quitclaim deed. The determination whether this transaction effected a payment or discharge of the bank mortgage, or an assignment of it to the defendant, Abbie, and whether she could insist upon payment by the plaintiff before he would be entitled to

possession by virtue of his mortgage of the equity of redemption, would involve legal questions not raised or transferred, dependent upon facts not reported. As to this point, it must be concluded that the rulings at the trial term were satisfactory to the parties, or that no question was made, if any could be, because, as was suggested in argument, the property is sufficiently valuable to satisfy both mortgage debts if legally chargeable therewith.

There were no exceptions to the instructions to the jury as the case was first submitted to them. It therefore must be concluded that all questions of fact raised by the pleadings and evidence were correctly submitted. After being out a long time, it appeared that the jury were unable to agree as to the payments that had been made, or whether they had been accepted in full payment of the note and satisfaction of the debt. It is to be inferred that the jury had agreed on all questions presented by the evidence upon the issues involved in the trial, except the extent to which the debt had been satisfied and discharged. Upon the fact and character of the disagreement of the jury becoming known, the plaintiff assented to the payments claimed by the defendant, and the jury were instructed, in computing the amount due on the note, to allow the payments which the defendant claimed. The instructions previously given were withdrawn, and the jury were instructed, in substance, that the alleged agreement to accept the payments in full satisfaction and payment of the note was immaterial upon the question of the amount due, and were directed to return a verdict for the plaintiff for the balance due after allowing the payments claimed. To this instruction and direction of the verdict the defendant excepted. In this action, the verdict for the plaintiff upon the general issue must have been that the defendant did disseise the plaintiff as alleged, and the assessment of damages was essential only to determine the amount for which conditional judgment should be rendered. The verdict directed, and the instruction given, after the difficulty of the jury was disclosed, appear to relate only to the question whether anything was due. It is therefore inferred that the jury had found the technical verdict in favor of the plaintiff, except as affected by the alleged agreement of satisfaction, or else that it had been previously ruled, without objection from the defendant, that the evidence as to the bar of the statute and the foreclosure presented nothing for the jury. It has therefore not seemed necessary to consider whether a payment of a certain sum in full satisfaction and discharge of a mortgage debt is an acknowledgment of an existing greater debt 17 L.R.A. (N.S.)

sufficient to repel the presumption of full payment arising from twenty years' undisturbed possession by the mortgagor, without other payment or recognition of the existence of the debt. The material question raised by the case is the legal soundness of the ruling that the payment and acceptance of a sum less than the amount due in full satisfaction and discharge of the debt is no defense to the collection of the balance.

The rule given the jury has been followed by this court. *Page v. Brewster*, 54 N. H. 184, 189; *Mathewson v. Strafford Bank*, 45 N. H. 104, 106, 107; *Blanchard v. Noyes*, 3 N. H. 518. In the first case cited there is no consideration of the question and the authorities relied on—*Fisher v. Willard*, 20 N. H. 424, and *Clark v. Dinsmore*, 5 N. H. 136—are not in point. In *Blanchard v. Noyes*, 3 N. H. 518, the suit was debt on a judgment for \$9.91 debt and \$4 costs. The defendant pleaded payment of \$10 to the plaintiff in full satisfaction of the judgment. The plea was held bad, the court saying: "It is well settled that a plea simply alleging the acceptance of a smaller sum of money in satisfaction of a larger sum is bad." But it was further held that the defendant might have leave to amend and plead payment. It was said: "The agreement to accept the \$10 in satisfaction may be left to the jury as evidence that the rest has been paid,"—citing *Henderson v. Moore*, 5 Cranch, 11, 3 L. ed. 22. This conclusion was approved in *Lisbon v. Bath*, 21 N. H. 319, 332, by Eastman, J., where he says: "It is perfectly competent for a person to take a less sum than what is actually due, and discharge his claim if he thinks proper so to do. And upon a plea of payment, the acceptance of a less sum in satisfaction may be left to a jury as evidence that the rest has been paid." If the rule of these cases is sound, the verdict directed in this case was erroneous because there was evidence upon the plea of payment. In *Mathewson v. Strafford Bank*, 45 N. H. 104, it was held that payment of a part of a debt after it is due is not a sufficient consideration for a promise to give time to the principal debtor, so as to discharge the surety, a conclusion which the court felt "reluctantly compelled by the weight of authority" to reach. In support of the conclusion, it was said: "A parol agreement by a creditor to accept part payment of his debt in money in satisfaction of the whole debt will not be binding upon him for want of consideration, although he actually receive such part payment and give a receipt for the whole debt." Although impressed with the unreasonableness of the rule, the court then felt compelled by the weight of authority to adhere to it. In *Russ v. Hobbs*, 61 N. H. 93, a written agreement

of extension in consideration of a note for the interest then due, signed by the maker of the note and a third party, was held invalid for want of consideration. The court says: "The case does not show the fact, and there is no legal presumption, that the new note for the amount of interest due was given or received as anything but payment, or was more valuable as an investment than the same amount of cash, or that for any reason it was more effective as a consideration than payment of the same amount of money." The rule has also been recognized in other cases which have been considered to constitute exceptions because of evidence held to furnish a consideration, viz.: Payment by note of a third person for a less sum (*Colburn v. Gould*, 1 N. H. 279); payment by a third person, at the debtor's request of a less sum in note or money (*Grant v. Porter*, 63 N. H. 229, 230); composition with creditors (*Bartlett v. Woodworth-Mason Co.* 69 N. H. 316, 41 Atl. 264; *Grant v. Porter*, supra; *Browne v. Stackpole*, 9 N. H. 478); if the damages are unliquidated (*Hilliard v. Noyes*, 58 N. H. 312). In *Fisher v. Willard*, 20 N. H. 421, 424, it is said that "nothing is better settled than that a promise, without some kind of consideration, to receive a less sum in payment of a greater, is of no effect." The only authority cited in *Fisher v. Willard* is *Clark v. Dinsmore*, 5 N. H. 136, which was a claim for unliquidated damages in which the accord would have been a bar if there had been satisfaction. In *Watson v. Elliott*, 57 N. H. 511, it is said: "A plea of accord and satisfaction must aver something done and accepted in satisfaction, and the averment must be proved. If the demand to be satisfied is a definite sum of money, and the sum to be paid in satisfaction also money, the satisfaction must equal the claim; but, if the claim is for unliquidated damages, or the thing done or given is not money, the question of adequacy does not arise." In *Curtis v. Egan*, 53 N. H. 511, 514, 515, the effect of an entry "N. P." (neither party) being under discussion, it was said that "the abandonment and discharge of the defendant's claim for costs was a good consideration for the abandonment and discharge of the plaintiff's claim for debt and costs." The conclusions reached in these cases seem in accord with the law as elsewhere held, with perhaps the exception of the holding in *Russ v. Hobbs*, supra, that the note of the debtor and another was no more effective as a consideration than the payment of the same amount of money,—a conclusion in principle in conflict with the statement in *Grant v. Porter*, supra, three years later, upon the authority of *Brooks v. White*, 2 Met. 233, 37 Am. Dec. 95, that 17 L.R.A. (N.S.)

the note of a third person for less than the amount due, accepted in full satisfaction and discharge, extinguishes the debt, unless a distinction can properly be made between an agreement for delay and one to discharge a debt. *Gibson v. Renne*, 19 Wend. 389; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247. In the remaining cases the invalidity of a parol agreement discharging an ascertained debt upon payment of less than is due is reluctantly recognized in view of the weight of authority, but any circumstances which could be considered as furnishing a technical legal consideration have been seized upon to establish the validity of the discharge. It is to be noted that only in *Page v. Brewster*, 54 N. H. 184, has the rule been directly enforced, and that in that case the rule was applied without discussion of the question or the citation of authorities supporting it. In *Blanchard v. Noyes*, 3 N. H. 518,—the remaining case where the rule was directly involved by the plea, although upon the authorities the plea of accord and satisfaction was held bad,—the evidence was considered sufficient to support a plea of payment, and, with the evident idea that the injustice of the court might be corrected by the jury, the responsibility was transferred to them. In other jurisdictions the rule is almost universally regarded with disfavor, although followed, and the extension of the exceptions has been carried so far by the discovery of sufficient consideration in trivial and apparently immaterial circumstances that the rule itself might more logically be abandoned, while in two states it has been directly attacked and overruled. *Clayton v. Clark*, 74 Miss. 499, 37 L.R.A. 771, 60 Am. St. Rep. 521, 21 So. 565, 22 So. 189; *Dreyfus v. Roberts*, 75 Ark. 354, 69 L.R.A. 823, 112 Am. St. Rep. 67, 87 S. W. 641, 5 A. & E. Ann. Cas. 521. In others it has been abrogated, in whole or in part, by legislative action. *Wald's Pollock*, Contr. 3d ed. 211, note; 1 Cyc. Law & Proc. p. 322; 1 Am. & Eng. Enc. Law, pp. 414, 415. In this state of the law it has been thought to be the duty of the court to re-examine the foundations of the rule, rather than to permit the case to be carried by the mere weight of authority here and elsewhere.

Discussion of the question generally starts with Lord Coke, A. D. 1602. In *Pinnel's Case*, 5 Coke, 117, 1 English Ruling Cases, 308, the plaintiff brought an action of debt on a bond for payment of £8 10s. November 11, 1600. The defendant pleaded that before that day, on October 1st, at the request of the plaintiff, he paid £5 2s. 2d., which sum the plaintiff accepted in full satisfaction of the debt. "The plaintiff had judgment for the insufficient pleading; for he did not

plead that he had paid the £5 2s. 2d., in full satisfaction (as by the law he ought), but pleaded the payment of part generally; and that the plaintiff accepted it in full satisfaction." The only point decided in Pinnel's Case was a point of pleading now obsolete; for it is certain that no court, English or American, would now dispose of Pinnel's Case as it was determined in 1602. If the point of pleading was considered of any moment, the defendant would have leave to amend, and judgment would go according to the right, not the form. But, in deciding the case, "it was resolved by the whole court that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum, but the gift of a horse, hawk, or robe, etc, in satisfaction, is good; for it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But, when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day, in satisfaction of the whole, would be good satisfaction in regard of circumstance of time, for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. So, if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction of the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction." While no case has been discovered resting on the point decided in Pinnel's Case, the matters "resolved" by the court have had great influence upon the law, as determined by decided cases which are generally and until recently, in the absence of statutory correction, universally in conformity with the *dictum* of the resolutions and the further point "adjudged,"—that a release by deed without consideration was a good bar. Two things were resolved: (1) That, if the creditor accepted in discharge of the debt anything which might be by any possibility of benefit to him, this was a good satisfaction; and (2) "that payment of a lesser sum on the day in satisfaction could not by any possibility be beneficial to the creditor." The latter resolution was in no way involved in the case, and the conclusion was simply *dictum*. Lord Blackburn, in *Foakes v. Beer*, L. R. 9 App. Cas. 17 L.R.A. (N.S.)

605, 616, 617. In the *dicta* of Lord Coke nothing is said of a want of consideration for the creditor's agreement to accept the less sum in satisfaction of the debt; but in 1804 Lord Ellenborough, in *Fitch v. Sutton*, 5 East, 230, relying upon the authority of Lord Coke in Pinnel's Case, introduced the idea of a want of consideration. "There must be," he says, "some consideration for the relinquishment of the residue, something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*." This statement by Lord Ellenborough has been followed by the courts, and is the foundation of the extended discussions which are to be found in the books. 12 Harvard Law Rev. 524. Much argument is found on the question whether, in the particular case, some consideration could be found for the agreement, or, as Lord Ellenborough puts it, some "possibility of benefit" to the creditor. The cases are very numerous. 1 Cyc. Law & Proc. pp. 319-322; 1 Am. & Eng. Enc. Law, pp. 415, 428; Notes to 100 Am. St. Rep. 428-447; 64 Am. Dec. 138; 20 L.R.A. 785; 1 English Ruling Cases, 368-405; 1 Smith, Lead. Cas. *146; *Jaffray v. Davis*, 124 N. Y. 164, 167, 11 L.R.A. 710, 26 N. E. 351. But the courts, while following the *dicta*, "have rarely failed, upon any recurrence of the question, to criticize and condemn its reasonableness, justice, fairness, or honesty." *Jaffray v. Davis*, supra. Alderson, B., in *Sibree v. Tripp*, 15 Mees. & W. 23, 38, says, after stating the rule: "The courts might very well have held the contrary, and have left the matter to the agreement of the parties;" while Lord Selborne, in *Foakes v. Beer*, L. R. 9 App. Cas. 605, 613, says: "It might be (and, indeed, I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction, though less than the whole, were held to be generally binding, though not under seal." In the same case the history of the rule is given by Lord Blackburn, who, while yielding to the opinion of his associates as to the weight of authority, says (pages 618, 622): "And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand can never be more beneficial than to insist on payment of the whole. And, if it be not the fact, it cannot be apparent to the judges. . . . What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act

on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so." "To say that you may receive something which is not money,—a chattel, for instance, of inferior value,—but that you cannot receive money, is to my mind a very singular state of the law." Grove, J., in *Goddard v. O'Brien*, L. R. 9 Q. B. Div. 37, 39. In *Johnson v. Brannan*, 5 Johns. 268, 271, the principle under discussion is termed "the rather unreasonable rule of the old law;" while in *Kellogg v. Richards*, 14 Wend. 116, 119, it is said to be "technical and not very well supported by reason." Under the rule, "the creditor may violate with legal impunity his promise to his debtor however freely and understandingly made. This rule . . . obviously may be urged in violation of good faith." *Brooks v. White*, 2 Met. 283, 285, 37 Am. Dec. 95. "The principle of law . . . has been long established and is well settled; still very little reason can be given for it." *Mitchell v. Wheaton*, 46 Conn. 315, 33 Am. Rep. 24. The rule is "somewhat harsh, contrary to the apparent intentions of parties in making a compromise settlement, and not in harmony with the dictates of natural justice." Shaw, Ch. J., in *Langdon v. Langdon*, 4 Gray, 186, 189.

But, despite this criticism, the rule has survived, in form at least. It is, of course, impossible to have examined all the cases; but, so far as such examination has been carried, the number of cases in which the rule has been applied and judgment rendered for the plaintiff, despite the agreement to discharge, is small in comparison with those in which the courts have been able to discover some circumstance, however trifling, which could be construed a technical legal consideration. The rule is not a statute, or even a rule of property. Its validity depends upon its consonance with reason. While the almost universal acceptance of it may commend it to the court with almost irresistible force, still it is open for examination as to whether it was originally sound, and whether the weight of the authority upholding it is not diminished or totally overthrown by the exceptions with which the rule cannot logically stand. Before reaching these questions it is to be considered whether, if originally sound, the reason does not fail after the changes of three hundred years,—a proposition for the affirmative of which there is authority. "There was a time in the history of the law, when, like everything else of that day, it was a system of

metaphysics and logic, and when the cause was decided without the slightest regard to its justice, solely on the technical accuracy of the pleaders on the several sides. Defect of form in the plea was defect of right in him who used it. . . . Payment of debt and interest on a bond, the next day after it fell due, was no defense in a court of law; nay, it was no defense to prove payment without an acquittance before the day; nay, if you pleaded and proved a payment, which was accepted in full of the debt, yet you failed unless your plea stated that you paid it in full, as well as that it was accepted in full, or perhaps because you pleaded it as a payment when you ought to have pleaded it as an accord and satisfaction. . . . It is not a century since it was solemnly decided that, if a creditor, finding his debtor in failing circumstances, and being afraid of losing his debt, proposed to give him a discharge in full if he paid half the money, and the debtor borrowed the money and paid the one half on the day the bond fell due, and got an acquittance in terms as explicit as the English language could afford, yet, if sued, he must pay the rest of the debt, for it was impossible, say the court, payment of part could be a satisfaction of the whole; but, if part was paid before the day, it was a good satisfaction of the whole. . . . It avails little, then, to go back to the last century, or further, to cite cases in which a matter was of validity or effect according as it was couched in this or that form. Universally the law is, or ought to be, that the meaning or intention of the parties is, if it can be distinctly known, to have effect, unless the intention contravenes some well-established principle of law." *Milliken v. Brown*, 1 Rawle, 391, 397, 398. "The rule that payment of a smaller sum is not a good accord and satisfaction for a larger one . . . was a deduction of strict scholastic logic in the days when money was regarded as having a fixed and unchangeable value. Hence, a part payment of money due could never logically be treated, even by agreement, as equivalent to a payment of the whole. In the business methods of the present, it has come to be recognized that money, like other commodities, has fluctuations of value, not only in the general market, but also and more especially to the individual. To a merchant with a note coming due, \$5,000 before 3 o'clock to-day, which will save his commercial credit, may well be worth more than \$20,000 to-morrow, after his note has gone to protest. . . . The rule was always regarded as more logical than just, and as coming very close to a contradiction of the general rule that the law will not measure the amount or value of

the consideration if parties have agreed upon it." *Ebert v. Johns*, 206 Pa. 305, 398, 55 Atl. 1064. See *Lord Blackburn in Foakes v. Beer*, supra. "The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum, is without any consideration to support it; that is, that the new agreement confers no benefit upon the creditor. However it may have seemed three hundred years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay, or the hazards of litigation in an effort to collect all, is not often—nay, generally—greatly to the benefit of the creditor." *Clayton v. Clark*, 74 Miss. 499, 509, 37 L.R.A. 771, 60 Am. St. Rep. 521, 21 So. 565, 22 So. 189. An abandonment of the rule may well be placed on the broadened spirit of the law, and upon the fact that the premise upon which it was founded, if true in the seventeenth, is not true in the twentieth, century.

In the application of the conclusion of Lord Ellenborough that some possibility of benefit to the creditor would furnish a consideration for the agreement to discharge the balance, the courts have practically in many cases overruled the rule itself, while adhering to it in form. They proceed upon the assumption that the observation of Lord Coke that the acceptance of any chattel in discharge of the debt was a satisfaction because the court could not know the value of the chattel implied that anything except money, though notoriously of less value than the debt, would furnish a consideration for the agreement. Some of the grounds upon which a parol agreement for discharge has been held valid are, as said in a recent case, "interesting and amusing." *Dreyfus v. Roberts*, 75 Ark. 354, 69 L.R.A. 823, 112 Am. St. Rep. 67, 87 S. W. 641, 5 A. & E. Ann. Cas. 521. Reference to them would only tend to display in a stronger light the disfavor with which the rule has been regarded, which sufficiently appears from the quotations already given. Many cases are discussed in *Jaffray v. Davis*, 124 N. Y. 164, 11 L.R.A. 710, 26 N. E. 351. Others are to be found in the general works cited supra. But the cases which hold that the furnishing of security by mortgage, pledge, or notes of a third person for a part of the debt is a

sufficient consideration for a discharge of the residue are without foundation, unless the payment of money is such a consideration. These cases are numerous. *Jaffray v. Davis*, supra; *Guild v. Butler*, 127 Mass. 390; *Kellogg v. Richards*, 14 Wend. 116, 119; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95; *Keeler v. Salisbury*, 33 N. Y. 648; *Sibree v. Tripp*, 15 Mees. & W. 23; *Bidder v. Bridges*, L. R. 37 Ch. Div. 406. The only purpose of security of this sort is to produce money for payment on the debt, and the only benefit to the creditor is that such may be the result. If it is not beneficial to a creditor to receive one half his debt in cash, it is not beneficial to have such payment secured. A promise cannot be beneficial unless the thing promised is. In *Jaffray v. Davis*, supra, notes for one half the debt, secured by a chattel mortgage, were given in discharge of the claim. The discharge was held good, although it appears to be conceded that the payment of one half in money at the time the notes were given, upon the same agreement, would not constitute a valid discharge. Under the doctrine of this case, a one-day note for one half the debt, secured by the pledge of an equal amount in gold coin, would constitute a valid discharge, while the direct payment of the same amount in gold coin could not. It is undoubtedly true that the creditor may be better off with security for one half the debt than with the whole claim unsecured. It may be true, as held in *Goddard v. O'Brien*, L. R. 9 Q. B. Div. 37, that a check, from its negotiable character, may be more beneficial to the creditor than a book account for a larger sum; but no security can be more valuable or more negotiable than cash in hand. Scholastic or any other variety of logic which establishes the sign to be more valuable than the thing signified, the shadow superior to the substance, the possession of an order for money more beneficial than the cash that can be obtained upon it, is the logic of unreason. When it is held that something whose only purpose and value lie in its capacity to secure the payment of money is a sufficient consideration for an oral discharge, the rule of *Pinnel's Case* that the money itself is not such a discharge is logically overturned. The two cannot stand together. To attempt to reconcile them by the suggestion of value in the paper on which the mortgage is written would be as reasonable as to say that the signature of a third party to a note "may be worth something as an autograph." *Curlewis v. Clark*, 3 Exch. 375, 380. It is generally beneficial to a creditor to transform his claim into money. Whether, under the circumstances, it is more beneficial for

him to take part in money, or to retain the claim for the whole, is for him to decide; and no sufficient reason exists in logic or morals why he should be relieved from an agreement understandingly made.

Difficulty has been found in technicalities of the plea of accord and satisfaction. *Watson v. Elliott*, 57 N. H. 511, 513. But difficulties of pleading are not now insuperable. If the parties have settled and agreed upon a discharge, or the application of something received—money, or anything else—in discharge, it is not material whether the transaction “came under the technical appellation of payment, accord and satisfaction, or release, or under no particular head usually found in the books. . . . And there seems to be no reason why such a discharge or application should not be shown under the general issue, as well as payment, or accord and satisfaction, if it would not come under either of these heads.” *Curtis v. Egan*, 53 N. H. 511. The difficulty, aside from the technicalities of an ancient plea, arises from the familiar common-law principle that a promise without consideration cannot be enforced. The entire foundation of the application of this principle to the question under consideration is the assumption that Lord Coke thought, three hundred years ago, that the payment of part of a debt was no consideration for a promise. But Professor Ames has not only demonstrated (12 *Harvard Law Rev.* 521–523) that this assumption is not warranted by anything said in Pinnel’s Case, or the statement in the Commentary on Littleton (212b), often cited to the same point, but cites the explicit language of Coke himself in *Bagge v. Slade*, 3 *Bulstr.* 162, to the contrary. The foundation of the remarks in Pinnel’s Case he suggests to be the statement of Brian, Ch. J., that “payment of £10 cannot be payment of £20.” *Y. B.* 10 Hen. VII., f. 4, pl. 4. After stating the language of Pinnel’s Case quoted above, the article continues: “There is no allusion in any of these remarks of the judges to the consideration for an assumpsit. The word ‘consideration,’ in its modern sense, was unknown to Brian, and the action of assumpsit itself was in his day in the embryonic stage. To his mind, whether £10 could be a satisfaction of £20 was a question of simple arithmetic which admitted of only one answer. Ten cannot be 20. The part cannot be the whole. Coke was presumably familiar with Brian’s statement. At all events, he reasoned in precisely the same axiomatic way: ‘It appears to the judges that by no possibility a lesser sum can be a satisfaction for a greater.’ It is sufficiently obvious from the similarity of the language of Coke and Brian that it never occurred to the for-

mer that the resolution in Pinnel’s Case was based upon any doctrine of consideration. But fortunately Coke’s opinion is not a mere matter of inference. We have his own explicit statement discriminating in the sharpest way between the operation of part payment as a satisfaction and as a consideration. In *Bagge v. Slade*, *supra*, he said: ‘If a man be bound to another by a bill in £1,000, and he pays unto him £500 in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of £1,000, this £500 is no satisfaction of the £1,000, but yet this is good and sufficient to make a good promise and upon a good consideration, because he has paid money £500, and he hath no remedy for this again.’ In 1639 the obligor recovered judgment upon a promise like that in the case put by Coke, the court saying: ‘For though legally, after the obligation is forfeited, £30 can be no satisfaction for £60, yet to have the money in his hands without suit is a good consideration to maintain this action upon the promise.’ *Rawlins v. Lockey*, 1 *Vin. Abr.* 308, pl. 24.” Other cases are cited to the same effect. 12 *Harvard Law Rev.* 523.

As has been seen, the absurdity of the results of the rule relied upon in this case has been commented upon in case after case; but persistence in error under the shadow of a great name still calls that right which is recognized to be wrong. Can the faulty structure stand, now that the foundation stone has been removed? The contention is that there is no consideration for the promised release or discharge, if less than the full amount of money is paid. In *Kidder v. Blake*, 45 N. H. 530, 532, Judge Bartlett quotes with approval this definition: “‘Consideration’ means something which is of some value in the eye of the law, moving from the plaintiff. It may be some benefit to the defendant [promisor], or some detriment to the plaintiff [promisee].” Stated with greater elaboration, “a valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.” *Currie v. Misa*, L. R. 10 *Exch.* 153, 162; *St. Mark’s Church v. Teed*, 120 N. Y. 583, 586, 24 N. E. 1014; *Wald’s Pollock*, *Contr.* 167. Professor Langdell says “detriment to the promisee is a universal test of the sufficiency of consideration,” and regards benefit to the promisor as “irrelevant to the question whether a given thing can be made the consideration of a promise.” Langdell, *Contr.* § 64. Professor Ames, in the article to which reference has been made, ap-

proves this simplified definition, but raises the question, What will be understood by detriment? He reaches the conclusion that the term should include every act or forbearance; while the opposite conclusion is that certain acts or forbearances, as matter of law, cannot constitute a detriment,—that a person does not in legal contemplation, incur any detriment by doing a thing which he was previously bound to do. Langdell, *Contr.* § 84. In the attempt to scientifically apply the rules of abstract logic to all the cases involving the question of consideration since the inception of the action of assumpsit, it is inevitable that numerous cases will be found unexplainable upon any theory deducible from such rules.

Upon the theory that the detriment to the promisee which will furnish a consideration for a promise is any act or forbearance, *Foakes v. Beer* and the line of cases following its doctrine are exceptions contrary to principle; while whatever rule is adopted as to acts or forbearances that, as matter of law, cannot constitute a detriment, numerous cases are found which must be recognized as exceptions. It is not necessary to consider further these abstract discussions of the subject. It must be and is conceded that the common definition of "consideration," found in the Reports, is, as above stated, in substance, "a detriment incurred by the promisee, or a benefit received by the promisor in exchange for the promise." If any act or forbearance by the promisee is a detriment which will sustain a promise, the sole question is of sustaining an exception in principle and following authority which "originated in misconception, is repugnant alike to judges and men of business, is not applied consistently to all the cases fairly within its scope, has been a source of highly artificial and technical distinctions, has been changed by statute in India and ten of our states, and is likely to be generally superseded by similar legislation." 12 *Harvard Law Rev.* 531. Under the other definition of "consideration," the doctrine can be upheld only upon the ground that, as matter of law, payment of a part of a debt before it is due cannot be beneficial to the creditor or a detriment to the debtor. Upon either view, we are met merely by an assumption of the judges, which is unfounded in fact. Upon the question whether such payment is or may be beneficial to a creditor, sufficient has already been said. There is nothing new or modern in the proposition that it may be. In *Reynolds v. Pinhowe* (1595) *Cro. Eliz.* 429, the court said of a payment to the creditor: "It is a benefit unto him to have it without suit or charge." "Payment without suit or trouble of that which is due is

a good consideration." *Johnson v. Astell* (1667) 1 *Lev.* 198. These and other like expressions, cited 12 *Harvard Law Rev.* 523, show that the opinions of the modern judges before quoted, that payment before it can be compelled may be beneficial to the creditor, are not new discoveries. Nor, if detriment to the promisee is to be taken as the sole definition of "consideration," is the conclusion that the present parting with money is no detriment defensible, judged by the fact and the practice of business men. When the parties have made a contract and agreed on a consideration,—the immediate payment of a sum of money,—it is the refinement of logic to say that such payment is no detriment, or to say, as does Alderson, B., in *Sibree v. Tripp*, 15 *Mees. & W.* 23, 37, "it is not one bargain, but two; namely, payment of part, and an agreement without consideration to give up the residue." Such a statement is generally untrue. If A pays B \$50 on a \$100 debt, and then requests B to release him from the residue, there are two contracts if B agrees, and no consideration for the second; but such is not the transaction in fact when A pays to-day \$50 in consideration of B's agreement to discharge the whole debt. But, it is said, A is legally bound to pay B the \$50, and, as A only does what he is legally bound to do, there is no consideration. But the confusion arises from a failure to distinguish between legal and moral obligations. One may be morally bound to do precisely in terms as he agrees; but he is legally bound to do as a practical proposition, whatever the theory may be, only what he can be compelled by law to do. The common law does not compel men to do as they agree. It gives damages for the failure to perform legal or contractual duties, but, except in a few instances only, can the specific performance of the contract be enforced. If A owes B a promissory note, no form of action is known by which B. can compel A to pay it when due. If A does not pay as promised, in an action of assumpsit B can recover damages because of the breach of A's promise. Since the abolition of imprisonment for debt, the law does not take any steps to compel A to pay the damages. A's property, if he has any subject to execution, the law will seize and apply on B's damages. So that the most that A, who owes B a note, can be legally compelled to do, is to suffer his property to be applied to pay B's damages. As to permit this is all A can be compelled to do, it is all he is legally bound to do. The law does not prohibit his breach of his contract, but leaves him free to break it if he chooses, giving the other party the remedy of damages. *Chellis v. Grimes*, 72 N. H. 104, 106, 54

Atl. 943; Wiggin v. Manchester, 72 N. H. 576, 581, 58 Atl. 522; Cox v. Jones, 73 N. H. 504, 505, 63 Atl. 178.

The damages the law awards for the non-payment of money is interest, and for the expense of obtaining judgment and execution, costs. If costs always equal the expense of litigation, if interest is always full recompense for delayed payment, and if an execution is always equivalent to money in hand, then a present part payment of a debt in cash is in fact never beneficial to the creditor or detrimental to the debtor, and can never be a consideration for a discharge of the balance. Whatever the conclusions of scholastic logic, as men having some acquaintance with affairs, judges are bound to know that none of these propositions are always, if ever, true; and, as they are not always all true, it cannot be matter of law that in a particular case a part payment was not such a benefit to the creditor or detriment to the debtor as to furnish a consideration for the creditor's agreement of discharge. *Harriman v. Harriman*, 12 Gray, 341, decided in 1859, was a suit on a judgment for \$140.03 recovered in 1839. The defendant was then poor and unable to pay, and the plaintiff told him if he would raise and pay \$20 he would receive the same in full satisfaction of the judgment. The defendant borrowed and collected \$20 and paid it to the plaintiff, who accepted it in full settlement and satisfaction of the judgment, and gave the defendant a receipt in full of all demands. If the defendant was poor and unable to pay, it is to be inferred nothing could be collected on the judgment. As a business proposition, the question for the plaintiff would seem to have been whether it was more beneficial for him to accept what the defendant could then raise and pay in discharge of the judgment, or to wait for an increase in the defendant's financial resources. There seems no reason why the plaintiff should not have been permitted to decide this question, or why the receipt of money which the defendant could not then be compelled to pay, and which the plaintiff could not obtain without the defendant's consent, should not constitute a sufficient consideration for the agreement under which the defendant was induced to part with his money. But it was held to be well settled that the discharge was invalid for want of consideration. But it is now held elsewhere that acceptance of part payment from an insolvent or embarrassed debtor in full satisfaction of the claim is founded on a sufficient consideration (*Engbretson v. Seiberling*, 122 Iowa, 522, 64 L.R.A. 75, 101 Am. St. Rep. 279, 98 N. W. 319; *Melroy v. Kemmerer*, 218 Pa. 381, 11 L.R.A.(N.S.) 1018, 67 Atl. 699), and 17 L.R.A.(N.S.)

that the abandonment of the right to go into insolvency or to take advantage of the bankrupt law furnishes a sufficient consideration for such a contract. Notes in 100 Am. St. Rep. 441, 442. The reason is clear in such cases the creditor obtains money that he would not otherwise receive, and the debtor pays money for the discharge which he could not be compelled to pay. It is difficult to see why money so paid and received is not a benefit, despite the observations of Lord Selborne to the contrary in *Foakes v. Beer*, L. R. 9 App. Cas. 605, 613, 614. It is to be noted that the extension of the exemption from execution in modern times, as well as the abolition of imprisonment for debt, creates a situation in which the debtor, by sacrificing a right which the law gives him, may pay more or less upon a debt when he can legally be compelled to pay nothing.

The law does not measure the adequacy of the consideration upon which the parties have agreed. *Wald's Pollock*, Contr. 193; *Langdell*, Contr. § 55. If a payment which the debtor cannot be compelled to make because of lack of property furnishes a consideration, present payment which he cannot be compelled to make because of lack of judicial machinery to effect such result must be equally efficacious. In the notes to *Cumber v. Wane*, 1st Smith, Lead. Cas. 7th Am. ed. 439, 450, it is doubted "whether the maxim that a smaller sum cannot be a satisfaction of a larger debt could apply to anything but a bond. . . . Technically, it would be difficult to make it apply to simple contracts. But, as a principle of evidence, this rule, which requires for the substantiation of such agreements either a surrender of the instrument or a legal release, is a just, wise, and convenient rule, so great is the danger of fraud and mistake." This might have been a sound reason for a rule of evidence applying in all cases of discharge claimed by anything but full performance. But a payment of less before the day, or in another place at the day, or by a chattel, is not a discharge unless so agreed, and the necessity of the rule of evidence is as strong in the one case as in the other. No such rule has been applied, nor does it appear to have been attempted to support the maxim on this ground in the adjudged cases. The whole matter resolves itself into one of statement. If A holds B's note for \$100, there is no reason in law or morals why he may not sell it to C for \$50, or to B. An agreement by A to sell to B, B's note for any sum less than there is due upon it, is open to no objection arising from the intricacies of the plea of accord and satisfaction, or of any theory of consideration. *Langdell*, Contr. § 88.

The facts in the present case are not fully reported, but enough appears to justify the suspicion that the case may be within some of the exceptions. It is at least fairly inferable that the plaintiff was insolvent and had no other property except that covered by the defendant's mortgage, upon which another mortgage had precedence. Wakefield could recover nothing out of the property without paying the first mortgage. The plaintiff was under no obligation to sell or assent to a sale of the Enfield property, and, if her consent to such sale was part of the agreement, there was a sufficient consideration under all the cases. Wakefield could have sold his second mortgage to the defendant for such a sum as he saw fit, and the fact that the sum would not have equaled the amount due on the mortgage would not have invalidated the contract. Wakefield lived some six years after these transactions. There is no suggestion that he had any purpose except to be bound by the contract. His executor brings the suit, and the contention is that because the parties regarded the transaction as payment or discharge instead of a sale, or because Wakefield neglected to deliver the note to the plaintiff, as it has been suggested in argument he agreed to do (*Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292), the law requires the plain purpose of the parties to be defeated, not because of any immorality in the transaction or lack of power in the parties to make the agreement, but because the words they used to describe what they did imply that it was impossible for them to do what they in fact did. No better guide for the determination of the rights of the parties in a contract can be discovered than their purpose and intention in making it. That having been ascertained, a sufficient reason for defeating such purpose is not found in the misinterpretation and misunderstanding of the language of a great jurist of the seventeenth century, however long continued. The rule that the payment of a less sum can never sustain an agreement to discharge a greater, because without consideration, however well supported by the authorities, is contrary to the fact at the present time, whatever the fact was when the rule originated, is based upon misconception, is not founded in reason, and cannot be followed without abandoning the greater principle that reason is the life of the law. In the words of the court in *Clayton v. Clark*, 74 Miss. 499, 510, 37 L.R.A. 771, 60 Am. St. Rep. 521, 21 So. 565, 569, 22 So. 189: "A rule of law which declares that, under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of 17 L.R.A. (N.S.)

money at the time and place stipulated in the original obligation, or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assent to it. We decline to adopt or to follow it."

While there was authority for the instruction finally given the jury, the discussion establishes that the instruction given and the direction of a verdict were erroneous. The verdict is set aside, and a new trial granted.

Exceptions sustained.

Chase, J., dissented. The others concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FRANKLIN H. GILSON, Admr., etc., of
Mary E. Walker, Deceased,

v.
ISRAEL NESSON.

(198 Mass. 598, 84 N. E. 854.)

Contract — consideration.

1. A promise by a mortgagee, on failure of the net proceeds of a sale of the mortgaged property to equal the debt, to take less than the debt in full discharge of it is without consideration and void.

Same — right to rents.

2. Acquisition of the right to collect the rents of mortgaged property prior to the time when the mortgagee is entitled to them under the mortgage is a sufficient consideration for his promise to accept the amount received at the foreclosure sale in satisfaction of the mortgage.

Appeal — sustaining judgment.

3. A judgment based on an erroneous ruling to which exception was taken cannot be sustained upon a ground not called to the attention of the *nisi prius* court.

(May 20, 1908.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover the amount alleged to be due on a promissory note, which resulted in a judgment for plaintiff. Sustained.

The facts are stated in the opinion.

Note. — As to partial payment of an indebtedness as a consideration for the satisfaction of the entire debt, see *Frye v. Hubbell*, ante, 1197, and annotation referred to in the footnote thereto.

Messrs. Whipple, Sears, & Ogden and Alexander Lincoln, for defendant:

An agreement to accept, in payment of a debt already due and payable, a sum less than the full amount due, is without legal consideration and *nudum pactum*.

Curran v. Rummell, 118 Mass. 482; Warren v. Hodge, 121 Mass. 106.

A variation in the mode of payment will, however, furnish a good consideration.

Brooks v. White, 2 Met. 285, 37 Am. Dec. 95; Bowker v. Childs, 3 Allen, 434.

The policy of the law is to permit the making of modified contracts, which both parties desire to make, rather than to force the injured party to resort to an action for damages for failure to perform the original contract.

Peck v. Requa, 13 Gray, 407; Munroe v. Perkins, 9 Pick. 298, 20 Am. Dec. 475; Holmes v. Doane, 9 Cush. 135; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Hastings v. Lovejoy, 140 Mass. 261, 54 Am. Rep. 462, 2 N. E. 776; Abbott v. Doane, 163 Mass. 433, 34 L.R.A. 33, 47 Am. St. Rep. 465, 40 N. E. 197.

A mortgagor, so long as he remains in possession or until actual entry by the mortgagee, may receive the rents and profits from the mortgaged premises to his own use, and is not liable to account therefor to the mortgagee.

Gibson v. Farley, 16 Mass. 280; Massachusetts Hospital L. Ins. Co. v. Wilson, 10 Met. 126; Hammond v. Thompson, 168 Mass. 531, 47 N. E. 137.

A promise may be accepted in satisfaction of a previous contract.

1 Am. & Eng. Enc. Law, 2d ed. p. 423; Stults v. Newhall, 118 Mass. 98.

An agreement to accept a new promise in satisfaction means nothing more than an agreement to waive the prior obligation. Whether such a waiver was made, is a question simply of intention, such intention to waive being by no means unusual.

Rogers v. Rogers, *supra*; Alden v. Thurber, 149 Mass. 271, 21 N. E. 312.

Mr. Clarence Alfred Bunker, for plaintiff:

The defendant, having put in practically the identical evidence to the admission of which an exception was taken, could not have been prejudiced by such admission; and the exception must be overruled.

Nixon v. Hammond, 12 Cush. 289; Nelson v. Boston & M. R. Co. 155 Mass. 356, 29 N. E. 586; Morrison v. Lawrence, 186 Mass. 456, 72 N. E. 91; McGonigle v. Victor H. J. Belleisle Co. 186 Mass. 310, 71 N. E. 569; Scaplen v. Blanchard, 187 Mass. 73, 72 N. E. 346.

The recitals in the foreclosure deed and 17 L.R.A. (N.S.)

affidavit were not conclusive, and did not operate as an estoppel in this action.

O'Connell v. Kelly, 114 Mass. 97; Claffin v. Boston & A. R. Co. 157 Mass. 489, 20 L.R.A. 638, 32 N. E. 659.

A recital in a deed can be relied upon only in an action upon the deed between the parties to it.

Merrifield v. Parritt, 11 Cush. 590.

The doing of a thing which the promisor is already bound to do is not sufficient consideration to support a contract.

Jennings v. Chase, 10 Allen, 526; Specialty Glass Co. v. Daley, 172 Mass. 460, 52 N. E. 633.

Hammond, J., delivered the opinion of the court:

Under the original contract, the defendant was to pay the amount of the note, and, in case of default, the plaintiff's intestate, Mrs. Walker, had the right to foreclose the mortgage and apply the net proceeds to the payment of the note, rendering the surplus, if any, to the defendant; and, by the express terms of the mortgage, the defendant was to pay upon demand all reasonable expenses of foreclosure.

By the terms of the new contract but little change was made. The promise contained in the defendant's note to McLoud to pay the foreclosure proceedings is, in substance, the same as that contained in his mortgage, and there was no change in that respect. The new contract also provided that any surplus after paying the note and expenses should go to the defendant. Here, also, there was no change. This is not a case where the debtor, still having an interest in the security, whether real or personal, agrees to surrender his interest to the creditor upon his agreeing to take the same in full payment. In the case before us there was no surrender of the defendant's interest in the security. It is said, however, by the defendant, that he had given up his right to procure bidders. But we do not so construe the agreement. It is true that, notwithstanding the land had been attached, he had still an interest in it, but, as stated before, he had not agreed to give up his interest absolutely; and while, under the circumstances disclosed, it may properly be inferred that he did not intend to have anything more to do with the sale of his interest, and that the plaintiff's intestate supposed that was his intention, still we do not think that such an intention and supposition were a part of the contract. The defendant had not released any right to make all reasonable efforts, either by way of procuring bidders, or in any other way, to increase the sum for which the land should be sold.

In short, after the new contract the parties in all these respects stood as before. After the contract, as before, the debtor had the same interest in the land, was entitled to the surplus proceeds of the foreclosure sale, had the right in all legal ways to increase those proceeds, and was under an obligation to pay the reasonable foreclosure proceedings. The only change was that the plaintiff's intestate had agreed in a certain contingency, to wit, the failure of the net proceeds of the sale to equal the debt, to take less than the debt in full discharge of it. Such a promise is void without a sufficient consideration, and thus far no valid consideration appears.

If, therefore, the case stopped here, the objection that there was no consideration for the new agreement set up in defense should be sustained. But the case does not stop here. The record recites that the defendant also agreed with the plaintiff's intestate "to allow her to collect the rents from December 31, 1903, and . . . she did collect the rents from that day under the agreement with" the defendant. The entry to foreclose the mortgage was not made until January 30, 1904. In the absence of any evidence to the contrary, the rents belonged to the defendant until the entry by the mortgagee; and we construe this record to mean that the plaintiff's intestate, by virtue of the agreement with the defendant, collected rents to which otherwise she would not have been entitled, and that this right to the rents was received as a part of the general agreement about foreclosure. If this be the proper interpretation, then it is plain that the right to collect these rents was a sufficient consideration for the agreement.

The presiding judge ruled that "the alleged agreement of Mrs. Walker, if made, was without consideration." We understand this to be a ruling that, as matter of law, upon any warrantable view of the evidence there was no valid consideration for the agreement. For reasons above stated, the ruling was erroneous.

It is argued, however, by the plaintiff, that, even if the ruling was erroneous, and even if there was an accord upon a valid consideration, still, inasmuch as there is no evidence that the defendant ever paid the foreclosure expenses as he agreed, there has been no satisfaction; and that accord without satisfaction is no bar to an action upon the original cause of action. Even if it be assumed that in this case not the promise, but the performance of the promise, to pay the reasonable foreclosure proceedings, formed a part of the accord (see *Bigelow v. Baldwin*, 1 Gray, 245, and *Field v. Aldrich*, 162 Mass. 587, 39 N. E. 288), 17 L.R.A. (N.S.)

still it does not appear that the case was decided by the court upon that ground, nor that the question whether there had been satisfaction was called to the attention of the court. Under the circumstances, we think that, inasmuch as the exception of the defendant to the ruling made, upon which evidently was based the decision of the case, was sustained, there should be a new trial.

Exceptions sustained.

TEXAS COURT OF CRIMINAL APPEALS.

ROBERT HANKS, Appt.,
v.
STATE OF TEXAS.

(— Tex. Crim. App. —, 111 S. W. 402.)

Gaming — card playing — betting.

Playing cards for money on a blanket in a shed as an attachment of a dance does not warrant conviction under a statute providing that any person who shall, for the purpose of gaming, exhibit any gaming table, bank, or device, shall be guilty of felony.

(June 6, 1908.)

Case Note. — Card-game paraphernalia as a gaming device, within a statute against gaming.

This note is confined to cases involving statutes similar to that upon which the decision in *HANKS v. STATE* turned; that is, statutes making it unlawful to set up, keep, or exhibit gaming or gambling devices; and the word "device" is interpreted as meaning the tangible thing with which the game of chance is played, as distinguished from the game itself.

The cases are not at all agreed upon the proposition here annotated, and the difficulty springs chiefly from the fact that a card game requires for its playing no special or peculiar device other than a pack of cards, and this is as frequently, if not more frequently, used for innocent amusement, than for gambling. However, it may be said that the weight of authority inclines decidedly to the view that a pack of cards and the table at which the game is played are "gambling devices" when used for gambling purposes.

In *Toney v. State*, 61 Ala. 1, where the statute extended to "any table for gaming, of whatsoever name, kind, or description," a pine-board table, without "any designs or devices" on it, was held, when used for gambling at chuckeluck (played with cards and dice), within the statute. And, under a statute of like import, in *Wren v. State*, 70 Ala. 1, an ordinary table at which draw poker was played for gain was held a gaming table. So, in *Bibb v. State*, 84 Ala. 13,

APPEAL by defendant from a judgment of the District Court for Travis County convicting him of keeping and exhibiting a gaming table and bank for the purpose of gaming. Reversed.

The facts are stated in the opinion.

Mr. Henry Faulk, for appellant:

The charge must set forth the law applicable to the case charged in the indictment. *Reed v. State*, 29 Tex. App. 449, 16 S. W. 99.

Where the misconduct of the jury has been such that the defendant has not received a fair trial, a new trial should be granted.

Smith v. State, 42 Tex. 444; *Ysaguirre v. State*, 42 Tex. Crim. Rep. 253, 58 S. W. 1005; *Hughes v. State*, 43 Tex. Crim. Rep. 511, 67 S. W. 104, 44 Tex. Crim. Rep. 296, 70 S. W. 746; *Hanna v. State*, 46 Tex. Crim.

Rep. 5, 79 S. W. 544; *Dixon v. State*, 46 Tex. Crim. Rep. 154, 79 S. W. 310; *Logan v. State*, 46 Tex. Crim. Rep. 573, 81 S. W. 721; *Winslow v. State* (Tex. Crim. App.) 98 S. W. 21.

The jurors' discussion of appellant's failure to testify constitutes misconduct warranting a new trial.

Carroll v. State, 50 Tex. Crim. Rep. 485, 98 S. W. 859; *Fults v. State*, 50 Tex. Crim. Rep. 502, 98 S. W. 1057.

Mr. John Brackenridge also for appellant.

Mr. F. J. McCord for the State.

Ramsey, J., delivered the opinion of the court:

Appellant was indicted in the district court of Travis county on a charge that he

4 So. 275, turning on a similar statute, it was said that the statute was "aimed at the use to which the table is appropriated. Any table used for gaming, without regard to its appliances or adaptation to any particular game, is included in the statute." (What was the character of the table or of the game played does not appear.)

The effect of a ruling made in *Owens v. State*, 52 Ala. 213, upon the trial court's action in granting and refusing certain instructions, seems to be that it is necessary to show that some game was at some time actually played upon the table. The evidence in this case showed that defendant took the prosecuting witness to his (defendant's) bedroom, produced a pack of cards then lying on a "plain pine table," and offered to bet the witness that he could so shuffle the cards as to cause certain of them to turn up in a named order. The bet was not taken up, nor was it shown that any game was at any time played upon the table. Under this evidence, it was held, an instruction was too broad which charged the jury that to "constitute a gaming table, it is not necessary that any game should ever have been played on the table, if it was kept and exhibited for that purpose."

In *Frisbie v. State*, 1 Or. 264, a pack of cards was held a gambling device within a statute which, in the words of the court, prohibited "all gambling with cards and all gambling devices," the proof showing the playing of poker for money on a "card table."

State v. Mann, 2 Or. 239, followed in *State v. Gitt Lee*, 6 Or. 425, in holding that "a game of cards commonly called poker" is not a "device," within the meaning of a statute prohibiting the setting up of a gambling device, illustrates the distinction between the intangible thing, the "game," and the tangible thing, the cards with which the game is played; a distinction pointed out above in prescribing the limits of this note.

In *Irvin v. State*, 52 Fla. 51, 41 So. 785, 10 A. & E. Ann. Cas. 1003, where the statute made it unlawful to keep or maintain 17 L.R.A. (N.S.)

a "gaming table or room, or gaming implements or apparatus, . . . for the purpose of gaming," it was held that it was the use to which the table was put, regardless of its structure, that was determinative of the question whether or not it was a "gambling table;" and, the proof showing the playing of poker with chips at an ordinary table, a conviction might be had.

Jones v. Territory, 5 Okla. 536, 49 Pac. 935, a prosecution for permitting gambling tables to be set up and used in a house under defendant's control holds an ordinary table to be a gambling device if used in the playing of poker for gain, when gambling at such game is prohibited. The indictment was drawn under a section of the statute prohibiting the permitting of "any gaming table, bank, or gaming device, prohibited by § 1" (the section which prohibited the playing or carrying on of poker).

The 1st section of the Wisconsin gaming statute made it unlawful to "set up or keep any table or gaming device," enumerating "faro bank, roulette, equality, or any kind of gambling table or device, adapted, devised, or designed for the purpose of playing any game of chance for money or property;" the 3d section prohibited the permitting of any of these devices on one's premises for gaming; the 4th section was directed against anyone who "suffers any game or games whatsoever to be played for gain 'upon his premises by means of any gaming device or machine of any denomination or name whatever,'" the 5th section, expressly naming cards, provided punishments for the violation of the provisions of the 4th section. In *State v. Lewis*, 12 Wis. 435, it was held that these sections divided gaming devices into two classes,—those used solely for gaming, covered by the 1st section, and those which may or may not be so used, and covered by the 4th section; and consequently, a prosecution under the 4th section, for suffering a game for gain to be played "by means of cards then and there used as a gaming device," was sustainable.

Jones v. State, 80 Miss. 181, 31 So. 581,

did then and there unlawfully keep and exhibit, for the purpose of gaming, a gaming table and bank. This indictment was returned, and prosecution began and concluded, under article 388a, chap. 49, p. 108, of the acts of the 30th legislature. This article is as follows: "If any person shall directly or as agent or employee for another, or through any agent or agents, keep or exhibit for the purpose of gaming, any policy game, any gaming table, bank, wheel, or device of any name or description whatever, or any table, bank, wheel, or device for the purpose of gaming which has no name, or any slot machine, any pigeon-hole table, any jenny-lind table, ten-pin alley or table or alley of any kind whatsoever, regardless of the name or whether named or not, or of the

number of pins, balls, or rings used for gaming, shall be guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than four years, regardless of whether any of the above-mentioned games, tables, banks, alleys, wheels, devices, or slot machines are licensed by law or not. Provided: that any such alley, table, bank, wheel, machine, or device shall be considered as used for gaming, if the table fees, alley fees, or money or anything of value, is bet thereon."

There are many questions raised in the record as grounds why this judgment of conviction should be reversed; but, in view of the conclusion to which we have arrived, it becomes unnecessary to consider any of them, except the single proposition that the

involving a statute making it unlawful to keep or exhibit "any game or gaming table commonly called A B C or E O, roulette, . . . or any faro bank or other game, gaming table, or bank of the same or like kind, or any other kind or description under any other name whatever," seems to assume, in deciding a point not relevant here, that an ordinary table, when used for playing poker for money, is a gaming table. A similar case is *Rawls v. State*, 70 Miss. 739, 12 So. 584.

And *Stetter v. State*, 77 Neb. 777, 110 N. W. 761, where the question was as to the sufficiency of the evidence to establish the keeping of the device and gambling at the same, seems to take for granted that a poker outfit may be within a statute condemning the setting up or keeping of "any gaming table, faro bank, keno, or any kind of gambling table, or gambling device, or gaming machine of any kind or description, under any denomination or name whatsoever, adapted, devised, and designed for the purpose of playing any game of chance."

In *Com. v. Wyatt*, 6 Rand. (Va.) 694, sustaining a conviction for "keeping and exhibiting a gaming table called blind hazard, alias haphazard," under a statute directed against "every keeper or exhibitor of any of the tables commonly called A B C or E O tables, or faro bank, or any other gaming table of the same or like kind under any denomination whatsoever, or whether the same be played with cards or dice or in any other manner whatsoever," the words of the statute "of the same or like kind" were interpreted to mean games having, in common with the games specially enumerated, the attribute that the chances preponderate in favor of the exhibitor, and, as "blind hazard" (played with cards) was a game in which the chances favored the exhibitor, the prosecution was maintainable.

Following this case, *Nuckolls v. Com.* 32 Gratt. 884, held a prosecution would not lie for "keeping or exhibiting a gaming table," where the proof showed draw poker was played; for in this game the chances are equally balanced. Upon this theory, then, the question whether a card-game

outfit is or is not a gambling device will depend, not alone upon whether it is used for gambling, but upon the nature of the gambling game that is played.

State v. Hardin, 1 Kan. 474, turned upon the question whether a pack of cards was a gaming device when used for gambling, within a statute making it unlawful to "set up or keep any table or gambling device, commonly called A B C, faro bank, E O, roulette, equality, or any kind of gambling table or gambling device, adapted, devised, and designed for the purpose of playing any game of chance for money or property." The court held a pack of cards was not within the statute, putting its decision on the words "devised and designed," holding that, while a pack of cards was adapted for gambling, it was not devised and designed for such purpose; and that the general words of the statute are to be limited to devices of a "similar character and, like them, designed solely for gambling purposes." This case is, however, in the extent to which it goes, disapproved in *State v. Stillwell*, 16 Kan. 24, which was a prosecution for betting at a "gambling device;" and it is there said that cards "may or may not be a gambling device, just as they are used and intended to be used."

But in *Lyle v. State*, 30 Tex. App. 118, 28 Am. St. Rep. 893, 16 S. W. 766, where the poker table which defendant was charged with setting up was a table covered with a cloth, in the center of which was a hole through which were dropped the chips constituting the "rake off," it was held not to be within the statute. The court said that the table, to come within the statute, must be one that can be "bet at by someone beside the keeper; . . . for it must be kept or exhibited for the purpose of obtaining betters. Penal Code, art. 363." And the test is whether the parties playing could, under the proof, be convicted of "betting at a gaming table, under art. 364;" but here such conviction could not be had because they "played and bet at poker." This case is followed in *Hairston v. State*, 34 Tex. Crim. Rep. 346, 30 S. W. 811, where it was held, a conviction for "exhibiting, for

verdict of the jury and judgment of the court are unsupported by and contrary to the evidence. We believe that the conviction is unwarranted and should be set aside. The following, substantially, is the evidence of the case. W. R. Wray, who was constable of precinct No. 2, Travis county, testified that, having received information that gaming was going on among the negroes of this community, he went out one night to where there was a negro dance going on, and that, not far from the house, and in a shed room by a barn, he saw a light; that he and the other persons with him, Will Williams, J. H. Allison, and George Nixon, stopped their horses out a piece in the lane; that they went to this shed room by the side of the barn, and in

the rear of same was a crack running horizontally, through which all four of them looked; that not far from the rear end was defendant, whom he identified on the trial as Robert Hanks, and who was sitting with his face towards party; that to his side was sitting Peter Jones and another negro whom he did not know, and that they were all playing cards; that he saw some money stacked upon the blanket in front of appellant; that he saw appellant laying the cards down in pairs of two; that he saw the other parties, Peter Jones and Dave Mollette, put money on the cards, and the appellant take the cards and money up and then place more cards out, when Mollette and Jones would again put the money on the cards and appellant would again take the cards and

the purpose of gaming, a gaming bank and table," was improper where the proof showed "senate poker" was played at an ordinary table.

State v. Herryford, 19 Mo. 377, was an indictment drawn under a statute making it unlawful to "permit any gaming table, bank, or device prohibited by the 15th section . . . [the section involved in State v. Gilmore, *infra*] to be set up or used for the purpose of gaming in any house . . . belonging or by him occupied;" and it was held that permitting a game of chance to be played for money with cards was within the statute.

And in a similar case, State v. Dyson, 39 Mo. App. 297, arising under a statute the words of which were "to permit any gaming table, bank, or device to be set up or used for the purpose of gaming in any house . . . by him occupied," the same ruling was made. State v. Mohr, 55 Mo. App. 329, arising under a statute similar to that involved in the last case, is to the same effect.

State v. Ellis, 4 Mo. 474, and State v. Scaggs, 33 Mo. 92, which were prosecutions for suffering the device to be set up on defendant's premises, seem to assume, in deciding questions of pleading, that a pack of cards may be a gambling device, within the meaning of substantially similar statutes.

State v. Purdom, 3 Mo. 115, was also a prosecution for suffering a gaming device on one's premises, the same being a pack of cards; the conviction was sustained, but here the statute made special mention of "cards."

Many early Missouri cases may be found which warrant the inference that a pack of cards would be a gambling device, within a statute making it unlawful to set up or keep any table or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, or any kind of gaming table or gambling device, adapted, devised, and designed for the purpose of playing any game of chance for money or property, and to induce, entice, or permit any person to bet or play at or upon any such gaming

table or gambling device, or at or upon any game played, or by means of such table or gambling device, or on the side or against the keeper thereof. In State v. Gilmore, 98 Mo. 206, 11 S. W. 620, a prosecution under this statute, it being charged that defendant "did unlawfully . . . set up and keep a certain table and gambling device, to wit, a certain table and chips or checks . . . and certain cards, . . . all the same being gambling devices adapted, devised, and designed for the purpose of playing a certain game of chance commonly called 'poker' for money and property; and did . . . entice, induce, and permit divers persons . . . to play at and upon said table and gambling device," it was held, applying the rule *ejusdem generis* and construing the gambling act in its entirety, that an instruction of the trial court that an ordinary pack of playing cards and poker chips is a gambling device, if used for playing a game of chance for money or property, was improper. The earlier Missouri cases are referred to and disapproved in so far as they assume that a pack of cards is a gambling device under this section of the statute; but are approved when confined to those sections of the statute that relate to betting at gaming devices and permitting the same to be set up on one's premises for the purpose of gambling.

This case is followed in State v. Etchman, 184 Mo. 193, 83 S. W. 978, where an indictment drawn under the same section and charging that the defendant "did . . . set up and keep gaming tables and gambling devices, to wit, . . . one poker table, commonly so-called, upon which are used poker chips, commonly so-called, and cards commonly called playing cards, which said gaming tables . . . were adapted, devised for the purpose of playing games of chance for money," etc., was held insufficient, because a poker table is not within this section of the statute, and because of the failure to allege the device was "devised and designed."

In State v. Mathis, 206 Mo. 604, 121 Am. St. Rep. 687, 105 S. W. 604, a conviction

money up; that he took the game that they were playing to be monte, and that the appellant Robert Hanks, had charge of the game and was dealing it, and that Peter Jones and Dave Mollette were betting at the game. This is substantially all the evidence. The statement of facts is replete with explanations of the game of monte, how played, and how many cards required in playing, and the difference between this game and the game called "oon can;" but the above is practically the entire evidence in the case, the testimony of the other witnesses being in general a substantial reproduction of that of the witness Wray, which we have given above.

was sustained under a statute making it unlawful to "set up or keep any table or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind, or make, or however worked, operated, or manipulated, or any kind of gambling table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property," etc.; the indictment charging that defendant "did . . . set up and keep divers gaming tables and gambling devices, to wit, two poker tables, commonly so-called, one crap table, commonly so-called, upon which dice and cards were used, which said gaming tables and gambling devices were adapted, devised, and designed for the purpose of," etc. The evidence showed that the "poker table" was a "round table" with a canvas cover, and contained a drawer in which were kept the cards, there was also a "slot" on the top of it, through which were dropped chips constituting the "rake off." To the argument of counsel that poker does not require a "table or device of a certain kind, and specially adapted, devised, and designed for the playing of the game of poker alone," it was replied that it "makes no difference whether the table on which the game of poker was played was a gambling device or not; if it was a table adapted, devised, and designed for the purpose of playing any game of chance for money or property;" and that the "poker table, so-called, was adapted and designed for the purpose of playing games of chance, is clearly shown by the fact that games of poker were played thereon." This, it would seem, is to lose sight of the meaning attached to the word "designed," in *State v. Etchman*, supra, where it was said the words "designed" and "devised" are not synonymous, and that "designed" implies "intentioned." To the further contention that poker "cannot be played by means of a table alone, but that the thing that is adapted, devised, and designed for the purpose of playing such game is an ordinary deck of playing cards," it was answered that the "primary object of the statute was to prevent gambling by prohibiting the setting up or keeping any kind of table or 17 L.R.A. (N.S.)

This shows, to our mind, that this was simply a game of cards by a lot of negroes out in a barn at night, and that it fails to bring the appellant within the purview of the law, which makes it a felony to run a gambling house. The record shows that informations were filed in the county court against all the parties for betting at a game of cards, and the testimony, taken together, is strong enough at least to raise a strong presumption of the guilt of this offense; but we do not believe that these negroes, any or all of them, were guilty, as in substance provided, of keeping or exhibiting any one or more of the different games referred to in article 388a of our Penal

gambling device for the purpose of playing any game of chance for money or property, and, although cards or dice may be necessary to be used in conjunction with such table or device in order to play such game of chance, it is none the less a gambling table or device when used in conjunction with cards or dice for the purpose of playing a game of chance for money or property." However, in *State v. Gilmore*, supra, it was said that the "ordinary table," the chairs, the chips, are but "adjuncts, conveniences, and incentives;" "neither one of these, or all combined, is a device for playing such game. The pack of cards is the device adapted, devised, and designed for playing the game of chance, the thing with which the game is played." *State v. Mathis* may not be in conflict with *State v. Gilmore* and *State v. Etchman*, for the statute involved in the *Mathis* Case was somewhat broader than that involved in the latter cases, and the *Gilmore* Case had reference to the "cards" while the *Mathis* Case dealt with the "table;" but in the *Etchman* Case the indictment charged it was the "table" that was the device; but that the table was anything other than an ordinary table, or was in any way peculiar, appears only in the *Mathis* Case. None of these matters, however, are pointed out in the *Mathis* Case; and it must be admitted, no matter what importance is to be attached to such distinctions, that the *Mathis* Case on the one hand, and the *Gilmore* and *Etchman* Cases on the other, are not, in their reasoning, altogether reconcilable.

Ervine v. Com. 5 Dana, 216, would seem to warrant the inference, though this is not quite clear, that a statute making it unlawful to permit a "gaming table or bank" to "be set up" or "kept," on which there shall be unlawful betting in a house occupied at the time, does not sustain an indictment for "permitting unlawful gaming with cards merely."

This note does not purport to cover prosecutions for betting at gaming devices, or prosecutions for maintaining "gambling houses;" nor is it concerned with prosecution for setting up the game of faro or a faro bank.

Code; and we are unwilling that any man, under this law, should suffer the ignominy of confinement in the penitentiary under the facts disclosed by this record. In this case there is no evidence that appellant owned the house, that he was the lessee of the house, nor was there any of the equipments or paraphernalia of the gambling establishment; nor does it appear, unless by mere rumor, that these people or anyone else had ever played any game at this place either before or since the night in question. The testimony was that they were playing cards on a blanket in a shed room to a barn,—an ordinary game of cards among negroes as an attachment of a negro dance. We do not believe that this character of misconduct, however reprehensible in morals or good taste, constitutes in law the keeping or exhibiting of any of the games referred to or named in the statute, or that the state has made a case under which any man, black or white, should be deprived of his liberty and confined in the penitentiary as a felon.

So believing, it results that the judgment of the court below must be reversed, and the cause remanded; and it is so ordered.

Brooks, J., absent.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WILLIAM N. TALLEY et al.

v.

JAMES H. FERGUSON, Trustee, et al.,
and

VICIE NIGHBERT, Admr., etc., of James
A. Nighbert, Appt.

(— W. Va. —, 62 S. E. 456.)

Trust — family maintenance — interest of beneficiaries.

1. In land conveyed to a trustee for the maintenance of a family, none of the beneficiaries has any distinct or separable interest, during the existence of the trust for that purpose, which he can charge or alien.

Same — construction.

2. A grant to wife and children, without more, creates in the wife and children in being at the time a joint estate in equal portions; but in a grant for the use and benefit of a wife and children, by its terms declaring it to be a provision for the family, any manifest indications which support reasonable construction of a life estate in the wife, with remainder to the children, will be followed, and that construction given, so that after-born children may take,

and so that the life tenant may have sufficient income to support the children.

(September 11, 1908.)

APPEAL by defendant Vicie Nighbert from a decree of the Circuit Court for Kanawha County in plaintiffs' favor in an action brought to set aside a deed of trust and to enjoin the trustee and beneficiary from enforcing the same. Affirmed.

The facts are stated in the opinion.

Messrs. Payne & Payne and Berkeley Minor, Jr., for appellant:

The wife was vested with the whole equitable estate.

Wallace v. Dold, 3 Leigh, 258; Stinson v. Day, 1 Rob. (Va.) 435; Wilmoth v. Wilmoth, 34 W. Va. 426, 12 S. E. 731; Seamounts v. Hodge, 36 W. Va. 304, 32 Am. St. Rep. 854, 15 S. E. 156; Bain v. Buff, 76 Va. 371; Atkinson v. McCormick, 76 Va. 791; Waller v. Catlett, 83 Va. 202, 2 S. E. 280; Mosby v. Paul, 88 Va. 534, 14 S. E. 336; Walke v. Moore, 95 Va. 729, 30 S. E. 374; Tyack v. Berkeley, 100 Va. 296, 40 S. E.

Case Note. — Effect of expression of intention to make provision for family, upon estates taken by beneficiaries of trust, in the absence of express definition thereof.

This note is limited in scope to cases in which an intention to make provision for a family is directly expressed by the creator of a trust, and does not include cases where such intention is merely a matter of inference, as where a trust is created for the benefit of a mother and her children.

While trusts created for the benefit of a parent and children are variously construed, in the light of varying provisions and circumstances, as giving a beneficial interest to the parent and her children then living as joint tenants or tenants in common to the exclusion of after-born children, or as making provision for after-born as well as then existing children, or as giving the children a share in the income during the parent's life with the remainder in fee, or as giving the parent the entire beneficial interest, the reference to the children being taken as simply indicative of the motive which prompted the creation of the trust other instances are not wanting in which the provision made was construed, as in TALLEY v. FERGUSON, as giving the parent a beneficial estate for life with remainder to the children.

Thus, in Williams v. McConico, 36 Ala. 22, the grantor's declared wish "to make permanent support for [his daughter] and her children," in a deed of gift of certain negroes in trust "for the sole use and benefit of my said daughter and the heirs of her body forever," was regarded, in connection with a limitation over in case the said daughter should die without an heir, as sufficient ground for holding that her children

904; *Honaker Sons v. Duff*, 101 Va. 675, 44 S. E. 900.

In the absence of language specifically including after-born children, the devise or grant to the children of a named person, as a class, vesting immediately, will vest in those only *in esse* at the time the devise or grant takes effect.

28 Am. & Eng. Enc. Law, p. 934; 30 Am. & Eng. Enc. Law, p. 720; 9 Am. & Eng. Enc. Law, p. 133; *Gillespie v. Schuman*, 62 Ga. 256; *Hogg v. Odom*, *Dudley* (Ga.) 185; *Blankenpickler v. Anderson*, 16 Gratt. 59; *Tharp v. Yarbrough*, 79 Ga. 382, 11 Am. St. Rep. 439, 4 S. E. 915; *Wild's Case*, 6 Coke, 16 b; *Baird v. Brooklyn*, 86 Ga. 709, 12 L.R.A. 157, 12 S. E. 981; *Shotts v. Poe*, 47 Md. 513, 28 Am. Rep. 485; *Mosby v. Paul*, *supra*.

If the wife took the whole equitable interest, an equitable separate estate in fee was created in her, the corpus of which she had the full power to alien or encumber by deed in which her husband united, when properly acknowledged by them.

Radford v. Carwile, 13 W. Va. 572.

Mr. J. E. Chilton also for appellant.

Messrs. D. C. Gallaher and George E. Price, for appellees:

The wife took by the deed one equal share in the property with each of her children then in life and afterwards born to her and her husband.

Whelan v. Reilly, 3 W. Va. 610; *Phillips v. Ferguson*, 85 Va. 509, 1 L.R.A. 837, 17 Am. St. Rep. 78, 8 S. E. 241; *White v. White*, 30 Vt. 338; *Townsend v. Townsend*, 156 Mass. 454, 31 N. E. 632; *R. v. Darlington*, 4 T. R. 797; *Wilmoth v. Wilmoth*, 34 W. Va. 435, 12 S. E. 731; *Taylor v. Watson*, 35 Md. 519; *Hague v. Hague*, 161 Pa. 643, 41 Am. St. Rep. 900, 29 Atl. 261.

The direction to apply the rents, etc., created an active trust.

Underhill, T. 1st Am. ed. p. 13, art. 4, p. 376, note; *Henson v. Wright*, 88 Tenn. 501, 12 S. W. 1035; *Barnes v. Dow*, 59 Vt. 530, 10 Atl. 258; 3 Pom. Eq. Jur. 1919, § 1012, note; *Addison v. Bowie*, 2 Bland, Ch. 606; *Stuart v. Stuart*, 18 W. Va. 675; *Bell v. Watkins*, 82 Ala. 512, 60 Am. Rep. 756, 1 So. 92; *Wills v. Foltz*, 61 W. Va. 262, 12 L.R.A.(N.S.) 283, 56 S. E. 473.

took, as remaindermen, the absolute property on the death of their mother. It was regarded as unnecessary to determine whether the daughter took the entire interest in the slaves for her life, or whether her children had, even during the life of their mother, a right to be supported by the services of the negroes, or a share in the profits of their labor.

In *May v. Ritchie*, 65 Ala. 602, a deed of gift by which property was conveyed in trust for the grantor's married daughter "and the heirs of her body, for their support and the support of her children; and, at the lawful age of her youngest child, after her death, then the property to be equally divided among her children," was construed as creating an estate for life in the daughter with remainder to her children, the evident intention to provide for the children being permitted to override the implication of an estate tail arising from the language of the deed taken in its technical sense.

Although not strictly within the scope of this note, reference may be made in this connection to the case of *Davis v. Hardin*, 80 Ky. 672, in which a conveyance by a husband to a trustee, reciting that such trustee "holds the legal title to the said property in trust for the said Mary E. Jones [the wife] and William P. Jones [an infant child] and any other child or children of her begotten by the said David W. Jones," was construed as creating a life estate in the wife, with remainder in fee to the children. The court said: "A father making provision for his child and that child's children may well be supposed to have intended them to take jointly. They are all of his blood, and the natural objects of his bounty." 17 L.R.A.(N.S.)

ty; but, when a husband makes a conveyance to his wife and their children, there is less reason to suppose that he intended they should take as joint tenants, whereby his bounty may, by her death, pass into the hands of a stranger, even as against himself."

As hereinbefore remarked, trusts of the kind under consideration are construed in the light of varying provisions and circumstances as giving the parent and children various other beneficial interests.

Thus in *Lindsey v. Eckels*, 99 Va. 668, 40 S. E. 23, a conveyance by an aunt "in trust for the following uses and purposes, to wit: For the use, support, and maintenance of the said Rebecca J. Lindsey, the wife of the said William G. Lindsey, and for the use, maintenance, and education of the issue of said William G. Lindsey and Rebecca J., his wife; it being the intention hereof that the said Rebecca J. Lindsey shall be supported from said property or the proceeds thereof during her life, and that the issue of the said Rebecca J. Lindsey and the said William G. Lindsey, during the life of the said Rebecca J. Lindsey, shall be supported and educated from the proceeds of said property, and at the death of said Rebecca J. Lindsey all the said property, as well as proceeds arising from the same, to be equally divided between or among the issue of the said William G. Lindsey and Rebecca J. Lindsey," was construed as giving the mother and her issue each an equal interest in the proceeds of the property during the life of the mother, the issue taking the property in fee simple at her death.

In *Wright v. Wright*, 104 Va. 8, 51 S. E. 151, a conveyance to a trustee to hold during the natural life of a married woman

The attempted trust deed was *ultra vires*.
Radford v. Carwile, 13 W. Va. 572.

Robinson, J., delivered the opinion of the court:

The decree appealed from set aside and declared null and void a deed of trust and perpetually enjoined and restrained the trustee and beneficiary from enforcing the same. The land covered by the deed of trust was a valuable tract on the west side of the Kanawha, in the county of that name, and below and near the mouth of Coal. It had been conveyed, by deed dated April 20, 1867, by Rachael M. Tompkins and her children to Henry P. Tompkins, trustee, that deed reciting that the said Rachael M. Tompkins, the mother of Beverly Tompkins, and his brothers and sisters, the grantors therein, "being willing and desirous of making a settlement and provision out of their several interests and portions in said estate for the maintenance of the wife and children of the said Beverly Tompkins, do hereby grant unto Henry P. Tompkins, for the uses and trusts hereinafter declared," etc., with this sequent provision: "In trust that

he, the said Henry P. Tompkins, will hold the tract of land . . . for the sole use and benefit of the wife and children of the said Beverly Tompkins, and free from all debts, demands, or claims upon him, the said Beverly Tompkins; and upon this further trust that he, the said Henry P. Tompkins, will apply the rents, issues, and profits of the tract of land hereby conveyed to the use and benefit, maintenance and support, of the wife and children of the said Beverly Tompkins." The deed contains this additional clause: "And it is known to the parties making this grant that the said Beverly Tompkins is embarrassed with debt; and, it being their intention as before stated, to make a provision for his family, the said grantors do hereby expressly declare that the property shall not in any mode or manner be subjected to or made liable for the debts of the said Beverly, either those now existing or any that may be created in the future."

Later Henry P. Tompkins resigned this trust. An order was entered by the circuit court of the said county appointing B. Tompkins "trustee for Sally Tompkins and

"for the joint use, benefit, profit, and advantage of herself and her present and future children by" her present husband was construed as giving the mother and children a joint estate in the property for the life of the mother; and it was held that the construction giving such interest was not affected by the fact that power was given to the wife to appoint the remainder in fee by her will, and to the trustee to change the investment with the wife's consent, to be held upon the same trusts.

In *Wilson v. Wilson*, 119 N. C. 588, 26 S. E. 155, a conveyance in trust "for the sole and separate use and benefit of the said . . . (wife of one of the grantors) and her two children . . . and any others thereafter born," and, after the death of the wife, then to hold the property on the same trust for the children aforesaid, the trustee being directed to "use the profits and proceeds thereof for the support and maintenance of said Samantha C. Wilson and her children as aforesaid, not going beyond the current profits nor anticipating the principal, until, by the coming of said age of twenty-one years, or marriage, of said children, the property is to be held and disposed of as hereinbefore set forth. the trust as to the boys to cease, and they to have their legal interest at the age of twenty-one years, and the proportion of said profits and income to be expended for the support and maintenance and education of the said *cestuis que trust*, to be according to their several needs and the ages and necessities of said children," was construed as making the wife and children tenants in common to the trust estate, rather than as giving a life estate to the wife, with re-

mainder to the children. The court said: "It appears to have been the purpose to provide for the comfort of the children as well as the wife. The defendants' contention would strip the children of their maintenance and education at that period of life when such assistance was more needed than at any other time. We cannot impute such a purpose in the mind of the father in the absence of any language to justify it."

In *Fackler v. Berry*, 93 Va. 565, 57 Am. St. Rep. 819, 25 S. E. 887, a conveyance, by a husband, of land to a trustee "to hold as the absolute property of . . . [the grantor's wife], by whom he derived the premises, that she may have a permanent home for her life, and his children, by her, a pittance after her death," was construed as giving the wife the entire interest, the reference to the children being taken merely as indicating the motive or consideration for the conveyance.

A like conclusion was reached in *Tyack v. Berkeley*, 100 Va. 296, 40 S. E. 904, where the conveyance was "in trust to have and to hold the said land, to and for the use and benefit of the said Susanna M. Hickson and her children by her present husband; and that the said trustee shall permit the said Susanna M. Hickson to occupy the land, and to use and enjoy and possess the rents, issues, and profits for the support and maintenance of herself and family, free from all manner of charge or liabilities of herself or her husband;" the court taking the view that the provision for the family was best conserved by making the mother the repository of the rights and interests of her children.

her children in the place of said H. P. Tompkins, but not to take place until B. Tompkins shall give bond before the clerk of this court in the penalty of \$2,500, with good security approved by the clerk, conditioned according to law." There is no evidence that this bond was ever given. Beverly Tompkins, trustee, and Sallie H., his wife, petitioned said circuit court for leave to execute a deed of trust on said real estate to secure the payment of \$2,500. On January 7, 1882, it was adjudged, ordered, and decreed "that said petitioners have leave to borrow said sum of \$2,500 upon the faith of said real estate, and secure the payment of the said sum and its interest by deed of trust duly executed by them and each of them on said real estate so conveyed and held for the use of the said Sallie H. Tompkins as aforesaid." The children of the said Beverly and Sallie were not made parties to the proceeding, nor were they given notice thereof. Notwithstanding this, on January 30, 1882, a deed of trust on the land aforesaid was executed to James H. Ferguson, trustee, by Sallie H. Tompkins and Beverly Tompkins, "her husband and trustee," to secure to James A. Nighbert the sum of \$2,000, with interest, payable two years thereafter. Beverly Tompkins signed and acknowledged this deed of trust as "trustee of Sallie H. Tompkins," and Sallie H. Tompkins acknowledged it as "the wife of Beverly Tompkins (who is also her trustee)." It is this deed of trust that has been declared null and void and the enforcement of which has been perpetually enjoined.

The case resolves itself into brief questions. Is Nighbert's deed of trust valid? Did Beverly Tompkins have authority as trustee to convey thereby? And did Sallie H. Tompkins have any interest that she could convey? We may safely and at once pronounce that Beverly Tompkins had no such standing as trustee as he professed to have in the making of this deed of trust. It is practically conceded that he had not such authority, never having given the bond required by the order appointing him. Of equal certainty is it that any interest which the children may have had in the land aforesaid was not conveyed by the deed of trust in question. They were not parties to Nighbert's deed of trust, nor to the proceedings in court upon which it was sought to be based. And this calls upon us to construe the grant of said land by the aforesaid deed of April 20, 1867, and to inquire as to what interests were given the wife and children by that deed.

We observe that the land was conveyed "in trust," to be held by the trustee "for the sole use and benefit of the wife and children

of the said Beverly Tompkins," and "upon this further trust," that the trustee "will apply the rents, issues, and profits of the tract of land conveyed to the use and benefit, maintenance and support, of the wife and children of the said Beverly Tompkins." Let us also distinctly note that the conveyance is declared to have as its intention the making of "a provision for his family:" that is, the family of the said Beverly Tompkins. And by no means let us overlook the part of this deed which must control greatly in its interpretation, that part being declaratory that the property "shall not in any mode or manner be subjected to or made liable for the debts of the said Beverly." The foregoing provisions enlighten us as to the ownership of the land conveyed by the deed. This was not a conveyance directly to the wife and children. In such case the words "wife and children" would be words of purchase, and the wife and children living at the date of the delivery of the deed would take jointly, even to the exclusion of after-born children. It was a conveyance to a trustee for the use and benefit of a family. And it is provided how this use and benefit shall accrue to them; that is, by the trustee's applying the rents, issues, and profits of the tract of land to the use and benefit, maintenance and support, of the wife and children. Here is the real purport of the conveyance. We see it in the words "rents, issues, and profits," "use and benefit," "maintenance and support." We see it again most clearly in the word "family." Manifestly, this deed was intended to set over the land to the family of Beverly Tompkins, to be of use to them, and to support and maintain his wife and children, through the instrumentality of the trustee. And yet it is insisted that Sallie H. Tompkins was, by this deed, vested with an equitable estate in fee in the whole of the land. This position is untenable, and cannot meet our approval for a moment. To concede it would absolutely defeat the clearly expressed intention of the grantors. Yes, it would absolutely override the safeguards thrown around the property conveyed by this deed, so that the same might be applied to the purposes desired by the grantors. Concede to Sallie H. Tompkins such interest in the land, or in fact any interest other than a life estate subject to the trust arrangement for the family, then we shall be inconsistent, not only with the clearly expressed intention from the four corners of the paper, but particularly with the defined provision that the property was granted so that it could in no mode or manner be subjected to or made liable for the debts of Beverly Tompkins. For, in case of her death, leaving him surviving, he would take

by the curtesy, and his creditors would deny to the children surviving the rents, issues, and profits, use and benefit, maintenance and support, or, at any rate, prevent the full operation of the trust arrangement for the family. The universal and fundamental rule of interpretation must prevail. The intention of the grantors must be sought from the plain words of the instrument, and be upheld.

Denying an equitable estate in fee to Sallie H. Tompkins, as we do, then it is said that the deed vested in her and the four children in being at the time of its execution a joint estate in the land, and that Nighbert's deed of trust is a valid and subsisting lien upon her interest therein. Connected with this contention are questions presented as to the validity of the execution of the deed of trust, it being insisted that the same was signed and acknowledged by Beverly Tompkins not as husband, but by Beverly Tompkins as trustee, and that, therefore, the deed of trust is one by a married woman of her separate estate in which her husband did not join. But the view we take of the ownership of the land attempted to be bound by the deed of trust saves us the necessity of determining these questions.

Clearly the deed aforesaid created such a trust that the beneficiaries took no interest which they could alien or anticipate. Such alienation or anticipation would obviously defeat the purpose of the trust, and undo all the grantors intended to do in its making. If a joint estate was intended, and the mother could anticipate or alien immediately, certainly any one of the children could do likewise. Thus the property, placed in the hands of a trustee as a producing whole for a distinct purpose, could be disturbed, and that purpose overridden. We hold that the deed conveying this property to a trustee for the use and benefit, maintenance and support, of the wife and children of Beverly Tompkins, and for the purpose of making provision for his family, created a blended trust, in which the interests of the beneficiaries were so inseparable that none of them could be aliened during the existence of that trust. "Where property is settled for the maintenance of a family, the expenditure must not exceed the annual income, nor can any debt contracted by the head of the family (himself only one of the *cestui que trust*), nor by the trustee (although the profits of the trust property be pledged for their payment), be charged on the prospective profits beyond the current income, so as to deprive the beneficiaries of the support provided for them. . . . The purpose is to protect the property against the improvidence and waste of the *cestui que trust*, and to make that which, under their

management, would have been dissipated in a short time, a permanent fund, furnishing some support for the household for an indefinite period. Hence no one of the *cestui que trust* has any interest separable from the rest which can be charged or disposed of by him. The fund is provided for the common support of the family, and can only be enjoyed jointly." 2 Minor, Inst. 4th ed. 227. This doctrine is supported by many cases there cited. It is, however, simply the application of sense and equity. In Perry on Trusts, vol. 1, § 386a, we find it as follows: "But a trust may be so created that no interest vests in the *cestui que trust*; consequently such interest cannot be alienated, as, where property is given to trustees to be applied, in their discretion, to the use of a third person, no interest goes to the third person until the trustees have exercised this discretion. So if property is given to trustees, to be applied by them to the support of the *cestui que trust* and his family, or to be paid over to the *cestui que trust* for the support of himself and the education and maintenance of his children. In short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities, and is in other respects legal, neither the trustees, nor the *cestui que trust*, nor his creditors or assignees, can divest the property from the appointed purposes. Any conveyance, whether by operation of law, or by the act of any of the parties, which disappoints the purposes of the settler by divesting the property or the income from the purposes named, would be a breach of the trust. Therefore it may be said that the power to create a trust for a specified purpose does in some sort impair the power to alienate property." The deed under consideration created no mere passive trust, but an active one. A simple reading of the words vouches this. And it gave to Sallie H. Tompkins no separate and distinct interest that she could encumber during the existence of this active trust, as was attempted to be done by the deed of trust to Nighbert.

The deed did not vest an estate in the wife and children in joint tenancy. It was not a direct conveyance, but a provision for the family. The grant contains more than a mere conveyance to the wife and children. If it were simply a conveyance to wife and children, *Wills v. Foltz*, 61 W. Va. 262, 12 L.R.A. (N.S.) 283, 56 S. E. 473, and *Fitzpatrick v. Fitzpatrick*, 100 Va. 552, 93 Am. St. Rep. 976, 42 S. E. 306, would apply. Then a joint estate in the wife and children *in esse* would be created. Those cases determine upon the words "wife and children," without more; but in this case there is much

more in the words of the deed to control in the construction of the grant. To *Wills v. Foltz*, supra, as reported in 12 L.R.A. (N.S.) 283, we find an eminently valuable case note, wherein we are shown that "the tendency of the courts is to construe a devise or grant to a person and her children as constituting a life estate, with a remainder to the children, and they seize hold of any indications manifest in the will to work this estate out, in order that after-born children may take under the will, and that the life tenant may have sufficient income to support the children. This construction then gives to the children as a class an estate as purchasers." Reading the deed under consideration, can we for a moment conceive that it was the intention of the grantors that it should apply only to the children *in esse* at the time? Other children were afterwards born to Beverly Tompkins and his wife. Were they to be excluded from this provision for his family? Good sense can answer this only in the negative. Yet, if we say the wife and children took jointly, subject to the trust interposing, we must deny these after-born children a share in this estate. This is not in harmony with a provision for the family. The after-born children became at their birth members of the family. Then what is a reasonable construction of the grant? Surely that which will promote the inherent and manifest purpose of the grantors; and this leads us to hold that the only interest of the wife in this property was a life estate. We may well adopt the language in *Faribault v. Taylor*, 58 N. C. (5 Jones, Eq.) 219, wherein it is said: "The construction which would give the property to her and her present children only, as tenants in common of the absolute interest in it, is inadmissible, both because it might, by diminishing the present and immediate interest in the wife, be an inadequate support for her during her life, and because it would exclude from the benefit of the fund any children she may thereafter have. The manifest intent of the testator will be much more effectually carried out by giving to the wife a life estate, with a remainder to all the children which she now has, or may hereafter have." Does not the deed indicate an intention that the wife should take a life estate, that she may thus have the benefit of the estate, and that she may thereby rear and educate the children, who shall take the remainder at her death? Most certainly these children were not to take immediately. For them to do so would disturb the whole arrangement provided in the deed. Can we say that the mother could absolutely take any portion immediately? Her so doing would likewise frustrate that arrangement. Neither was immediately

vested. A trust in their favor interposed. Now, when was the property to vest absolutely? Must we not say, only when the family ceased to exist, and not earlier? The arrangement is declared to be a provision for the family; and the duration of that provision must logically be coexistent with the family. When the family ceased to exist, the trust provision was to end. But when does the family cease to exist? Shall we not, in sense, say at the death of the mother,—the natural guardian and head, as this arrangement presents itself? Was it not the intention simply to preserve the estate together as long as the family should be held together as only a mother can hold it? Only a life estate in the wife and mother is consistent with such intention. And no other interest in the wife is consistent with the conveyance of the land so as to be in no mode or manner liable for the debts of the husband. And this construction seems to be natural and reasonable for the carrying out of the provisions of the deed, for the letting in of after-born children, and for the making of the arrangement just that provision it was declared by the deed to be. Sallie H. Tompkins had only a life estate in the property. That life estate was subject to the trust arrangement. Through this life estate and that arrangement provision was made for the family. And that life estate was so subject to and interwoven with the trust arrangement, so necessary to the support and maintenance, use, and benefit of herself and children, that she could not transfer, assign, or alien it; for to permit her to do this would break up and destroy the trust created by the grantors.

The decree of the Circuit Court is right, and we affirm it.

IOWA SUPREME COURT.

RE TAXATION OF H. E. BOYD.

DALLAS COUNTY et al., Appts.,
v.

H. E. BOYD.

(— Iowa, —, 116 N. W. 700.)

Tax — credit — real-estate contract.

1. An enforceable contract for the purchase of real estate is a credit subject to

Case Note. — Amount due under contract for the purchase of land, not evidenced by note or purchase-money mortgage, as a credit subject to taxation.

This note is limited strictly to those cases where, as in *DALLAS COUNTY v. BOYD*, the

taxation, although it provides for forfeiture upon default of the purchaser.

Same — property in hands of referee.

2. A referee appointed by the court to sell real estate for partition is not within the meaning of a statute requiring the listing of property for taxation by a trustee of property held in trust, or by one holding property for a nonresident in the assessment district where the property is held, so as to render the contracts for sale, when executed, subject to taxation in his hands.

Same — double.

3. Contracts for the sale of land, secured by a referee appointed to sell lands for partition, should be treated as real estate, so that the taxation of them in his hands would result in double taxation.

(June 8, 1908.)

question was raised whether the amount due under an enforceable contract for the sale of land, but for which, so far as appears, at least, no note or purchase-money mortgage has been given, is a credit in the hands of the vendor, and, as such, subject to taxation. It therefore does not include those cases in which it was decided whether a note given on the purchase of land, or a purchase-money mortgage, is a credit in the hands of the vendor subject to taxation, or whether the taxation of these amounts to double taxation.

All the courts seem to be at one in holding, with *DALLAS COUNTY v. BOYD*, that the amount due under an enforceable contract for the sale of land is a credit, and as such subject to taxation in the hands of the vendor, although, as was the case in practically every instance, the contract provides for forfeiture upon default of the purchaser.

In *Clark v. Horn*, 122 Iowa, 375, 98 N. W. 148, it was held that the amount due under a contract for the sale and conveyance of land upon which a partial payment is made, the vendee having taken possession, is assessable for taxation as a credit, notwithstanding a provision that, upon the vendee's default in making payments the vendor may declare the agreement void; the court taking the view that this latter provision was intended only for the benefit of the vendor, and did not operate, upon the vendee's default, to release the latter from any further liability.

In *Perrine v. Jacobs*, 64 Iowa, 79, 19 N. W. 861, where a person, by parol, sold a farm to another, and agreed, upon the remainder of the purchase price being paid, to execute to him a warranty deed, the vendor retaining possession until that time, it was held that the contract created a "claim and demand for money" in favor of the obligor, so as to be assessable as a credit.

In *Adams v. Clarke*, 80 Miss. 134, 31 So. 216, it was held that a debt due to the vendor of land is a solvent credit, where the vendee has paid the taxes on the land for 17 L.R.A. (N.S.)

A PPEAL by petitioners from a judgment of the District Court for Dallas County relieving the referee to sell an estate for partition from taxation upon the contracts in his hands. Affirmed.

Statement by Deemer, J.:

This is a proceeding to charge a referee in partition with taxes upon certain contracts made by him for the sale of lands belonging to the heirs of Elias Cardell, deceased. The trial court held that the referee was not liable for taxes upon the contracts and Dallas county and its auditor appeal.

Messrs. D. H. Miller and Miller & Russell, for appellants:

The land contracts constituted property

the year for which the debt is sought to be taxed.

It was held in *Cross v. Snakenberg*, 126 Iowa, 636, 102 N. W. 508, that, where the vendor bound himself to convey the real estate if the vendee should pay certain promissory notes given for the purchase price, and should, upon a certain date, execute other notes for the remainder of the purchase price, secured by mortgage, the amount due to the vendor, to be represented by the last-mentioned notes, was taxable as a credit, under a statute defining credits as including money secured by deed, title bond, mortgage, or otherwise, although the contract contained no formal agreement by the vendee to make payment, and was not signed by him, but was in fact delivered to him, and placed by him on record; it appearing that he had executed the first mentioned notes for the purchase money, and it being evident that the parties intended the contract to be binding on both.

In *Rheinboldt v. Raine*, 52 Ohio St. 160, 39 N. E. 145, it was held that a sum due the vendor of real estate from the vendee, as purchase money, to pay which the vendee has given an absolute obligation, is a credit, and taxable as such, notwithstanding the vendor has retained the legal title of the land sold as his security. In this case it was also contended that to tax these sums would result in double taxation; but the court said: "As to the claim that to tax these sums would result in double taxation, it is enough to say that, although the real estate continued to stand in the name of the partnership on the duplicate, yet, by the contract, the Kauffmans were obligated to pay all taxes and assessments, and if Rheinboldt, because of default on the part of the Kauffmans, should be compelled to pay any such charge, such payment would be payment of a debt of the Kauffmans rather than his own, and a legal right to collect of them would result."

A similar case, and holding to the same effect, is *Marquette v. Michigan Iron & Land Co.* 132 Mich. 130, 92 N. W. 934, where the court, after holding that, where

in the hands of the referee, and as such were subject to assessment, and were rightly listed and assessed against him by the auditor as omitted property.

Code, § 1309; Code Supp. § 1385-b; Meyer v. Dubuque County, 49 Iowa, 193; Waller v. Jaeger, 39 Iowa, 228; Perrine v. Jacobs, 64 Iowa, 79, 19 N. W. 861; Clark v. Horn, 122 Iowa, 375, 98 N. W. 148; Cross v. Snakenberg, 126 Iowa, 636, 102 N. W. 508; Re Kellinger, 1 Ch. Sent. 27; Bates v. Boston, 5 Cush. 93; Re Bank of United States, 1 Phila. 330, Cooley, Taxn. 1st ed. 1876, p. 271.

Such contracts were held by the referee as trustee within the meaning of § 1312 of the Code.

25 Am. & Eng. Enc. Law, p. 126; San Luis Obispo v. Pettit, 87 Cal. 499, 25 Pac. 694; People v. Lardner, 30 Cal. 242; 2 Redf. Wills, 3d ed. p. 510.

The referee was in possession of such contracts as agent within the meaning of

§ 1320 of the Code, and the same were subject to assessment in his hands as made by the auditor.

Miller v. Dorris, 116 Iowa, 446, 116 N. W. 89; German Trust Co. v. Board of Equalization, 121 Iowa, 325, 96 N. W. 878; Heinz v. Board of Equalization, 121 Iowa, 445, 96 N. W. 967; Security Sav. Bank v. Carroll, 131 Iowa, 605, 109 N. W. 212.

The contracts were subject to assessment for taxation in the hands of the referee as an officer of the court.

25 Am. & Eng. Enc. Law, p. 126; San Luis Obispo v. Pettit and People v. Lardner, supra; 2 Redf. Wills, 3d ed. p. 510.

Taxation is the rule, and all property not expressly exempted therefrom is subject to taxation.

Jaggard, Taxn. p. 35; Griswold College v. State, 46 Iowa, 275, 26 Am. Rep. 138; Sioux City v. Independent School Dist. 55 Iowa, 150, 7 N. W. 488; Ft. Des Moines

the contracts are such as are here under consideration, the equitable title to the property therein described is at once transferred to the vendee, and that the vendor holds the legal title only as trustee for the vendee, said: "The vendor has, in effect, exchanged his property for the unconditional obligation of the vendee, the performance of which is secured by the retention of the legal title. The fact that the vendee, in the case of the land contract, may, when making his final payment, demand a conveyance, does not distinguish the obligation from that of a credit secured by a mortgage, as the mortgagor may, when making his final payment, demand a discharge of the mortgage. The obligations under consideration, therefore, resemble, not agreements to pay future rent, or salary to be earned in the future, or promises to buy merchandise and products to be delivered in the future, but credits secured by mortgages. The resemblance between these obligations and credits secured by purchase-money mortgages may best be described by stating that they differ only in this: That the vendor has a remedy, to enforce his rights, which is not given to the mortgagee, namely, he may take immediate possession of his security. Such an inconsequential difference accords no ground for a legal distinction. The decisions of this court which hold all credits secured by mortgages taxable are, therefore, in our judgment, decisive of the proposition under discussion."

In State v. Rand, 39 Minn. 502, 40 N. W. 835, it was held that a debt arising from a written contract whereby four persons agreed, upon the payment of a certain part of the purchase price, to convey by warranty deed certain real estate to a corporation, the latter to have possession and to pay the taxes assessed against the property, was an assessable credit in the hands of the obli-

gors under the Constitution and revenue laws of the state. In this case it was also urged that the proposed assessment would result in double taxation; but the court said: "It is possible that the purchaser may default in its promise to pay for the property, as well as in its covenant to pay the taxes upon the same for the year 1886, but this cannot be assumed. If there is no default, the taxes upon the real estate for the year involved in these proceedings—1886—will be paid by the corporation purchaser. The vendors will suffer no hardship, but simply pay taxes upon what they actually have in property, in return for the protection which they and it receive at the hands of the government. The contingency which is urged, that they may have to pay upon both credit and real property for the same year, is too remote for serious consideration. If it be available in this instance, it is equally so in all cases where real estate security is accepted by one who loans money or sells such property upon time. There is a possibility of a failure to pay the debt so secured, and that taxes may be allowed to accumulate in both cases, but this is not necessarily the result of the transaction."

A leading case on this question is Griffin v. Board of Review, 184 Ill. 275, 56 N. E. 397, where it was held that the amount remaining unpaid under an agreement to convey land by warranty deed upon the payment of a specified sum of money is taxable as a "credit" under a statute providing for taxation thereon, although the vendor holds the title to the land in his name and the amount due is not evidenced by a promissory note. The court, in this case, said: "The appellant invested Riehl with the possession and beneficial use of the land, and obligated himself to invest him with the title also upon the fulfillment by Riehl of the obligations on his part relative to the payment of the remainder of the purchase price

Lodge No. 25 I. O. O. F. v. Polk County, 56 Iowa, 34, 8 N. W. 687.

Messrs. L. V. Harpel and Cardell & Fahey, for appellee:

The so-called contracts sought to be taxed are mere options.

Re Shields Bros. 134 Iowa, 559, 10 L.R.A. (N.S.) 1061, 111 N. W. 963.

The mere passing of property through the hands of an officer of the court for distribution does not change its situs for taxation.

1 Cooley, Taxn. p. 663; Jaggard, Taxn. p. 275; Brooks v. Hartford, 61 Conn. 112, 23 Atl. 697; Re Kellinger, 9 Paige, 62; 27 Am. & Eng. Enc. Law, 2d ed. p. 657.

The referee's duties are the same as sheriff's duties, and in many states are performed by the sheriff; and his sales are judicial sales. A statute making property in the hands of a sheriff or clerk nontaxable will have that effect as to a referee.

21 Am. & Eng. Enc. Law, 2d ed. pp. 1178,

of the land. For all the purposes of determining as to the liability of the land, and of the indebtedness due to appellant, to assessment for taxation, the retention of the title by the appellant may be regarded as but a mode adopted to secure the payment of the full purchase price of the land. In that view, the liability of the land and the debt to taxation is the same as in a case where the title has been placed in the purchaser and payment of the purchase price secured by means of a mortgage on the land, acknowledging the indebtedness and creating a lien on the land to secure the payment. A debt secured by mortgage, and the land mortgaged to secure the debt, are both subject to taxation. . . . The legal effect of the transaction between the parties hereto was to create new or additional property, viz., a legally enforceable demand in favor of the appellant to recover from said Riehl the unpaid balance of the purchase money of the lands. This property is entirely distinct from the property in the land. Taxation levied upon both of said properties is not double taxation." In this case, Justice Carter, in a dissenting opinion, Justice Craig concurring, drew a distinction between a contract of sale, and a contract for a sale, and, after saying that in this case no title passed to the obligee, but that it remained in the obligor, and that the lands described in the agreement were assessable to the obligor as his property and were in fact assessed to him, and that the mere fact that the obligee covenanted to pay the taxes on the land assessed subsequently to the year of sale did not make him owner of either the legal or equitable title to the property, took the view that the owner of property who has made a mere executory agreement to convey it for and upon the payment of a stipulated price, to one who, by such agreement, promises to pay that price at the time fixed upon, no promis-

1196, 1213; Code, §§ 4262, 4263; 27 Am. & Eng. Enc. Law, 2d ed. p. 657.

Deemer, J., delivered the opinion of the court:

The facts are not in dispute. So far as material, they are as follows: In January of the year 1905 H. E. Boyd, a resident of the town of Minburn, in Dallas county, was, by order of court, appointed referee to sell certain real estate involved in a partition suit among the heirs of Elias Cardell, deceased. Pursuant to said order, Boyd entered into several contracts for the sale of different portions of said land, which contracts were reported to and approved by the court appointing the referee. All this was done during the year 1905, and all save one of these contracts were in the possession of the referee on January 1, 1906. The referee did not return these contracts for assessment, and thereafter the county auditor gave him notice to show cause why these

sory note or obligation other than such agreement having been given, cannot be assessed upon both the property and the price or amount agreed to be paid for it. Justice Carter took occasion to say: "As a credit is defined to be a demand for any 'valuable thing,' why, under the opinion of the court, would not Riehl's right, by the contract, to have Griffin convey the land to him upon payment of the contract price, be a demand for a valuable thing—for land—and taxable as a credit in his hands? Riehl was no more bound to pay than Griffin was to convey. The title remained in Griffin, and was assessed to him. By such a construction for purposes of taxation three kinds of property would be created: First, the real and only property,—the land; and the other two, fictitious credits,—one a demand for money and the other a demand for land. So, also, if A and B agree to exchange horses at a future designated day, in a certain sense each would have a demand against the other for the horse contracted for; but no one would contend that, in addition to the two horses, there would be two credits of similar value created for purposes of taxation. Such executory agreements are not credits. The fact that they are enforceable proves nothing. True, it has been held that promissory notes given for lands purchased, where the vendor retains the legal title as security for payment, executing a bond for a deed, the land being assessed to the purchaser, are taxable as credits; but I know of no previous case in which this court has held that a mere agreement for a future sale and payment is a credit, within the meaning of the revenue law."

For cases on the question whether a taxable credit can arise out of a mere option contract to purchase real estate, see case note to Re Shields, 10 L.R.A. (N.S.) 1061.

contracts should not be assessed. Boyd appeared and filed his objections, and these were overruled, and the auditor entered them for assessment. Thereupon the referee appealed from said order to the district court where his objections were sustained, and the assessment annulled and discharged. The appeal is from this ruling.

The order of the court appointing the referee directed him to make sales of the land and to divide the proceeds among the owners according to their respective shares, and authorized him to make sales for cash, or partly for cash, the balance to be paid in three equal annual payments. Pursuant to this authority, the referee entered into sixteen contracts which are involved in this controversy. In each of these contracts the referee agreed to sell to the purchaser all his right, title, and interest in and to the real estate, describing it, for an expressed consideration, naming it, and the purchaser agreed to purchase the same for an agreed price, and to pay that sum to the referee, his heirs or assigns, in a manner specified in the contracts. In eight of these contracts was the following provision: "And it is expressly agreed by and between the parties hereto that the time and times of payment of said sums of money, interest, and taxes as aforesaid is the essence and important part of the contract; and that if any default is made in any of the payments or agreement above mentioned to be performed by the party of the second part, in consideration of the damage, injury, and expense thereby resulting, or that may be incurred by or to the party of the first part thereby, this agreement shall be void and of no effect, and the party of the second part shall have no claim in law or equity against the party of the first part, nor to the above-mentioned real estate, nor any part thereof; and any claim or interest or right the party of the second part may have had thereunder up to that time by reason hereof, or any payments and improvements made hereunder, shall on all such default cease and determine and become forfeited, without any declaration of forfeiture, re-entry, or any act of the party of the first part." The others had this stipulation in lieu of the one just quoted: "And said referee hereby agrees to procure the approval of this sale by the court, and to make and execute to said purchaser a good and sufficient referee's deed and have same approved by the court, and to furnish said purchaser an abstract showing perfect title to said premises. And said referee hereby agrees that, in case he shall fail to have this sale approved, and a good and sufficient referee's deed made, executed, and approved, and abstract furnished showing perfect title, that he will refund to said

purchaser said sum so paid to him, and neither party shall have any claim upon the other." None of the land covered by these contracts was in Dallas county, and it does not appear where the owners thereof resided January 1, 1906. Five of these contracts were not approved by the court until after January 1, 1906, but the others were approved during the year 1905. These contracts were all carried out, and deeds made pursuant thereto by the referee in every case save one, and it does not appear what was done under it. What is known as the A. E. Olson contract was fully performed by the purchaser before January 1, 1906, and Leary, one of the purchasers, paid the amount due under his contract on the day the same was approved by the court. The referee received the money thereon December 30, 1905, and delivered the deed January 2, 1906.

Two primary questions arise upon this appeal as follows: (1) Are the contracts such as that, had they been made by an individual in his own name, they would have been subject to assessment for taxation? (2) Are they or any of them assessable in the hands of the referee? It is said that the contracts involved are mere options, and not contracts of purchase, and *Re Shields Bros.* 134 Iowa, 559, 10 L.R.A. (N.S.) 1081, 111 N. W. 963, is cited as an authority for the proposition. That case does not so hold, and is clearly distinguishable in its facts from the one in hand. No evidence was introduced tending to show that these contracts were intended as mere option. We have no doubt that after the approval of the court each and all of these contracts could have been enforced against the purchasers by proper action in court. Where one holds an enforceable contract for the sale of land, he has such a credit as is subject to taxation. *Clark v. Horn*, 122 Iowa, 375, 98 N. W. 148; *Croas v. Snakenberg*, 126 Iowa, 636, 102 N. W. 508; *Perrine v. Jacobs*, 64 Iowa, 79, 19 N. W. 861; *Schoonover v. Petcina*, 126 Iowa, 261, 100 N. W. 490, is not in point. Had the contracts been made by an individual in his own right, they would undoubtedly have been assessable.

2. The next question is much more difficult of satisfactory solution. Boyd was a referee with powers already mentioned. He was commissioned to sell the land as a referee, and, in fact, had no title to, right, or interest in the land sold. He was not a receiver of the property, nor was he a trustee thereof. He was simply an officer of court appointed for the purpose of selling or making contracts for the sale of the land and to divide the proceeds among the owners. Were these land contracts assessable to him as such referee? Appellant relies primarily

upon the fundamental principle that taxation is the rule and exemption from taxation the exception, as announced not only in our own, but in many other cases, as, for example, in *Griswold College v. State*, 46 Iowa, 275, 26 Am. Rep. 138, and *Ft. Des Moines Lodge No. 25, I. O. O. F. v. Polk County*, 56 Iowa, 34, 8 N. W. 687; while appellee says with equal confidence that there can be no taxation except as authorized by statutory or constitutional provision, citing *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Iowa, 383, 82 N. W. 787; *Tallman v. Butler County*, 12 Iowa, 531. There is no real conflict in these rules. Of course, no property can be taxed until the lawmaking power authorizes and requires it to be done. But, when property in general is made subject to taxation as it is by §§ 1303 and 1308 of our Code, he who would claim an exemption must be able to point to a statute or some rule of law which gives him the right. However, an agent or representative of another is not personally liable to taxation unless there be a statute creating such liability. Appellants' counsel rely upon §§ 1309, 1312, 1314, 1316, 1320, and 1350 of the Code as authorizing an assessment of the property against the referee; but in our opinion none of them do so. Section 1309 simply defines credits. Section 1312 provides that every inhabitant of the state shall list for the assessor all property subject to taxation of which he is owner or has the control or management, in the manner therein directed; that is to say, the property of one under disability, by the person in charge; of married woman, by herself or husband; of a beneficiary for whom property is held in trust, by the trustee; the personal property of a decedent, by the executor or administrator, or, if there be none, by any person interested therein, etc. Section 1314 provides that assignees authorized to sell and persons having in their possession property belonging to another, subject to taxation in the assessment district where said property is found when the owner of the goods does not reside in the county, are, for the purposes of taxation, to be deemed the owners of the property in their possession. Section 1316 provides that any person required to list property shall do so in the same county in which he would do so were it his own. Section 1320 makes an agent holding credits with a view to investing, loaning, or in any other manner using or holding the same for pecuniary profit for himself or the owner personally liable for the tax on the same. Section 1350 provides that personal property shall be listed each year in the name of the owner thereof on the 1st day of January. These are the only sections relied upon, and the only ones we can find which have any bearing

upon the case; and it is manifest that, if there be any authority for taxing the credits to the referee, it must be either § 1312 or § 1314. Section 1312 authorizes the assessment of the property of a beneficiary held in trust by a trustee and of which he has the control and management, and § 1314 authorizes the assessment of property held by another in the assessment district where held when the owner does not reside in the county. If the referee be a trustee, holding the property as such for the benefit of another or others, and having control and management thereof, he should list the same with the assessor; and, in contemplation of law, he is regarded as the owner thereof when the owner does not reside in the county. We do not think that a referee appointed by a court as commissioner to make a sale of property in a partition proceeding is a trustee controlling and managing the property, within the meaning of § 1312 of the Code. At most, he is an officer of court, controlling and managing the property under its direction. He is not authorized to pay claims unless ordered to do so by the court appointing him, and in whatever he does is subject to the control and direction of the court. A receiver who holds funds awaiting distribution is not regarded as an owner or trustee within the meaning of the law. *Brooks v. Hartford*, 61 Conn. 112, 23 Atl. 697. Indeed, the rule as to receivers seems to be that, unless the title to the property is vested in them, they are not regarded as owners for the purposes of taxation. 1 *Cooley, Taxn.* p. 663; *Jaggard, Taxn.* p. 275. As referees are omitted from the list of representatives who are liable to taxation, there is every reason for supposing that the legislature intended to exempt them. In the instant case the referee had nothing but the naked legal title to the contracts made by him, and the proceedings were simply a method of partitioning the land or its proceeds among the owners thereof. His control was limited, and he did not hold the property with a view of investing, loaning, or in any other manner using it for pecuniary profit either for himself or the owner. Should we hold that the property was subject to taxation, it could not be assessed to the referee for two reasons: (1) There is no showing that the real owners thereof did not reside within the county; and (2) the referee did not hold the same with a view of either profit to himself or to the owner thereof. Partition proceedings are instituted for the purpose of securing a division of the property among the owners; and a sale in such an action is simply a method of dividing up the property. Until the proceeds are paid to the owners of the real estate, these proceeds partake of

the nature of the realty; in other words, there is no conversion, as a general rule, into personality until the money is actually paid to those who are entitled to it. 3 Pom. Eq. Jur. § 1167; 9 Cyc. Law & Proc. pp. 844, 845; 7 Am. & Eng. Enc. Law, 2d ed. pp. 473-475, and cases cited. These land contracts should, for the purposes of taxation, be treated as realty, and to tax them either to the referee or to the beneficiary would manifestly result in double taxation, which is everywhere inhibited. Even were this not the rule, it is clear under our statutes that a referee cannot be made personally liable for the taxes, for the reason that he is not holding or using either the property or the contracts with a view to investing, loaning, or in any way deriving any pecuniary profit for himself or the beneficial owners. *German Trust Co. v. Board of Equalization*, 121 Iowa, 325, 96 N. W. 873; *Heinz v. Board of Equalization*, 121 Iowa, 445, 96 N. W. 967. Our conclusions on the whole case find support in *McNeill v. Hagerty*, 51 Ohio St. 255, 23 L.R.A. 628, 37 N. E. 526; *Re Kellinger*, 9 Paige, 62; *Public Schools v. Trenton*, 30 N. J. Eq. 668; *Brooks v. Hartford*, supra. Appellants rely upon two California cases, to wit, *San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. 694, and *People v. Lardner*, 30 Cal. 242, in support of their contention. Neither of these cases is controlling. The statute of that state expressly authorized the assessment of property or money in litigation held by the county treasurer, court, county clerk, or receiver to such officials. Moreover, the *San Luis Obispo Case* does not decide the point here involved. Much more might be said in favor of the conclusion reached, but the matters already considered seem to be conclusive and point to the final word.

The judgment must be, and it is, affirmed.

KANSAS SUPREME COURT.

SARAH DALTON et al., Plffs. in Err.,
v.

KANSAS CITY, FORT SCOTT, & MEM-
PHIS RAILROAD COMPANY.

(— Kan. —, 96 Pac. 475.)

Damages — carriage beyond destination — inconvenience.

1. Where a passenger on a railroad is negligently carried beyond his destination, he is entitled, in the absence of other inculpatory circumstances, to recover as damages therefor a reasonable sum for loss of

time, necessary expenses incurred, and, in addition thereto, fair compensation for inconvenience experienced, if any, on account of such action of the railroad company.

Same — amount — question for jury.

2. On a trial for damages in such a case, where there is any evidence tending to establish a right to recover, the amount to be awarded is a question for the jury, and should not be withdrawn from its consideration.

Same — setting aside findings — inconvenience.

3. Where, in such a case, the jury return special findings of fact wherein the different elements of damage are stated separately as follows: For loss of time, \$1; expenses, \$2.50; inconvenience, \$300,—the court cannot, on a motion to reduce the amount of the general verdict, set aside the finding for inconvenience, and render judgment for \$3.50, if there is any evidence upon which such finding could have been based for any amount.

(June 6, 1908.)

Case Note. — Measure of damages for carrying passenger beyond destination.

A number of other cases in point upon this question are set out in a case note entitled, "What injuries may be deemed the proximate result of discharging passenger at improper place, or one not his destination?" appended to *Georgia R. & Electric Co. v. McAllister*, 7 L.R.A. (N.S.) 1177.

As to damages incident to attempt to reach destination by other means, as an element of recovery for failure to stop train for intending passenger, see case note to *International & G. N. R. Co. v. Addison*, 8 L.R.A. (N.S.) 880.

It is the duty of a carrier to notify its passengers, or have its stations announced, as the trains approach the same (see subject note to *Texas & P. R. Co. v. James*, 15 L.R.A. 347), and to allow them a sufficient or reasonable time in which to alight (see case note to *Chicago, R. I. & P. R. Co. v. Wimmer*, 4 L.R.A. (N.S.) 140). If, therefore, because of the carrier's failure to announce the station or to allow a reasonable opportunity to alight, a passenger is carried beyond his destination, it will be liable, as will appear from many of the following cases, for all damages proximately growing out of such failure.

The general rule is that a carrier is liable for the natural and proximate damages resulting from negligently or wrongfully carrying a passenger beyond his destination. *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 315; *Dorsey v. Central R. Co.* 113 Ga. 564, 38 S. E. 958; *Southern R. Co. v. Hobbs*, 118 Ga. 227, 63 L.R.A. 68, 45 S. E. 23; *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179.

If a passenger holding a ticket entitling him to alight at a particular station is carried past such station without his com-

ERROR to the District Court for Anderson County to review a judgment in plaintiffs' favor after striking out an item of damages for inconvenience, found by the jury in an action brought to recover damages for carrying plaintiffs beyond their destination. Reversed.

Statement by Graves, J.:

Sarah and Jennie Dalton are sisters. At the time of the transaction out of which this action arose, Sarah resided near Fontana, in Miami county, with her father; Jennie was then living with a sister at Moline. Sarah was twenty-four years of age, and Jennie twenty. On August 27, 1899, they met by appointment at Kansas City. On August 28, at 9:45 in the evening, they

left Kansas City together on the defendant's passenger train, for Fontana, where the train was due at 11:30 that night. Sarah bought a round-trip ticket when she left Fontana; Jennie bought a ticket for Fontana at Kansas City. The train did not stop at Fontana; it went to La Cygne, the next station, 8 miles from Fontana. At La Cygne, a freight train was standing, ready to leave for Fontana. The plaintiffs and their baggage were transferred to the caboose of that train, and taken back to Fontana, where they, with their baggage, were left on the depot platform. There were no lights in or about the station, but the plaintiffs were acquainted there, and walked about a block and a half to a hotel where they aroused the inmates, who assisted them

sent and without being allowed a reasonable opportunity to leave the train, he has a right of action against the carrier for whatever damages may have accrued to him by reason of nondelivery at the place for which he was ticketed. *Illinois C. R. Co. v. Able*, 59 Ill. 131; *Illinois C. R. Co. v. Chambers*, 71 Ill. 519.

In *King v. Southern R. Co.* 128 Ga. 285, 57 S. E. 507, it was held to be a tort, for which an action would lie, to afford a passenger no opportunity to alight at his destination, and to use abusive language and personal violence in putting him off some distance beyond.

In *Louisville & N. R. Co. v. Gaddie*, 31 Ky. L. Rep. 602, 102 S. W. 817, it was held that, where a conductor, by mistake, failed to announce a passenger's station, and carried her beyond; and there was no evidence of mistreatment or incivility; and she was offered free transportation back to her station,—her recovery should be limited to such loss of time, illness, and inconvenience suffered as was the natural and reasonable result of being carried past her station.

In *The Canadian, Brown, Adm. 11, Fed. Cas. No. 2376*, and *The President*, 92 Fed. 673, it was held that the recovery would be limited to the actual loss sustained, where there was no insult or ill treatment.

Physical suffering and sickness.

A passenger negligently or wrongfully carried beyond his destination is entitled to recover for physical suffering which is the natural, direct, and immediate consequence of the wrongful act. *East Tennessee, V. & G. R. Co. v. Lockhart*, supra; *Dawson v. Louisville & N. R. Co.* 6 Ky. L. Rep. 668; *Texas & P. R. Co. v. Pollard*, 2 Tex. App. Civ. Cas. (Willson) 424.

Such a passenger may recover for an injury received in attempting, in the dark, to get from the railroad to the station platform. *Case v. Delaware, L. & W. R. Co.* 191 Pa. 450, 43 Atl. 319.

He may recover for a fall through a trestle where, at night, he followed the directions of a conductor in endeavoring to get

back to his destination. *Kentucky & I. Bridge & R. Co. v. Buckler*, 30 Ky. L. Rep. 1086, 8 L.R.A. (N.S.) 555, 100 S. W. 328.

As affecting the question of damages, he may show that the enforced walk back to his destination caused mental and physical suffering. *Chesapeake & O. R. Co. v. Lynch*, 28 Ky. L. Rep. 467, 89 S. W. 517.

Where physical suffering is proved, and superadded mental suffering, the jury should fix the damages at such sum as will reasonably compensate the plaintiff for such suffering. *Winkler v. St. Louis, I. M. & S. R. Co.* 21 Mo. App. 99.

In *Dawson v. Louisville & N. R. Co.* 4 Ky. L. Rep. 801, it appeared that a passenger suffering from a recent surgical operation was not given a sufficient time to alight at his destination; and, when he begged the conductor to stop and let him off, and told him he believed it would kill him to be carried away from home, the conductor replied that he "would have to stand it;" that the conduct of the railroad caused him much mental suffering, and, at the station 4 or 5 miles beyond, where he was put off, he was exposed to cold and dampness, suffered a relapse, and was in bed over a month attended by a physician. It was held that he was entitled to recover compensatory damages beyond the damages for his loss of time and the cost of a return ticket.

In the nature of things, in actions for the recovery of damages for physical suffering and mental anguish caused by being negligently carried beyond one's destination and put off at the wrong place, it is impossible, and therefore unnecessary, to prove specifically in dollars and cents the extent of the damages suffered. *Bell v. Gulf & C. R. Co.* 76 Miss. 71, 23 So. 268; *Winkler v. St. Louis, I. M. & S. R. Co.* supra.

Fatigue from the enforced walk back is an element of damages. *East Tennessee, V. & G. R. Co. v. Lockhart*, supra; *Central R. Co. v. Dorsey*, 116 Ga. 719, 42 S. E. 1024.

He may recover for sickness caused by an enforced journey on foot back to his destination. *Louisville & N. R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796; *Southern R. Co. v.*

by getting a livery team to take them home, and placing their baggage in the hotel. They reached home about 2 o'clock at night, and returned the next day and got their baggage. Their brother came to the station at Fontana to meet them and was there when the train passed. They each commenced an action in the district court of Miami county, March 30, 1900, one of which was tried in December, 1900, and the other in February, 1901. One of them recovered judgment for \$300. The railroad company prosecuted proceedings in error to this court, where the case was reversed, and is reported in 65 Kan. 661, 70 Pac. 645. The other case was also reversed. 66 Kan. 799, 72 Pac. 209. In the first case, the district

court instructed the jury that "annoyance, fright, and mental anguish" were proper elements of damage in such a case, and for this the judgment was reversed. The cases were subsequently tried in the district court where the plaintiffs again recovered, and a new trial was granted by that court. The trial, which is now here for review, was had March 19, 1906. The two cases were tried together, and each plaintiff recovered a verdict for \$303.50. This amount was, by special findings made by the jury, apportioned as follows: For loss of time, \$1; expenses, \$2.60; inconvenience, \$300. Upon the application of the railroad company, the court struck out the sum of \$300 and entered judgment for each plaintiff in the sum of \$3.50. The application was based upon two

Humphries, 108 Ga. 591, 34 S. E. 283; Cincinnati, H. & I. R. Co. v. Eaton, *supra*; Kentucky C. R. Co. v. Biddle, 17 Ky. L. Rep. 1363, 34 S. W. 904; Texas & P. R. Co. v. Pollard, *supra*.

In Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 So. 360, where the passenger's destination was not called; and the train was not stopped until it had gone some 500 or 600 yards beyond, at which point he got off at midnight and walked to his home, not by the station, but by another route; and, from the exposure to the bitter cold and disagreeable weather, he was taken sick and died,—it was held that his administrator was entitled to recover more than nominal damages.

Such a passenger may recover for sickness caused by exposure to rain while walking back 2 miles to his destination, where he had directed that his horse and buggy be taken to meet him. St. Louis Southwestern R. Co. v. Knight, 81 Ark. 429, 99 S. W. 684.

And for sickness caused by being caught in the rain while riding back in an open buggy. St. Louis Southwestern R. Co. v. Ricketts, 96 Tex. 68, 70 S. W. 315.

And he may recover for an injury done, where, while afflicted with chronic rheumatism, he was compelled to walk back 5 miles through rain at night. Mobile & O. R. Co. v. McArthur, 43 Miss. 180.

But, in Louisville v. N. R. Co. v. Quick, 125 Ala. 553, 28 So. 14, where it appeared that a passenger was carried beyond and brought back to her station, where she was unacquainted, and her son, who had come to meet her, had left the station, it was held that rheumatism contracted by exposure in a drenching rain while out hunting her son's residence was an improper element of damages, as being too remote, and not proximate to the wrong.

In East Tennessee, V. & G. R. Co. v. Lockhart, 79 Ala. 315, it was held that, if it was necessary for the passenger to walk back to his destination, and he thereby aggravated a present sickness unknown to the carrier, such aggravation constituted an element of the damages.
17 L.R.A. (N.S.)

State of weather.

Where the passenger is compelled to walk back, the state of the weather may be considered on the question of damages. Louisville & N. R. Co. v. Dancy, *supra*; Cincinnati, H. & I. R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179; Louisville & N. R. Co. v. Guy, 18 Ky. L. Rep. 750, 37 S. W. 1043; Peos & N. T. R. Co. v. Williams, 34 Tex. Civ. App. 100, 78 S. W. 5.

Condition of way back to destination.

It may be shown that the road over which such passenger was compelled to walk in getting back to his destination was rough, rocky, muddy, or dusty. East Tennessee, V. & G. R. Co. v. Lockhart; Cincinnati, H. & I. R. Co. v. Eaton; and Louisville & N. R. Co. v. Guy,—*supra*.

So, it may be shown, as an element of damages, that the passenger fell and hurt herself while crossing a cattle guard on her way back to the station, this being the only way back known to her. New York, C. & St. L. R. Co. v. Doane, 115 Ind. 435, 1 L.R.A. 157, 7 Am. St. Rep. 451, 17 N. E. 913.

Mental anguish.

Passengers negligently carried beyond their destination have been permitted to recover for fright or mental anguish, pure and simple, without any bodily injury. Louisville & N. R. Co. v. Dancy; Louisville & N. R. Co. v. Quick; and Cincinnati, H. & I. R. Co. v. Eaton,—*supra*; Texas & P. R. Co. v. Gott, 20 Tex. Civ. App. 335, 50 S. W. 193.

But in Chicago, R. I. & P. R. Co. v. Boyles, 11 Tex. Civ. App. 522, 33 S. W. 247, it was held that, where it was neither averred nor proven that the carrier knew that plaintiff was to be met by her father, or that, failing to meet him, she would suffer keen anguish and disappointment, such mental anguish, though actually suffered, was not a proper element of damages.

In Cincinnati, etc. R. Co. v. Richardson, 14 Ky. L. Rep. 367, it was held that plain-

grounds, which read: "(1) There was no evidence justifying any damages for inconvenience and trouble for which the jury assessed damages against the defendant in the sum of \$300 in favor of the plaintiff. (2) Because the amount allowed for inconvenience and trouble is not a proper element of damages in assessing or estimating plaintiffs' damages herein." The plaintiffs bring their case here for review.

Mr. Frank M. Sheridan for plaintiffs in error.

Messrs. W. F. Evans, I. P. Dana, and A. L. Berger, for defendant in error:

The trial court's findings and judgment will not be disturbed unless the record affirmatively shows error.

tiff could show that she was so frightened that she was confined to her bed the next day because of her being put off beyond her station on a steep embankment, where she was compelled to jump 3 or 4 feet to the ground, and because of seeing one of her children roll down the embankment when carelessly helped off the train by the brakeman.

Where, under the evidence, plaintiff is not entitled to any actual damages, but is entitled to damages for injury to her peace, happiness, or feelings, it is not error to charge the jury that, "in all cases where a tort has been committed, the damages are left to the enlightened conscience of an impartial jury." Georgia R. & Bkg. Co. v. Jett, 95 Ga. 236, 22 S. E. 251; Southern R. Co. v. Bryant, 105 Ga. 316, 31 S. E. 182.

In San Antonio Traction Co. v. Crawford (Tex. Civ. App.) 71 S. W. 306, it was held that a passenger on a street car, deliberately and wilfully carried past her destination by a motorman, who then shook his finger and a piece of iron in her face, was entitled to recover compensatory damages for mental suffering, though there was no physical suffering. This, however, is not in conflict with the general rule stated in the next paragraph, for here it is clear that the plaintiff was subjected to insult and wilful abuse.

But the weight of authority is to the effect that damages for mental anguish or wounded feelings arising solely from the circumstance that the passenger has been negligently carried beyond his destination are not recoverable where he has sustained no injury to his person or his purse, and has not been subjected to insult, abuse, or humiliation. Sappington v. Atlanta & W. P. R. Co. 127 Ga. 178, 56 S. E. 311; Trigg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 305; Deming v. Chicago, R. I. & P. R. Co. 80 Mo. App. 152.

In other words, it is generally held that no damages should be allowed for mental suffering in such cases, unless there is a showing of some personal injury independent of the mental suffering. Texarkana & Ft. S. R. Co. v. Anderson, 67 Ark. 123, 17 L.R.A. (N.S.)

Ward v. Preferred Acci. Ins. Co. 80 Vt. 321, 67 Atl. 821; Downing v. Ernst, 40 Colo. 137, 92 Pac. 230; Ryan v. Brown (Okla.) 91 Pac. 894; Brew v. Hastings, 206 Pa. 155, 55 Atl. 922; Corgan v. George F. Lee Coal Co. 218 Pa. 386, 67 Atl. 655; Benson v. Bawden, 149 Mich. 584, 13 L.R.A. (N.S.) 721, 113 N. W. 20; Butteris v. Miffin & L. Min. Co. 133 Wis. 343, 113 N. W. 642; Parker v. Continental Ins. Co. 143 N. C. 339, 55 S. E. 717; Handlan-Buck Mfg. Co. v. Wendelkin Constr. Co. 124 Mo. App. 349, 101 S. W. 702; Kiesewetter v. Supreme Tent K. M. 227 Ill. 48, 81 N. E. 19; Garrity v. Ham-burger Co. 136 Ill. 499, 27 N. E. 11; Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109; Burbank v. Barton, 117 La. 262, 41 So. 587; Robertson v. Long-

53 S. W. 673; Kansas City Ft. S. & M. R. Co. v. Dalton, 65 Kan. 661, 70 Pac. 645; Judice v. Southern P. Co. 47 La. Ann. 255, 16 So. 816; Pullman Co. v. Kelly, 86 Miss. 87, 38 So. 317; Strange v. Missouri P. R. Co. 61 Mo. App. 586; Smith v. Wilming-ton & W. R. Co. 130 N. C. 304, 41 S. E. 481.

In Rawlings v. Wabash R. Co. 97 Mo. App. 515, 71 S. W. 534, it was held that, where a passenger, in walking back to her destination, was compelled to cross a cattle guard, into which she fell and hurt herself and got wet from head to foot, her anxiety of mind or injured feelings was a proper element of damages.

The mental distress of persons other than the passenger carried beyond his destination is not an element of damages.

Thus, in Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335, 28 S. W. 96, it was held that a passenger carried beyond her destination could not recover for the fright and distress of a six-year-old nephew accompanying her on the journey.

And in Texas & P. R. Co. v. Woods, 15 Tex. Civ. App. 612, 40 S. W. 846, it was held that, in an action by a husband for carrying his wife beyond her destination, he was not entitled to recover for his own mental suffering.

Humiliation.

Humiliation is not an element of damage where the carrier was guilty of no rude or offensive conduct, but merely carried the passenger beyond his destination accidentally or carelessly. St. Louis Southwestern R. Co. v. Knight, 77 Ark. 20, 88 S. W. 1035; Airey v. Pullman Palace Car Co. 50 La. Ann. 648, 23 So. 512.

In Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530, and Louisville & N. R. Co. v. Ballard, 88 Ky. 159, 2 L.R.A. 694, 10 S. W. 429, it was held, however, that the fact that the brakeman looked at the passenger and grinned as she was getting off at a lonely point about a mile beyond her station was admissible as affecting the damages.

ley, 28 Mont. 123, 72 Pac. 423; Passavant v. Arnold, 34 Mont. 513, 87 Pac. 905; Van Vranken v. Granite County, 35 Mont. 427, 90 Pac. 164; Johansen v. Mulligan, 45 Wash. 529, 88 Pac. 1107; Kinsel v. Wieland, 38 Colo. 296, 88 Pac. 153; Southern R. Co. v. Lester, 81 C. C. A. 53, 151 Fed. 573; West v. Richmond R. & Electric Co. 102 Va. 339, 46 S. E. 330; United States Mineral Co. v. Camden, 106 Va. 663, 117 Am. St. Rep. 1028, 56 S. E. 561.

The trial court must determine whether the jury was mistaken in weighing the evidence, or whether the evidence would justify the finding.

St. Louis & S. F. R. Co. v. Vanzego, 71 Kan. 427, 80 Pac. 944; Argentine v. Bender, 71 Kan. 422, 80 Pac. 935; Missouri P.

R. Co. v. Dwyer, 36 Kan. 69, 12 Pac. 352; Atyeo v. Kelsey, 13 Kan. 216; McCrum v. Corby, 15 Kan. 116; Kansas P. R. Co. v. Kunkel, 17 Kan. 172; Kansas City, W. & N. R. Co. v. Ryan, 49 Kan. 12, 30 Pac. 108.

It was within the province of the trial court, under the evidence here, to reduce the general verdict.

Parsons & P. R. Co. v. Montgomery, 46 Kan. 120, 26 Pac. 403; Cudahy Packing Co. v. Broadbent, 70 Kan. 535, 79 Pac. 126; American Surety Co. v. Ashmore, 74 Kan. 325, 86 Pac. 453.

Graves, J., delivered the opinion of the court:

The only question presented in this case relates to the measure of damages. The

Peril.

Peril which is the natural, direct, and immediate consequence of the wrongful act is an element of damages. East Tennessee, V. & G. R. Co. v. Lockhart, 79 Ala. 315; Cincinnati, H. & I. R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179.

Trouble and inconvenience.

A passenger in such a case is entitled to recover damages for his proximate trouble and inconvenience in getting back to his destination. East Tennessee, V. & G. R. Co. v. Lockhart, supra; Southern R. Co. v. Humphries, 108 Ga. 591, 34 S. E. 283; Simmons v. Seaboard Air-Line R. Co. 120 Ga. 225, 47 S. E. 570, 1 A. & E. Ann. Cas. 777; Judice v. Southern P. Co. supra; Airey v. Pullman Palace Car Co. supra; Trigg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 305; Owens v. Wabash R. Co. 84 Mo. App. 143; Smith v. St. Louis & S. F. R. Co. 127 Mo. App. 53, 106 S. W. 108; Pennsylvania R. Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323; Rountree v. Atlantic Coast Line R. Co. 73 S. C. 268, 53 S. E. 424; Texas & P. R. Co. v. Pollard, 2 Tex. App. Civ. Cas. (Willson) 424; Texas & P. R. Co. v. Woods, 8 Tex. Civ. App. 462, 28 S. W. 416.

In St. Louis, I. M. & S. R. Co. v. Power, 67 Ark. 142, 53 S. W. 572, it was held that the inconvenience and annoyance from voluntarily riding back upon a freight train in a car where men were smoking, chewing, and spitting, when, by waiting an hour longer, she could have returned by a regular passenger train, were not proper elements of damages.

Loss of time and expenses.

Loss of time which is the natural, direct, and immediate consequence of the wrongful act is an element of damage. Judice v. Southern P. Co.; Pennsylvania R. Co. v. Aspell; and Texas & P. R. Co. v. Pollard, —supra.

And the passenger may recover for his actual expenses in getting back to his destination, together with his loss of time. 17 L.R.A. (N.S.)

The President, 92 Fed. 673; The Canadian, Brown, Adm. 11, Fed. Cas. No. 2,376; Simmons v. Seaboard Air-Line R. Co. and Airey v. Pullman Palace Car Co. supra; Dorrah v. Illinois C. R. Co. 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. 36; Porter v. The New England, 17 Mo. 290; Trigg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 305; Marshall v. St. Louis, K. C. & N. R. Co. 78 Mo. 610; Owens v. Wabash R. Co. 84 Mo. App. 143; Smith v. St. Louis & S. F. R. Co. supra; International & G. N. R. Co. v. Terry, 62 Tex. 380, 50 Am. Rep. 529; Texas & P. R. Co. v. Woods, 8 Tex. Civ. App. 462, 28 S. W. 416; Gulf, C. & S. F. R. Co. v. Cleveland (Tex. Civ. App.) 33 S. W. 687.

In Mississippi & T. R. Co. v. Gill, 66 Miss. 39, 5 So. 393, it was held that a passenger who attempted to alight from the rear end of the car, but was prevented by a throng of people so determined to get in that he could not get out before the train was started, and was carried to the next station, where he was detained an hour and paid his fare back, was entitled to compensation only, no insult being shown.

Other losses.

In Texas & P. R. Co. v. Pollard, 2 Tex. App. Civ. Cas. (Willson) 424, it was held that the loss of capacity to earn money was an element of damages.

Probable profits on a commercial deal which failed because of plaintiff's delay were not allowed in The Canadian, supra. In this case the master of the schooner which was detained because the steamer on which he took passage to the port where the schooner was moored, carried him to another port, was allowed to recover demurrage for the detention of his vessel.

Nominal damages.

If no actual, substantial loss or damage is suffered, plaintiff is entitled to recover nominal damages only for the mere negligent act of carrying him beyond his destination. Louisville & N. R. Co. v. Dancy, 97 Ala. 338, 11 So. 796; Chattanooga, R. & G. R. Co. v. Lyon, 89 Ga. 16, 15 L.R.A.

act of the railroad company in carrying the plaintiffs beyond their destination, in the absence of other inculpatory facts, amounts to a mere breach of contract. The rule of damages in all such cases is compensation for loss of time, and expenses incurred on account of the nonperformance of the contract. There is an entire absence in this case, of any wantonness, violence, insulting or oppressive conduct on the part of the railroad company's employees such as must be shown before exemplary damages can be awarded; and no physical injury was received upon which damages for mental pain and anguish may be based. The damages must therefore be limited to such as are proper in the ordinary case where a contract has been violated. 6 Cyc. Law & Proc.

p. 589; 5 Am. & Eng. Enc. Law, 2d ed. pp. 690-697; Northern C. R. Co. v. O'Conner, 76 Md. 207, 16 L.R.A. 449, 35 Am. St. Rep. 422, 24 Atl. 449; Dorrah v. Illinois C. R. Co. 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. 36. It has been urged in argument that inconvenience is recognized as a proper element of damages in cases of this nature, in addition to those before mentioned; and authorities have been cited which sustain this contention. Undoubtedly, the rule is that inconvenience, when of a substantial character, is a proper element of damages; but it does not follow that a recovery may be had therefor in every case where a passenger is carried beyond his destination. When, in such a case, the passenger, in order to get back to where the railroad com-

857, 32 Am. St. Rep. 72, 15 S. E. 24; Sappington v. Atlanta & W. P. R. Co. 127 Ga. 178, 56 S. E. 311.

In *Texarkana & Ft. S. R. Co. v. Anderson*, 67 Ark. 123, 53 S. W. 673, it was held that nominal damages only were recoverable where there were no personal injury, no circumstances of aggravation, no inconvenience other than a mere delay of two hours, and no showing of the value of time lost or expense incurred.

In *Blackburn v. Alabama G. & S. R. Co.* 143 Ala. 346, 39 So. 345, 5 A. & E. Ann. Cas. 223, it was held that a passenger who was compelled to walk about 1 mile further than he would have had to walk if he had not been carried 2 miles beyond his station, and who was put to no expense and suffered no mental or physical pain, was entitled to recover only nominal damages.

Negligently to carry a passenger beyond his destination entitles him to at least nominal damages. *Cable v. Southern R. Co.* 122 N. C. 892, 29 S. E. 377.

Exemplary damages.

A passenger wilfully and intentionally carried past his destination is entitled to exemplary damages. *Dawson v. Louisville & N. R. Co.* 6 Ky. L. Rep. 668; *Harlan v. Wabash R. Co.* 117 Mo. App. 537, 94 S. W. 737; *Samuels v. Richmond & D. R. Co.* 35 S. C. 493, 28 Am. St. Rep. 883, 14 S. E. 943.

Where the conductor and brakeman refused to stop, and were insulting in their manner (*Louisville & N. R. Co. v. Ballard*, 88 Ky. 159, 2 L.R.A. 694, 10 S. W. 429); or the carrying beyond was the result of intentional or malicious neglect (*Memphis & C. Packet Co. v. Nagel*, 97 Ky. 9, 29 S. W. 743; *Hutchinson v. Southern R. Co.* 140 N. C. 123, 52 S. E. 263, 6 A. & E. Ann. Cas. 22),—the plaintiff is entitled to punitive damages.

In *Birmingham R. Light & P. Co. v. Nolan*, 134 Ala. 329, 32 So. 715, it was held that plaintiff was entitled to exemplary damages where it appeared that she told the conductor where she desired to get off; that, near her station, the bell cord was pulled by a passenger, whereupon the con-

ductor said she would have to go to the next station, and signaled the engineer to go ahead and carried plaintiff $\frac{3}{4}$ of a mile beyond, where she got off and walked back; that it was windy and cold, and the ground was wet and sloppy; that she got her feet wet, and was taken sick and required the attention of a physician.

In *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967, it was held that plaintiff was entitled to punitive damages where it appeared that the train did not stop at his destination; that the name of the station was not called; that the brakeman was asleep; that the conductor was intoxicated, and, upon being requested to stop the train, used profane and insulting language to the plaintiff; and that plaintiff was quiet and peaceable.

In *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17, 9 So. 375, it was held to be a wilful wrong for a conductor to require a woman with a valise and a baby in her arms to alight in a drenching rain from a train which had run 200 yards beyond the station, where there was no shelter; and for his failing to move the train back to the stopping place, and exposing her to the weather, which caused a severe illness, she was entitled to exemplary damages.

In *Texas & P. R. Co. v. Pollard*, supra, it appeared that a passenger's station was not announced, and she was carried about $\frac{1}{2}$ a mile beyond, where the train was stopped at her instance, and she requested that it be backed that she might get off at her station, which request was refused by the railway servants, who compelled her to leave the train in the open prairie, with an infant child and satchel to carry, alone and in the dark. Plaintiff was allowed to recover \$1,000 on account of her alarm, distress of mind, and sickness caused by the negligent acts of the employees.

The mere negligent act of carrying a passenger beyond his destination is not sufficient to warrant the imposition of punitive damages, there being no evidence of bodily injury, mental suffering, insult, oppression, or pecuniary loss. *Kentucky C. R. Co. v. Biddle*, 17 Ky. L. Rep. 1363, 34

exert pressure upon the occupant to obtain payment, by refusing to furnish gas so long as its bill remained unpaid. But against new occupants having their own rights, it could not do this. We think that the plaintiffs are entitled to start anew under their title, and that they may use and dispose of the property for the benefit of creditors, as any other purchaser might do, subject only to the provisions of the assignment, and to liens which may be enforced by law. Rev. Laws, chap. 58, § 17. *Turner v. Revere Water Co.* supra; *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, 10 L.R.A. 122, 26 N. E. 97.

The plaintiffs, upon petition, would be entitled to a writ of mandamus against the defendant, to compel the delivery of gas, in the performance of a quasi public duty under the statute. It does not follow that they can maintain this suit in equity. The remedy at law, already referred to, is perfect. We see no ground for jurisdiction in equity. There is no contract between the plaintiffs and the defendant, and therefore there cannot be a decree for specific performance. The bill is, in substance, to obtain a mandatory injunction to compel the defendant to perform a quasi public duty, in the performance of which the plaintiffs have a private interest.

Mandatory injunctions are often granted where the defendant is guilty of a continuing wrong upon the plaintiff, from the further perpetration of which he ought to be enjoined, and where the termination of the wrongful conduct involves a restoration of conditions existing before the wrongful conduct began. They are not granted where the only ground of equitable relief is a failure of the defendant to perform an independent public duty which he owes to the plaintiff individually, as well as to others.

There is some ground for contending that, in refusing to furnish gas to the plaintiffs on request, the defendant is guilty of an actionable, continuing wrong upon them, which is in the nature of a nuisance, the maintenance of which may be enjoined in equity. The prayer of the bill seems to be framed on this theory. But we think it is more in accordance with sound principle, in the absence of any contract or previous dealings between the plaintiffs and the defendant, to hold that the mere failure to supply gas on request is only negative conduct, as distinguished from affirmative, wrongful act which calls for an injunction in equity. We have not been referred to any case in which relief in equity has been granted upon facts like those now before us.

Bill dismissed.
17 L.R.A. (N.S.)

MICHIGAN SUPREME COURT.

CORYDON E. AINSWORTH et al., Appts,
v.
MUNOSKONG HUNTING & FISHING CLUB.

(— Mich. —, 116 N. W. 992.)

Injunction — hunting — protection of rights.

Injunction will lie to prevent threatened repeated wrongful interference with the attempt of a citizen to take wild fowl upon the public navigable waters of the state.

(June 27, 1908.)

Case Note. — Injunction against hunting or fishing on navigable waters, or against interference therewith.

A fishing and hunting club, its officers, members, and agents, will be enjoined from interfering with or preventing one from fishing in navigable waters in which the club claims an exclusive right. *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249.

So, those engaged in the occupation of fishing in a navigable river may enjoin the driving of stakes therein for the setting of fish traps, which interfere with their fishing, notwithstanding it constitutes a public nuisance, as the injury sustained is a special damage. *Morris v. Graham*, 16 Wash. 343, 58 Am. St. Rep. 33, 47 Pac. 752; *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55; *Skinner v. Hettrick*, 73 N. C. 53.

And an injunction will be denied the one driving such stakes to restrain the removal thereof by those injured thereby. *Hettrick v. Page*, 82 N. C. 65.

In *Bodi v. Winous Point Shooting Club*, 57 Ohio St. 226, 48 N. E. 944, the court having held that the navigable waters in dispute were part of Sandusky bay, and not a part of the river of that name, or of Mud creek, held that a private club could not enjoin members of the public from hunting and fishing thereon.

So, in *Dwelle v. Wilson*, 14 Ohio C. C. 551, the court recognized the doctrine that one could not be enjoined from fishing in the navigable water of Lake Erie by the owner of the adjacent land.

But the erection of wharves and the employment of steamboats upon navigable waters will not be enjoined on the ground that it is destructive of the public right of fisheries, where the relator does not show any especial injury which would authorize him to maintain an action in his own right to redress a public grievance. *Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479, 29 Am. Dec. 561; *Reyburn v. Sawyer*, 128 N. C. 8, 37 S. E. 954.

However, in the last case the court, in denying a preliminary injunction, said that would not prevent the plaintiff from making out his case for a permanent injunction

APPPEAL by complainants from a decree of the Circuit Court for Chippewa County in defendant's favor in a suit to enjoin interference with complainants' right to hunt. Reversed.

The facts are stated in the opinion.

Mr. E. S. B. Sutton for appellants.

Messrs. Sharpe & Handy for appellees.

McAlvay, J., delivered the opinion of the court:

Complainants, residents of the county of Chippewa, filed their bill of complaint against defendant, praying that defendant be enjoined from interfering with, preventing, and molesting complainants in the pursuit of their common right to hunt wild fowl on Munoskong bay in said county, whose waters, as is claimed in said bill, are a part of the Great Lakes; the defendant claiming to have exclusive right to take such wild fowl.

The material matters set forth in the bill of complaint, necessary to state, are: That the waters referred to are navigable meandered waters; that they were hunting ducks on said waters in a rowboat about $\frac{1}{4}$ mile from shore, and had set their decoys for that purpose; that the agents and servants of defendant corporation came from the clubhouse and ordered complainants to cease hunting ducks, claiming the exclusive right to hunt ducks on said waters to be in defendant, and that complainants had no right or privilege to do so; that the agents and servants of defendant wilfully and with intent to prevent complainants from hunting ducks upon these waters rowed their boat about among the decoys and prevented ducks from alighting near them, and prevented complainants from shooting and securing them; that complainants moved their decoys from that place to another upon the navigable waters of this bay, where they might lawfully hunt ducks; that these parties followed them, repeating their unlawful conduct, and, acting under orders of defend-

ant, again prevented complainants from hunting; that they followed complainants about with their boat, and finally they were unlawfully compelled to cease from exercising their lawful right to hunt on this navigable meandered bay; that defendant's servants, when requested to keep away and desist from interfering with them, refused, and said they were game keepers of defendant, which had employed and placed them there to prevent any persons except members of the club from hunting on said waters, which right was possessed solely and exclusively by defendant,—which conduct complainants allege is in violation of their inalienable rights in the pursuit of happiness and also of their personal liberty. Complainants allege that defendant club owns certain land on the border of this bay, upon which land is a clubhouse where these game keepers remain for the purpose of keeping hunters from these waters, and that defendant claims that, by reason of such ownership, it has the exclusive right to hunt on said waters; that defendant, through its members, has publicly stated and advertised the fact that they will prohibit and prevent all persons, including complainants, at all times from hunting upon these waters.

The bill avers: That this bay is navigable by large steam and sail craft; that the ownership of defendant extends only to high or low water mark, at which point the fee of the state of Michigan begins; that they have a right at all times when the law so allows, to hunt upon said waters in common with all citizens of the state; and that the lands covered by the waters of said bay beyond the meandered line thereof are unsurveyed, and none of them are owned or possessed by defendant, but belong in fee to the state of Michigan, held by the state as trustee for all of the people of the state; and complainants have as much right to hunt upon these waters as the members of defendant club. The bill also states that complainants desire and intend to hunt on

at the trial, if he showed an injury peculiar to himself.

And the right of a private fisherman to enjoin a city from depositing garbage in a navigable lake, which, upon a single occasion, was driven into his nets by the winds and waves, and killed the fish therein, in the absence of a showing of danger of a repetition of these injuries, was denied in *Kuehn v. Milwaukee*, 83 Wis. 583, 18 L.R.A. 553, 53 N. W. 912.

So, the fact that a right of navigation arises in the public by the raising of water over private property by the improvement of an adjoining river does not carry with it the right to hunt and fish upon the property; and the owner thereof may enjoin such acts by others. *Schulte v. Warren*, 17 L.R.A. (N.S.)

218 Ill. 108, 13 L.R.A. (N.S.) 745, 75 N. E. 783.

As to the general subject of the right to fish in navigable waters, as controlled by exclusive grants, prescriptive rights, or public rights, and as to the redress for injuries thereto, see the note to *State v. Shaw*, 60 L.R.A. 481.

As to injuries to fishing rights in navigable waters by the navigation of vessels, see the note to *Crookston Waterworks, Power & Light Co. v. Sprague*, 64 L.R.A. 982.

As to what waters are navigable, see note to *Willow River Club v. Wade*, 42 L.R.A. 305.

As to right to enjoin trespasses on oyster beds, see the subject note to *Cain v. Simonson*, 3 L.R.A. (N.S.) 205.

said bay during the then approaching open season of 1907, but will be prevented from doing so by defendant's servants and agents, unless they are enjoined from interfering with them to the irreparable loss and injury of each of them; all of which is alleged to be contrary to equity and the rights of complainants, and to their manifest wrong and injury. The bill alleges jurisdiction, and contains all the usual and necessary formal parts of a bill in chancery, and prays that defendant and its members, agents, etc., be restrained and enjoined from interfering with, obstructing, and preventing, in any manner, complainants from the free exercise of their right to hunt wild fowl upon said waters.

A preliminary injunction issued upon filing the usual bond in the sum of \$500. A motion for dissolution of this injunction was denied. Defendant then demurred to the bill of complaint upon the following grounds: "(1) Complainants have not, in and by their said bill, made or stated such a cause as entitles them in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill or in any of such matters. (2) It appears by the said bill of complaint that, if complainants have any cause of action relative to the matters set forth in said bill of complaint, they have an adequate remedy at law. (3) It appears by said bill of complaint that the rights affected of complainants, if any, are to their persons, and not to their property. (4) That said bill of complaint fails to show any immediate danger of irreparable damage. (5) That complainants have been guilty of such laches that they are now barred and estopped from asking relief. (6) That complainants seek to restrain others from doing acts and things they have a legal right to do. (7) That the allegations in said bill of complaint are insufficient to give the court jurisdiction to grant the relief prayed for." Upon a hearing a decree was granted sustaining the demurrer and dismissing the bill of complaint. Complainants have appealed.

The demurrer admits the truth of the facts charged in the bill of complaint. At this time, then, there is no necessity for discussing complainants' rights in the premises; and we assume that the waters upon which they were attempting to pursue, hunt, and capture wild fowl were navigable waters, where they were entitled to exercise all the rights they claim. We may also assume that the hired servants of defendant wrongfully and unlawfully, under the instructions of their employer, the defendant, by the means stated, interfered with complainants in the peaceable enjoy-

ment of their rights, under the claim that defendant had acquired exclusive rights and privileges for its members to hunt wild fowl upon these waters, and that such interference will continue to the damage and injury of complainants. The only proposition to consider is whether the bill sets forth such a cause of action over which a court of equity will entertain jurisdiction, and whether the bill of complaint states facts and circumstances sufficient to entitle complainants to an injunction against defendant. It will be unnecessary to cite and discuss text writers and authorities as to the fundamental principles which govern courts in issuing or denying relief by injunction. The first question in an injunction case, in addition to the general question on the threshold of every chancery case relative to jurisdiction, is as to the necessity for the restraining writ of the court. This is determined by ascertaining the nature of the injury done or threatened. This is strictly an injunction bill, and to deny an injunction, preliminary or permanent, disposes of the whole case.

If hunting for wild fowl upon these navigable waters for recreation or health is a right which the complainants are entitled to exercise, no person may lawfully interfere with the reasonable and lawful exercise of that right. If it is urged that trespass will lie against defendant and its officers and agents for the wrong complained of, the repetition and continuance of the interference with complainants would require a multiplicity of suits, and, if complainants must be relegated to such suits, they certainly would be absolutely deprived of the exercise of a legal and substantial right, and the damages possible to be obtained would be wholly inadequate. Parties in such cases should be entitled to equitable relief. *Nashville, C. & St. L. R. Co. v. McConnell* (C. C.) 82 Fed. 65. The right upon which complainants insist is a civil right, and their protection in its exercise clearly within equitable jurisdiction. 22 Cyc. Law & Proc. p. 757. We think that this right is not merely a bare legal right, and interference with it causes no substantial injury. To many people such rights are highly prized, and their exercise valuable and necessary. To hold that such rights are not of sufficient dignity that interference therewith, and the prevention of their lawful exercise, and threatened continuance of such interference, will be taken cognizance of by the courts, and injury arising therefrom prevented, would be to deprive complainants of such rights, and to encourage wrongdoers in the assumption of the sovereign prerogative. The allegations of the bill of complaint as to the apprehended injury

threatened by defendant are sufficient. The averments of the bill, not being denied, are sufficient if charged on information and belief. High, Inj. § 35. From the state of the pleadings there is no dispute here as to complainants' rights. Whether there is an injury for which a suit at law will furnish no adequate remedy, and whether that injury is irreparable, are the crucial questions. The first we have decided in the affirmative. Whether an injury to property or rights is irreparable depends in each case upon the nature of the right or property. "An injury, to be irreparable, need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages, or when there exists no certain pecuniary standard for the measurement of the damage . . . due . . . to the nature of the right or property injured." 22 Cyc. Law & Proc. pp. 763, 764, and cases cited. The right to fish in navigable waters is a public right. 13 Am. & Eng. Enc. Law, p. 560, and cases cited. An action for damages will lie for injury to such right. 13 Am. & Eng. Enc. Law, p. 584. The authorities hold that certain injuries to fishing, which, if permitted, would be irreparable, or for which the law furnishes no adequate remedy, may be restrained by injunction. 13 Am. & Eng. Enc. Law, p. 585 and notes. To hunt and fish in and upon the navigable waters such as these is a public right of which any citizen may avail himself, subject to the game laws of the state. The right to hunt is as valuable to the individual as his right to fish, and the authorities which sustain and protect him in the exercise of the one may be invoked with equal force as to the other. We are unable to draw any distinction between them.

Our conclusion is that the injury to complainants' rights complained of comes within this definition.

The decree of the Circuit Court sustaining the demurrer and dismissing the bill is reversed, with costs of both courts to complainants. The cause will be remanded, and defendant allowed the time fixed by rule to answer said bill of complaint.

VERMONT SUPREME COURT.

W. J. PERRIN, Exr., etc., of Carrie M. Bedford, Deceased,

v.

ELIZA CHANDLER.

(— Vt. —, 69 Atl. 874.)

Note — payable during life — validity.

1. An instrument promising for value re-
17 L.R.A. (N.S.)

ceived to pay a certain amount to a certain person if collected in her lifetime is not void as being either an attempt by her to dispose of property at death without the required formalities, or as an attempted gift without the requisite person making a complete delivery.

Same — promise to pay — consideration.

2. A promise by the maker of a note to pay soon is no consideration for a promise to refrain from suing upon it.

Same — postponement of suit — consideration.

3. That one holding a note payable to him, but not to his estate, postpones suing upon promise by the debtor to pay soon, does not raise a new obligation on his part for the benefit of the estate; and therefore the estate cannot enforce the note upon death of the holder before suit is brought.

(May 25, 1908.)

Case Note. — Validity of provision in contract for payment of money that it shall be payable to obligee only, and not to his estate.

This note does not include cases passing upon the validity of subsequent attempts to terminate at the obligee's death instruments which have taken effect. The cases disclosed upon the question under consideration do not appear to be in entire harmony.

The case of *Sebrell v. Couch*, 55 Ind. 122, is exactly in point with *PERRIN v. CHANDLER* and the decisions are in harmony. There a mortgage given to secure the payment of a certain sum contained a provision that it was "to be paid by the mortgagor to the mortgagee when called on by said mortgagee. . . . The mortgagor does not agree to pay the above sum to no [any] one else, except said mortgagee." The court said: "The fair construction of the mortgage, as we think, bound the mortgagor, Benjamin, to pay the money specified when he should be called upon for that purpose by the mortgagee; and, if not called upon by the mortgagee for that purpose, he was not bound to pay it at all. The condition on which he was to pay was, that the mortgagee should call on him for payment, and, that condition not having been performed, he was not bound to pay at all. Any other interpretation of the mortgage would do violence to its terms, and frustrate the intention of the parties, as gathered from the language employed by them. There is no analogy between the case here and the case of a note payable on demand, generally, on which suit may be brought without any demand. . . . Here a demand was not only to be made, but was to be made by the mortgagee himself; implying, when taken in connection with what follows in the mortgage, that, if he did not choose to make it, the debt was not to be paid at all. It may well have been that the mortgagee never intended that the debt should be paid at all unless he himself should have occasion, or

EXCEPTIONS by plaintiff to rulings of the Lamoille County Court made during the trial of an action brought to recover the amount alleged to be due on a promissory note which resulted in a judgment in defendant's favor. Judgment affirmed.

The facts are stated in the opinion.

Mr. B. E. Bullard, for plaintiff:

The words "and to no other person, executor, trustee, or assignee" do not inhibit this plaintiff from acting as agent or attorney of the testatrix.

Black, Constr. & Interpretation of Laws, 141; 1 Bouvier's Law Dict. 581.

This was an agency coupled with an interest which survives the death of the principal.

1 Bouvier's Law Dict. 134; Stevens v. Sessa, 50 App. Div. 547, 64 N. Y. Supp. 28.

The words quoted are void because, if effect is given to them, the transaction is a

last will and testament, wanting formalities required by the statute of wills and the sanction of probate.

1 Jarman, Wills, 26; Vt. Stat. 2349, 2356; Knott v. Hogan; 4 Met. (Ky.) 99; Brittain v. Richardson, 3 Rob. (La.) 78.

Also because, if given effect, the transaction is a gift *inter vivos*, or *causa mortis*, wanting in essential elements of both.

2 Kent, Com. 438, 439; Dean v. Dean. 43 Vt. 337; Story, Eq. 611-613; French v. Raymond, 39 Vt. 623.

Forbearance to sue is a sufficient consideration for the agreement.

Templeton v. Bascom, 33 Vt. 132; Hakes v. Hotchkiss, 23 Vt. 231; Hill v. Smith, 34 Vt. 535; Ballard v. Burton, 64 Vt. 387, 16 L.R.A. 664, 24 Atl. 769; 1 Bouvier's Law Dict. 377; Gailer v. Grinnel, 2 Aik. (Vt.) 349; Ames v. Le Rue, 2 McLean, 216, Fed.

see proper, to demand it, intending, if he should not demand it, that the consideration of the indebtedness should be retained by the mortgagor as a gift or gratuity; and, dying without having demanded the debt, the gift became complete and perfect. This in no way contravenes the doctrine that, to constitute a valid gift, the thing given must be delivered to the donee. It may be assumed that the consideration for the mortgage, whatever it may have been, was delivered to the mortgagor at or before the execution of the mortgage; and this consideration is what constitutes the gift, the mortgagee not demanding payment in his lifetime, according to the terms of the mortgage."

But in *Rodemer v. Rettig*, 114 Ky. 634, 71 S. W. 869, where a note payable to deceased contained a provision that it should become null and void on the death of the testatrix, it was held, where it remained in the payee's possession, that it was invalid as a gift, since there was no irrevocable delivery. It would appear in this case that the promise was equally subject to enforcement during the payee's life as the note in *PERRIN v. CHANDLER*, and both were, in effect, to terminate at the payee's death.

And in *Knott v. Hogan*, 4 Met. (Ky.) 99, where, at the time a note was executed, the payee delivered a writing to the maker stating that she had loaned the amount, interest to be paid if required; and further providing that, if it should not be collected during the payee's lifetime, her administrator should surrender the note to the maker as she intended it as a gift,—it was held that there was no valid gift shown, since it was not irrevocable; and this was especially true where the payee died before the maturity of the note, and therefore had no opportunity to enforce its payment.

A parol agreement in effect the same as the undertaking in *PERRIN v. CHANDLER* was sought to be shown in *May v. May*, 36 Ill. App. 77. The maker of notes attempted to defend upon the ground that the payee, his

father, expressly agreed that he should hold the notes during his life, and should require payment of only so much as he needed for maintenance, and that at his death the note were to be discharged and satisfied by the terms of the agreement without further payment. The evidence was held to show merely an intention to give, and, there having been no delivery, the defense failed.

In *Doty v. Wilson*, 5 Lans. 7, a son had obtained money from his father, and shortly afterward inquired of the latter concerning the condition upon which it had been received. The latter stated that the condition was that, if he ever wanted the interest or any part thereof, it would be 6 per cent, and, if not, when he was dead that was to be the end of it; and he had made a good use of the property. It was held that, there being no writing, and nothing but an agreement, no delivery could be made; and, further, that the donor also retained an interest, so that he did not part with all the interest as required to constitute a valid gift.

In *McGuire v. Adams*, 8 Pa. 286, evidence that defendant's stepmother told him that she never intended to collect the balance on a note, and that, if it was not paid during her lifetime, it was not to be paid, was held merely evidence of an unexecuted intention to give, and not a gift. This case is distinguishable from *PERRIN v. CHANDLER*, as the agreement was not incorporated in the note.

In *Hinkle v. Landis*, 131 Pa. 573, 18 Atl. 941, where a married woman surrendered notes of her brother-in-law, given for money lent him, for a bond which provided that he was to pay her annually during her life a certain amount of interest, and that the principal should never become due and payable, it was held that this was not a testamentary disposition of the money, but was intended as an absolute transfer, and was invalid, since she had no right to enter into such an agreement without her husband's consent.

Cas. No. 327; *Kampshall v. Goodman*, 6 McLean, 189, Fed. Cas. No. 7,605.

Messrs. Taylor & Dutton, for defendant:

The writing is not a promissory note because it lacks the element of certainty as to time of payment.

Story, *Promissory Notes*, 5th ed. 1.

The executor cannot recover.

Hackett v. Moxley, 65 Vt. 71, 25 Atl. 898.

Munson, J., delivered the opinion of the court:

In 1898 the defendant gave plaintiff's decedent a writing which reads as follows: "For value received I . . . promise to pay Mrs. Carrie M. Bedford, and to no other person, executor, trustee, or assignee, the sum of \$300, with interest annually." Interest was paid thereon from time to time until July, 1904. We think the restriction embodied in the writing cannot be regarded as a mere limitation upon the payee's right of transfer. It was evidently intended that the promise should be available to the payee in her lifetime, and become unenforceable at her death. But the plaintiff contends that the restriction is void, as an attempt to dispose of property after death without the required formalities; and contends, further that, if the transaction be viewed as a gift *inter vivos*, it lacks the requisites of present giving and complete delivery. It is enough to say, as regards these claims, that all the gift that the decedent intended was irrevocably made and completely delivered when the consideration of the note was made over in exchange for a promise of payment thus limited. The gift consisted of so much of the amount represented by the note as the payee should not collect in her lifetime. The title to the gift passed to the defendant, subject to a right of defeasance terminated at the donor's death. The reservation of this right did not make the gift invalid, and the limitation of the right was such that nothing was left in the donor to pass at her death. *Blanchard v. Sheldon*, 43 Vt. 512; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898; *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9.

It remains to inquire whether the obligation of the defendant has been enlarged by anything done in Mrs. Bedford's lifetime. It appears from the testimony of the plaintiff that, early in December, 1904, in the lifetime of Mrs. Bedford and pursuant to her instructions, he applied to defendant for payment of the note, and threatened to bring suit on it, saying that Mrs. Bedford had directed him to collect it, but offered to take a new note in place of the old one, explaining that Mrs. Bedford did not understand this writing and wanted a straight note. De-

fendant did not want to give a new note, nor pay the note at that time, but she did not want to be sued, and asked plaintiff to let the matter rest until January 1st, promising to pay the note at that time. Plaintiff said this would be satisfactory to him if it was to Mrs. Bedford, and said he would see her and let defendant know if there was anything different. Mrs. Bedford was content to let the matter rest until January 1st, and plaintiff said nothing further to defendant. Defendant paid plaintiff \$100 on the note January 3d, and said she would pay the balance soon. This was brought to Mrs. Bedford's attention, and she consented to the further delay. Mrs. Bedford died about three weeks later, and plaintiff was appointed her executor, and sues in that capacity.

The facts shown amount to a promise on the part of Mrs. Bedford to forbear suit for a reasonable time. She did, in fact, forbear suit for a time which the court may treat as reasonable for the purposes of this discussion. But she could have brought suit at any time notwithstanding her promise, if the promise was without consideration. The consideration claimed here is the promise of the debtor to pay soon. A promise which involves nothing but what the promisor is already legally holden for affords no consideration. *Mason v. Peters*, 4 Vt. 101; *Russell v. Buck*, 11 Vt. 166; *Pomeroy v. Slade*, 16 Vt. 220; *Merrill v. Pease*, 51 Vt. 556; *Anonymous*, Cowp. pt. 1, p. 128; *Deacon v. Gridley*, 15 C. B. 295; *Williams v. Stern*, L. R. 5 Q. B. Div. 409; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411; *Stuber v. Schack*, 83 Ill. 191; *Holmes v. Boyd*, 90 Ind. 333; *Davis v. Stout*, 126 Ind. 12, 22 Am. St. Rep. 565, 25 N. E. 862; *Turnbull v. Brock*, 31 Ohio St. Rep. 649; *Hunt v. Knox*, 34 Miss. 656; *Parmelee v. Thompson*, 45 N. Y. 58, 6 Am. Rep. 33. It is on this ground that sureties are held not to be released by an agreement to forbear in consideration of the debtor's promise to pay. *Joslyn v. Smith*, 13 Vt. 353; *Wheeler v. Washburn*, 24 Vt. 293; *Hoffman v. Coombs*, 9 Gill, 284; *Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875, 60 S. W. 499. But, when the debtor does or promises more than his contract calls for, there is a consideration for the promise to forbear (7 Cyc. Law & Proc. p. 900), as where he pays part of the debt before it is due, or promises to pay an increased lawful rate of interest, or gives or promises to give security (*Cox v. Carrell*, 6 Iowa, 350; *Prouty v. Wilson*, 123 Mass. 297; *Bell v. Martin*, 18 N. J. L. 167; *Alliance Bank v. Broom*, 2 Drew. & S. 289). The case of *Russell v. Buck*, 11 Vt. 166, is specially in point. There the plaintiff was the holder of a prom-

issory note indorsed by a firm in which the defendant was a partner, and the defendant gave him a writing by which he guaranteed the payment of the note if not called upon for it before a certain date. There was no agreement on the part of the plaintiff to delay collection of the maker. The plaintiff having permitted the statute to run on any claim he had against the defendant as indorser, brought suit on this writing as an independent ground of action. The court held that the writing had no consideration, and created no new liability; that, if the defendant was then liable as an indorser, it was merely the case of one who promises that, if waited on, he will pay what he is already holden to pay; that, if he was not then liable as indorser, the writing was simply a recognition of that liability, with a promise to pay if he himself was waited on. There is nothing in *Hill v. Smith*, 34 Vt. 535, inconsistent with our other cases. That was an agreement to enlarge the time allowed for the delivery of goods, and was entered into before the original time of performance had expired, and without there having been any failure in the performance; and the defendant had omitted to complete the delivery within the time allowed by the original contract, in reliance on the supplemental agreement.

We think there was no consideration to give force to Mrs. Bedford's promise or forbearance. She forbore to her detriment, or, rather, to the detriment of her estate; but it was no more than the forbearance of any creditor who risks a delay in the bringing of a suit. She suffered no detriment from her promise to forbear, for the promise bound her to nothing. There was no change whatever in the situation. The debtor remained under the same liability, and the creditor retained the same right. The creditor's failure to exercise her right subjected her to a different risk from that ordinarily incurred, because of the peculiar nature of the obligation. But we see no ground upon which her forbearance at the debtor's request can be held to have raised a new promise for the benefit of her estate. To do so would be to create a further obligation which the debtor declined to give when threatened with a suit. The debtor would do nothing but promise payment of the existing obligation, and the creditor let the matter rest upon that. It was the ordinary case of deferring suit upon a promise of speedy payment. Mrs. Bedford took the chance of loss by delay in the hope of an early settlement without suit.

Judgment affirmed.

17 L.R.A. (N.S.)

WASHINGTON SUPREME COURT.

G. J. SAUERS et al., Appts,
v.
PAUL SMITS.

(49 Wash. 557, 95 Pac. 1097.)

Physician — negligence — X-ray.

1. The use by a physician of the X-ray in the treatment of a patient, of the effect of which he is ignorant, may be found by the jury to be negligence *per se*.

Same — contributory negligence.

2. A physician is not relieved from liability for burning a patient by the use of the X-ray by the fact that she quit his treatment before he was willing she should do so, or that she neglected to follow instructions as to the use and care of the affected part.

(June 4, 1908.)

Case Note. — Patient's own negligence or failure to follow instructions as affecting liability of physician or surgeon for malpractice.

This note is confined to the substantive question of law and does not cover the questions of practice whether it is incumbent upon the plaintiff in the first instance to allege or prove freedom from contributory negligence.

It is clear that the fact that an action sounding in tort by a patient against a physician or surgeon for malpractice is founded on contract will not preclude the defendant from availing himself of the defense of contributory negligence on the part of the patient. *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630.

While it is practically conceded by all the cases that it is competent for a physician or surgeon, in an action for malpractice, to prove negligence of the patient, or of another whose negligence is chargeable to him, directly and proximately contributing to the injury, there is some confusion among the cases as to whether the effect of such negligence is to bar a recovery altogether, or merely to mitigate or reduce the damages. This confusion is due largely to the inherent differences in facts and conditions in different cases in which the question may arise. There are three different aspects in which the question of the effect of negligence of the patient himself, or of a third person whose negligence is chargeable to him, may arise:

(1) It may appear that there was no breach of duty on the part of the physician or surgeon, and that the injury was due entirely to the patient's own negligence or failure to follow instructions, or to such negligence or failure on the part of one whose negligence is chargeable to him. In such a case, of course, it is clear that there can be no recovery at all.

(2) It may appear that, while there was a breach of duty on the part of the physi-

APPEAL by plaintiffs from a judgment of the Superior Court for Chehalis County in defendant's favor in an action brought to recover damages for malpractice. Reversed.

The facts are stated in the opinion.

Messrs. W. H. Abel and A. M. Abel, for appellants:

The mere act of plaintiff's quitting her physician, if attended by evil results, is not necessarily a bar to recovery.

Spurrier v. Front Street Cable R. Co. 3 Wash. 661, 29 Pac. 346; *Cowie v. Seattle*, 22 Wash. 668, 62 Pac. 121; *Cremer v. Portland*, 36 Wis. 92; *Atherton v. Tacoma R. & Power Co.* 30 Wash. 403, 71 Pac. 39; *Redford v. Spokane Street R. Co.* 15 Wash. 423, 46 Pac. 650.

cian or surgeon, yet that no substantial injury would have resulted therefrom but for the patient's own negligence, or that of a third person whose negligence is chargeable to him. This is analogous to the situation presented in the ordinary action for personal injuries where but for the plaintiff's own antecedent negligence there would have been no accident, and therefore no injury, at all. Upon this hypothesis, the patient's negligence is one of the causes which proximately contributes to the occurrence of the injury, and does not affect merely its extent. In such a case, also, it seems clear that the negligence of the patient himself, or of a third person whose negligence is chargeable to him, though slight as compared with that of the physician or surgeon, will preclude a recovery altogether, and not merely mitigate the damages. There is a possible exception to this proposition in those jurisdictions, if any, in which there are any remnants of the doctrine of comparative negligence.

(3) It may appear—and this is probably generally the case—that there was a breach of duty on the part of the physician or surgeon which, even in the absence of negligence on the part of the patient, or of a third person whose negligence is chargeable to him, would have caused some injury; but that the injury was aggravated by that of the patient, or of such third person. Here the analogy is to those cases where an accident resulting in an injury was caused solely by the negligence of the defendant, but the injury was subsequently aggravated by the plaintiff's own negligence; and it would seem—at least if it is possible to separate the consequences of the negligence of the physician or surgeon from that of the patient—that the latter's negligence should not bar a recovery altogether, but merely mitigate the damages so that the physician or surgeon would be held only for such injuries as resulted from his own breach of duty, and relieved from liability for such of the injuries as resulted from the negligence chargeable to the patient himself.

It is obvious that the statement of the court in *McCandless v. McWha*, 22 Pa. 261, 17 L.R.A. (N.S.)

Contributory negligence, to defeat a right of action, must be simultaneous and co-operating with the fault of the defendant.

22 Am. & Eng. Enc. Law, 2d ed. p. 807; *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338; *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 109; *Beadle v. Paine*, 48 Or. 424, 80 Pac. 906; *DuBois v. Decker*, 22 N. Y. S. R. 274, 4 N. Y. Supp. 768, 130 N. Y. 325, 14 L.R.A. 429, 27 Am. St. Rep. 529, 29 N. E. 313; *Adams v. Wiggins Ferry Co.* 27 Mo. 95, 72 Am. Dec. 247; *Geiselman v. Scott*, 25 Ohio St. 86; 7 Thomp. Neg. § 6725.

Mr. J. B. Bridges, for respondent:

The negligence of plaintiff after exposure to the X-rays is a bar to recovery.

Swanson v. French, 92 Iowa, 695, 61 N. W. 407; *Potter v. Warner*, 91 Pa. 362, 36 Am.

that, if it should appear on a retrial that the surgeon performed his whole duty to his patient, and that any defects in the limb were due to the patient's fault, there ought to be no recovery, goes no further than the first of the foregoing propositions.

This is also true of the statement in *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094, that, if an office patient receives careful and skilful treatment, and then fails to return to the office for further treatment, and, in consequence thereof, suffers injury, he is not entitled to maintain an action against the physician, because it is his own fault and misfeasance.

The decision in *Reber v. Herring*, 115 Pa. 599, 8 Atl. 830, to the effect that negligence on the part of the plaintiff which contributes to the injury will bar a recovery, is probably referable to either the first, or the second, of the classes above stated.

Some of the courts, in stating the general rule that contributory negligence on the part of the plaintiff will bar a recovery, apparently ignore the distinctions already referred to, and state the rule in terms broad enough to cover the third class of cases as well as the first and second.

Thus, the court, in *Geiselman v. Scott*, 25 Ohio St. 86, declared that it is a well-settled principle of law that a party seeking to recover for an injury must not have contributed to it in any degree, either by his negligence, or the disregard of a duty imposed upon him by a party who, by his negligence or want of skill, may also in some degree have contributed to the injury; and approved an instruction that, if the patient negligently failed to observe the physician's directions, or purposely disobeyed the same, and such neglect or disobedience proximately contributed to the injury of which he complains, he cannot recover although he may prove that the defendant's negligence and want of skill also contributed to the injury; and that it makes no difference that one of the parties contributed in a much greater degree than the other; the patient must not have contributed at all.

So, in *Baird v. Morford*, 29 Iowa, 531, the refusal of an instruction requiring the

Rep. 668; *Beadle v. Paine*, 46 Or. 424, 80 Pac. 903; *Young v. Mason*, 8 Ind. App. 264, 35 N. E. 521.

Rudkin, J., delivered the opinion of the court:

This action was instituted to recover damages for malpractice. Without going into the details of the complaint, the substance of the plaintiffs' cause of action is that during the early part of the year 1906, the plaintiff *Mrs. Sauers* was suffering from an ailment of the foot, and applied to the defendant, who is a regularly licensed physician and surgeon, for treatment. The treatment prescribed and administered consisted in the daily exposure of the affected member or part to the light and rays of an X-ray

machine for a period of about a month, each exposure lasting from fifteen to thirty minutes. After this course of treatment had continued for some two weeks, the foot began to swell, itch, and burn. The treatment continued for about two weeks longer, at the expiration of which time the entire left side of the foot from the toe to the heel was severely burned, so that the skin came off and a large angry sore, involving the whole side of the foot, was formed; and, by reason of the treatment prescribed, the foot is permanently injured, the patient has been rendered a cripple for life, and the injury will probably necessitate the amputation of the foot. The negligence charged is that the defendant failed to shield or protect the foot from the X-rays, that he should have dis-

patient to prove that no negligence of his own tended to "increase or consummate" the injury complained of was held erroneous.

And in *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407, the court apparently approved an instruction that the burden was upon the plaintiff to prove that he was not guilty of any fault or negligence which directly contributed to the injury; but in this case it was the physician, and not the patient, who was complaining of the instruction.

And in *Link v. Sheldon*, 45 N. Y. S. R. 165, 18 N. Y. Supp. 815, the court apparently approved an instruction to the effect that, if any part of the injuries complained of were caused by the defendant, and a part was also caused by the fault of the plaintiff or his parents, or of others who treated the case after the defendant had left, there can be no recovery; but in this case also the physician, and not the patient, was the appellant.

In *Scudder v. Crossan*, 43 Ind. 343, the court, in support of its decision that the averments in the complaint that, by reason of the unskillfulness, negligence, and want of care on the part of the defendants in treating the broken arm, it became inflamed and mortified, and had to be amputated, were sufficient to show that the plaintiff and his injured son were without fault and that their negligence did not contribute to the result, remarked that the allegations would not be sustained if it appeared that the negligence of the plaintiff or his son, whose arm was broken, contributed to it.

In *Becker v. Janinski*, 27 Abb. N. C. 45, 15 N. Y. Supp. 675 (a nisi prius case), the jury were instructed that, if the injury of which the plaintiff complains was the effect of the plaintiff's own negligence alone, or was the effect of the defendant's negligence or want of skill in combination and co-operation with her own negligence, she could not recover; and that her contributory negligence would defeat the action.

In *Chamberlain v. Porter*, 9 Minn. 260, Gil. 244, the court said, in effect, that the question of contributory negligence was a 17 L.R.A. (N.S.)

substantive issue, and had no relation to the question of damages.

In *Young v. Mason*, 8 Ind. App. 264, 35 N. E. 521, the court said that, where both the surgeon and the patient are free from negligence, or where the surgeon and patient are both guilty of negligence, or where the surgeon is free from fault and the patient is guilty of negligence, no recovery can be had; and that it is only where the surgeon is guilty of negligence and the patient is without negligence on his part contributing in any degree to the injuries that the patient can recover damages of the surgeon.

Notwithstanding the generality of the language employed in these cases, and although it cannot be positively affirmed that it was employed with reference to the first or second of the classes above referred to, to the exclusion of the third, they can hardly be regarded as authority for holding that the negligence of the patient would be a complete bar to recovery in a case of the third class,—that is, where the defendant's breach of duty would have caused some injury even if the patient's negligence had not supervened.

The distinction between the second and third classes is clearly brought out by the opinion in *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338, holding that, if the improper manner in which the plaintiff's arm was dressed after an accident brought it in such condition that he must inevitably have a defective arm, the surgeon would be liable even though it should be found that mismanagement or neglect on the part of those having charge of the plaintiff may have aggravated the case and rendered the ultimate condition of the arm worse than it otherwise would have been; that the supervening mismanagement or negligence would bear only on the measure and amount of damages, not on the right of action. The court then distinguishes the case from those where the contributory negligence on the part of the plaintiff enters into the creation of a cause of action, and not merely supervenes upon it by way of aggravating the damaging results.

The same distinction is observed in *Carper*

continued the X-ray treatment as soon as the burning and scalding of the foot made its appearance, and that the tube or bulb of the X-ray machine was placed too close to the foot. Issue was joined on the complaint, and, from a judgment and verdict in favor of the defendant, the plaintiffs have appealed.

Two questions have been presented for the consideration of this court: First, the sufficiency of the evidence to warrant the submission of the case to the jury; and, second, the accuracy of one of the instructions given by the court. The testimony on the part of the appellants tended to show that there were 17 daily exposures of the foot to the X-ray machine, except on one date toward the last when the patient was unable to attend

the hospital; that no shield was used to protect the foot from the X-rays; that the tube or bulb of the X-ray machine was placed not to exceed 2 or 3 inches from the foot; that the exposures after the first lasted from twenty-five to thirty minutes; that, at the expiration of about two weeks from the first exposure, the foot became very red and itched and burned, and that this condition grew gradually worse from day to day until the patient was no longer able to go to the hospital; that thereafter the respondent attended the patient once at the home of her brother-in-law, where she was stopping, but did not call on the following day, and another physician was called in; and that, after the fifth exposure to the X-rays, a medicated paste was spread over the affected part,

ter v. Blake, 75 N. Y. 12, holding that a request to charge was properly refused because it was to the effect that negligence on the part of the patient after the surgeon had ceased to attend him would defeat a recovery; the court remarking that the cause of action, having previously accrued, could not be discharged by the subsequent negligence of the plaintiff, or of another surgeon whom she afterwards employed; that the most which could be claimed on account of any subsequent negligence would be that it would mitigate the amount of the plaintiff's damages.

To the same effect are *DuBois v. Decker*, 130 N. Y. 325, 14 L.R.A. 420, 27 Am. St. Rep. 529, 29 N. E. 313, and *McCracken v. Smathers*, 122 N. C. 799, 29 S. E. 354, both of which observe the distinction.

The distinction is also clearly suggested in *Beadle v. Paine*, 46 Or. 424, 80 Pac. 903, where the court said it is a good defense in an action for malpractice that the patient was negligent at the time, which conducted or contributed to produce the injury complained of; but it will not suffice to defeat the action that the injured party was subsequently negligent and thereby conducted to the aggravation of the injury primarily sustained at the hands of the physician or surgeon; and such conduct on the part of the patient is pertinent to be shown in mitigation of damages only where enhanced thereby, but not to relieve against the primary liability.

To the same effect is *Sanderson v. Holland*, 39 Mo. App. 233, which also clearly states the distinction.

In *Carpenter v. McDavitt*, 53 Mo. App. 393, the charge was held erroneous because it omitted an instruction that, if the jury found for plaintiff, they should assess only such damages as he had sustained on account of the treatment of his injury, and should not allow any damages for any aggravation of the injury, or new injury, caused by his own imprudent use of his leg.

It seems, however, that, even when the physician's or surgeon's breach of duty would have caused some injury even if the patient's own negligence had not supervened, 17 L.R.A. (N.S.)

such negligence may nevertheless bar recovery altogether if it is impossible to distinguish between the injuries due to the former's negligence and those due to the latter's negligence.

Thus, the court, in *Hibbard v. Thompson*, 109 Mass. 286, approved and commended an instruction that, "if it be impossible to separate the injury occasioned by the neglect of the plaintiff from that occasioned by the neglect of the defendant, the plaintiff cannot recover. . . . If, however, they can be separated, for such injury as the plaintiff may show thus proceeded solely from the want of ordinary skill or ordinary care of the defendant, he may recover."

To the same effect is *Jones v. Angell*, 95 Ind. 376.

In *Richards v. Willard*, 176 Pa. 181, 35 Atl. 114, an instruction was held erroneous because it undertook—what the court said was manifestly impossible—to set up a dividing line at the time the plaintiff left the hospital where he had been treated by the defendant, and to attempt to separate those consequences of alleged negligent treatment which occurred prior to plaintiff's leaving the hospital from the ulterior consequences resulting from the plaintiff's contributory negligence after he left. The court said that it was impossible to know what would have been the result of the defendant's treatment if the plaintiff had remained at the hospital. This decision was apparently made with reference to the facts before the court, and is not to be regarded as authority for the position that it is impractical in any case to undertake to distinguish between the consequences due to the negligence of the physician and of the patient respectively.

It is obvious, of course, that the question as to what the patient must do or omit to do in order to keep himself free from the charge of negligence, and the question whether his negligence, if any, proximately contributed to the injury, and the extent to which it contributed, depend very largely upon the circumstances of the particular case; and that any generalizations on the subject are of but little value. It may be

which was about the size of a nickel. There was further testimony tending to show that at the close of the respondent's treatment there was an X-ray burn of the fourth degree on the foot, which is generally considered incurable. It is unnecessary to refer to the testimony bearing upon the condition of the patient after this time as it would only go to the measure of damages, and that question is not before us. The testimony on the part of the respondent, on the other hand, tended to show that the number of exposures was about 10; that the tube or bulb was placed from 4 to 6 inches from the foot; that the exposures occurred only every other day, and lasted from eight to eighteen minutes; that the red or burnt appearance of the foot was caused by the paste, and not by the X-rays; that the patient had used her foot contrary to instructions, and by reason thereof the paste spread from the affected part to other parts of the foot; that there was no X-ray burn of any kind; that the treatment was proper; and that at the time of the trial the foot was entirely cured, and in a healthy condition. There was further testimony on the part of the respondent tending to show that the X-ray is comparatively a new discovery, and was not well understood by physicians and surgeons practising in such communities as Aberdeen at the time

this treatment was given. The appellants denied that the patient had disobeyed instructions, or that the paste had spread from the affected part to other portions of the foot, or that the condition of the foot was caused by the paste. It will thus be seen that there was a direct conflict in the testimony on many essential points. The jury would have been authorized in finding that the injured foot was severely burned by the X-rays, that the treatment was improper, and that the injury was caused by one or more of the acts of negligence charged in the complaint. If it should appear that physicians and surgeons in such communities as Aberdeen were as ignorant of the effect of X-ray exposures as some of the testimony tends to show, the jury might well conclude that the use of such a dangerous agency by one who had little or no knowledge as to the probable consequences was negligence *per se*. We are satisfied, therefore, that the motion for a nonsuit and the motion for a directed judgment were properly denied.

The instruction complained of by the appellants is as follows: "If you find from the evidence that the patient quit the treatment of the defendant before she should have done so, and before he was willing she should quit him, and that any evil results have come from that action on her part, then she would

said generally, however, in this connection, that it is the duty of the patient to submit to the treatment prescribed by his physician, and follow the necessary or reasonable directions given by him. *Jones v. Angell*, supra; *Lawson v. Conaway*, 37 W. Va. 159, 18 L.R.A. 627, 38 Am. St. Rep. 17, 16 S. E. 564; *Haire v. Reese*, 7 Phila. 138.

So, it is the duty of the patient to follow reasonable advice of his surgeon: and, if the latter requests additional assistance, and the patient refuses or neglects to procure it, the surgeon cannot be held liable for a permanent injury resulting therefrom, though he may have made a mistake in the treatment. *Hearing v. Spicer*, 92 Ill. App. 449.

So, a surgeon is not liable if prevented from reducing a dislocation by the refusal of a patient to submit to an operation. *Littlejohn v. Arbogast*, 95 Ill. App. 605.

But the refusal of a patient to have her limb rebroken and reset does not relieve a surgeon from liability where, by reason of want of ordinary care and skill on his part, the limb was permitted or caused to be crooked,—especially where there was evidence tending to show that such an operation would be attended with great pain, and that, at the patient's age and in her physical condition, there was great danger that it would prove fatal to her. *Morris v. Despain*, 104 Ill. App. 452.

It was held in *Gramm v. Boener*, 56 Ind. 497, that if a surgeon, when requested by a patient of mature years and sound mind to rebreak and reset his arm, advises him that

an operation is unnecessary and improper, but, in compliance with the patient's insistence, performs the operation, he cannot be held responsible to the patient for the damages, on the ground that the operation was improper and injurious.

There is, however, no duty on the part of a patient to test the propriety of the physician's treatment, the nonperformance of which will constitute a defense to an action against the physician for maltreatment. *Schoonover v. Holden* (Iowa) 87 N. W. 737.

To preclude a recovery, the patient's own negligence or improper conduct must have contributed substantially to produce the injury. *West v. Martin*, 31 Mo. 375. 80 Am. Dec. 107.

An instruction to the effect that plaintiff's negligence must have directly contributed to his injury in order to defeat a recovery is not erroneous because the word "directly" is used instead of "proximately." *Davis v. Spicer*, 27 Mo. App. 279.

There can be no recovery by a child for malpractice if the negligence of his parents contributed to his injury. *Sanderson v. Holland*, 39 Mo. App. 233; *Potter v. Warner*, 91 Pa. 362, 36 Am. Rep. 668.

But a physician who, by a slip of the pen, improperly wrote a prescription, cannot escape liability for death resulting from the patient taking the prescription, by reason of the negligence of the druggist who filled the same in failing to discover the error. *Murdock v. Walker*, 43 Ill. App. 590.

not be entitled to recover. If you believe that the defendant gave her directions as to how she should act, and as to how she should treat her foot, how she should use it and take care of it during the time she was treating it, and she did not follow those directions with reasonable care and diligence upon her part, and any injury has resulted on account of that negligence or want of attention or care upon her part, then she would not be entitled to recover." This instruction was erroneous. If we assume that the patient quit the treatment of the respondent before she should have done so, and before he was willing that she should quit him, or that she neglected to follow instructions as to how she should use and care for the foot, and injury resulted by reason thereof, the fact remains that these acts of negligence on the part of the patient in no manner concurred with the act of the respondent in burning the foot, if he did so. It would be a harsh doctrine to say that a patient cannot recover for malpractice if any subsequent or independent act of negligence on her part increases or augments the injury caused by the negligence or incompetency of the attending physician; and such is not the law. As said by Agnew, Ch. J., in *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705: "The contributory negligence which prevents recovery for an injury is that which co-operates in causing the injury,—some act or omission concurring with the act or omission of the other party to produce the injury (not the loss merely), and without which the injury would not have happened. A negligence which has no operation in causing the injury, but which merely adds to the damage resulting, is no bar to the action, though it will detract from the damages as a whole." In *Beadle v. Paine*, 46 Or. 424, 80 Pac. 906, the court said: "But it will not suffice to defeat the action that the injured party was subsequently negligent, and thereby conducted to the aggravation of the injury primarily sustained at the hands of the physician or surgeon; and such conduct on the part of the patient is pertinent to be shown in mitigation of damages only where enhanced thereby, but not to relieve against the primary liability." See also *Carpenter v. Blake*, 75 N. Y. 12; *Du Bois v. Decker*, 130 N. Y. 325, 14 L.R.A. 429, 27 Am. St. Rep. 529, 29 N. E. 313; *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338; *Thomp. Neg.* § 201; 22 Am. & Eng. Enc. Law, 2d ed. p. 807. The statement that any injury resulting from the negligent acts of the patient would bar a recovery was also too favorable to the respondent. We are therefore of opinion that there was sufficient evidence of negligence on the part of the re-

spondent to go to the jury, and that the instruction complained of was erroneous.

For this error, the judgment is reversed and a new trial ordered.

Hadley, Ch. J., and Fullerton, Root, Mount, Crow, and Dunbar, JJ., concur

DISTRICT OF COLUMBIA COURT OF APPEALS.

JOHN A. BENSON, Appt.,
v.

AULICK PALMER, United States Marshal.

(31 App. D. C. 561.)

Judgment — habeas corpus — effect.

A decision of a Federal court in the district where a person indicted for crime in another jurisdiction is found, discharging him under a writ of habeas corpus because of insufficiency of the indictment, from custody to which he had been committed under warrant of the United States marshal in extradition proceedings, is no bar to the prosecution of accused upon the same indictment when he is subsequently arrested under a bench warrant in the jurisdiction where the indictment was found, since the court had no power to pass upon the merits of the case in the habeas corpus proceeding.

(June 9, 1908.)

APPEAL by petitioner from a judgment of the Supreme Court dismissing a petition for a writ of habeas corpus to secure the release of petitioner from custody to which he had been committed for violation of a Federal statute. Affirmed.

The facts are stated in the opinion.

Messrs. Arthur A. Birney and Joseph C. Campbell, for appellant:

The United States circuit court had jurisdiction to issue the writ of habeas corpus, and to inquire into the cause of the restraint of liberty.

U. S. Rev. Stat. §§ 751, 752, U. S. Comp. Stat. 1901, p. 592; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650.

It was the duty of the court to examine

Note. — While there are a number of cases holding as does *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173, referred to in *Benson v. Palmer*, that a discharge in an extradition proceeding does not bar a rearrest in furtherance of a second attempt to extradite, no case has been found precisely in point with *Benson v. Palmer* in treating of the effect of a discharge under a writ of habeas corpus of one held in an interstate extradition proceeding, as a bar to a subsequent prosecution for the offense for which he was attempted to be extradited.

the indictment and determine if, "upon a broad, liberal, and inartificial construction," it charged an offense against the United States. This was what was done.

Re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; Re Doig, 4 Fed. 193; Re Coy, 31 Fed 794, affirmed in 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; Ex parte Siebold, 100 U. S. 376, 25 L. ed. 719; Stewart v. United States, 55 C. C. A. 641, 119 Fed. 89; Horner v. United States, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407; Re Terrell, 51 Fed. 213; Re Greene, 52 Fed. 104; Ex parte Bollman, 4 Cranch, 75, 2 L. ed. 554.

The judgment of the United States circuit court that the indictment charged no offense against the laws of the United States, and its consequent discharge of Mr. Benson from imprisonment, was a conclusive determination, binding on every court, that he could not be lawfully imprisoned under any process based on that indictment.

U. S. Rev. Stat. §§ 753, 766, U. S. Comp. Stat. 1901, pp. 592, 597; 15 Am. & Eng. Enc. Law, p. 212; 21 Cyc. Law & Proc. p. 349; Slack v. Perrine, 9 App. D. C. 128; Palmer v. Thompson, 20 App. D. C. 273; Cox v. Hakes, L. R. 15 App. Cas. 514; Yates v. People, 6 Johns. 339; Mercein v. People, 25 Wend. 64, 35 Am. Dec. 653; Ex parte Jilz, 64 Mo. 205, 27 Am. Rep. 218; Re Crandall, 59 Kan. 671, 54 Pac. 686; McCatalogue's Case, 107 Mass. 154; Re Crow, 60 Wis. 349, 19 N. W. 713; United States v. Chung Shee, 71 Fed. 277.

Messrs. Daniel W. Baker, Arthur B. Pugh, and Stuart McNamara, for appellee:

The discharge of habeas corpus in removal proceedings under § 1014, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 716, is not *res judicata* of the guilt or innocence of the defendant, nor the validity of the indictment.

Re Macdonnell, 11 Blatchf. 170, Fed. Cas. No. 8,772; Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218; Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; Re Oteiza y Cortes, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; Stevens v. Fuller, 136 U. S. 468, 34 L. ed. 461, 10 Sup. Ct. Rep. 911; Kurtz v. State, 22 Fla. 36, 1 Am. St. Rep. 173; Ex parte Milburn, 9 Pet. 704, 9 L. ed. 280; Com. v. Hall, 9 Gray, 262, 69 Am. Dec. 285; State ex rel. Barbee v. Weatherspoon, 88 N. C. 19; Vorce v. Oppenheim, 37 App. Div. 69, 55 N. Y. Supp. 596; Ex parte Cameron, 100 Ala. 395, 14 So. 97; Re Begerow, 136 Cal. 293, 56 L.R.A. 528, 68 Pac. 773; State v. Garthwaite, 23 N. J. L. 143; Bas-sing v. Cady, 208 U. S. 386, 52 L. ed. 540, 28 Sup. Ct. Rep. 392.
17 L.R.A. (N.S.)

Van Orsdel, J., delivered the opinion of the court:

This is an appeal from an order of the supreme court of the District of Columbia denying the petition of the appellant, John A. Benson, for a writ of habeas corpus. On February 17, 1904, the grand jury of the United States for the District of Columbia found an indictment against appellant and others charging a violation of the provisions of § 5440 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 3676. On the 20th of February, 1904, one William J. Byrnes made a complaint under oath before one Shields, a United States commissioner for the southern district of New York, charging that the petitioner was then in said district, and was the identical person named in the said indictment pending in the District of Columbia, a copy of which indictment, together with a copy of the bench warrant of the supreme court of the District of Columbia issued thereon, were attached to the said complaint. On the same day Shields issued a warrant for the arrest of appellant. The warrant was executed by the United States marshal for the said District, and the appellant was committed to the custody of the marshal until an examination could be had before the commissioner.

On June 7, 1904, the commissioner made an order committing the appellant for trial in the District of Columbia, and remanding him to the custody of the said marshal until a warrant for his removal to the District of Columbia could be issued by the United States district judge for the southern district of New York. On the same day, appellant filed a petition for a writ of habeas corpus in the circuit court of the United States for the southern district of New York. After alleging the circumstances relating to his arrest and commitment, appellant claimed that he was illegally restrained and denied his liberty upon "a written complaint of one William J. Byrnes which sought to charge your petitioner, together with Frederick A. Hyde and others, with a conspiracy to defraud the United States in violation of § 5440 of the United States Revised Statutes. That said complaint was made wholly upon information and belief, and the complainant's belief was stated to be based upon a copy of an indictment against your petitioner, Frederick A. Hyde and others, said to have been found in the supreme court of the District of Columbia at a criminal term thereof, on the 17th day of February, 1904." The petition further charged that the arrest and detention of appellant by order of the United States commissioner was without due process of law, and in violation of the Consti-

tution of the United States, in that the complaint, alleged indictment, and evidence, which constituted the sole authority for appellant's arrest and commitment, charge no crime against the United States, and show no violation by appellant of the provisions of § 5440 of the Revised Statutes or any other statutes of the United States, but show affirmatively that no offense was committed by appellant upon which he could be tried in the District of Columbia. A writ of habeas corpus was allowed on the same day by the circuit court, and also a writ of certiorari directed to the United States commissioner to certify the record in the case before him to the said court. Return was made to each writ, and, on the 28th of July, 1904, the said circuit court ordered the discharge of the petitioner because, in its judgment, it appeared that the appellant was illegally held, for the reason the record before it did not set forth facts tending to establish a conspiracy to commit an offense against the United States. The United States attempted to take an appeal from the order discharging the appellant to the circuit court of appeals for the second circuit. The appeal, however, was dismissed for want of jurisdiction.

No further attempt was made on the part of the officers of the United States to extradite the appellant. On May 26, 1905, the appellant, being found in the District of Columbia, was arrested upon another bench warrant issued under the same indictment. On April 6, 1908, his surety surrendered him in open court, and he was taken in custody by the appellee, the United States marshal for the District of Columbia. Appellant then presented to the supreme court of the District of Columbia a petition for a writ of habeas corpus claiming that his detention was based solely upon the indictment originally found against him, and that this indictment had been finally and conclusively adjudged by the circuit court of the United States for the southern district of New York, having jurisdiction as well of the person of appellant as of the subject-matter of this proceeding before it, to state no crime against the United States; that the judgment of said court concluded the power of the courts of the District of Columbia to hold appellant under said indictment; that appellant was being held to answer an infamous crime upon an indictment which had been declared by a court of competent jurisdiction to be insufficient and invalid, and that he was not again subject to arrest on account of said indictment. Upon hearing, an order was entered in the supreme court of the District of Columbia denying the prayer of appellant.

From that order the case comes here on appeal.

The only question presented for our consideration is whether or not the discharge by writ of habeas corpus of appellant in New York from detention in an extradition proceeding under process issued upon a complaint filed before a United States commissioner to answer an indictment found against him in the District of Columbia forbids his subsequent arrest and detention for the purpose of prosecution in said District upon a bench warrant issued under the same indictment. The United States district court for the southern district of New York had jurisdiction of the matter before it only for the purpose of extradition. It had no greater jurisdiction than was possessed by the United States commissioner who issued the warrant upon which appellant was detained. That warrant was the process upon which appellant was held. It was issued upon a complaint filed before the commissioner. The indictment filed in the supreme court of the District of Columbia, and the bench warrant issued thereon, were not the process upon which appellant was arrested in New York, but the evidence upon which the complaint was based. The indictment found against the appellant in the District of Columbia furnished the basis upon which he could there be arrested and tried for the offense charged. There alone could the merits of the case, the guilt or innocence of the accused, be determined. The proceeding in New York was based solely upon the complaint filed before the commissioner. It had nothing to do with the merits of the case, the guilt or innocence of appellant. It related solely to the question of his removal. The proceedings in New York were merely preliminary and ancillary to the proceedings in the District of Columbia.

If apprehended outside of the District of Columbia, the intervention of two processes was necessary to hold appellant for trial. One process was issued upon the complaint filed in New York, which was for the sole purpose of accomplishing his removal to the District of Columbia; the second process was the bench warrant issued upon the indictment under which he could alone be held in the District of Columbia after the process for removal had served the purpose of bringing him here. In fact, in this case only the second process was used. Appellant was arrested in the District of Columbia on a bench warrant issued upon the indictment subsequent to his discharge in New York. The intervention of the first process was not necessary to bring him within

the jurisdiction of the trial court; hence, that court will not stop to inquire how appellant came before it, provided the process under which he is immediately held is sufficient to give it jurisdiction. Any action that may have been taken under the first process will have no more effect upon the jurisdiction of the trial court than would the action of a committing magistrate. In both cases they are preliminary proceedings to bring persons accused of crime within the jurisdiction of the court empowered to try the charge on its merits. Hence, the discharge of appellant from the process under which he was held in the proceedings in New York has nothing to do with the process upon which he was subsequently arrested and held for trial in the District of Columbia. The inquiry into the sufficiency of the indictment was for the sole purpose of ascertaining if it set forth evidence upon which the complaint before the commissioner in the removal proceedings could be sustained; in other words, whether the indictment charged a crime against the United States, or, on its face, disclosed probable cause for the removal of appellant to the District of Columbia for trial.

It should be remembered that the question of whether or not appellant should be removed was not one to be determined alone from the indictment. It was to be decided upon the evidence offered in support of the complaint in the removal proceedings. The indictment was but a piece of evidence that might or might not be decisive of the issue of extradition. In fact, an indictment was not necessary at all in order to secure the removal of appellant. *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218; *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84; *Pierce v. Creecy*, 210 U. S. 387, 52 L. ed. 1113, 28 Sup. Ct. Rep. 714. As was said by the court in *Greene v. Henkel*, 260: "The finding of an indictment does not preclude the government, under § 1014, U. S. Comp. Stat. 1901, p. 716, from giving evidence of a certain and definite character concerning the commission of the offense by the defendants in regard to acts, times, and circumstances which are stated in the indictment itself with less minuteness and detail, and the mere fact that in the indictment there may be lacking some technical averment of time, or place, or circumstance, in order to render the indictment free from even technical defects, will not prevent the removal under that section, if evidence will be given upon the hearing which supplies such defects and shows probable cause to believe the defendants guilty of the commission of the offense defectively stated in the indictment."

ment." It thus clearly appears that the indictment is used only as evidence in support of the complaint in the removal proceedings.

It is well settled that a district judge of the United States may look into an indictment before issuing a warrant for the extradition of a prisoner to determine whether or not it charges a crime against the United States for which the accused may be tried in the jurisdiction where the indictment was found. Quoting further from the opinion in *Greene v. Henkel*, supra: "We do not, however, hold that, when an indictment charges no offense against the laws of the United States, and the evidence given fails to show any, or if it appear that the offense charged was not committed or triable in the district to which the removal is sought, the court would be justified in ordering the removal, and thus subjecting the defendant to the necessity of making such a defense in the court where the indictment was found. In that case there would be no jurisdiction to commit, nor any to order the removal of the prisoner." This simply announces a well-settled doctrine that, where the indictment alone is relied upon as evidence in the removal proceeding, and it fails to charge a crime against the United States, a warrant for the removal of the accused should not be issued; but it will be observed that the court distinctly limits such interpretation of the indictment to the removal proceedings, and does not extend it to subsequent proceedings under the same indictment in the court having jurisdiction to try the case on its merits. In other words, such a finding concludes the proceedings for removal, but not for trial.

In the case of *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102, where it was sought to remove relator from the state of Michigan to the District of Columbia to answer to an indictment there found, Judge Dillon said: "Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed an offense not committed or triable in the district to which the removal is sought, would misconceive his duty and fail to protect the liberty of the citizen." It will be observed that the learned jurist carefully used the expression, "when the only probable cause relied on or shown was the indictment," implying not only that the indictment in such cases is used merely as evidence in support of the charge made in the complaint, but that other or additional evidence might be adduced in support of such charge. In that case extradition was re-

fused because of a failure of the evidence to support the complaint. We think the authorities will sustain our view that the certified copy of the indictment in this case could only be used as evidence in support of the charge made against appellant in the complaint filed in New York, and that the process upon which he was there arrested and held, and from which he was discharged, was issued upon the complaint, and not upon the indictment.

It is not the policy of our criminal jurisprudence that an accused shall be permitted to escape trial on the merits of the charge against him through a mere defect in the preliminary proceedings leading up to the trial. No discharge by writ of habeas corpus will operate as a bar to further proceedings in the same cause, unless the inquiry on the petition for the writ involves a full investigation into the merits of the case, the guilt or innocence of the accused. This is the distinction in the leading case relied on by counsel for appellant, *United States v. Chung Shee*, 71 Fed. 277. Chung Shee was the wife of a Chinese merchant in Portland, Oregon, who sought to enter the United States under the Chinese exclusion act. She was arrested, tried, and an order issued for her deportation. While she was held under said order she filed a petition for a writ of habeas corpus, and, on hearing, was discharged from detention. Subsequently she was arrested in Los Angeles, California, under the same act, and pleaded her former discharge as a bar to that proceeding. The court held her former discharge was a bar to further prosecution on the same charge, on the ground that her guilt or innocence had been determined by a competent tribunal, and that the inquiry in the original habeas corpus proceeding, of necessity, involved a full investigation of the merits of the case. The learned judge, in his opinion, clearly distinguishes the difference between the discharge of a prisoner upon habeas corpus in a preliminary matter and a discharge on the merits of the case, when he said: "The further argument of the government in this connection is . . . that the decision of a collector denying an alien admission into this country is similar to an order, upon preliminary examination, discharging or committing a person accused of crime. With this argument, we cannot agree. The order of a committing magistrate does not purport to determine the question of innocence or guilt, and therefore the discharge of the accused, whether at the preliminary examination or a review upon habeas corpus, does not, of course, bar subsequent inquiry, indictment, or trial. It was to this situation that the supreme court of South Carolina re-

ferred in the case of *State v. Fley*, 2 Brev. 338, 4 Am. Dec. 583, . . . where the court declared that it would be monstrous to say that the discharge of a prisoner upon habeas corpus shielded him from subsequent prosecution. The determination, however, of an alien's claim to enter the United States is wholly different. When the power and duty of so determining are committed to any officer, no matter whether such officer belongs to the executive or judicial branch of the government, the decision of such officer is an adjudication of the right involved, namely, the right of the alien to enter the country, and such adjudication is final, unless the law expressly or impliedly provides for an appeal from, or review of, the decision." This case clearly presents the distinction. If the inquiry on a petition for the writ of habeas corpus involves an investigation of the merits on commitment after trial by a court with full jurisdiction to investigate the question of the guilt or innocence of the accused, it is equivalent to a trial on the merits; it is a bar to any further proceedings on the same charge; but that is not the case at bar. The New York court had no power to pass upon the merits of the case. Its jurisdiction was limited to the mere independent, preliminary question of removal.

The rule that, when a discharge has been granted on writ of habeas corpus, the issues of law and fact involved are *res judicata*, and that the person so discharged cannot lawfully be again arrested for the same cause, has no application when the discharge has been of a prisoner sought to be extradited. In the case of *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173, the appellant Kurtz was a fugitive from New York. He was arrested in Florida, and released upon a writ of habeas corpus. Later he was re-arrested, and he sued out another writ of habeas corpus. The court refused to discharge him on this writ. On appeal, the supreme court, in its opinion, said: "Counsel also insists that the former discharges of Kurtz by the judge below had the force and effect of *res judicata*, and that he could not be arrested a second time for the same charge. We have examined the numerous authorities submitted by counsel as well as others referred to in the text-books, and, while it seems that in those states where a judgment of a court in a habeas corpus proceeding discharging or remanding to custody a prisoner is final, and a writ of error is allowed thereon, that the principle of *res judicata* is applicable, yet in none of these cases was the question of extradition involved. No case brought to our attention has decided that the principle applies where the discharge of the prisoner was from the custody of an officer holding him by virtue

of a warrant of a resident governor, upon the requisition of the governor of the state from which he had fled. They are all cases where the parties were restrained of their liberty for alleged crime by some local state law, or seeking discharge from the Army or Navy, both of which required a hearing and inquiry into evidence and a judicial determination of the facts and the law. The courts in a habeas corpus proceeding of this kind, where the prisoner is arrested for extradition, cannot go into a trial of the merits of the cause. The proceeding is only an initiatory step to a trial in another state. As to the guilt of the prisoner, they are not allowed to inquire. Their judicial powers are limited to a determination on the sufficiency of the papers and the identity of the prisoner. If the prisoner is discharged, it will not absolve him from being rearrested on a new warrant issued by the governor." To the same effect are the cases of *Com. v. Hall*, 9 Gray, 262, 69 Am. Dec. 285, and *Bassing v. Cady*, 208 U. S. 386, 52 L. ed. 540, 28 Sup. Ct. Rep. 392.

It is also well settled that a discharge upon a writ of habeas corpus from imprisonment on process issued upon an indictment is a bar to future arrest on the same process, but not to arrest and detention upon another process issued upon the same indictment. In the case of *Ex parte Milburn*, 9 Pet. 704, 9 L. ed. 280, Milburn was imprisoned in the jail of the county of Washington, on a bench warrant issued by the circuit court of the United States for the District of Columbia to answer an indictment pending against him. He had been arrested on a former capias issued upon the same indictment, on which he gave a recognizance for his appearance. He did not appear, and the recognizance was forfeited; and a scire facias was issued against him and his sureties. At the same term another writ of capias was issued against him, which was returned *non est inventus*. Later, another writ of capias was issued, on which he was arrested, and from which arrest he was discharged on a writ of habeas corpus by the chief justice of the circuit court on the ground that the writ was improperly issued. Subsequently a bench warrant was issued by order of a majority of the judges of the circuit court, on which he was arrested and placed in custody. He applied for a writ of habeas corpus to the Supreme Court of the United States, which was refused. Mr. Justice Story announced the opinion of the court on this feature of the case in one sentence, as follows: "A discharge of a party, under a writ of habeas corpus, from the process under which he is imprisoned, discharges him from any further confinement under the process; but not under any other process, which may be issued

against him, under the same indictment." This conclusively disposes of the case before us. There Milburn was discharged on a writ of habeas corpus from the preliminary process under which he was imprisoned to await trial on an indictment pending against him. Here appellant was discharged on a similar writ from a process issued upon a complaint in New York in a preliminary proceeding to subject him to trial on an indictment found in the District of Columbia. There Milburn was arrested and lawfully held upon another process issued against him upon the same indictment. Here appellant was arrested and is being tried upon another process issued against him upon the same indictment.

It may be suggested, however, that the indictment in Milburn's Case, and the other cases here cited, were not condemned for failure to charge a crime, and in that particular they are not in point with the one here under consideration. To hold, as was done in Milburn's Case, that the court having jurisdiction of the subject-matter of the charge contained in the indictment has power to try the accused on process issued thereon, irrespective of a former discharge by writ of habeas corpus on another process in a preliminary proceeding, is equivalent to a declaration that the court ordering the discharge under such circumstances has no power to place any limitation whatever upon the jurisdiction of the court trying the case on its merits. We think the rule a sound one, and, applying it to the case at bar, the trial court in the District of Columbia can proceed without regard to the action taken in New York in the removal proceedings.

It, therefore, being well settled that a discharge on habeas corpus prior to trial is not a bar to a subsequent indictment and trial upon the merits by a court having jurisdiction of the subject-matter of the offense charged (*State ex rel. Barbee v. Weatherspoon*, 88 N. C. 19; *Ex parte Cameron*, 100 Ala. 395, 14 So. 97), it would certainly be extraordinary to hold that a court has power to indict and try an accused after discharge by habeas corpus in a preliminary proceeding, but that it could not try the accused on the same indictment pending against him at the time of his discharge. Such a declaration would be anomalous, for the same objection that could be made to an indictment in existence at the time of the discharge of the accused could be interposed to any other indictment charging him with the same offense; hence, the result would be that the discharge would operate as a bar to any future prosecution for the same offense. It was beyond the jurisdiction of the court in New York to discharge appellant for mere formal de-

fects in the indictment. *Pierce v. Creecy*, 210 U. S. 387, 52 L. ed. 1113, 28 Sup. Ct. Rep. 714. He issued the writ on the broad ground that the indictment was bad in substance, yet counsel for appellant insist that he cannot be tried on that indictment, but may be tried on another indictment containing the same charge, however slightly changed in verbiage. Any other indictment containing the same charge must of necessity, be the same in substance as the one condemned, hence it is hard to conceive just how another indictment could be drawn containing the same charge that would not be subject to a similar objection.

Equally anomalous is the contention of counsel for appellant that the ruling of the circuit judge in New York is final and operates as a bar to further proceedings upon the same indictment. If that contention is correct, the reverse would be true, that, where an indictment, in extradition proceedings, has been sustained by the court ordering removal, the accused would be estopped from questioning the sufficiency or the validity of the indictment in the court having jurisdiction of the subject-matter of the offense charged. The mere statement of the conclusion to which the reasoning would lead refutes itself. As said by Mr. Justice Peckham in *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218: "It follows, also, that a decision granting a removal under the section named [Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716], where an indictment has been found, is not to be regarded as adjudging the sufficiency of the indictment in law as against any objection thereto which may subsequently be made by the defendants." Of course, the right of objection to the sufficiency of the indictment is reserved to the defendant in the court having jurisdiction to try the accused for the offense charged therein, and it logically follows that, if the decision of the judge granting the requisition is not conclusive upon the defendant, it cannot for the same reason, be conclusive upon the government.

The judgment refusing the writ is affirmed with costs, and it is so ordered.

MICHIGAN SUPREME COURT.

KATE SCHWARTZ, Admr., etc., of John Fravert,
v.

MINERAL RANGE RAILROAD COMPANY, Impleaded, etc., Plff. in Err.

(—Mich.—, 116 N. W. 540.)

Railroad—Injury at crossing—negligence.

One who walks beside a load of wood towards a railroad crossing on a stormy day

when the view of the track is obscured and sound diminished, without taking any precaution to ascertain whether or not a train is approaching from the opposite side, is guilty of negligence which will preclude recovery for his death in case he is killed by a train from that direction; and it is immaterial that, if trains were on time, the next one would approach on the side on which he was walking, where one was due to pass in the opposite direction but a short time previously.

(May 26, 1908.)

Case Note. — *Right of one about to cross railroad track to rely upon train schedules.*

One may not implicitly rely upon his knowledge that no train is scheduled to pass at the time he attempts to cross a railway track at a public crossing, but the question whether one is, as a matter of law, guilty of contributory negligence, or whether it is a question for the jury, must depend largely upon the peculiar facts and circumstances of each case.

As a railroad track is a known place of danger, and trains are liable to be run over it out of schedule time, it is the duty of one, before crossing it, to look and listen for approaching trains, irrespective of whether he knows that one is or is not due at the time. *Tucker v. Chicago & G. T. R. Co.* 122 Mich. 149, 80 N. W. 984; *Hinkle v. Richmond & D. R. Co.* 109 N. C. 472, 26 Am. St. Rep. 581, 13 S. E. 884; *Carlson v. Chicago & N. W. R. Co.* 96 Minn. 504, 4 L.R.A. (N.S.) 349, 113 Am. St. Rep. 655, 105 N. W. 555; *Toledo, W. & N. R. Co. v. Jones*, 76 Ill. 311; *Cordell v. New York C. & H. R. R. Co.* 75 N. Y. 330; *Salter v. Utica & B. River R. Co.* 75 N. Y. 273, reversing 13 Hun, 187; *Howard v. Northern C. R. Co.* 17 N. Y. S. R. 190, 1 N. Y. Supp. 528.

So, one is guilty of contributory negligence where, having an unobstructed view of a railway track, but relying upon the fact that no train is scheduled from one direction, he looks only in the opposite direction, and is struck by an unexpected train. *Nixon v. Chicago, R. I. & P. R. Co.* 84 Iowa. 331, 51 N. W. 157; *Toledo, St. L. & K. C. R. Co. v. Cline*, 135 Ill. 41, 25 N. E. 846, reversing 31 Ill. App. 563.

Or where, having stopped before going upon the tracks at a point where he had an unobstructed view in the direction from which the train that struck him came, he looked in the opposite direction, from which he knew a regularly scheduled train was due, notwithstanding he did not see or hear the approaching train. *Hartman v. Harris*, 182 Pa. 172, 37 Atl. 942.

Or where, without looking, he drives upon a railway track at a point where there is a clear view of the track for a long distance, and where he may safely stop, relying upon the fact that no train is scheduled to pass, and is struck by a train which is behind time.

ERROR to the Circuit Court for Ontonagon County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of her intestate. Reversed.

The facts are stated in the opinion.

Messrs. A. B. Eldredge and A. E. Miller, for plaintiff in error:

The duty to look and listen is not fulfilled by looking at a point 197 feet away from the railroad track, when at a distance of 133 feet a clear and unobstructed view may be obtained.

Underhill v. Chicago & G. T. R. Co. 81 Mich. 43, 45 N. W. 508; Haas v. Grand Rapids & I. R. Co. 47 Mich. 401, 11 N. W. 216; Brady v. Toledo, A. A. & N. M. R. Co. 81 Mich. 617, 45 N. W. 1110.

Dascomb v. Buffalo & State Line R. Co. 27 Barb. 221, affirmed by court of appeals without opinion. See 24 How. Pr. 609.

Or where, at a time when he knows that no scheduled train is due, without stopping, looking or listening he drives upon a railway track at a public crossing, where he has an unobstructed view of the track long before reaching it and is struck by an extra train which gives the usual crossing signals. Vincent v. Morgan's L. & T. R. & S. S. Co. 48 La. Ann. 933, 55 Am. St. Rep. 287, 20 So. 207.

Or where, approaching a railway crossing, before driving thereon, he has a clear view of the track for upwards of $\frac{3}{4}$ of a mile, and drives thereon without looking and listening for approaching trains, notwithstanding he is familiar with the schedule time of trains, and knows that none is due at that time. Payne v. Chicago & N. W. R. Co. 108 Iowa, 188, 78 N. W. 813.

Or where he drives upon a railway track at an obscured railroad crossing relying upon the fact that he knows that no scheduled train is due, and is struck by an extra engine. Durbin v. Oregon R. & Nav. Co. 17 Or. 5, 11 Am. St. Rep. 778, 17 Pac. 5. The court said that the fact that he knew that no regular train was due for some time did not relieve him of the duty of observing care and prudence and using his faculties when he approached a railroad track where the view was obscured.

Or where, without looking for approaching trains, and relying on the fact that a scheduled train has just passed, he drives upon the track at a country crossing where he has an unobstructed view of the track for nearly 2 miles, and is struck by an extra train. Jackson v. Mobile & O. R. Co. 89 Miss. 32, 42 So. 236.

Or where he attempts to drive cattle over a private crossing after two scheduled trains have passed, without stopping to look or listen for other trains, assuming that no other trains will be passing at that time. McGill Bros. v. Minneapolis & St. L. R. Co. 113 Iowa, 358, 85 N. W. 620.

Or where he drives upon a railway track without looking for approaching trains, a 17 L.R.A. (N.S.)

A person familiar with a railroad crossing, when approaching the same, is under the highest possible obligation to observe such precautions as are needful to avoid a collision.

Shufelt v. Flint & P. M. R. Co. 96 Mich. 327, 55 N. W. 1013; Houghton v. Chicago & G. T. R. Co. 99 Mich. 308, 58 N. W. 314; Jensen v. Michigan C. R. Co. 102 Mich. 176, 60 N. W. 57; Vreeland v. Cincinnati, S. & M. R. Co. 109 Mich. 585, 67 N. W. 905; Tucker v. Chicago & G. T. R. Co. 122 Mich. 149, 80 N. W. 984; Britton v. Michigan C. R. Co. 122 Mich. 359, 81 N. W. 253; Phillips v. Detroit, G. H. & M. R. Co. 111 Mich. 274, 66 Am. St. Rep. 392, 69 N. W. 496; Stewart v. Michigan C. R. Co. 119 Mich. 91, 77 N. W. 643.

regularly scheduled train having just passed, relying upon a known rule of the railway company that trains shall not follow each other within ten minutes, and is struck by an extra train running in violation of such rule. Bush v. Northern P. R. Co. 62 Kan. 709, 64 Pac. 624.

Or where, without looking, he attempts to cross tracks near a railway station, and is struck by an engine, he being familiar with the fact that engines are passing and repassing at all times of the day or night, notwithstanding he is probably familiar with the time of the passing of regular trains, and none is due at the time. Wilcox v. Rome, W. & O. R. Co. 39 N. Y. 358, 100 Am. Dec. 440.

So, it was held in Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125, that the trial court properly directed a verdict for the railway company where one who had an unobstructed view of the railroad track for a considerable distance before reaching the crossing might have seen an approaching train had he looked; and the fact that it was an extra train with which he collided, and no scheduled train was due at that time, would not relieve him of the duty of exercising care in driving upon the track.

And the fact that the necessary crossing signals were not given will not, under such circumstances, relieve one of contributory negligence in failing to exercise due care to discover an approaching train. Jackson v. Mobile & O. R. Co.; Toledo, St. L. & K. C. R. Co. v. Cline; Schofield v. Chicago, M. & St. P. R. Co.; Nixon v. Chicago, R. I. & P. R. Co.; and Dascomb v. Buffalo & State Line R. Co.—supra.

A complaint is bad which alleges that one familiar with the schedule time of trains looked and listened carefully for approaching trains before driving upon a railway track at a public crossing, where he was struck by an extra train running at the rate of 60 miles an hour, which failed to give the usual crossing signals, as it fails to show that the plaintiff was free from contributory negligence, and that he would have

Mr. P. H. O'Brien, for defendant in error:

The question of contributory negligence was for the jury.

Coffee v. Pere Marquette R. Co. 139 Mich. 378, 102 N. W. 953; *Guggenheim v. Lake Shore & M. S. R. Co.* 66 Mich. 150, 33 N. W. 161; *Barnum v. Grand Trunk Western R. Co.* 137 Mich. 580, 100 N. W. 1022; *Breckenfelder v. Lake Shore & M. S. R. Co.* 79 Mich. 563, 44 N. W. 957; *Line v. Grand Rapids & I. R. Co.* 143 Mich. 163, 106 N. W. 719; *Wilbur v. Michigan C. R. Co.* 145 Mich. 344, 108 N. W. 713; *Potter v. Pere Marquette R. Co.* 140 Mich. 362, 103 N. W. 808; *Mynning v. Detroit, L. & N. R. Co.* 64 Mich. 94, 8 Am. St. Rep. 804, 31 N. W. 147; *Schremms v. Pere Marquette R. Co.* 145

Mich. 190, 116 Am. St. Rep. 291, 108 N. W. 698; *Staal v. Grand Rapids & I. R. Co.* 57 Mich. 239, 23 N. W. 795; *Corbs v. Michigan C. R. Co.* 144 Mich. 73, 107 N. W. 892; *Haines v. Lake Shore & M. S. R. Co.* 129 Mich. 475, 89 N. W. 349.

Blair, J., delivered the opinion of the court:

This is an action for the negligent killing of one John Fravert on the 3d of February, 1904. The accident occurred on the Chicago, Milwaukee, & St. Paul Railway where the same crosses a public highway known as the Rockland road, running from Ontonagon to Rockland. This highway at the point in question crosses the railway at an angle of about 65 degrees, the highway running

heard such signals if they had been given, and that they would have enabled him to avoid the collision; or that the collision was due to the omission to give such crossing signals. *Baltimore & O. S. W. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479.

But, as against a demurrer, a complaint states a cause of action, and does not show contributory negligence on the part of the plaintiff, where it alleges that the deceased approached a dangerous railroad crossing, where his view of the track was obstructed, knowing that a regularly scheduled train had recently passed, and was struck by an extra train following it, which failed to give the statutory crossing signals; and that a stationary alarm bell at the crossing did not ring as it usually did, upon the approach of such train; and that the deceased approached the crossing thereby lulled into a sense of security. *Southern Indiana R. Co. v. Corps*, 37 Ind. App. 586, 76 N. E. 902.

The following cases hold that the question of contributory negligence, under the facts disclosed, is for the jury:

Where, even though the approach is made at a time when no train is expected to pass, the view of the track is obscured and the road narrow, and the train inflicting the injury approaches without giving the usual signals, if the proper signals would have prevented the accident. *Randall v. Richmond & D. R. Co.* 104 N. C. 410, 10 S. E. 691.

Where one drove upon a railroad crossing at a point where his view of the track was obstructed, at a time when he knew no train was due, and was struck by a regular train running at a high rate of speed, which was three and a quarter hours behind its usual schedule time, and there is a conflict of testimony as to the care exercised by him before driving upon the track as well as whether the proper crossing signals were given. *Louisville & N. R. Co. v. Lucas*, 30 Ky. L. Rep. 359, 98 S. W. 308.

Where it appears that one had reason to believe that no train was due, and, before driving upon a railway crossing in a busy city street, where his view of the track was obstructed, he listened for approaching trains

and heard nothing, and, when upon the track, was struck by a train running at a high rate of speed, two hours behind its schedule time, without giving any warning of its approach. *Guggenheim v. Lake Shore & M. S. R. Co.* 57 Mich. 488, 24 N. W. 827, on subsequent appeal, 66 Mich. 150, 33 N. W. 161. The court said this certainly tended to show that the deceased exercised the use of his sight and hearing, and ordinary care at least,—especially as no train was then due by the schedule time of the company.

Where one, when no scheduled train was due, slowed up his horse and listened for approaching trains before driving upon a railway track at a much-frequented village-street crossing, where his view of the track was obstructed by freight cars standing upon a siding, and was injured by his horse taking fright at an extra train, which was running at an excessive rate of speed, without giving any signal of its approach. *Louisville & N. R. Co. v. Crominarity*, 86 Miss. 464, 38 So. 633.

Where a woman drove slowly toward a railway track, holding a sleeping babe upon her lap, and listening for approaching trains, and, being aware that no scheduled train was due from the north, did not look in that direction until she was upon the track, when she was struck by a special train running at the rate of 50 miles an hour, which did not give any signal of its approach, the only point where she might have obtained a view of the track, which ran through a deep cut, before driving upon it, being some distance therefrom, and, had she stopped at such point, the train would not then have been within her range of vision. *Cincinnati, N. O. & T. P. R. Co. v. Farra*, 13 C. C. A. 602, 31 U. S. App. 306, 66 Fed. 496. The court said: "The train with which she did collide turns out to have been a special train, moving at extraordinary speed. There was therefore no special reason to apprehend a train from . . . [that direction] at that hour."

Where one, driving along a road that twice crossed the same track in a short distance, before reaching the first crossing, looked and saw no train, and, when ap-

northwesterly and southeasterly; the railway at the point of crossing running almost due east and west. The crossing is about 1 mile east of the village of Ontonagon, and almost immediately west the railway begins to curve, and descends a sharp grade into the village of Ontonagon. One thousand one hundred and forty feet east of the center of the crossing is a whistling post, and at this whistling post the railway has commenced to curve quite sharply to the southeast. On the east side of the highway, 197 feet from the railway track, is a barn. On the southerly side of the railway, 56 feet south of the south rail, and extending 1,080 feet from the crossing easterly, was a high board snow fence, 7 feet 6 inches in height,

with an average space between the boards of about 2½ inches; the widest spaces being 5½ inches. Some of the spaces were only an inch. The highway sloped down to the railway track, and at a point 96 feet south was in its natural condition 3½ feet higher than at the crossing. At the time in question there was snow upon the ground to a depth of 2 or 3 feet in the traveled part of the highway. The snow thrown out by the snowplows of the railroad company into the highway at and near the crossing had been thrown upon each side of the highway for a distance of 15 to 20 feet back from the crossing. Its height was in dispute; the witnesses for the plaintiff claiming that it was 6 or 7 feet high, the defendant's wit-

proaching the second crossing, looked again, and, when within 75 or 100 yards therefrom, looked a third time without discovering a rapidly moving train, which was running behind its schedule time, with which he was familiar; and the testimony is conflicting whether the usual crossing signals were given. *Wright v. Cincinnati, N. O. & T. P. R. Co.* 94 Ky. 114, 21 S. W. 581.

It is for the jury to determine whether one driving upon a railway track at a private crossing was negligent, and could, by the exercise of reasonable diligence, have discovered an approaching train, where the usual crossing signals for a nearby public crossing were not given, which would have been heard by him. *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345, 18 S. W. 2. The court said: "There may be evidence sufficient to satisfy a person of ordinary carefulness the track is clear without taking that precaution [to look before attempting to cross it],—as when he knows it is not usual train time, and does not hear the signal he knows it is customary for the company to give and him to hear. A person thus reasoning and acting, it seems to us, cannot, upon principle, be regarded as negligent, even if he does fall short of the measure of vigilance needed to prevent being injured by a passenger train running hours behind time, at an extraordinary rate of speed and without any signal of its approach."

One cannot be said to be guilty of contributory negligence, as a matter of law, by reason of driving upon a railway track at a public crossing at a time when he knew no train was scheduled to pass, and who, before driving upon the track, looked in the direction from which the last train came and saw or heard nothing, but was struck by an engine running at a high rate of speed ahead of a belated train, without giving any warning, and making but little noise, and the approach of which was concealed from his view by a deep cut. *Bower v. Chicago, M. & St. P. R. Co.* 61 Wis. 457, 21 N. W. 536. The court said that he might have well supposed that the regular train has passed, when he looked at his watch and

found it to be after its usual time for passing.

Where a slightly deaf person approached a railway crossing in a wagon producing much noise and following another wagon, his view of the track being obstructed in the direction from which an extra train which struck his wagon came; and he looked in the opposite direction from which he knew the next scheduled train was due, but did not stop before driving upon the tracks, the evidence being in conflict as to whether the usual crossing signals were given,—it was held, in *Continental Improv. Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403, that the trial court correctly instructed the jury that it was for them to determine whether he was guilty of contributory negligence, and that he was required to exercise that degree of care and caution incumbent upon a person possessing ordinary reason and intelligence under the special circumstances of the case, having regard to the particular character of the crossing, and the difficulty of seeing a train approaching from the direction in which this came; and the fact that his hearing was somewhat impaired did not exempt him from the necessity of using the same degree of care required of persons in possession of their ordinary senses or faculties; if the place was dangerous and the approach to it by a train obscured, he should have proceeded with more caution and circumspection than if the crossing was in an open country, and should not venture upon the track without ascertaining that no train was approaching, or, at least, without the use of the means that common prudence would dictate to ascertain such fact. But, as this was not a regular train, or on usual time, the same degree of caution would not be required on his part as it were a regular train and on usual time.

It has been said that the jury may properly consider the fact that the train by which one was killed at a crossing was not running on schedule time, as a circumstance in determining whether deceased, in approaching the crossing, had reason to apprehend danger. *Wrightsville & T. R. Co. v. Gornto*, 129 Ga. 204, 58 S. E. 769.

nesses that it was from 4 to 5 feet. By reason of the removal of the snow from the railroad track, the inclined 96 feet above referred to had, at the time of the accident, been shortened up so that for the last 30 feet it was quite sharp; and the witnesses are all agreed that a loaded team which started down this incline could not be stopped until it had reached the track. The track east of the crossing is in a cut, the south bank of which is about 6 feet above the track at the crossing, and gradually decreases in height to the east end of the snow fence which stands upon it. "It is on a bank about 3 feet above the highway and about 6 feet above the level of the railway track." Defendant's train which struck and killed plaintiff's intestate was due in Ontonagon at 1:35 P. M., and due to leave on its return trip east 1:55 P. M. The accident occurred at 2:05 P. M.

The only witness of the accident testified as follows:

I saw John Fravert that day about a mile on the other side of the crossing, or a mile and a half on the Rockland side of the crossing. I was coming to Ontonagon with a load of hay. John Fravert was hauling wood to Ontonagon with a double team of horses. He had a big load of cord wood. I was behind him. I drove right up pretty close to him, 5 or 6 feet maybe. The team was behind. We stopped once at the barn up there by the crossing. I mean the barn that is near the railroad crossing. It is on the right-hand side as we were going along. We stopped on the railway side of the barn.

Q. What did John Fravert do, if anything, after you stopped there?

A. He changed over onto the left-hand side of the load, and started up, went down to the crossing. Just as he got on the crossing, the train came along and struck him. The train ran into the load, and dragged him down the track, and threw the sleigh off the railroad.

Q. Now, state whether you were listening for a train as you were approaching that crossing.

A. Yes; I was listening for a train. I did not hear any whistle blown or bell rung. I was about 15 or 20 feet from the crossing when the train went by. The snow was piled up pretty high from the barn to the crossing on both sides. . . .

Q. Now, how was the snow with reference to that fence, how high was it?

A. Well, it was piled up pretty high. I think it was up to the top of the fence all right, if it wasn't over. Coming from the barn along the highway, towards the railway, I couldn't see a train until it got to 17 L.R.A. (N.S.)

the crossing. Then I seen it pretty near to the crossing.

Q. Why couldn't you see the train?

A. Well, there was too much snow piled up there. . . . It was a pretty cold day, and he was well bundled up. I didn't notice whether he had his cap down over his ears or not. It was a very cold day. He stopped at the barn two or three minutes anyway, stopped to rest his horses, and then he changed to the other side of the track, of the sleigh, that is nearest on—that is towards the west, the left-hand side—so that the way the train came the wood was between him and the train.

Q. And then he went down to the crossing from that spot without stopping at all?

A. Yes.

Q. The team walking?

A. Yes.

Q. Now, when you say that, on account of the snow, a man couldn't see from the barn across that fence, you mean a man walking in the highway?

A. Yes.

Q. You could have seen from the top of that load of hay if you had looked?

A. Yes; I guess I could. From the top of the load of hay I seen the train when it was about 20 or 25 feet from where the wagon road crosses,—I guess 20 feet,—and then the train was coming towards the crossing about 20 feet from the crossing. . . . At the time that Fravert stopped there, I didn't know what he stopped for. He didn't say what he stopped for.

Q. Now, did you know whether he stopped to rest his horses or not?

A. No; I did not. I had my cap pulled down, but I guess I could hear all right if there was anything to hear. . . .

Q. Mr. Snyder, do you remember whether you looked toward the east that day?

A. I looked both ways.

Q. Did the bell ring, or did it not?

A. No; the bell did not ring.

Q. Did the whistle blow as the train approached from the east?

A. No; the whistle didn't blow. I didn't hear it blow.

Q. Mr. Snyder, you weren't paying any attention to the whistle or bell were you?

A. If the whistle blew, I was right there. I would have heard it.

Q. You weren't paying any attention to it, were you, up where you could see?

A. Well, I couldn't see much that day. It was pretty stormy.

Q. You weren't paying any attention, were you?

A. O, yes; I was paying a little. I was kind of expecting the train to come along.

Q. You weren't paying any particular

attention as to whether that bell rang or the whistle blew, were you?

A. I was right there. If it blew, I would have heard it.

It was a stormy day, and the snow was drifting with the wind, although it was not actually snowing.

The fireman testified: "I stopped cleaning the window as soon as I saw the load of wood. I think we were about 200 feet from the crossing then. We had been going through a snowbank, and the plow had been throwing snow back against the window, so that it was impossible to see ahead if you did not keep the snow off."

The engineer testified: "It was not snowing any. Of course, it was windy, and the wind was drifting the snow, so that I was not able to see the crossing ahead until I got a clear rail. A bank of snow extended up to within 200 feet of the crossing, and the only time I had a view of the crossing would be from a point 200 feet from it. . . . My engine carried a plow. . . . My usual speed over that crossing is from 15 to 18 miles or 20 miles,—say 15 miles an hour; and the reason why I was running at a greater speed than 15 miles an hour was to get through those snowbanks. . . . The snow was drifting quite bad, and my view was pretty badly obscured going through the bank, until we were within 200 feet of the crossing, and we passed that 200 feet in a few seconds."

Defendant's station agent testified: "I know it was a bad day, snowing or blowing. You can't tell whether it snows or blows in this country. It left the atmosphere kind of snowy."

The testimony was in dispute as to whether a man walking north in the highway from the barn could see a train approaching from the east all the way until he reached the line of the snow fence; the plaintiff's testimony indicating that from the snow fence to the track a view could not be had until too late to be of service, but that between the snow fence and barn there were places where a train could be seen and places where it could not be seen. As stated in plaintiff's brief: "A person's ability to see a train approaching that crossing would depend upon his being in a particular spot at the time the train was approaching." It was stipulated that there is a curve east of the crossing on the railway at a distance of 1,080 feet from the crossing, and beyond this curve it is impossible to see the train from the highway. A witness testified that he measured the height of the engine and coaches, and the engine was 12 feet 6 inches from the top of the smokestack to the track. The coaches measured 13 feet 6 inches from the rail to the top of the coach.
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At the close of the testimony, defendant's counsel moved for a view of the premises by the jury, whereupon the following occurred: "Mr. O'Brien: I think that we would be willing to have the jury view the premises, but, on account of the conditions being dissimilar now as to what they were on that day, as far as snow is concerned, winter time then, summer time now, we object to the train running back and forth. Mr. Eldridge: The view would not be of any use unless the court will allow the jury to see the train running back and forth. The court: I shall allow the jury to proceed to view the premises. . . ." The court thereupon took a recess for the purpose of having the jury view the premises, and, after a view of the premises, and of the train going back and forth, the jury returned to the courtroom, and the following proceedings were had: "Mr. Eldridge: We have measured and agreed upon the heights of these two cars that were with us, and the engine, and they are, respectively, the coaches 13 feet, 6½ inches; that was the passenger coach; and 14 feet the baggage car and smoker combined, and the engine 14 feet, 6. That being the height above the rail of each of them. That would make the baggage car 6 inches higher than the Mineral Range car, and the engine higher, but I can't recall how much." At the close of plaintiff's testimony, and at the close of the case, defendant's counsel moved for a verdict in its favor on the ground that, under the undisputed evidence, the plaintiff was guilty of contributory negligence. The same point was made by several requests to charge.

The trial judge charged the jury, among other things, as follows: ". . . And, if you find from the testimony that, if he looked, he could have seen said train in time to avoid his injuries, and you further find from the testimony that he failed to look, then, in that case, it will be your duty to say that he is guilty of contributory negligence which will defeat his recovery in this case. On the other hand, if you find from said circumstances which I have outlined to you, and all the other circumstances in the case, that he did look, but, by reason of the nature of the crossing and the conditions thereabout, he was unable to see the train, and that he took such measures to avoid injuries as a reasonably prudent man occupying his situation under the same circumstances would have taken, then the said John Fravert cannot be said to be guilty of contributory negligence. . . . Every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of negligence unless he approaches it as if it were dangerous. Fravert knew that the crossing where the accident complained of

occurred was a dangerous one. He was bound to know that a train might be approaching, and, if he did not look or listen to ascertain whether one was coming at every place where he could look or listen, but, on the contrary, drove directly down from the barn on the south side of the crossing to the track, and that he did so without ascertaining or using any effort whatever to ascertain whether a train was coming from either direction or both directions, then I charge you, gentlemen of the jury, that John Fravert would be guilty of contributory negligence. In other words, the fact that the train was late did not excuse Fravert from using diligence in ascertaining whether a train was coming from either or both directions upon the day in question. It was his duty to use care and precaution in approaching this crossing,—such care and precaution as a prudent man would use; and that care and precaution imposed upon him the duty to observe and look and listen continually until he reached that crossing, to ascertain, if possible, whether a train was approaching either from Ontonagon, or from the other direction." Under this charge and their own view, the jury must have determined that Fravert looked and listened "at every place where he could look and listen," but, by reason of the nature of the crossing and the conditions thereabout, he was unable to see the train. There was no evidence whatever that decedent looked or listened at any point; and the finding of the jury can only be sustained upon the ground that, in the absence of any testimony as to decedent's conduct in approaching the crossing, the jury would be justified in finding that he took proper precautions to ascertain whether a train was approaching. *Mynning v. Detroit*, L. & N. R. Co. 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147; *Underhill v. Chicago & G. T. R. Co.* 81 Mich. 43, 45 N. W. 508; *Schremms v. Pere Marquette R. Co.* 145 Mich. 190, 116 Am. St. Rep. 291, 108 N. W. 698. But in the case before us there was testimony as to decedent's conduct, showing that, after leaving the barn, he placed himself on the west side of his large load of cord wood, "so that the way the train came the wood was between him and the train," and then went down to the crossing without stopping at all. There is no room for a presumption or inference that he stopped, that he went, at any point, to the east side of his load, or that he looked towards the east at all. All the circumstances required great care. The snow was being drifted and whirled through the air by the high wind, and tended, with the snow fence, to obscure the view of a train approaching from the east. The wind was blowing strongly away from the drivers and

towards the oncoming train, making it more difficult to hear. Midway between the snow fence and the track a steep descent began, during which the team could not be stopped. Without pausing for even a second at the top of the descent or anywhere else, to exercise his senses to the best purpose, either of sight or hearing; without, apparently, taking any precaution whatever against a train from the east,—he drove upon the track. The testimony shows that he knew the time of the trains, that the train which struck him was about due from the west, which adequately explains why he left the east side of his load at the barn and walked upon the west side, where he could see the train if it came from the expected direction. There was no evidence that he was relying upon Snyder to look to the east and warn him, and his conduct was negligent, unless the circumstance that, if the train was on time, it would be coming from the west, excused him from giving any attention whatever to the eastern approach. Considering the short interval between the scheduled arrival and departure of this train, the season of the year, and the locality, decedent was not justified in withdrawing his attention entirely from the east after leaving the barn. *Tucker v. Chicago & G. T. R. Co.* 122 Mich. 149, 80 N. W. 984. We are of the opinion that the defendant's motion for an instructed verdict should have been granted.

Judgment reversed, and new trial granted.

MINNESOTA SUPREME COURT.

ANDREW NELSON, Respt.,

v.

J. B. JOHNSON, Appt.

(104 Minn. 440, 116 N. W. 828.)

Innkeeper — lodging house — theft — liability.

The defendant held out his house, of which he was the keeper, as a hotel in which furnished rooms were to let for a single night or longer time. In the regular course of business he let, without special contract,

Headnote by STARR, Ch. J.

Case Note. — *Furnishing food to guests as an essential characteristic of a hotel or inn.*

Few cases squarely in point with *NELSON v. JOHNSON* have been found, and it is doubtful if many courts, either in this country or in England, would go to the extent the Minnesota court has gone in enforcing the strict liability of the innkeeper against one whose sole business consists in furnishing suitable lodging to the general public indiscriminate-

at stipulated prices, rooms therein for a single night or a longer time, as was desired to all who applied in a fit condition to be received. He kept an office therein, which was in charge of clerks and open at all hours for the reception of guests, in which a register was kept for the guests to inscribe therein their names and addresses. There were not maintained at or in connection with the house any facilities for supplying guests with food, and none was furnished to them by the defendant. Held, that the house was a public hotel, and that the defendant, as keeper thereof, was liable to the plaintiff, a traveler who was a guest therein, for money stolen in the nighttime from him, while he was in his room, without the negligence of either party.

(June 12, 1908)

APPEAL by defendant from a judgment of the Municipal Court of Minneapolis in plaintiff's favor in an action brought to recover for the loss of money stolen from him while occupying a room in defendant's public lodging house. Affirmed.

The facts are stated in the opinion.

Messrs. Veilkanje & Alcott, for appellant:

If the house kept by the defendant is a mere lodging house, then the extraordinary liability of the innkeeper cannot be enforced against him.

Johnson v. Chadbourn Finance Co. 89 Minn. 310, 99 Am. St. Rep. 571, 94 N. W. 874; Beale, Innkeepers & Hotels, 1906, § 15; Lewis v. Hitchcock, 10 Fed. 4; Kelly v. Excise Comrs. 54 How. Pr. 327; Cromwell v. Stephens, 2 Daly, 15; Re Brewster, 39 Misc. 689, 80 N. Y. Supp. 666; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Walling v. Potter, 35 Conn. 183; Wandell, Inns, Hotels, & Boarding Houses, p. 27; Van Zile, Bailments & Carriers, §§ 331, 332; 22 Cyc. Law & Proc. pp. 1070, 1071; 16 Am. & Eng. Enc. Law, 2d ed. p. 508.

The facts that a house is open to all comers, and does a public business, make no difference, if lodging alone is furnished.

Pullman Palace Car Co. v. Smith, 73 Ill. 364, 24 Am. Rep. 258.

Mr. Thomas Kneeland, for respondent:

Holding out the house as a hotel estops any proprietor thereof from thereafter disclaiming that he is running a hotel.

Pinkerton v. Woodward, 33 Cal. 596, 91 Am. Dec. 657; Bullock v. Adair, 63 Ill. App. 30; Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112.

An inn must be a place of rest or lodging for a night.

Bunn v. Johnson, 77 Mo. App. 596; Fruchey v. Eagleson, 15 Ind. App. 88, 43 N. E. 146.

The reason why the law made an innkeeper

ly for hire. Some courts, while following the rule that the furnishing of both food and lodging are essential characteristics of an inn, have held a proprietor liable as an innkeeper though he furnished only lodging, meals being procured at the restaurant in the basement in which he with others was jointly interested; but this was apparently on the theory of estoppel. Other courts have taken a contrary view, where the restaurant was conducted by a third person. A careful examination of the cases seems to indicate the rule to be that the furnishing of food as well as lodging is still an essential characteristic of an inn.

The proprietor of a house, who maintains twenty beds for the accommodation of travelers whom he entertains, without any agreement as to the duration of their stay or as to the terms of their entertainment, but who has no means of cooking food on the premises, food, however, being procured from neighboring restaurants if ordered by his guests, is not entitled to a license to sell intoxicating liquor on the theory that he is an innkeeper, as an innkeeper is one who furnishes both food and lodging. Kelly v. Excise Comrs. 54 How. Pr. 329.

But in Smith v. Scott, 9 Bing. 14, the proprietor of a house in which lodging was offered to all persons for hire for longer or shorter periods, provisions being found and cooked for them if required, was held subject to the bankrupt laws as a hotel keeper, although the provisions so furnished did not

form any general stock of the proprietor, and were set apart as the separate property of each guest. The court seems to make a distinction between the term "hotel" and "inn," treating the former as applying to the mere furnishing of lodging, while the latter is characterized as a place where all necessary entertainment is furnished to travelers for hire. The case, therefore, does not stand up on the broad proposition that one who merely furnishes lodging is an innkeeper.

In Johnson v. Chadbourn Finance Co. 89 Minn. 310, 99 Am. St. Rep. 571, 94 N. W. 874, cited in NELSON v. JOHNSON, the defendant was held responsible as an innkeeper for the loss of the effects of a guest, where he was the proprietor of a building the upper stories of which were fitted up as rooms for guests, in each of which was placed a notice restricting the liability to occupants as provided by the innkeepers' law, and had held himself out to the public at large as furnishing accommodations for all persons for hire, and conducted the business like that of any other large hotel, except that he did not furnish meals to guests, a suitable restaurant being conducted on the first floor by other parties, to which his guests had easy access. While the court expressly said that it did not decide the question whether the defendant would have been liable as an innkeeper had no restaurant been conducted in his building, yet the same line of reasoning is followed as in NELSON v. JOHNSON, and the court seems to have broken away from the

er liable for the loss of his guest's goods in olden time was that the wayfaring guest had no means of knowing the neighborhood or the character of those he might meet with at the inn.

Holder v. Soulbey, 8 C. B. N. S. 263.

Start, Ch. J., delivered the opinion of the court:

The facts in this case, as found by the trial judge, are substantially these: The defendant, on and prior to November 16, 1907, was the keeper of a house for the entertainment of travelers and transient lodgers, known as the "Bridge Square Hotel," in the city of Minneapolis. There was publicly displayed upon the front of the building the name "Bridge Square Hotel," and a sign advertising to the public that furnished rooms were there to let for a single night. There were 36 rooms so to let in the building, in which there was an office for the reception of guests seeking to hire rooms for the purpose of lodging therein. The defendant, in the due and regular course of his business, let the rooms to such persons who were in fit condition to be received therein, and who paid therefor certain stipulated prices, without special contract, for a single night, or such longer period as they might desire, and the persons so hiring the rooms customarily inscribed their names and

addresses in a register kept in the office for that purpose. The defendant employed two clerks to have charge of the office and keep the same open for the reception of such guests at all hours of the day and night. There was not maintained at or in connection with the place any dining room or other place where food was customarily supplied to the lodgers, or to other persons beside the defendant and his family and employees. On the day named the plaintiff, who was then a traveler temporarily sojourning in the city, hired of one of defendant's clerks in the office a room to be used by him for the purpose of lodging therein on the night of that day and the following night, paying therefor the sum of 50 cents. At the time of such hiring he was invited to write his name in the register, and so did, and thereupon a room was assigned to his use, without examination thereof on his part or special contract therefor. While the plaintiff was so occupying the room, and during the night, there was stolen from his clothing therein \$95, without negligence on the part of either him or the defendant. Upon these facts the trial judge found as a conclusion of law that at the time of the loss of the money the defendant and plaintiff stood in the respective relations to each other of common innkeeper and guest, and that the plaintiff was entitled to judgment

old theory that furnishing meals is an essential characteristic of an innkeeper.

And in *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657, defendant was proprietor of a building known as a hotel, which consisted of rooms for the accommodation and entertainment of travelers, in the basement of which defendant and two others conducted a restaurant. The plaintiff sought to hold defendant liable as an innkeeper for the loss of his effects while a guest in the hotel, and it was insisted for the defendant that he was not liable as an innkeeper because the eating department was distinct from the lodging department; but the court held the defendant liable as an innkeeper on the theory that, since he held himself out as keeping a hotel with all the necessary accommodations for the entertainment of his guests, he is now estopped to deny that his profession was false, and that he was not in fact an innkeeper.

But in *Cromwell v. Stephens*, 2 Daly, 15, also cited in *Nelson v. Johnson*, where the proprietor of an eight-story building, the whole of which, except the basement, in which third parties kept a restaurant, was divided into small rooms fitted up for the accommodation of single persons at a fixed price per night, sought an injunction to restrain the city board from enforcing against him a certain water tax imposed upon persons conducting a hotel, he injunction was granted, on the theory that the plaintiff did not conduct a hotel merely because he furnished lodg-

ing to persons for hire, since he furnished no meals for his guests. The court said: "A mere lodging house, in which no provision is made for supplying the lodgers with their meals, wants one of the essential requisites of an inn."

And in *Cochrane v. Schryver*, 12 Daly, 174, 17 N. Y. Week. Dig. 442, where defendant let out rooms in the upper part of his building to lodgers whom he did not supply with meals, but had leased the basement to third parties who kept a restaurant therein as an independent establishment, a doorway giving access from the lodging rooms, it was held the defendant was not an innkeeper so as to give him a lien on the baggage of persons to whom he let rooms, since he merely furnished lodging without meals, "and an inn furnishes both food and lodging to the guests."

In *Lewis v. Hitchcock*, 10 Fed. 4, where the question arose as to the sufficiency of a complaint in an action for penalty for a denial of the privileges of an inn, the court, in defining an inn, used the following language: "To constitute an inn there must be some provision for the essential needs of a traveler upon his journey, viz., lodging as well as food. These two elements of an inn may doubtless be present in very disproportionate degrees, as the needs of the situation may require; but both must in some degree be present to constitute an inn."

against the defendant for \$95. Judgment was so entered, from which the defendant appealed.

The sole question for our decision is whether the facts found sustain the conclusions of law. It is the contention of the defendant that the facts found do not sustain the conclusions of law, because no provision was made in his house for serving meals to his guests. Therefore it was not an inn or hotel, but a mere lodging house, and the extraordinary liability of a common innkeeper was not imposed upon him. The plaintiff's loss was not due to any negligence on the part of the defendant; hence, if he was not an innkeeper, he is not liable for the loss; but, if he was, he is so liable. The question, then, in its last analysis, is: Was the defendant's house a hotel or inn? There is no substantial difference, as to the rights and liabilities of the keepers thereof, between an inn and a hotel; for in this country the legal definition of each is practically the same. If the defendant had furnished his guests with food, his house would have been, without question, an inn, within the present legal meaning of that term. In early days and under primitive conditions it was necessary, in order to bring a place within the legal definition of an inn, and to charge the keeper thereof with liability as such, that lodging, food, drink, and stabling should be furnished to travelers. But, as cities grew, and modes of living, travel, and transportation of persons changed, the legal definition of an inn was modified thereby, and a bar to supply guests with drink and a stable for the care of their horses are now no longer essential requisites of an inn. Why, then, should a dining room, or café or a restaurant, to supply guests with food, be now held an essential requisite of an inn or hotel? The reason for holding that the supplying guests with food is a necessary requisite of an inn has as effectually ceased as it has with reference to the supplying of drink and stabling. On the other hand, the reason for imposing the liability of a common innkeeper upon a hotel keeper who furnishes lodgings only is still just as potent as it ever was for imposing it in any case. Therefore the justice and necessity of enforcing the liability against the proprietor of a house at which no meals are served, but which he holds out to the public as a hotel, and not as a private lodging house, are just as imperative as they would be if meals were served therein.

The reasons for this conclusion cannot be better stated than they were by the learned trial judge in his able and helpful memorandum: "It seems to me impossible to suggest any reason why, upon principle, the extreme degree of liability should or should

not be imposed upon the keeper of a place where the traveling public are offered lodgings, according as he does or does not furnish meals for his lodgers. . . . The need for protection to the traveler's property is incident to his lodging, and not to his eating. It is while he is asleep in his bed, and his personal belongings are unguarded by his own watchfulness, that for the security of his property he needs to invoke the most stringent rules of the law of bailment. Especially in large cities does he need this protection. The exigencies of travel bring him often to unfamiliar places, and at hours and under conditions when investigation is impracticable. He must go for bed and shelter to the place which he finds open for his accommodation, trust himself and his property to a stranger, and accept, practically without opportunity for selection the quarters assigned to him. The rush and turmoil of the city afford to the thief his most attractive field of operation, and the stranger more than others is exposed to his depredations. . . . These considerations lead to the conclusion that the necessities of modern life demand that the extreme degree of responsibility for the property of the guest be applied to the keeper of a place of entertainment for travelers according to the essential features of the relation, and not in fixed adherence to old definitions, or according to the name by which the place is known,—whether 'inn,' 'hotel,' or 'lodging house.'"

It is, however, stated in many of the text-books and encyclopedias that a place which does not furnish the traveler with both lodging and food is not an inn. Nearly all of the adjudged cases cited in support of this proposition rely upon the very interesting opinion of Judge Daly in the case of *Cromwell v. Stephens*, 2 Daly, 15, in which it is stated that a mere lodging house, in which no provision is made for supplying lodgers with their meals, wants one of the essential requisites of an inn. The question at issue in that case was not whether the proprietor of the house was liable to his guests as a keeper of a common inn, but whether the house was a hotel within the meaning of an ordinance fixing water rates for hotels. An examination of the cases cited in that opinion raises a grave doubt whether facilities for furnishing guests with meals was, even at the time the decision was made, an essential requisite of a hotel. However this may be, the question is an open one. Mr. Schouler says: "Whether the utter omission to provide a place for meals on the premises is enough to take a house for transient lodgers out of the legal fellowship of inns is not clearly determined." Schouler, *Bailments*, § 278. The question here under consideration was before this court in the

case of *Johnson v. Chadbourn Finance Co.* 89 Minn. 310, 99 Am. St. Rep. 571, 94 N. W. 874, but was not directly decided, for the reason that there was a restaurant connected with the hotel in question in that case, although it was not owned or controlled by the proprietor of the hotel. The logic of that case, however, leads directly to the conclusion that supplying guests with meals is not now one of the essential requisites of a hotel, in order to charge the proprietor thereof with the liability of a keeper of a common inn; and we so hold.

There is a clear distinction between a mere private lodging house and a hotel where no meals are served. Such a hotel or inn is a house the proprietor of which "holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." The keeper of such a house is bound, without making any special contract therefor, to provide for all to the limit of his facilities, at a reasonable price; but the proprietor of a private lodging house is not bound to receive all who apply, but he has the right to select his guests, contracting specially with each. The facts found in this case clearly justify the conclusion of law that the defendant was liable as the keeper of an inn or hotel.

Judgment affirmed.

MONTANA SUPREME COURT.

BARNEY MCGILLIC, Appt.,

v.

JOSEPH A. CORBY et al., Respts.

(— Mont. —, 95 Pac. 1063.)

Officer — acting — salary.

1. An ordinance providing that any acting mayor shall be entitled to the salary of the mayor is void under a statute providing for an acting mayor, and entitling an acting mayor who shall perform the duties of the mayor for a period longer than sixty days to the mayor's salary.

Municipal ordinance — validity.

2. An ordinance void under a statute existing at the time of its enactment is not validated by amendment of the statute so that it might be validly enacted under the amended law.

Same — validating.

3. An invalid municipal ordinance cannot be validated by a curative act of the legislature.

Municipal officer — compensation — allowance.

4. A municipal council cannot allow compensation to the president of its board for

services rendered as acting mayor, which are not provided for by statute or ordinance.

(June 1, 1908.)

APPEAL by plaintiff from an order of the District Court for Silver Bow County denying an injunction to restrain the payment of salary to an acting mayor. Reversed.

The facts are stated in the opinion.

Mr. T. F. Nolan, for appellant:

The ordinance is inconsistent with the territorial law under which it was passed.

Mont. Comp. Stat. 1887, p. 699; *Parish v. Rogers*, 20 App. Div. 279, 46 N. Y. Supp. 1058; 6 Words & Phrases, 5302, under title "Period;" *Cooley*, Const. Lim. 239; *Ex parte Frank*, 52 Cal. 609, 28 Am. Rep. 642; *Ex parte Kearny*, 55 Cal. 225; *Re Sic*, 73 Cal. 142, 14 Pac. 405; *Ex parte Mansfield*, 106 Cal. 400, 39 Pac. 772.

The ordinance is broader than the statute which authorizes it, and is therefore void.

Whelen's Appeal, 108 Pa. 162, 1 Atl. 88; *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464; *Kemp v. Monett*, 95 Mo. App. 452, 69 S. W. 31.

The ordinance contravenes a legislative act, and is therefore void.

Brooklyn v. Furey, 9 Misc. 193, 30 N. Y. Supp. 349; *Dill. Mun. Corp.* 3d ed. § 366:

Case Note. — *Right of public officer to be paid quantum meruit.*

This note is limited to cases like *McGILLIC v. CORBY*, in which the question is as to the right of the public officer, or person acting as a public officer, to be paid *quantum meruit* for rendering services as such officer, or for performing the duties of the office, where compensation has not been provided by statute. Cases in which a public officer for whom some compensation is provided seeks to recover, in addition, fees for services in connection with his office, but for which no special compensation has been provided, have been excluded, as have also cases involving the right of *de facto* officers to recover salaries.

There is but little authority upon this question. In *Stephens v. Old Town*, 102 Me. 21, 65 Atl. 115, the plaintiff was the *de jure*, but not the *de facto*, superintendent of streets in the city, but was prevented from performing the duties of the office by the city council's wrongful recognition of another person as such officer, who did in fact perform the duties. The plaintiff counted upon a *quantum meruit*, and contended that, even if no stated sum had been established by law for the office, the sum claimed by him was a reasonable sum and what the responsibilities and duties of the office were reasonably worth, but it was held that there was no contractual obligation upon the city to make any compensation, and hence there

State v. Evans, 15 Mont. 542, 28 L.R.A. 127, 48 Am. St. Rep. 701, 39 Pac. 850; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Ex parte Sweetman, 5 Cal. App. 577, 90 Pac. 1069; Horr & B. Mun. Pol. Ord. § 138; East Tennessee Teleph. Co. v. Russellville, 106 Ky. 667, 51 S. W. 308; Re McFarland, 10 Mont. 445, 26 Pac. 185.

Messrs. Edwin S. Booth and William E. Carroll for respondents.

Brantly, Ch. J., delivered the opinion of the court:

Action for an injunction. During certain periods in the years 1906 and 1907 Honorable John MacGinniss, the mayor of the city of Butte, was absent from the city. James Doull, a member of the city council, having been elected president thereof under authority of § 4783, title 3, art. 3, chap. 3, Pol. Code 1895, performed the duties of mayor. He thereupon presented his claim to the city for such services during three periods, to wit: For three days during September, 1906; for fifty-one days covering the time from November 22, 1906, to January 12, 1907; and ten days during April, 1907. On September 11, 1907, the council ordered a warrant drawn for payment to him of \$275.55; this sum being the amount the mayor received during the same period, upon a salary fixed by ordinance at \$2,000 per annum. This action was brought by the plaintiff, a resident taxpayer of the city, to perpetually enjoin the defendants, the mayor, clerk, and treasurer, as disbursing officers of the city, from the issuance and payment of the warrant; it being alleged that it is their intention to issue and pay it, and thus make an unauthorized use of the funds of the city. Upon application, the district court issued an order to defendants to show cause why the relief prayed for should not be granted. In the meantime, and until a hearing could be had, the defendants were restrained from proceeding. At the hearing it was made to appear that the council ordered the payment of the claim under au-

thority of an ordinance of the city passed and approved on June 27, 1888, defining the powers and duties of the mayor, § 10 of which declares: "In the absence of the mayor from the city, or from his inability from any cause to discharge the duties of his office, the president of the council shall exercise all the powers and discharge all the duties of the mayor. In case of absence or inability of the mayor and president of the council, the vice president shall preside and discharge the duties of said president. The president or vice president of the council, while performing the duties of mayor, shall be styled the acting mayor. Any acting mayor shall be entitled to the salary of the mayor." The court thereupon dissolved the restraining order, and denied the injunction. The plaintiff has appealed.

Contention is made by counsel for appellant that the ordinance referred to is void, and furnished no authority under which the defendants could lawfully act. The respondents contend that the ordinance is a valid exercise of power by the city council, under the general laws in force at the time of its enactment; and, further, that, even if it be held to be void, the council may nevertheless lawfully pay to an acting mayor the reasonable value of his services in that behalf. The questions submitted, therefore, are whether the provision of the ordinance quoted is void, and, if so, whether the council may lawfully pay the reasonable value of the services. The ordinance was passed and approved under authority of § 368, chap. 22, div. 5, Comp. Stat. 1887. It is therein declared: "At the first meeting of the council in each year they [the city council] shall proceed to elect by ballot from their number a president and vice president. . . . The president of the council or vice president, while performing the duties of mayor, shall be styled the acting mayor, and acts performed by him while acting as mayor aforesaid shall have the same force and validity as if performed by the mayor. Any acting mayor performing the duties of a

could be no recovery upon a *quantum meruit*. It would seem that, regardless of the reasons stated by the court, it was not a proper case for the application of the principle of *quantum meruit*, as the plaintiff had in fact performed no duties whatever pertaining to the office.

In *Kinnie v. Waverly*, 42 Iowa, 486, it was held that, where neither the duties nor compensation of a city solicitor were prescribed, it was his duty, unless otherwise instructed, to perform such services as the interest of the city might require; and he might recover therefor what they were reasonably worth. In this case a section of the Code provided that the officers of cities should receive such compensation and fees 17 L.R.A. (N.S.)

for their services as the council should, by ordinance, prescribe. Although this decision seems to be contrary in principle to that in *McGilliv v. Conroy*, still the facts of the case are so essentially different that it can hardly be considered authority upon the subject.

There are some cases, like *State ex rel. Sadler v. La Grave*, 23 Nev. 216, 35 L.R.A. 233, 45 Pac. 243, for example, where it has been held that, upon the death or removal of an incumbent of an office, the person succeeding him by statutory or constitutional provision is entitled to the compensation of the office; but these cases do not turn upon the right of the officer to be paid *quantum meruit* for the services rendered.

mayor for a period longer than sixty days shall be entitled to the salary of the mayor." The evident meaning of this provision is that if, during any period longer than sixty days, it became necessary for the acting mayor to perform the duties of the mayor, he should receive compensation for his services, and not only so, but that this compensation should be the salary which otherwise, during the same period, the mayor himself would have received. If he served for a period of sixty days or less, he was not entitled to compensation, the apparent purpose being that absence or disability of the mayor from whatever cause should not add to the expense of administration, and therefore, that, in case of absence or disability for a period longer than sixty days he should draw no salary, but for such period it should go to the acting mayor. In enacting the ordinance the council proceeded upon the theory that it had the authority, under the statute, to appropriate the salary of the mayor to compensate the acting mayor whenever the latter was absent or disqualified, whether for a longer or shorter period than sixty days; for the language is, "any acting mayor shall be entitled to the salary of the mayor," omitting entirely the limitation imposed by the statute under the authority of which it was enacted. The ordinance is inconsistent with and directly contravenes the provisions of the statute, in that the statute did not authorize any provision for compensation for periods of sixty days or less, and in that it deprived the mayor of his compensation without warrant of law. It is therefore void. "Statute law and by-laws are intended to meet different wants and exigencies, and to serve different purposes. The former, when general in its nature and operation, is intended to furnish a rule for the government of the people of the state everywhere. The latter, made by the corporation under derivative authority, are local regulations for the government of the inhabitants, or the regulation of the local concerns of the incorporated place; and of course they must be void, unless specially authorized by the charter or organic act of the corporation, whenever they are repugnant to, or inconsistent with, the general law of the land. No implied power to pass by-laws, and no express general grant of the power, can authorize a by-law which conflicts with the statutes of the state, or with the general principles of the common law adopted or in force in the state." 1 Dill. Mun. Corp. § 366. Much less can an ordinance which directly contravenes the provision of the law creating the municipality be held to be valid. Since the ordinance was void at the time of its enactment, it was void for all time; for, though

the law covering the same subject has been changed, as will be observed by an examination of § 4783, *supra*, and does not now contain any provision on the subject of compensation of the acting mayor, this does not affect in any wise the validity of the ordinance. The change in the organic law could not give it validity. Nor was it given validity by any provision in § 5035, Pol. Code, 1895. This section is not curative in character, but was intended simply to preserve the *statum quod* of all municipal corporations in existence at the time of the adoption of the Code of 1895. Even if it be held to be a curative provision, it could not give life to what had no life, nor render valid that which had no validity. *Re McFarland*, 10 Mont. 445, 26 Pac. 185; *State v. Evans*, 15 Mont. 539, 28 L.R.A. 127, 48 Am. St. Rep. 701, 39 Pac. 850; *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82; *Ex parte Sweetman*, 5 Cal. App. 577, 90 Pac. 1069; *Horr & B. Mun. Pol. Ord.* § 138.

May the defendants, as disbursing officers of the city, lawfully pay the allowance on the theory that Doull, having performed the services, is entitled to what they are reasonably worth? This query must also be answered in the negative, unless there be some provision of the municipal act itself, or some ordinance enacted under authority granted by it, permitting payment to be made. The right of a public officer to compensation for the performance of duties imposed upon him by law does not rest upon contract, but is incident to the right to hold office; and, unless compensation is allowed by law, he may not lawfully demand payment as upon a *quantum meruit* for services rendered. No provision of the municipal act has been called to our attention which authorizes the council to make any allowance for the services in question, or, indeed, for any services rendered to the city by any officer, except by ordinance. Section 4740 of the Political Code for 1895, after enumerating the officers which a city of the first class, to which Butte belongs, must or may have, declares: "The city council may, by ordinance prescribe the duties of all city officers, and fix their compensation, subject to the limitations contained in this title." This grant of power is subject not only to the express and implied limitations found elsewhere in the title, but contains in itself a limitation as to the mode in which the power granted may be executed. It is a familiar rule of construction that, when a power is conferred upon a municipal corporation, and the mode in which it is to exercise it is prescribed, such mode must be pursued. 20 Am. & Eng. Enc. Law, 2d ed. p. 1142. Under the provisions of § 4783, *supra*, the council may or may not elect a

president. When elected, he must be held to know whether provision has been made for his compensation. If none has been made in the mode prescribed by law, then he is entitled to none, and has no legal claim against the city. It is not claimed that there is any other ordinance under which the defendants assumed to act. Therefore, in undertaking to make him an allowance under the guise of a claim for services rendered to the city, the council was doing no more than making a gift to him of so much of the funds belonging to the city.

In our opinion the council acted without authority, and the defendants, the disbursing officers of the city, had no authority to make payment. The result is that the court was in error in refusing the injunction. Accordingly the order is reversed, and the cause is remanded, with direction to grant the injunction.

Holloway and Smith, JJ., concur.

PENNSYLVANIA SUPREME COURT.

A. L. WISNER, Appt.,

v.

FIRST NATIONAL BANK OF GALLITZIN.

(220 Pa. 21, 68 Atl. 955.)

Check — failure to return — delivery to notary.

1. Delivering a check to a notary for protest does not, where by statute protest is not necessary, fulfil the duty of the drawee so as to relieve it from the operation of the section of the negotiable instruments law that, where the drawee refuses to return the bill within twenty-four hours, he will be deemed to have accepted it.

Same — negligence.

2. A tortious refusal to return a check, on the part of the drawee, to the holder or collecting bank, is not necessary to render the drawee liable thereon under the provisions of the negotiable instruments law that, where the drawee refuses to return the bill within twenty-four hours, he will be deemed to have accepted it; but mere passive neglect to return is sufficient.

(January 6, 1908.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Cambria County in defendant's favor in an action brought to recover the amount alleged to be due on certain checks. Reversed.

The facts are stated in the opinion.

Messrs. O. H. Hewitt, A. V. Barker, 17 L.R.A. (N.S.)

Fred D. Barker, and S. C. Herriman for appellant.

Messrs. John E. Evans, George W. Flowers, and Charles S. Evans for appellee.

Mestrezat, J., delivered the opinion of the court:

Samuel R. Bullock drew six checks on the defendant bank in favor of Charles W. Gallae, Jr., who deposited them in the plaintiff bank in New York city, which credited them to his account in that bank. The first check is dated December 27, 1904, and the last January 3, 1905. The plaintiff sent these checks to the defendant bank, two of them through the First National Bank of Altoona, Pennsylvania, and the remaining four through the Farmers' Deposit National Bank of Pittsburgh. On the day they were received the defendant bank handed the several checks to a notary public usually employed by it, for the purpose of protest, and he held the checks without protesting them or giving notice of dishonor. On January 9, 1905, some days after the checks had been delivered to the notary, the cashier of the Altoona bank went to Gallitzin, obtained the checks from the notary, took them to the Gallitzin bank, whose cashier gave the cashier of the Altoona bank a letter to a notary public in Altoona inclosing five of the Bullock checks with the request that they be protested for

Case Note. — Detention of bill of exchange or check by drawee as acceptance thereof.

The following statement from *Westberg v. Chicago Lumber & Coal Co.* 117 Wis. 589, 94 N. W. 572, gives in a very clear and concise manner the general rules and principles underlying this subject, which are maintained and supported by the great majority of the cases: "Upon delivery for acceptance, the drawee is not bound to act at once. He has a right to a reasonable time—usually twenty-four hours—to ascertain the state of accounts between himself and the drawer, and, until expiration of that time, the holder has no right to demand an answer, nor, without categorical answer, to deem the bill either accepted or dishonored: not accepted, because of the right of drawee to consider before he binds himself; not dishonored, because both drawer and drawee have the right that their paper be not discredited during such period of investigation. After the expiration of that reasonable time the holder has a right to know whether the drawee assumes liability to him by accepting, and, if not, he has a right to return of the document, so that he may protest or otherwise proceed to preserve his rights against the drawer. The consensus of authority is, however, that the duty rests on the holder to demand either acceptance or return of the bill, and that mere inaction

want of sufficient funds in the Gallitzin bank to pay them. One of the two checks sent by the Altoona bank to the defendant bank was returned to the former bank on the same day. It was conceded by the plaintiff on the trial below that there could be no recovery for this check. The other check sent by the Altoona bank and the four checks sent by the Pittsburgh bank to the defendant bank were not returned by the defendant to the collecting banks for more than two days after their delivery to the latter bank. With the one exception, the Bullock checks were not returned to the defendant bank by the notary public to whom they were delivered for protest within twenty-four hours after their receipt from the transmitting bank. The checks therefore, with the one

exception, were not returned to the collecting banks within twenty-four hours after their delivery to the drawee bank, the defendant in this action. This is an action of assumpsit brought by the plaintiff, the holder of the checks, to recover the amount of the checks on the ground that the drawee bank, the defendant, had accepted the checks by its refusal and failure to return them within twenty-four hours after their receipt, as required by § 137 of the act of assembly of May 16, 1901 (P. L. 213; 3 Purdon's Dig. [13th ed.] p. 3250), known as the "Negotiable Instruments Law." The defendant claims that it is relieved from liability on the checks because it had refused to accept them, and had, on the day of their receipt, delivered them to a notary public

on the part of the drawee has no effect. After the expiration of this time for investigation, the drawee may, by retention of the bill, accompanied by other circumstances, become bound as an acceptor; not, however, by mere retention. There seem to be two phases of conduct recognized by the authorities as charging the drawee: One purely contractual, as where the retention is accompanied by such custom, promise, or notification as to warrant the holder, to the knowledge of the drawee, in understanding that the retention declares acceptance; the other, where the conduct of the drawee is substantially tortious and amounts to a conversion of the bill. This is the phase of conduct which our negotiable instruments statute . . . has undertaken to define and limit as refusal (not mere neglect) to return the bill, or destruction of it; reiterating the common-law rule that mere retention of the bill is not acceptance. . . . The doctrine of constructive acceptance is based on the general principles of estoppel. If the conduct of the drawee will prejudice the existing rights of the holder, unless it means acceptance, and the drawee has knowledge of such fact, he is estopped to deny the only purpose which could render his conduct innocuous; namely, acceptance of the bill. This underlying principle suggests the reasons for many of the limitations upon the implication of acceptance from conduct; as, for example, that such implication arises only when the bill is presented for acceptance, and that no one but the holder (payee or indorsee) can make such technical presentment. . . . Only when the drawee knows that acceptance is expected, would he suppose that his conduct can lead to a belief that he does accept. Only when the presentment is by the holder, whose conduct and rights must be affected by acceptance or refusal, is the drawee charged by the strict rules of the law merchant with notice that his conduct may so injuriously affect the person delivering the bill to him."

As is shown in the foregoing statement, the mere retention of a check without more does not constitute an acceptance by the drawee; and the question to be decided in 17 L.R.A. (N.S.)

the most of the cases is whether there has been some other act in addition to the mere retention which would justify the conclusion that the drawee had accepted the bill or check.

Thus, in *Sands v. Matthews*, 27 Ala. 399, it was held that the retention of a bill of exchange from Saturday until the following Monday, by the permission of the holder, for examination, could not be considered an acceptance.

And in *Williams v. Gallyon*, 107 Ala. 439, 18 So. 162, it was held that retention by the drawee of an order with the acquiescence of the holder until such time as he could ascertain the amount due from him to the drawer, was not an acceptance.

And in *Colorado Nat. Bank v. Boettcher*, 5 Colo. 185, 40 Am. Rep. 142, it was said that to warrant the inference of acceptance from conduct, it would seem that the circumstances must clearly indicate such an intention on the part of the drawee; and the mere detention of the check would be insufficient.

The mere retention, by the selectmen of a town, of an order drawn upon them by one who had done work for the town, was held, in *Holbrook v. Payne*, 151 Mass. 383, 21 Am. St. Rep. 456, 24 N. E. 210, not to amount to an acceptance.

So there are numerous other cases which hold that mere retention of a check does not imply an acceptance thereof. *Overman v. Hoboken City Bank*, 31 N. J. L. 563; *Briggs v. Sizer*, 30 N. Y. 647; *Koch v. Howell*, 6 Watts & S. 350; *Dunavan v. Flynn*, 118 Mass. 537; *Bellasis v. Hester*, 1 Ld. Raym. 281; *Mason v. Barff*, 2 Barn. & Ald. 26.

Where the payee of a bill of exchange indorsed upon the back thereof a partial payment, and the bill was retained by the drawee as a voucher, it was held, in *Gates v. Eno*, 4 Hun, 96, 6 Thomp. & C. 384, that such acts between the parties in respect to the bill deprived it of its character as negotiable paper; and consequently the retention of the bill so indorsed did not amount to an acceptance thereof.

Where, upon the presentment of an order to the drawee, he stated that he thought he

for protest and dishonor. The learned trial judge was of the opinion, and so instructed the jury, that the defendant had not, by its conduct, "relieved itself from the presumption that it had accepted these checks by any evidence which it had produced in the case," and that the verdict should be for the plaintiff for the amount of the five checks. Subsequently the court, on motion of defendant's counsel, entered judgment for the defendant *non obstante veredicto* on the entire record. The learned court, in its opinion, entering judgment for the defendant, held that, under the negotiable instruments law, it was necessary for the holder, in order to recover against the drawee bank, to prove a conversion of the checks; and that the mere retention of them for more than twenty-four hours, without a demand for their return, is not a refusal within the

meaning of the statute. The plaintiff has taken this appeal.

Unaffected or uncontrolled by statute, an acceptance of a bill of exchange or check may be implied from the conduct of the drawee. Such acts or conduct on his part which indicate clearly an intention to honor the bill and from which the drawer may infer such intention is regarded as an acceptance, and will impose liability on the drawee. In *First Nat. Bank v. McMichael*, 106 Pa. 460, 51 Am. Rep. 529, the essential facts of which are strikingly similar to those of the case in hand, this court held that, where a check had been sent by the collecting bank to the drawee bank in another city and the latter did not pay or accept it on presentation, the bank was bound to refuse within the proper time, and failing to do so, was deemed to have ac-

could save the amount for the payee, and he thereafter retained possession of the check, it was held, in *McEowen v. Scott*, 49 Vt. 376, that the retention of the check by the drawee, and the statement made by him in connection therewith, were not sufficient to constitute an acceptance thereof.

So, in *Hall v. Steel*, 68 Ill. 231, it was held that mere retention of orders given by a subcontractor upon the principal contractor would not be deemed an acceptance, where it appeared that it was the custom to hold such orders until the monthly estimates came in, when the orders would be deducted from the amount to be paid the contractor.

A drawee who, upon the presentment of a bill or order, inspected it, promised to pay it, and carried it away with him, was held, in *Hall v. Flanders*, 83 Me. 242, 22 Atl. 158, not to be liable as an acceptor under a statute which provided that "no person shall be charged as an acceptor of a bill of exchange, draft, or written order unless his acceptance is in writing signed by him or his lawful agent."

In *Jeune v. Ward*, 1 Barn. & Ald. 653, a bill was left for acceptance and retained by the drawee for forty-one days, when he destroyed it. It was held that, as the bill had been left with the drawee for acceptance, and not sent by letter, it was the duty of the party leaving it to call for it and inquire whether it was accepted, and not the duty of the drawee to send it back; and that the act of destroying it could not be construed as an act of acceptance.

And in *Guthrie Nat. Bank v. Gill*, 6 Okla. 560, 54 Pac. 434, the court said: "So long as the bill remains in the hands of the drawee, although he may have written an acceptance upon it, the acceptance is not fully binding, and he may, at least while he has not communicated the facts of his acceptance to the holder, obliterate his acceptance and redeliver the bill without incurring any liability as acceptor."

In the following cases the conduct of the drawee in connection with the retention of 17 L.R.A. (N.S.)

the check was held sufficient to hold him as acceptor.

Where the drawee of an order took the same with the statement that there was no money at that time, but that it would be paid, and thereafter retained the order until suit was brought thereon, it was held, in *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21, that the conduct of the drawee amounted to an acceptance.

Where the drawee at first refused to accept an order, saying that the drawer had no funds, but retained possession of it, and thereafter said that there would be money enough to pay it, and that it would be all right, and that he would pay it, it was held, in *Short v. Blount*, 99 N. C. 49, 5 S. E. 190, that the conduct of the drawee was such as to render him liable upon the order.

Where a bank paid checks drawn on a special deposit, but neglected to pay a prior order drawn thereon, which order had been left with the cashier of the bank by agreement of the parties, it was held, in *Taggart v. First Nat. Bank*, 12 Wash. 538, 41 Pac. 892, that the bank would be liable to the holder of the order if funds sufficient to pay the same had been paid to the special deposit.

And in *Bank of Rutland v. Woodruff*, 34 Vt. 89, the court said: "Where a party, having in his possession a bill drawn upon himself, procures another to discount it or advance the money upon it to him, the law would, from that fact, imply an acceptance by him, without any express language to that effect."

The acceptance of a check so as to give a right of action to the payee was held, in *Pickle v. Muse* (*Pickle v. People's Nat. Bank*) 88 Tenn. 380, 7 L.R.A. 93, 17 Am. St. Rep. 900, 12 S. W. 919, to be inferable from the retention of the check by the bank, and a subsequent charge of its amount to the drawer, although it was presented by and payment made to an unauthorized person.

Where the drawee took the draft when it was presented to him, saying that there were

cepted the check, and was liable to the payee. But the rule, however well established, gives rise to great uncertainty as to what conduct or acts of a drawee are the equivalent of an acceptance of negotiable paper. Unreasonable detention, as well as the destruction, of the bill, retaining sufficient funds to meet an outstanding check by the drawee in settling the drawer's account, and other circumstances, are regarded as an implied acceptance. But what are a prolonged or unreasonable detention of the bill and the other circumstances which should be considered or held to be an acceptance by implication are necessarily questions of fact for a jury (*First Nat. Bank v. McMichael*, supra); and hence the liability of the drawee on an alleged acceptance is not determined by any fixed rule or standard, but whether a jury thinks that

the drawee's conduct amounts to an implied acceptance. This necessarily leaves the question of acceptance of the bill in the domain of uncertainty, and affects very seriously its value. It is true there is an implied obligation on the drawee to act promptly in accepting or refusing a bill of exchange; but the law merchant gives no definite or fixed method by which to determine whether he has performed the imposed duty. Within the last few years the legislatures of several of the states have codified the law on the subject of negotiable instruments. Some of the provisions of the several statutes are simply declaratory of the existing law, while others have altered or changed the law as heretofore declared. The purpose of the legislation is to produce uniformity on the subject among the several states, and to make certain and definite by statute the rules of

sufficient funds in his hands to pay the same, and that he would attend to it, and thereafter retained possession of it, it was held, in *Bell v. Pletscher*, 32 Misc. 746, 65 N. Y. Supp. 609, that his conduct was such as to render him liable to the payee for the amount for which the draft was given.

A refusal to return an order upon demand was held, in *Lockhart v. Moss*, 53 Mo. App. 633, to be sufficient evidence of an acceptance.

Where a drawee of a draft refused to pay it upon the tender of a discharge from it, saying that he would rather pay it in the regular way and have it in his hands before he paid it, and it was thereafter indorsed by the payee and mailed to the drawee, who retained it, but did not pay it or acknowledge letters written about it by the payee, it was held, in *Hough v. Loring*, 24 Pick. 254, that a jury, under the circumstances, would be warranted in finding that the conduct of the drawee amounted to an acceptance.

In *Harvey v. Martin*, 1 Campb. 425, note, a bill was sent to the drawee with request to accept and send it to the payee. Two weeks afterwards the drawer again wrote the drawee asking him to accept and return the bill, adding that detention would be construed as equivalent to acceptance. Some time after this the drawee wrote that he had intended to accept the bill, but now refused as he had no funds of the drawer in his hands. It was held, however, that the drawee was liable as acceptor.

In a number of states the statute contains provisions in regard to the acceptance of checks and bills of exchange similar to that set forth in *WISNER v. FIRST NAT. BANK*, but, as appears from the statement given from *Westberg v. Chicago Lumber & Coal Co.* cited supra, such statute merely reiterates the common-law rules, and consequently the decisions thereunder do not differ materially from those rendered in jurisdictions where there is no such statute.

Thus, in *Matteson v. Moulton*, 11 Hun, 17 L.R.A. (N.S.)

268, affirmed in 79 N. Y. 627, it was held that the refusal mentioned in the statute referred to something of a tortious character, implying an unauthorized conversion of the bill by the drawee; and that it did not mean a mere detention of the bill.

So, there are several other cases which hold that the mere retention of a check is not an acceptance thereof, within the meaning of the statute. *Dickinson v. Marsh*, 57 Mo. App. 566; *St. Louis S. W. R. Co. v. James*, 78 Ark. 490, 95 S. W. 804; 8 A. & E. Ann. Cas. 611; *Rousch v. Duff*, 35 Mo. 312.

But a bank which had been charged at the clearing house with the amount of certain checks drawn upon it was held, in *State Bank v. Weiss*, 46 Misc. 93, 91 N. Y. Supp. 276, to have accepted the checks under the provision of the statute, where no demand was made by the payee until the bringing of the action.

In *First Nat. Bank v. McMichael*, 106 Pa. 460, 51 Am. Rep. 529, the court seems to lay down a somewhat stricter rule in regard to the payment by a bank of a check drawn upon it than that laid down in the above cases. In the course of the opinion the court said: "A bank is not bound by a legal obligation to the holder to pay or accept a check drawn by a depositor, although there may be funds of the drawer sufficient for the purpose, to his credit at the time of presentment. But, if it does not pay or accept, it is bound to refuse. It has no right to receive and keep the check indefinitely, thereby leaving the holder to suppose that it has accepted the check and assumed its payment."

In *Kilsby v. Williams*, 5 Barn. & Ald. 815, it was held that, where a check was drawn upon persons who were bankers for both the drawer and the payee, the bankers were entitled to one day's time to determine whether they were in funds with which to pay the check; and that, by giving notice of refusal on the following day, they were relieved from liability merely on the ground that they had retained the check for the one day.

the law governing negotiable paper. The acts in the different states are very similar, many of their provisions being identical in language; and the manifest purpose of all is, as far as possible, to prescribe definite and fixed rules regulating the entire subject. In closing the opinion of the supreme court of appeals of Virginia in *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837, a case involving the construction of certain provisions of the negotiable instruments law of that state, Keith, P., very aptly said (page 757 of 102 Va.): "This opinion might be greatly prolonged by citation of conflicting cases, and a discussion of the discordant views entertained by courts and text writers of the greatest ability upon these questions; but the object, as we understand it, of the codification of the law with respect to negotiable instruments, was to relieve the courts of this duty, and to render certain and unambiguous that which had theretofore been doubtful and obscure, so that the business of the commercial world, largely transacted through the agency of negotiable paper, might be conducted in obedience to a written law emanating from a source whose authority admits of no question." In view of the rulings in some of the decisions interpreting the negotiable instruments law, however, it may not be inappropriate to note the suggestion in the address of the learned president of the fourteenth annual conference of commissioners of uniform state law. He said: "However clear the statute [negotiable instruments law], there is an unfortunate tendency of the courts to fall back to the old law." The negotiable instruments law of this state was approved May 16, 1901, and went into effect on the first Monday of September of that year. The part of the act requiring the interpretation in this case, and on which the plaintiff relies to recover, is § 137, P. L. 213 (3 Purdon's Dig. [13th ed.] p. 3307), and is as follows: "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, accepted or nonaccepted, to the holder, he will be deemed to have accepted the same." The plaintiff claims that the failure or neglect of the defendant bank to return the five checks in suit to the holder or the collecting bank within twenty-four hours after their delivery was a refusal to return the checks within the meaning of this section of the act, and that, therefore, the defendant must "be deemed to have accepted the same." The defendant contends that the section of the law just quoted does not apply to a check presented to a drawee for payment; that, if it does, the "refusal"

in the act means a tortious or wrongful refusal to return, amounting to a conversion of the check; that there was no refusal by the defendant bank to return the checks, either express or implied; and that the defendant bank did not hold the checks, but "promptly refused payment and passed each of them on to the notary public, the next person to receive a dishonored bill under the custom of banks."

The contention of the defendant that § 137 of the act does not apply to a check presented to the drawee bank for payment is answered adversely to its position by the act itself. Section 185, P. L. 219 (3 Purdon's Dig. [13th ed.] p. 3314), provides as follows: "A check is a bill of exchange drawn on the bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." No provision of the act has been pointed out, and we know of none, making § 137 inapplicable to bank checks presented for payment. On the contrary, there is every reason why the section should apply, and the drawee should give prompt notice of acceptance or refusal. The reasons for such notice are pointed out in *First Nat. Bank v. McMichael*, *supra*. The holder of a check is interested in knowing at the earliest time whether the drawer has sufficient funds in the bank for payment of the check, and especially should he be advised as promptly as possible if the drawer has no funds that the check is to be dishonored. Delay in furnishing this information may result in the loss of the amount of the check to the holder. We think it apparent that it is quite as important to have a check, payable on demand, returned promptly to the holder, as to require the prompt return of an ordinary bill of exchange. As the act of 1901 abolishes implied acceptances of bills and checks, and thereby changes the law as declared by this court, there is no protection for the holder against unreasonable detention of a check by the drawee bank if this section does not apply. We cannot assume that the legislature intended such results in the passage of the act. If the section applies to the checks presented to the drawee bank in the case in hand,—and this question will be considered and determined later,—the act of the bank in delivering the checks to a notary public for protest was not a compliance with the section, and did not relieve the drawee from liability. While protesting a bill of exchange or check is permissible, it is not mandatory under the negotiable instruments law, as § 118 specifically provides that a "protest is not required except in the case of foreign bills of exchange," and § 152

declares that, "where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary." In view of the fact that the act declares a check to be a bill of exchange drawn on a bank, payable on demand, and that the provisions of the act apply to checks, protesting the checks for nonacceptance by the drawee bank in this case was wholly unnecessary, and could in no way affect its liability on the checks under § 137 of the act.

We come now to the principal and controlling question in the case, and that is whether the failure to return the checks to the holder or the collecting bank within twenty-four hours after their delivery to the defendant was a refusal to return the checks within the meaning of § 137 of the act; or did the act contemplate a tortious refusal to return, amounting to a conversion of the checks, as claimed by the defendant and as held by the court below? The drawee to whom a bill is delivered for acceptance is deemed or taken to have accepted it under this section of the act (a) where he destroys it; (b) where he refuses within twenty-four hours after delivery to return the bill, accepted or nonaccepted, to the holder; and (c) where he refuses, within such other period as the holder may allow, to return the bill, accepted or nonaccepted, to the holder. When either of these conditions exists, the drawee becomes an acceptor of the bill, and assumes liability as such. An implied or a verbal acceptance of a bill is abolished by the act, and there are now only two modes of accepting a bill: (1) By writing, signed by the drawee, as provided in § 132; and (2) by a nonreturn of the bill, which is declared by the section under consideration to be the equivalent of an acceptance. The manifest purpose in requiring the prompt return of the bill is in the interest of and for the protection of the holder. It is immaterial to the drawer when the bill is returned, as he is protected by notice of dishonor; and hence this section of the act requiring prompt action in returning the bill was obviously enacted for the benefit of the holder of the bill. The act declares in § 136 that twenty-four hours is sufficient time for the drawee to decide whether or not he will accept the bill, and, the section under consideration having allowed this time, it requires him to return the bill accepted or nonaccepted. If a demand and refusal are conditions precedent to an acceptance under this section, then the holder must not only present the bill for acceptance, but he must make a demand for its acceptance, and await a specific refusal before the drawee is deemed an acceptor. This would certainly not be to the convenience or the interest of the holder, but in direct opposition

to both. It would afford the holder less protection, and would in effect prevent the return of the bill within twenty-four hours; or it would require the holder, in transmitting the bill with instructions to present it for acceptance, to send at the same time a demand for its acceptance. It is obvious that such demand accompanying a presentation of a bill for acceptance is wholly unnecessary, and certainly was not in contemplation of the legislature in enacting the section. The presentation of a bill for acceptance is a demand for its acceptance, which, if the bill is retained by the drawee, implies a demand for its return if acceptance is declined, in contemplation of the negotiable instruments law. The purpose of presenting a bill of exchange to the drawee is to require him to accept and assume liability for its payment, or to refuse its acceptance, and thereby avoid liability. When the bill is presented, action by the drawee is therefore demanded of him, and he cannot remain silent and inactive without incurring the statutory penalty prescribed for such conduct. If he is permitted to retain the bill, he must return it accepted or not accepted at the expiration of twenty-four hours. If he accepts, he is required to do so in writing, and must return the bill. If he refuses, he must return the bill not accepted. If he fails to do either,—return it accepted or not accepted,—he is "deemed to have accepted the bill" under this section of the act, and is liable thereon to the holder. It is apparent, we think, that in the enactment of this section of the statute the legislature regarded the presentation for acceptance as a demand for an acceptance, which, when the bill is retained by the drawee, implies a demand for its return within the time specified, and that, therefore, the neglect or failure to return is a refusal to return the bill. As said by this court in *First Nat. Bank v. McMichael*, supra, if a bank does not pay or accept a check, it is bound to refuse it. And this is more clearly disclosed as the true interpretation of the word "refuses" in this connection, when we consider that the consequences to the holder of the nonreturn of the bill are the same whether it follows a demand, additional to the presentation for acceptance and a refusal, or simply a neglect or failure to return after the demand implied by its presentation for acceptance. If the section has in view the protection of the holder, as it manifestly has, then it was evidently the intention of the legislature that the nonreturn of the bill within the specified time, regardless of the clause, will make the drawee an acceptor.

The law merchant discourages laches in parties to negotiable paper, and demands

prompt action in the performance of the duties imposed upon them. It was not the intention of the legislature in the enactment of the negotiable instruments law to abolish this rule, and to encourage delay or inaction in the holder or drawee of such paper. The intention of the section in question was to expedite action by the drawee in accepting or refusing a bill presented and retained by him, and to fix a definite time, which had previously been uncertain, in which he should act on the bill. He is granted twenty-four hours after delivery, and not after a demand for a return of the bill, in which he must accept or decline to honor it. The time for returning the bill to the holder does not begin to run from the demand for its return, but from the date of its delivery. The drawee must, therefore, act within twenty-four hours from the date of the delivery of the bill, whether his action be an acceptance or a refusal. The section gives no other alternative, and makes no other provision either for failure or neglect. Hence, action being required of the drawee, and one of the two alternatives being open to him, if he does not accept and return the bill, it will be deemed accepted if the bill, by his default remains in his hands beyond the time limit. He refuses to return the bill in contemplation of the act when for any cause within the drawee's control it is not sent to the holder in the specified time. There can be no reason—and we will not assume that the legislature intended to do an unreasonable thing—why the law should make a distinction between the nonreturn of the bill by the refusal to return after a specific demand and the failure or neglect to return after a demand implied by presenting the bill for acceptance. If such should be the proper interpretation of the section and a formal demand be necessary, then there is no provision in any part of the entire act imposing a penalty for the default or neglect of the drawee to return the bill, although the consequences of such act on the part of the drawee are as prejudicial to the holder as if a refusal to return the bill had followed a prior specific demand. There is, however, no such *casus omissus* in the act; but the enforcement of the return of the bill, accepted or nonaccepted, within the time, designated, being the primal object of the section, the cause of its detention is wholly immaterial, and cannot affect the drawee's liability as an acceptor. The construction we place on § 137 is necessary to protect the holder of checks and other negotiable paper, it furnishes a complete statutory remedy for any default of the drawee in acting on the paper when retained by him, and does no violence to the language employed in the section. It carries L.R.A. (N.S.)

ries out the obvious intent of the legislative mind in the enactment of the section, and establishes a fixed and certain rule to govern the drawee and the holder in the former's action on negotiable paper presented to and retained by him.

Our interpretation of the statute coincides with the legislative construction placed upon a similar statute in the state of Wisconsin. In enacting a negotiable instruments law the legislature of that state added to a section of it similar to § 137 of our act a proviso "that the mere retention of the drawee will not amount to an acceptance." The logical inference is that the mere retention of the bill would be an acceptance within the meaning of the language of our statute which contains no such proviso. It is not accurate to say, as suggested by the appellee, that, under the negotiable instruments law, a bill can only be accepted by writing signed by the drawee. It is true that verbal and implied acceptances have been abolished by § 132, which provides that the acceptance must be in writing and signed by the drawee. But § 137, involved in this case, declares that the action of the drawee in destroying a bill or in not returning it, as required by the section, shall be deemed an acceptance of it. A constructive acceptance of a bill under this section is as effective to charge the drawee as an acceptance in writing under § 132. Nor do the two sections in any way conflict. The former section requires affirmative action on the part of the drawee by assuming liability by a writing. The latter section declares his liability if he destroys the bill, or if, by inaction, he retains the bill beyond the specified time. An acceptance under either section obligates the drawee to pay the bill. In the state of New York a negotiable instruments law has been enacted, and a section similar to § 137 of our act is included in the statute. The supreme court of that state, in *State Bank v. Weiss*, 46 Misc. 93, 91 N. Y. Supp. 276, has construed this section of the statute in conformity with the meaning we have given our own act. The case was decided in 1904, and it does not appear to have been carried to the court of appeals of the state. It was an action on a check drawn on a branch bank of the plaintiff, and was paid by plaintiff by the allowance of a credit at the clearing house. It was afterwards discovered that the drawer had had no funds in the bank, and this suit was brought to recover from the indorsers six days later. It was held there could be no recovery, that a check was a bill of exchange, payable on demand, and that, under the negotiable instruments law, a drawee will be deemed to have accepted a bill when

It does not return it within twenty-four hours after its delivery for acceptance. *Matteson v. Moulton*, 79 N. Y. 627, relied upon by the court below and the appellee here, was decided by the court of appeals in 1880, and the syllabus of the case states that the court held that "refusal" in the New York statute is "an affirmative act, or is made up of conduct tantamount to one, [and] it is also a wilful or wrongful act." But the facts of the case did not require the court to determine whether the failure or neglect to return the bill within twenty-four hours was a refusal to return it within the meaning of the act. The bill was sent to the office of the defendant, who retained it for three or four months with the consent of the plaintiff, and under a promise to pay, relied on by the plaintiff. It will therefore be observed that the facts of the case did not require the court to determine whether the mere retention of a bill of exchange for twenty-four hours after its delivery to the drawee would constitute an acceptance. Again, if the case is still authority in that state for an interpretation of the act, it is singular that it is not cited or referred to in the very recent case of *State Bank v. Weiss*, supra, in which the court gave an interpretation of the same section of the negotiable instruments law of that state diametrically opposite to the construction of the act announced in the *Matteson* Case. In construing similar acts the supreme courts of Arkansas and Missouri seem to have held that a nonreturn of the bill was not a refusal in the absence of a demand or proof that the drawee had refused to return the bill. The learned counsel for the appellee also cites in support of this construction of the act *Westberg v. Chicago* 17 L.R.A. (N.S.)

Lumber & Coal Co. 117 Wis. 589, 94 N. W. 572; but this case is not authority for the proposition. The learned justice who delivered the able, if not convincing, opinion in the case, discussed the question and arrived at that conclusion, but the instrument sued on was a non-negotiable bill of exchange; and hence the question was not involved in the case. This is conceded by the learned judge in closing his opinion, reversing and remanding the case for new trial, wherein he said (page 595 of 117 Wis.): "It seems clear from the title that the codifying law of 1899 is intended to regulate only negotiable instruments. . . . It therefore does not affect or control the rights of the parties upon this paper. . . ."

We are of the opinion that, under § 137 of the negotiable instruments law of this state, the failure or neglect of a drawee to whom a bill is delivered for acceptance to return the bill, accepted or nonaccepted, to the holder within twenty-four hours after delivery, makes the drawee an acceptor of the bill. It therefore follows in the case in hand that, the defendant bank having failed to return the five checks to the collecting bank within twenty-four hours after their delivery to the drawee, the latter must be deemed to have accepted the checks, and is therefore liable to the plaintiff for the amount of them.

The judgment *non obstante veredicto* in favor of the defendant is reversed, and judgment is now directed to be entered by the court below on the verdict in favor of the plaintiff and against the defendant.

Petition for rehearing denied February 25, 1908.

RÉSUMÉ

GIVING a brief and comprehensive view of the points of special interest and importance in this volume.

- I. PUBLIC MATTERS AND RELATIONS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY RELATIONS; PERSONAL CAPACITY; AGENCY
- VI. TORTS; NEGLIGENCE; NUISANCES.
- VII. PROPERTY RIGHTS; WILLS.
- VIII. CIVIL REMEDIES; PRACTICE AND PROCEDURE.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC MATTERS AND RELATIONS.

Intoxicating liquor. A Nebraska case overruled an attack upon the constitutionality of a liquor-license statute, made upon the ground that it is not within the power of the legislature to license such traffic, or to authorize any official to issue a license for the purpose, because the business is vicious and demoralizing and opposed to the laws of God and the letter and spirit of the fundamental law of the land. 1001. Forbidding one, under penalty, to carry into a county where the sale of intoxicating liquor is prohibited more than $\frac{1}{2}$ gallon of such liquor on any one day, held to deprive him of his constitutional property rights in case he has no intent to sell the liquor. 299.

Interstate commerce. A rule of a state railroad commission imposing a penalty for failure to furnish cars needed for interstate shipments held an invalid interference with interstate commerce. 364.

Eminent domain. The rights of an owner of riparian land such as access to the navigable portion of the stream, light and air, and other kindred intangible rights appurtenant to real estate, held subject to condemnation for public use without an appropriation of the land itself. 1005. The word "damaged" in a constitutional provision forbidding the enactment of any law whereby property shall be damaged for public use without just compensation held not confined to acts which would give a cause of action if done by an individual. 1053. Loss through diminution in value of property for residence purposes because of the location of a cemetery near it held not within a constitutional provision requiring compensation in case property is damaged for public use. 17 L.R.A. (N.S.)

use. 1061. The extension of the limits of a municipal corporation along the line of a turnpike road, and the removal by the municipal authorities of the tollgates, held a taking of property for which compensation must be made. 1074. The owner of land taken for public use held not entitled to recover for loss of profits during the removal of a business conducted on the land, under the constitutional provision for compensation for property taken for public use. 124.

Children. Forbidding the employment of children under twelve in factories or manufacturing establishments held not to violate the constitutional rights of the child or its parents. 602.

Annexation. A statute permitting the annexation of property belonging to women to municipalities without giving them an opportunity to make defense to the proceedings held not to deprive them of the equal protection of laws. 421.

Inebriates' home. The Minnesota statute creating and establishing a hospital farm for inebriates, and authorizing the state board of control to purchase land therefor and to provide means for the building and maintenance of the institution, held constitutional. 984.

Capacity of bottle. Imposing a penalty on a milk dealer for having in possession, with intent to use, any bottle or jar of less capacity than is marked thereon, held a valid exercise of police power, and not unconstitutional to deprive him of his property rights. 684.

Public service. Assignees for creditors held not so identified with the assignor as

to justify the cutting off of a supply of gas because of the assignor's failure to pay prior bills. 1235. A Wisconsin case holds that it is within the power of a railroad commission to require a railroad company to stop one local train a day each way at a platform half way between two stations 7 or 8 miles apart, for the accommodation of 64 families. 821. A California case holds that a contract by a railroad company, in consideration of a grant of right of way, to establish a station and stop trains at a certain place without depriving it of the power of complying with its duty to the public, is not unlawful, and will be enforced if not detrimental to the interests of the public, or imposing a great burden without corresponding benefit. 428. A contract by a railroad company to maintain a siding for private use, and to run trains to and from it, held not against public policy. 130.

Health. Charter authority to appoint a board of health, and make all regulations necessary for the promotion of health or the suppression of disease, held not to empower a municipal corporation to make vaccination a condition precedent to attendance at the public schools. 709. A police regulation making every habitation, regardless of locality, a boarding or lodging house in case the proprietor allows a person not a member of his family to have a sleeping room therein, and regulating the maintenance of the house as regards light, location of beds, equipment with water closets, etc., held an unreasonable interference with property rights. 486. The opinion contains an elaborate discussion of the subject.

License; occupation tax. A trial and conviction in a court of competent jurisdiction held not a condition precedent to a proceeding by the state board of health against a physician to revoke his license for any of the causes provided by statute. 439. A classification of business according to the capital employed, for the purpose of levying an occupation tax, held not to violate the provision of a statute that all license fees shall be uniform in respect of the class upon which they are imposed. 898. One who practises midwifery, making use of instruments usually employed for that practice and of certain printed formulas for conditions encountered in the practice, held to be within a statute requiring a license to practise medicine. 94. A change by a hotel keeper who has paid a hotel license fee from the American to the European plan held not to subject him to the payment of an additional fee as a restaurant keeper, although he may serve meals to persons not rooming in the hotel, and the ordinance defines a restaurant as a place where food is prepared for casual customers, and sold for consumption therein. 566.

Conflict of laws. A legislative declaration that it shall not be lawful for a divorced person to marry again within a year from the date of the divorce held to evince a public policy which will prevent the recognition by the courts of the state of a marriage between its citizens who go to another state to avoid the provisions of the statute, and, after the ceremony, return to their former domicile. 804. A marriage by one of the parties to divorce proceedings within the time prohibited by statute, which the statute expressly declares shall be void whether contracted within or without the state, held not void if contracted in a foreign country, by whose laws it is valid, after the party has acquired a domicile there; but otherwise if the parties went to the foreign country for the purpose of evading the local law and with the expectation of returning to their former home. 800. A Massachusetts court refused to enforce an Illinois statute making a wife liable jointly with her husband for family expenses in case of purchases made by a citizen of Massachusetts while he and his wife were temporarily in Illinois. 426. A clause in a deed executed and delivered in Minnesota, of land in Iowa, by which the grantee assumes and agrees to pay an existing mortgage, held a personal covenant, and governed by the laws of Minnesota. 1094.

Municipal corporations. The operation by a municipal corporation of an elevator in the police station held a part of its governmental duty, for negligence in respect of which it is not liable to an individual injured thereby. 741.

Officers. A Montana case denies the right of the municipal council to allow compensation to the president of its board for services rendered as acting mayor, no provision for compensation being made by statute, upon the theory that he is entitled to what the services are reasonably worth. 1263.

Highways. A municipality held to have no power unqualifiedly to deny a property owner's right to erect a platform on his own lot, and connect the same by proper and substantial railings with a bridge elevated above the surface of the highway, constructed therein by the municipality. 497.

Public lands. A homesteader upon public lands, proceeding lawfully to perfect his title, held entitled to compensation for injury done to the premises, the measure of damages, however, not being the same as if he owned the land in fee simple. 958.

Taxes. That negotiations for a loan were made by persons within the state, and that it was secured by a mortgage on prop-

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erty located in the state, held not to subject the lender's interest in the loan to local taxation, where he was a nonresident and had no place of business, or location, or agent in the state, and consummated the loan beyond the limits of the state. 138. It is held by the circuit court of appeals that a pre-existing tax lien or claim upon property in the course of an administration under the bankruptcy act cannot be converted into a full title by the procurement of a tax deed without the court's sanction. 465. A tax on dogs for the promotion of the sheep industry by providing funds to make good losses of sheep caused by dogs held a police measure, and not within constitutional provisions requiring taxes to be for public purposes and uniformly assessed. 855. An enforceable contract for the purchase of real estate held a credit subject to taxation, although it provides for forfeiture upon default of the purchaser. 1220. A grant of the right to take turpentine from standing trees for a specified time held not subject to taxation as a separate or special interest in the land. 693. The property held under an oil and gas lease which vests in the lessee all the property rights in the oil and gas that may be found in paying quantities, held taxable to the lessee under statutes taxing all real and personal property within the state, and making it the duty of persons owning any oil or gas privileges by lease or otherwise to list them for taxation. 688. A local auxiliary of a foreign missionary society, whose funds are mainly devoted to enterprises in foreign countries, held not within a statute exempting from taxation the property of charitable associations devoted exclusively to the uses and purposes of public charity, since the legislature will not be presumed to have exempted institutions having no relation to the welfare of the inhabitants of the state. 733. Property received by collateral heirs by deed from tes-

tator's widow upon compromise of a contest of his will which gave all his property to her, held not within the provisions of a statute taxing estates passing by will or inheritance, or by grant or gift in contemplation of death, to other than parents, husband, wife, or lineal descendants of decedents. 753.

Attorneys. A Nevada case held that, under the particular circumstances of the case, a criticism of a decision and opinion of the supreme court was sufficient cause for the suspension or disbarment of an attorney. 572. A personal letter by an attorney to a chief justice of the supreme court impugning his intelligence and integrity, and that of his associates, in a decision of certain appeals in which the writer had appeared for the defeated litigants, held professional misconduct for which he may be suspended from practice for six months. 585.

Attorneys' fees. A statute allowing an attorney's fee to one who establishes a mechanics' lien, which is not allowed to other classes of litigants, held to violate the constitutional guaranty of equal protection of the laws, uniformity of laws, and equal rights in the acquisition and protection of property. 909.

Contempt. A commitment for contempt for willful refusal to obey an order to pay suit money and temporary alimony pending a divorce suit held not an unconstitutional imprisonment for debt. 1140. A grand juror held not guilty of contempt for violating his oath to keep the counsel of the United States, by disclosing the evidence on which an indictment was founded after publication of the indictment, the accused being in custody, and the grand jury having been finally discharged. 1049. An editorial misstatement of the law as stated in the court's written opinion on a matter of wide application and importance, although unintentional, held a contempt of court. 582.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

See also *supra*, I., Conflict of Laws.

Bankruptcy. The transfer of the proceeds of a sale of property, to be applied on a loan, although within four months of bankruptcy proceedings against the assignor, held not a voidable transfer if made in accordance with an agreement at the time of the loan, entered into more than four months before such proceedings, to transfer the proceeds when received. 935. The United States circuit court of appeals of the eighth circuit holds that a court of bankruptcy is without jurisdiction summarily to take and administer in proceedings against

a partnership the individual assets of a solvent partner without his consent. 886. The application, with the consent of all the partners, of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy and while the partners and partnership are insolvent, held not evidence of an intent to hinder, delay, or defraud creditors, within § 67e of the bankruptcy law; nor void or voidable where the creditor paid had no reasonable cause to believe that a preference was intended. 1040. A foreign involuntary assignment in

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bankruptcy held entitled to precedence over the claim of the assignor to share as next of kin in the personal estate of decedent.

173. A trustee in bankruptcy who seeks to recover the bankrupt's property in an action which the latter might have prosecuted but for the bankruptcy, held not bound to allege insufficiency of assets to pay liabilities. 350. See also *supra*, I., Taxes.

Gift or will. An instrument promising for value received to pay a certain amount to a certain person if collected in the latter's lifetime held not void either as an attempt by the latter to dispose of property at her death without the required formalities, or as an attempted gift without a delivery. 1239.

Champerty. A contract by an attorney for a contingent fee, with a stipulation that the client shall not compromise or settle his claim without the attorney's consent, held champertous and voidable at the client's option; and, further, that its illegality is available as a defense in any action against a third party which is based on the contract. 443.

Incapacity. A California case holds that equity will set aside a sale of property obtained from a person while incapacitated by intoxication, where the consideration was grossly inadequate. 1066.

Parol contract. Parol evidence held inadmissible to show that the proper consideration for a deed, which is recited to be a sum of money, was, in addition thereto, a contract to build a pass way across the property conveyed, since the effect would be to establish the reservation of an easement inconsistent with the terms of the deed. 702.

Public contracts. Statutory authority to contract for the construction of county buildings held to include authority to bind the contractor to pay claims of laborers and materialmen, although such contract is for their benefit. 906. Fraudulently underestimating the work to be done under a contract for public work, or a mutual mistake based on an erroneous estimate by the public engineer, held a ground for a cancellation of the contract at the instance of the contractor. 96.

Construction contract. One employed to build a street to a certain level held entitled to his pay when he has constructed the street to that level according to specifications, although, because of the action of the elements or the nature of the soil, it subsequently settles below that level. 697.

Architect's certificate. An architect's certificate of compliance with the plans and specifications of a building contract held to estop the owner from disputing such compliance, so far as it is not within the exception 17 L.R.A. (N.S.)

of the contract that the certificate shall not release the contractor from the obligation to perform the work in a good and workman-like manner. 231.

Covenants. A covenant in a deed that "I hold said premises by good and perfect title," if untrue, held broken as soon as made, so that a right of action will accrue at once thereon. 1178. The grantee's right of action against the warrantor for breach of covenants of warranty held not to date from the time the deed was delivered, so as to be barred by the statute of limitations at the end of six years thereafter. 1195. A Wisconsin case holds that, in case of a conveyance of land with full covenants, there being an outstanding mortgage, no action lies for substantial damages in advance of an eviction, or of the owner of the land entitled to the benefit of the covenant paying off the encumbrance. 1189.

Bills and notes. Giving one's own check in exchange for that of a third person held to make one a holder for value notwithstanding that the payment of the stranger's check is refused before his own check has been negotiated or presented for payment. 747. The holder of a promissory note payable to another or order and undorsed held to be the real party in interest, and, as such, entitled to sue thereon, where the consideration passed solely between the holder and maker, and the note was given to another person solely for the benefit of the holder. 1113. An Oregon case holds that a bank which takes without indorsement from its cashier negotiable paper indorsed to him without designation of his fiscal position holds it subject to all equities existing in favor of the maker. 1105.

Banks; check. A Michigan case holds that a bank cannot justify payment of a check fraudulently drawn in favor of a fictitious payee, by the fact that the check came to it through other banks which had cashed it, since their negligence is imputed to it. 514. A contrary position was taken by the supreme court of the District of Columbia in a similar case. 520. A bank which cashes the checks of a customer of a national bank, with notice that the latter bank has loaned its credit to the customer, cannot enforce its guaranty to pay the check. 526. The delivery of a check by the payee to a notary for protest, which is unnecessary, does not relieve the drawee from the operation of the section of the negotiable instruments law that, where a drawee refuses to return the bill within twenty-four hours, he will be deemed to have accepted it. 1266.

Carriers. A sufficient tender of live stock to a carrier for shipment held to have been made by notifying the carrier of the

need of cars, and placing and keeping the stock within a short distance of the station in obedience to the station agent's instructions. 327. A Kentucky case holds that a carrier cannot escape liability for injury to property from a defective car because of the failure of the shipper to inspect the car. 1034. The provisions of a contract whereby a shipper of sheep assumes all risk of damages in consequence of delay in transportation, or loss, or damage, not resulting from wilful or gross negligence of the carrier; and all provisions exempting or limiting the liability for loss or damage resulting from failure to exercise proper care, —held to contravene public policy, and to be void. 628. Noncompliance by the shipper with a provision in a bill of lading relieving the carrier from liability for injury to property during transportation if the making of a claim is delayed more than thirty days after delivery of the property held to be a matter of defense which will be waived by failure to plead it. 641. When a trunk is delivered to the baggage man at a railway station in proper season, held that the passenger has the right to require that it shall be carried on the same train which he takes. 1091. As to liability for personal injuries, see *infra*, VI.

Inns. That no facilities for supplying guests with food are maintained in connection with a house in which furnished rooms were let for a single night or longer time without special contract, held not to deprive the house of its character as an hotel, the keeper of which is liable for money stolen from a guest without negligence on the part of either party. 1259.

Insurance. A declaration of forfeiture held not necessary to terminate the rights of a member of a mutual-benefit society for nonpayment of dues, where the by-laws provide that any member shall *ipso facto* forfeit his membership who fails to pay his assessment for thirty days after notice. 246. A Kansas case holds that, where the beneficiary named in a benefit certificate issued by a mutual-benefit society dies before the insured member, the former's heirs cannot take the fund by inheritance. 1083. The phrase "death by suicide, sane or insane," in a policy of life insurance, held not to include death by the act of the assured without any mental purpose of self-destruction. 260. The report of the medical examiner that the applicant is a fit subject for insurance held, under a statute to that effect, to estop the association from setting up in defense that the certificate never took effect because the insured was not in good health subsequent to the signing of the application, under a provision of the certificate that it should not become operative until delivered to the insured while in good health. 1144. Death from blood poisoning following a slight accidental abrasion of the skin held to be within an accident-insurance policy against bodily injuries sustained through external, violent, and accidental means independently of all other causes. 1011. Drowning, although not accompanied by external marks, held covered by an accident policy insuring against personal injury leaving upon the body external marks, where drowning appears in the lists of accidents insured against, and a separate provision limits the liability in case of drowning, in the absence of eyewitnesses, to a certain percentage of the face of the policy. 714. The burning of property by insured while insane held not to absolve the insurer from liability in the absence of any provision to that effect in the policy. 189.

Interest. A Kansas case holds that the general interest statute cannot be interpreted to impose a liability upon a county for interest upon taxes wrongfully exacted from a taxpayer over his protest. 552.

Payment. A New Hampshire case repudiates the rule generally accepted, that partial payment of a liquidated indebtedness does not constitute a sufficient consideration for the discharge of the whole debt. 1197. But a Massachusetts case, adhering to the general rule, holds that a promise by a mortgagee upon failure of the net proceeds of a sale of mortgaged property to equal the debt, to take less than the debt in full discharge of it, is without consideration and void. 1208. The acceptance, by an agent, of a debt due from a third person to the former's principal, held not to constitute payment. 606.

Principal and surety. An administrator held to have no authority to enter into a binding contract for the extension of time on a note executed by his intestate, so as to release sureties thereon. 1122.

Sale. One who buys an ice plant with knowledge that its operation had been abandoned because its output did not equal its capacity, and after having full opportunity to investigate its condition, held not entitled to avoid paying the purchase price because the vendor stated that with some repairs it would turn out about a certain amount per day. 240. That goods bought in another state for resale are fraudulently marked as to quality so as to make them unsalable under a statute of the state where the order was given, held not to authorize the purchaser to rescind the contract and return them to the seller, if they comply with the order as given. 1119. Goods procured by an insolvent merchant by fraudulent representations as to his financial standing, without any intention of paying for them, held

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 not to pass by his assignment for the benefit of his creditors, or to his assignee in bankruptcy. 1032. Misrepresentation as to the amount an order for a specified number of steel bars at a specified price per pound will come to, held not a ground for avoiding the sale, where there is no trust relation between the parties, and the buyer is experienced in the business and can easily ascertain for himself what the steel will weigh, and therefore what it will cost. 419. A manufacturer of a beverage, whose sales agent represents that it is not alcoholic and not subject to license tax, and binds his employer to make good any sum which the purchaser may be required to pay because of its alcoholic nature, held bound to allow on the purchase price the amount paid by the purchaser as a tax because the beverage proves to be alcoholic. 193. A West Virginia case holds that neither an action for goods bargained and sold, nor for goods sold and

delivered, will lie, if the title to the property has not passed to the vendee. 801. An oil tank for the storage of oil held to be within the rule that a contract for the purchase thereof may be rescinded by the purchaser for failure to furnish one of the kind and quality agreed upon. 558.

Telegraphs. An Arkansas case holds that a telegraph company cannot escape liability for the statutory penalty for refusing to transmit over its lines a telegram reporting the neglect of an employee, on the theory that it was an improper message. 836.

Unfair competition. One other than the original patentee, manufacturing repair parts for a machine the patent on which has expired, held not bound to place thereon anything to indicate their origin, where there is no attempt to palm them off as made by the patentee. 448.

III. CORPORATIONS AND ASSOCIATIONS.

Corporations. A statute denying to a foreign corporation which has not complied with the local laws the right to maintain an action in the state courts, held not to prevent its defending an action brought against it there. 1117. The secretary-treasurer of a corporation, who is also its manager, held to have no implied authority to contract for services of an employee for a term extending

beyond the term of his own office as well as that of the board of directors. 177. A statute substituting for all other methods of enforcing the individual liability of stockholders an action to be brought by a receiver, held not to impair the obligation of contracts, in its application to stockholders who became such prior to its enactment. 779.

IV. DOMESTIC RELATIONS.

See *supra*, I., Conflict of Laws.

Capacity of married woman. An Idaho case holds that, under the local statute which confers upon married women all the privileges of contracting in relation to their separate property necessary to the complete enjoyment and power of disposition thereof, a married woman has no authority to become surety or guarantor for the debts of others. 876.

Community. A homestead donation entered by a man and wife, the title to which is finally secured by his performance of the legal requirements, held to be their community estate, although before expiration of the time required for perfecting the title the wife dies and the man remarries. 154.

V. FIDUCIARY RELATIONS; PERSONAL CAPACITY; AGENCY.

Partners. One member of a partnership which conducted a logging business held not entitled, in the absence of an agreement to that effect, to a greater share in the partnership earnings than the other because the latter was frequently away from the field of operations, and, in consequence, the former did the greater amount of the work in connection with the firm's business. 384. A Georgia case holds that, under its Civil Code, one member of a commercial partner-

ship can bind it by signing his name to a promissory note under seal in the course of business of the partnership. 989.

Principal and agent. Where an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is contrary to public policy, and voidable in equity upon the application of either party. 622. Evidence that a husband frequently signed checks on his wife's account, with her knowledge and consent, held com-

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petent on the issue whether he was her agent, with authority to sign her name to a check upon her bank account. 219.

Executors and administrators. The bona fide payment of an indebtedness to an administrator to whom letters had been regularly issued held a legal discharge of the indebtedness, notwithstanding the subsequent

appointment of an executor under a will that had been discovered and presented for probate prior to such payment. 878.

Brokers. A real-estate broker held without authority to execute a contract of sale which shall be binding on one who places real estate in his hands for sale, unless such authority is specially conferred. 210.

VI. TORTS; NEGLIGENCE; NUISANCES.

Strike; picketing. A combination of employees to compel the employer to permit representatives of a union to adjust all differences between employer and employees, and to enforce compliance with the decision by a strike on the part of all, held to be illegal. 162. A Georgia case holds that striking workmen may be enjoined from the keeping of patrols around their former employer's business, where such patrols resort to intimidation or any manner of coercion to prevent others from entering into or remaining in the service of the employer. 848.

Exhibition. A student association of a university held liable for injuries to a patron through the collapse of a negligently constructed stand erected, through one of its directors, upon the athletic field. 234.

Landlord and tenant. The lessee of a room in a tenement building held not entitled to complain that the common passageways are not lighted in the nighttime, in the absence of any agreement on the part of the landlord to light them. 928. The owner of a wharf which collapsed while being put to the use for which it was intended held responsible for injuries to a guest or visitor of the lessee of the wharf. 1161. A landlord held not liable for injuries to a tenant by shutting off heat after the tenant is in arrears for rent, where the lease provides for forfeiture in case of nonpayment of rent, and for re-entry by the use of such force as is necessary; in which event no action shall be brought by the tenant. 672.

Dangerous premises. A railroad company held not liable to a guest in a hotel adjoining its property for failure to light or guard a retaining wall between the properties, over which the guest falls while wandering about the hotel grounds in the night on business of his own. 916. The owner of a building held to owe no duty to a police officer who accompanies an express wagon to the building, to protect it from strikers, except to refrain from wilfully or wantonly injuring him. 776.

Elevators. The owner of an elevator in a business house held not liable for injuries to an infant from falling down the elevator 17 L.R.A. (N.S.)

shaft, unless he came upon the premises by invitation, express or implied. 136. The owner of a building held not liable for injury to one using its elevator to deliver merchandise therein, by its fall due to a latent defect in a bolt imbedded in a beam, which had been put in by a competent workman in repairing the elevator, the elevator repairs having been approved by a casualty company and official public inspectors. 104. See also *supra*, I., Municipal Corporations.

Duty to sick person. The owner of an apartment building who insisted on the removal of a relative of the janitor who had become ill with an infectious disease while temporarily in the janitor's apartments held not liable for an aggravation of the illness due to the excitement attending the removal, where the patient was not confined to bed, and there is nothing to show that she might not with comparative safety have been taken home in a cab, or that the owner had any knowledge as to her pecuniary ability to procure one, or that he might have inferred that the disease would be aggravated by the removal. 510.

Animals. One held to be the keeper of a dog, within a statute making such keeper liable for the value of sheep killed by a dog, where the dog, with his knowledge and consent, was owned by his daughter, who lived with and kept house for him. 431.

Physicians and surgeons. A physician held not relieved from liability for burning a patient by the use of the X-ray by the fact that she quit his treatment before he was willing she should do so, or that she neglected to follow instructions as to use and care of the affected part. 1242.

Independent contractors. The work of burning a fire guard along a railroad right of way held to be a part of the operation of the railroad, so that the railroad company cannot, by delegating the work to an independent contractor, avoid the liability placed upon it by statute. 788. That work is paid for "by the job," and that the person doing the same has power to employ assistants to be paid by himself, while tending to show that he is an independent contractor, held not to be conclusive on that point, and to yield if it ap-

pears that he is merely working under a general employment having no dominion or control over the premises, and is subject at all times to the order of the employer as to when and how he shall work and the results to be accomplished, and is subject to discharge at any time. 370.

Master and servant. A servant held not to assume the risk from absence of fastenings on a trapdoor, which might have been placed on the underside, which he never had occasion to examine. 76. The closing of a switch held not part of the master's duty which cannot be delegated. 542. The duty of keeping in place a box inclosing a shaft where it runs through a dressing room for employees, held non-delegable. 568. A master held liable for injury to an employee due to his failure to furnish a suitable number of servants to do the work required of them. 778. One employed to paint cars in a large car-manufacturing plant requiring various and distinct branches of labor, who works under the general paint foreman, held not a fellow servant of the switching crew employed and superintended by the general superintendent to move cars as the exigencies of the work require, over whom the paint foreman has no authority. 292. A servant in the employment of a general employer, and servants of his subcontractor, or of an independent contractor, held not fellow servants, unless the circumstances show that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that person as his master for the purpose of the common employment. 334. A street railway company held not within a constitutional provision abolishing fellow-servant rules as to employees of a "railroad company." 117. The defense of contributory negligence held not barred by a statutory provision that continuance of a servant in his employment with knowledge that the employer has failed to guard his machinery, as required by law, shall not operate as a defense to an action for injuries due to such omission. 904. The owner of a cart which the driver is trying to repair in a public street, after raising the pole into the air, held liable for the act of a stranger whom the driver calls to his assistance, in negligently causing the pole to fall upon one looking into a shop window near by. 982.

Contributory negligence. An ordinarily bright and intelligent boy twelve years old, living in a city in which electric-light and power wires are in constant use, and who, having knowledge of the danger, but not of its extent, purposely takes hold of such a wire in order to obtain a shock, 17 L.R.A. (N.S.)

held, as a matter of law, to be guilty of contributory negligence. 435.

Last clear chance. The negligence of one in attempting to drive across a street-railway track in front of a car held not the proximate cause of his injury, if, upon seeing his design, the motorman, because of his inexperience, became confused, released the brake, and caused the car to increase its speed so that it struck the wagon, which it would not have done if he had used ordinary care. 707.

Imputed negligence. An owner of cotton who left it with a compress company to be bailed held not chargeable with the latter's negligence, so as to prevent him from recovering against a railroad company whose negligence combined with that of the compress company occasioned the loss. 923.

Highways. A pedestrian held negligent as a matter of law, especially on a clear day, if, with nothing to obstruct her vision, she stumbles over a place in the sidewalk where one paving stone is raised 4 inches above the adjoining one, that fact being well known to her. 194. The abutting property owner held liable for an injury to a pedestrian in falling over a covering constituting an obstruction which was placed by an independent contractor over a repaired sidewalk, without signals or guards. 758.

Hospital. A hospital maintained by a railroad for the benefit of employees, to which they are required to contribute, held not a charitable institution within the rule which exempts such institutions from liability for negligence. 1167.

Nuisance. Unavoidable noises resulting from the operation of an ice plant constructed under a municipal permit held to furnish no basis for enjoining its operation as creating a private nuisance. 287. Maintaining a stable in a state of uncleanliness, and permitting the horses to be brought in, in the nighttime, and the drivers to use loud and profane language, so that the sleep of neighboring occupants is disturbed and their health impaired, held to be a nuisance. 1025.

Carriers. A railroad company held liable for an injury to a passenger by the jerking of the train in starting while he was standing on the platform awaiting an opportunity to alight after the train had stopped at his station, the cars standing or moving on parallel tracks so close to his train that any attempt to use the passageway between them was not unlikely to result in injury. 179. A Wisconsin case held that freedom from contributory negligence could not be declared, as a matter of law, where a passenger injured by a train going into a washout voluntarily rode on

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the platform of a fast-moving train, in the nighttime, in the midst of, or soon after, a rain storm, when there was room inside the car, no one inside the car being injured. 158. A conductor held bound to exercise the highest degree of care possible to prevent a child from alighting from a moving car where she has become frightened and frenzied by the negligence of the carrier's employees in carrying her past her destination. 101. A street-car passenger who, upon reaching the transfer point and in obedience to the conductor's demand, gets off the car, but continues to demand a transfer, held not to have lost his right as a passenger, so as to absolve the company from liability for an assault upon him by the conductor growing out of the altercation over the transfer. 763. A street car company held not liable for an assault by its motorman upon a passenger who has left the car to stop a fight between the conductor and a person who has been ejected from the car. 770.

Street railway. A Maryland case holds that negligence cannot be imputed to a street car company merely because the wheel of a carriage passing along the street falls into a cable slot. 978.

Railroads. A Michigan case discusses the question as to the right of one about to cross a railroad track to rely upon train schedules, as affecting the question of contributory negligence in failing to look in both directions for a train. 1253. A traveler about to cross four railroad tracks covering a distance of only 49 feet held to exercise proper care if he stops, looks, and listens before venturing upon the first track, without repeating the precaution with each of the successive tracks. 505. Running a train through a town where persons are reasonably to be expected on the track, without sufficient notice of its approach, and at such a speed that those in charge of it are powerless to accomplish anything to avoid injury after seeing a person on the track, held negligence. 224. Charter authority to enact and enforce all local, police, sanitary, and other regulations which do not conflict with general laws, held to empower a municipality to require railroads running through its limits to adopt such precautions as to speed of trains crossing its streets as may be needed for the safety of the public. 561.

VII. PROPERTY RIGHTS; WILLS.

Chattel mortgage. The burden held to be upon the mortgagee, under a chattel mortgage on domestic animals which expressly covers the increase, to establish that such increase was conceived before the mortgage was given, in an action involving the right to the possession of the increase as between such mortgagee and a creditor of the mortgagor. 203.

Liens. The constitutional provision against special legislation held violated by a statute providing for the enforcement of mechanics' liens against the property of public service corporations, not by writ of *levari facias*, as in the case of liens against other property, but by special *fiery facias*, which seizes the property as a whole so as not to stop the operation of the corporation and defeat its object. 884.

Levy and seizure. The interest of a lessee under a lease for a term of years of real estate held not subject to sale under an execution at law against him, notwithstanding that he has an option to purchase the leased property for a stipulated amount, and, in the event of failure to exercise the option, is to be paid one half of the value of the improvements he has made on the property. 841. A debtor who sells all his nonexempt property and starts to remove to another state held, while he is on his way, but yet within the state, to be a "resi-

dent of the state" within the exemption laws. 990.

Fixtures. The execution of new lease in which the tenant does not expressly reserve fixtures or improvements erected by him under a preceding lease held not to deprive him of the right to remove them. 1135. A gas stove and widow shades running on rollers attached by the owner to his dwelling house designed for a single family, held not fixtures which will pass with a mortgage of the realty. 699.

Easement. The absence of a constructed track for teams to a road on which a grant of land is bounded held not sufficient to give the grantee a way of necessity over remaining land of the grantor. 1018.

Dower. The provisions of a statute that a jointure is a bar to dower held ordinarily not to deprive the intended wife of power to bar her dower by any other form of antenuptial contract. 866. An Oregon case denies the power of the legislature to enlarge dower rights of the widow, as against the rights of one who had previously contracted for a judgment lien on the husband's property, although the judgment was not actually entered until after the statute was passed. 319. A wife held entitled to redeem from a foreclosure sale of her husband's land during his life; and, further, that a purchaser of the husband's interest

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subsequently to a divorce of the parties is subject to a lien on the land in favor of the wife for the amount she paid to redeem, with interest, less the net value of the use of the land while it was in her possession. 981.

Gifts. A delivery sufficient to pass title to a savings bank account held to be shown by the delivery to one having possession of the book as bailee, of an order on the bank to pay the account to him, accompanying a parol gift of it, and followed by a holding of the book by donee as owner. 181.

Fraudulent conveyances. A transfer by an insolvent debtor of all his assets to an insolvent corporation organized by him, held, under the circumstances in the case, including the fact that he was to be retained as president and manager of the corporation at a salary, to be fraudulent and void as to his creditors not assenting thereto. 310.

Life tenant. A sale of a remainder interest at what it would be worth if the life tenant were in good health held voidable for fraud, where the purchaser, knowing that the life tenant was on his deathbed, sought the remainderman and gave a misleading answer to a question as to the life tenant's health, with the object of affirmatively deceiving him and thereby procuring the trade. 284.

Wills. A promise not to contest a will, by one who in good faith, for a cause which did not appear to him to be vexatious or frivolous, had intended to do so, held a sufficient consideration for a promise to let him share in the estate, without the necessity of showing that he had reasonable cause to believe that he had a fair chance of success in the contest; and, further, that a contract between next of kin, that each shall have a certain portion of the estate, does not amount to an agreement to divide the estate without probating the will. 1036. A Kentucky case upholds a letter written by a man sentenced to death, three days before execution, as a will. 1126. In an action to contest a probated will the burden of proof to explain an erasure in the will held not to be upon the defendant in the first instance. 184. A will held not to have been signed at the end thereof by the testatrix, where, though the blank for the *testimonium* clause was filled out, the line immediately following the same for the signature of the maker was left blank, although the testatrix's name was written in the attestation clause which immediately followed the *testimonium* clause. 353. Undue influence in the making of a will held not inferable from the mere fact that it was 17 L.R.A. (N.S.)

in favor of one with whom the testator had maintained illicit relations, and was contrary to his expressed intention of leaving the property to a dependent sister who had cared for him in his youth. 477. A devise to testator's children and their personal and lawful heirs held to create a fee in the children, the words "personal and lawful heirs" not being equivalent to "heirs of the body" so as to create an estate tail. 1079. An Illinois case holds that a bequest of a life estate for the benefit of testator's daughter, with remainder to her children under conditions rendering the remainder void under the rule against perpetuities, may be upheld. 216. A West Virginia case holds that, in a grant for the use and benefit of a wife and children by its term-declaring it to be a provision for the family, any manifest indications which support the reasonable construction of a life estate in the wife with remainder to the children will be followed, and that construction given so that after-born children may take, and so that the life tenant may have sufficient income to support the children. 1215.

Waters. Grantees of specific quantities of water flowing from an artesian well held to take in the order of the grants, so that the first grantee will be entitled to the entire quantity granted to him although the aggregate amount granted exceeds the supply. 647. A Minnesota case contains an interesting discussion of the relative rights of a municipal corporation and property owners in percolating water. 650. A canal company which, under statutory authority, has constructed and maintained for more than forty years a channel to feed the waters of a lake into its canal, held entitled to abandon and close the channel, thereby causing the water of the lake to seek its former outlet, without liability for consequential injuries to lands not abutting on the channel, but which have been relieved by it from a burden which they formerly bore. 945. The owner of a prior right to make direct application of appropriated water to irrigation purposes during the irrigation season held entitled, to the extent of his priority in volume and time, to store it for later use. 329. The making and filing of a plat laying out a town site upon a desert entry held not to dedicate to the public the water used upon the streets and alleys under a water right subsequently located and acquired. 86. A municipal corporation held not entitled, without statutory authority, to compel the purchaser of property to pay rents for water consumed by his vendor, as a condition of continuing the supply. 923.

VIII. CIVIL REMEDIES; PRACTICE AND PROCEDURE.

Abatement. The injury to the husband through deprivation of his wife's services or matrimonial companionship in consequence of a personal injury to her, held not within a statute providing that actions for tort or assault, "or other damages to the person," shall not abate by death. 570.

Death. A statute giving the widow a right of action for the negligent killing of her husband held to operate in favor of a nonresident alien. 964.

Election of remedies. Bringing an action to recover the value of timber cut from land by a trespasser held to bar a subsequent action to recover for the trespass. 280.

Damages. Damages for personal injuries to a pregnant woman held to include compensation for mental suffering because of probable deformity of the child, as well as for disappointment at the birth of a deformed child, but not for sorrow on account of the child's suffering because of the deformity. 594. A Minnesota court holds that the pain and suffering which the mother would have suffered if the child had been born in the natural course of events cannot be deducted from the pain and suffering occasioned by a miscarriage resulting from defendant's negligence. 598. Mental suffering held not presumed to exist for deprivation of opportunity to attend the funeral of one's first cousin. 1002. A conductor's refusal to listen to a passenger's explanation as to a special contract that he should be let off at a way station where the train was not scheduled to stop, held evidence justifying the assessment of punitive damages, where the passenger was compelled to leave the train at the last regular stop before his station was reached. 344. The rupture of an artery due to a muscular contraction in attempting to avoid injury from an article which falls upon one's umbrella held to be the proper basis of recovery against one responsible for the fall of such article. 974. The measure of damages for carrying a passenger past his destination held to be a reasonable sum for loss of time, necessary expenses incurred, and, in addition thereto, fair compensation for inconvenience experienced, if any. 1226. One failing to perform his contract to erect in an office building an elevator which will work at its rated capacity held not liable to the owner for loss of rents during the time unsatisfactory service continues. 1130.

Evidence. Testimony of witnesses who made a peep-hole into a saloon, as to what

they observed inside, and that they took some articles from the room and brought them into court, held not inadmissible in a prosecution for illegal liquor selling, as being an unreasonable search or seizure, or as compelling one to become a witness against himself. 451. A mortality table printed in a law book held not admissible in evidence where it is not shown to have been in actual use for the purpose for which such tables are intended, or to have acquired a reputation for accuracy, unless the authenticity is established by competent evidence. 1138. Parol evidence held admissible, as against a purchaser with notice, to show that an unrestricted indorsement by a bank upon a note was made to facilitate collection. 838. The presumption attaching to a second marriage of a person held not sufficient to overcome direct testimony of himself and his former wife and disinterested witnesses that the first marriage was legally solemnized. 960. Evidence that deceased did not believe in a Supreme Being, offered to discredit his dying declaration, held not inadmissible because it relates to a time a year before his death. 291. The privilege as to communications to an attorney held not to attach to statements made by him or testator during the preparation of a will, in a proceeding to contest the will on the ground of coercion, duress, and undue influence. 108. A letter bearing a typewritten signature held admissible in evidence as proof of the receipt of a remittance acknowledged therein, without authentication of the signature, where it was sent in response to a letter containing notification of the remittance. 229. Evidence of the vicious acts of a cow on the morning after she has inflicted injury on a person held not inadmissible in an action to hold her owner liable for the injury on the theory that they are not part of the *res gestæ*. 1233.

Injunction. A Michigan case holds that injunction will lie to prevent threatened repeated wrongful interference with the attempt of a citizen to hunt wild fowl upon the public navigable waters of the state. 1236. A North Carolina case holds that an abutting owner who delays seeking an injunction against the operation of a railroad in the street, for a period of seventeen years and until its removal would seriously affect public interests, will be denied such relief. 949. A Colorado case holds that a municipal corporation may be enjoined from proceeding to enforce its order to close a club room, based upon an arbitrary *ex parte* de-

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termination that the furnishing by the club of intoxicating liquors to its members violates the ordinance against dispensing such liquors in the city. 272.

Mandamus. A student held entitled to mandamus to compel the issuance of a diploma to him by a medical college where the dean has reported to the directors that the relator has fulfilled all demands of the institution and passed all examinations so as to entitle her to a diploma, and the board of directors has arbitrarily and capriciously refused to graduate the student or issue her diploma. 930.

Misconduct of trial judge. The conduct of the trial judge in entering the jury room in the absence of the attorneys at the request of the jurors, after they had retired to deliberate on a verdict, and communicating or conversing with them in reference to the case, held to require the granting of a new trial in a criminal case, without consideration of the question whether the conversation was prejudicial or not. 609.

Writ and process. An error in the middle initial of a defendant's name in a summons served by publication held fatal to the jurisdiction. 236. A statute permitting service of process by publication on domestic corporations in counties where the cause of action arises, but in which the corporation has no representative, held not to deprive it of due process of law. 324.

Removal of causes. An action by an employee against a railroad company for personal injuries, held removable as one arising under the laws of the United States, where the Federal statute requiring the use of automatic couplers is relied upon to defeat the assumption of risk, although the petition states a good cause of action independently of the Federal statute. 861.

Holiday. A judgment entered on a judicial day held not void because evidence was taken and arguments heard without objection on a day which had, without knowl-

edge of the court, been proclaimed by the governor to be a holiday. 257.

Joinder; receiver. An Illinois case holds that the receivers of a railroad company, who are jointly and severally liable for a personal injury caused by the negligence of themselves and another company, may be joined with the latter in an action by the injured person for damages. 852.

Limitation of actions. An action for damages for overflowing lands by the erection and maintenance of a milldam which is a permanent structure, held barred unless brought within two years next after the damages are first sustained. 206. That money is obtained by fraud held not to prevent the running of the statute of limitations against an action to recover it back from the consummation of the transaction, unless investigation is prevented by affirmative acts on the part of the wrongdoer, mere silence not being sufficient. 660. So, in the absence of fraudulent concealment, the statute of limitations held to begin to run against a claim upon an attorney for money collected by him, from the time the money should have been paid over, which is within a reasonable time after collection. 667. The statute held not to run against liability on an open bank account before demand of payment by the depositor or refusal to pay on his order. 994. The phrase "has arisen in another state," in a statute providing that, when a cause of action has arisen in another state, and is barred by the laws thereof, an action shall not be maintained against him in "this" state, held to refer to the state in which the foreign contract is to be paid or discharged, and to have no application to an intermediate state through which the debtor may subsequently travel, or in which he may reside for a sufficient time to bar an action under the law of that state. 472. See also *supra*, II., Covenants.

IX. CRIMINAL LAW AND PRACTICE.

Suspension of civil rights. The suspension of the civil rights of a person sentenced to the penitentiary for a term less than life held to begin at the date of his imprisonment under sentence. 502.

Ordinance and statute. A municipal ordinance providing for the punishment of anyone maintaining or participating in a gambling game held not superseded by a subsequent statute making the carrying on of a gambling game a felony. 49.

Confessions. Confessions or inculpatory statements elicited on the examination before the coroner's jury of defendants 17 L.R.A. (N.S.)

charged with murder held not admissible where they were in custody at the time of the examination, and were not informed that they were not compelled to testify. 468.

Assault. The owner of land entitled to immediate possession held not liable as for an assault upon a trespasser thereon, because of the use by him of no more force than is necessary to expel the trespasser when he attempts to exercise his right of entry. 455.

Burglary. Opening a screen door held shut by springs, with the intent to commit

larceny, held a breaking, within the meaning of the law of burglary. 1100. Pushing up a window which is held down by its own weight only, and is left open enough to permit the insertion of a hand under it, so as to form an aperture large enough to admit one's body, held a sufficient breaking to constitute burglary. 1102.

Extradition. A discharge in habeas corpus from custody under extradition proceedings because of the insufficiency of the indictment held not a bar to the prosecution of accused upon the same indictment when subsequently arrested in a jurisdiction where the indictment was found. 1247.

Embezzlement. Money delivered by one agent to another to be carried to the principal held to be the subject of embezzlement by the latter, although the contracts of the agents require each to report to the principal on his own account for moneys received by him. 531.

Gambling. Playing cards for money on a blanket in a shed as an attachment of a dance held not to warrant a conviction under a statute providing that any person who shall, for the purpose of gaming, exhibit any gaming table, bank, or device, shall be guilty of felony. 1210.

Homicide. One assaulted by a trespasser with a deadly weapon when within a few feet of his doorstep held entitled to meet force with force, even though the result is the death of his adversary. 483. One held guilty of manslaughter who killed another with a gun intentionally pointed at him, although it was believed to have been unloaded, where such pointing of a gun is by statute made a misdemeanor, and the gun had not been handled for several weeks, so 17 L.R.A. (N.S.)

that the accused was culpably negligent. 308. The killing of a motorman by shooting him held not reduced to manslaughter by the fact that, being a powerful man, he had just assaulted a smaller man, a friend of the accused, because of a misunderstanding as to payment of the fare, where the assault had ceased, and the deceased was retiring from the combat. 795.

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GENERAL INDEX

NOTES ARE INDEXED BY THE WORD "ANNOTATED" AFTER THE PARAGRAPHS TO WHICH THEY APPLY.

(Separate Index to Notes Precedes this.)

ABATEMENT AND REVIVAL.

1. If the declaration and facts stated in opening the case show that the cause of action did not survive the death of the original defendant, his successor may move to dismiss, although he has not demurred to the declaration, or requested the rendition of a verdict in his favor. *Hey v. Prime*, 17: 570, 84 N. E. 141, 197 Mass. 474.

2. The injury to the husband through deprivation of his wife's services or matrimonial companionship because of a personal injury to her is not damages to the person, within the meaning of a statute providing that actions for tort for assault, "or other damages to the person," shall not abate by death. *Hey v. Prime*, 17: 570, 84 N. E. 141, 197 Mass. 474. (Annotated)

ABORTION.

In a hearing, by the state board of health, of charges against a physician for procuring, or aiding or abetting in procuring, a criminal abortion, it is not necessary either to allege or to prove that the woman had become quick; as the crime may be perpetrated the moment embryo life and gestation have begun. *Munk v. Frink*, 17: 439, 116 N. W. 525, — Neb. —.

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Where restoration of property the sale of which is sought by bill in equity to be set aside has become impracticable, the court may state an account between the parties, and decree the payment of the value of the property received, although such relief is not asked by the bill. *Swan v. Talbot*, 17: 1066, 94 Pac. 238, 152 Cal. 142.

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As to parties, see Parties.

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See Unborn Children.

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See Principal and Agent.

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testimony as to the contents of a former will is not rendered harmless by the fact that the testimony was not made to appear relevant or material, where nothing could be ascertained as to its character because of the rulings of the court. *Re Young*, 17: 108, 94 Pac. 731, 33 Utah, 382.

28. The erroneous exclusion of evidence is not available error, where no sufficient offer to prove was made. *Grimestad v. Lofgren*, 17: 990, 117 N. W. 515, — Minn. —.

29. A judgment unsupported by the findings and conclusions of law will be reversed. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.

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Passing of, on conveyance of land, see Deeds, 4.

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In attempt to enter upon one's own property in possession of wrongdoer, see Appeal and Error, 24; Evidence, 41, 44, 55.

On passenger, see Carriers, 1, 2.

Right of one assaulted to defend himself, see Homicide, 3.

1. That one injured by a property owner attempting to effect an entry on the property was merely an employee of one in wrongful possession thereof does not render such owner liable for the injury if he used no more force than was necessary to effect the entry. *Walker v. Chanslor*, 17: 455, 94 Pac. 606, 153 Cal. 118. (Annotated)

2. The owner of land who is entitled to immediate possession of it is not liable for assault upon a trespasser thereon because of the use by him of no more force than is necessary to expel the trespasser when he attempts to exercise his right of entry. *Walker v. Chanslor*, 17: 455, 94 Pac. 606, 153 Cal. 118. (Annotated)

ASSIGNMENT.

An agreement, in consideration of a loan of money, to transfer to the lender the proceeds of a pending sale of real estate when received, constitutes a present equitable assignment of such proceeds. *Godwin v. Murchison Nat. Bank*, 17: 935, 59 S. E. 154, 145 N. C. 320.
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What property subject to, see Levy and Seizure.

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When limitations begin to run against claim against attorney for money collected by him, see Limitation of Actions, 4, 7.

As to what is reasonable time to allow attorney to pay over money collected by him for client as question for jury, see Trial, 5.

Disbarment.

1. The entry upon his records by the trial judge, after reversal of his decision by the supreme court, of a statement that the supreme court made a statement of facts not supported by the record for the purpose of bolstering up a decision, neither founded on law nor supported by facts, its opinion being an abnormally strange document, and a reversal of a decision that had been accepted law for forty years; all of which was reprehensible if the court knew what it was doing, pitiful if it did not,—is such a violation of his duty as an attorney and officer of the supreme court as to justify his suspension or disbarment, although he declares under oath that he meant no disrespect for that court, and the matters on which the statement by the supreme court was based came to its attention during the

argument of the case before it, of which fact the trial judge was ignorant. *Re Breen*, 17: 572, 93 Pac. 997, — Nev. —.

(Annotated)

2. An attorney, in exercising his right to comment upon and criticize the rulings of a judicial officer, is guilty of professional misconduct for which he may be disbarred or suspended, where he addresses to the chief justice of the supreme court a personal letter impugning both the intelligence and the integrity of the chief justice and his associates, in the decision of certain appeals then fully ended and in which he has been attorney for the defeated litigants. *Re Hart*, 17: 585, 116 N. W. 212, 104 Minn. 88.

3. An attorney has the right, in common with every citizen, to comment upon and criticize, without any restriction, the rulings of a judicial officer in an action which has been finally determined, and is not answerable therefor otherwise than in an action triable by jury, unless the comment or criticism is so base and vile as to establish clearly his bad character and his unfitness to remain a member of an honorable profession, in which case his conduct may be considered a sufficient cause for disbarment. *Re Hart*, 17: 585, 116 N. W. 212, 104 Minn. 88.

(Annotated)

Compensation.

Contract for contingent attorney's fee, see *Champerly*.

Validity of agreement that client should not compromise or settle claim without consent of attorney, see *Contracts*, 10.

4. The illegality of a contract for a contingent attorney's fee, arising from a stipulation that the client shall not compromise or settle his claim without the consent of the attorney, is available as a defense in an action against a third party, based on the contract. *Davy v. Fidelity & C. Ins. Co.* 17: 443, 85 N. E. 504, 78 Ohio St. 256.

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Allowing attorneys' fees in mechanics' lien case, see *Constitutional Law*, 8.

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Violation of Federal statute requiring use of, see *Removal of Causes*.

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As to what passes to assignee for benefit of creditors, see *Assignment for Creditors*.

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Jurisdiction of actions by trustee in bankruptcy, see *Courts*, 7.

Sufficiency of evidence to show that money on deposit was property of bankrupt corporation, see *Evidence*, 58.

Necessity of pleading insufficiency of assets to pay liabilities, in action by trustee in bankruptcy, see *Pleading*, 4, 5.

1. A court of bankruptcy may, by summary process, require those who assert title to, or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court, and, the notice being reasonable, may proceed to adjudicate the merits of such claims. *Eppstein v. Orahood*, 17: 465, 156 Fed. 42, 84 C. C. A. 208.

2. Property in the course of administration under the bankruptcy act, while not exempted from taxation or freed from tax liens or claims theretofore fastened upon it, is nevertheless in *custodia legis*; and a pre-existing tax lien or claim cannot be converted into a full title by the procurement of a tax deed without the court's sanction. *Eppstein v. Orahood*, 17: 465, 156 Fed. 42, 84 C. C. A. 208.

(Annotated)

Partnership bankruptcy.

See also *infra*, 11.

3. A bankruptcy court is without jurisdiction, after determining that a partnership is bankrupt, but that none of the partners is a bankrupt, summarily to take and administer in the proceedings against the partnership the individual estate of a solvent partner without his consent. *Re Bertenshaw*, 17: 886, 157 Fed. 363, 85 C. C. A. 61.

4. Partnership creditors may pursue unadjudicated partners by actions at law and suits in equity before, during, and after the proceedings in bankruptcy against the partnership. *Re Bertenshaw*, 17: 886, 157 Fed. 363, 85 C. C. A. 61.

5. The provision of the bankruptcy act of July 1, 1898, chap. 541, § 5f, 30 Stat. at L. 548, U. S. Comp. Stat. 1901, p. 3424, that the net proceeds of partnership property shall be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts, enunciates a rule of administration of partnership and individual property; and it governs only such partnership and such individual property as the alleged bankrupts own at the time the petition is filed, and that which has been previously transferred fraudulently or to make a voidable preference. *Sargent v. Blake*, 17: 1040, 160 Fed. 57, — C. C. A. —.

6. A partnership is insolvent under the bankruptcy act of July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418, if the partnership property is insufficient to pay the partnership debts, because by § 1 (19) of the act it is a person,

and because under § 1(15) any person is insolvent whose property is insufficient to pay its debts, and since the only property a partnership has or can convey or apply to the payment of its debts is partnership property, and the only debts it owes are the partnership debts. *Re Bertenshaw*, 17: 886, 157 Fed. 363, 85 C. C. A. 61.

7. A partnership, under the bankruptcy act of July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418, is a distinct entity, separate from the partners who compose it, which owns its property and owes its debts apart from the individual property of its members, which it does not own, and apart from the individual debts of its members, which it does not owe; and it may be adjudged bankrupt although the partners who compose it are not so adjudicated. *Re Bertenshaw*, 17: 886, 157 Fed. 363, 85 C. C. A. 61.

8. The discharge of the partnership where the partners are not adjudicated bankrupt does not discharge the partners from their liability for the partnership debts. *Re Bertenshaw*, 17: 886, 157 Fed. 363, 85 C. C. A. 61.

9. The trustee of the estate of a bankrupt partnership is not the trustee of the individual property of the unadjudicated partners, and has no right to administer it; nor is he the trustee or the assignee of the claims of the partnership creditors, nor their agent or attorney to collect those claims out of other than the partnership property; and where no partner is adjudged bankrupt, the trustee has no power to enforce such claims against any property except that of the partnership, or against any unadjudicated partner or other person who has none of the partnership property. *Re Bertenshaw*, 17: 886, 157 Fed. 363, 85 C. C. A. 61.

Preferences; rights of preferred creditors.

10. The transfer of the proceeds of a sale of property, to be applied on a loan, although within four months of the institution of bankruptcy proceedings against the assignor, is not a voidable transfer if made in accordance with an agreement at the time of the loan, entered into more than four months before such proceedings, to transfer the proceeds when received, where a present equitable assignment was created by the agreement, with nothing but the transfer remaining to be done. *Godwin v. Murchison Nat. Bank*, 17: 935, 59 S. E. 154, 145 N. C. 320. (Annotated)

11. The application, with the consent of all the partners, of the partnership property to the payment of an individual debt of a partner, within four months of the filing of a petition in bankruptcy, and while the partners and the partnership are insolvent, does not evidence any intent to hinder, delay, or defraud the creditors of the partnership, within the meaning of § 67e of the bankruptcy law (act July 1, 1898, chap. 541, 30 Stat. at L. 564, U. S. Comp. Stat. 1901, p. 3449); and it is not void or void-

able, where the creditor paid has no reasonable cause to believe that a preference is intended thereby. *Sargent v. Blake*, 17: 1040, 160 Fed. 57, — C. C. A. —.

(Annotated)

12. Intentional transfers by insolvent to secure or pay pre-existing debts, within four months prior to the filing of a petition in bankruptcy, which are not voidable as preferences under the bankruptcy act of July 1, 1898, chap. 541, § 67e, 30 Stat. at L. 564, U. S. Comp. Stat. 1901, p. 3449, or violative of other provisions of law, and which are made without intent to hinder, delay, or defraud creditors more than such securities or payments necessarily have that effect, do not evidence an intent to hinder, delay, or defraud creditors, within the meaning of that section. *Sargent v. Blake*, 17: 1040, 160 Fed. 57, — C. C. A. —.

Foreign bankruptcy.

13. Real estate cannot be transferred by a foreign involuntary assignment in bankruptcy which does not comply with the provisions of the statute as to the conveyance of real estate. *Re Delehanty*, 17: 173, 95 Pac. 109, — Ariz. —.

14. A foreign involuntary assignment in bankruptcy will be given precedence over the claim of the assignor to share as next of kin in the personal estate of a decedent. *Re Delehanty*, 17: 173, 95 Pac. 109, — Ariz. —.

(Annotated)

BANKS.

Rights of bank taking from its cashier, without indorsement, negotiable paper indorsed to him personally, see Bills and Notes, 6.

Parol evidence as to indorsement of notes to cashier of bank as individual, see Evidence, 21.

Sufficiency of evidence to show that money on deposit was property of bankrupt corporation, see Evidence, 88.

Gift of bank deposit, see Gift.

When limitations against liability on open bank account begin to run, see Limitation of Actions, 8.

Loaning credit of.

1. An agreement by a national bank to "protect" the checks of its customer and raise the limit of its "guarantee" so that the customer may draw to any amount is sufficient to charge the other party with notice that the bank is exceeding its powers. *Merchants' Bank v. Baird*, 17: 526, 160 Fed. 642, — C. C. A. —.

(Annotated)

2. That a national bank which guaranteed payment of a customer's checks profited by the agreement to the extent of exchange in the payment of checks and kept the profit does not prevent its denying liability on its guaranty where the profit was all swallowed up in losses growing out of the transaction. *Merchants' Bank v. Baird*, 17: 526, 160 Fed. 642, — C. C. A. —.

3. A bank which cashes the checks of a customer of a national bank with notice that the bank has loaned its credit to the

customer cannot enforce its guaranty to pay the checks. *Merchants' Bank v. Baird*, 17: 526, 160 Fed. 642, — C. C. A. —.

Relation of bank and depositor.

4. The relation of bank and depositor exists between a bank and a railroad company where the former purchases county aid bonds and places the amount of the bid to the credit of the railroad company payable on its order. *Missouri P. R. Co. v. Continental Nat. Bank*, 17: 994, 111 S. W. 574, 212 Mo. 505.

5. The creation of a bank account subject to another's check is not prevented from constituting the relation of bank and depositor between the bank and such person by the fact that his right to the fund is subject to a condition, if it is duly performed. *Missouri P. R. Co. v. Continental Nat. Bank*, 17: 994, 111 S. W. 574, 212 Mo. 505.

Payment of checks; forgeries.

Presumption of acceptance of check from delay in returning, see Bills and Notes, 3, 4.

Evidence to show that one who made the first indorsement on a forged check was the one whom the maker intended should receive the money, see Evidence, 56.

6. A bank cannot justify payment of a check fraudulently drawn in favor of a fictitious payee by the fact that the check came to it through other banks which had cashed it, since their negligence is imputed to it. *Harmon v. Old Detroit Nat. Bank*, 17: 514, 116 N. W. 617, — Mich. —.

7. The bank cashing a check must take proper means to assure itself that it is paid to the proper person,—especially where it is presented far distant from the residence of drawee or payee. *Harmon v. Old Detroit Nat. Bank*, 17: 514, 116 N. W. 617, — Mich. —.

8. A statute making a check drawn in favor of a fictitious payee payable to bearer does not apply where its execution in that form was secured by fraud. *Harmon v. Old Detroit Nat. Bank*, 17: 514, 116 N. W. 617, — Mich. —.

9. The duty of the bank to identify the one to whom a check is paid is not changed by the fact that the name of a fictitious payee was fraudulently inserted before it was signed by the drawer. *Harmon v. Old Detroit Nat. Bank*, 17: 514, 116 N. W. 617, — Mich. —. (Annotated)

Collections.

Parol evidence to explain indorsement by bank of note, see Evidence, 20.

10. A bank which, upon receiving a note for collection, indorses it, "Previous indorsements guaranteed. Pay to the order of any bank or banker;" and forwards it to a correspondent for collection,—does not render itself liable on the paper. *Johnston v. Schnabaum*, 17: 838, 109 S. W. 1163, — Ark. —.

11. An indorsement, by a bank, of a note, to pay to the order of any bank or banker, 17 L.R.A. (N.S.)

shows on its face that it passes title for collection only. *Johnston v. Schnabaum*, 17: 838, 109 S. W. 1163, — Ark. —.

12. One who cashed a check on indorsement by the payee of the assumed name in which he had fraudulently obtained it from the maker, and who received the amount from the drawee, cannot, upon discovery of the fraud and return of the amount by the drawee to the drawer's account, be compelled to return to the drawee what he received from it on the ground that he guaranteed the indorsement, since he made payment as intended by the maker, who should bear the loss caused by his own negligence. *Central Nat. Bank v. National Metropolitan Bank*, 17: 520, 31 App. D. C. 391.

BENEFICIARIES.

Power of beneficiary of trust to charge or alien his interest, see Trusts, 2.
Of insurance, see Insurance.

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As to insurance, see Insurance.

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See Appeal and Error, 8, 9.

BILLS AND NOTES.

Necessity of consideration to support agreement to indemnify surety on note against loss, see Contracts, 1.

Promise by maker to pay soon as consideration for promise to refrain from suit, see Contracts, 3, 4.

Fraud in inducing signing of, see Contracts, 26.

Presumption as to application of payment of interest on, see Evidence, 10.

Admissibility of note in evidence, see Evidence, 15.

Release of surety on, see Principal and Surety.

Power of one partner to bind partnership by signing partnership name to note, see Partnership, 1.

Signature to partnership note by agent in presence of one partner, see Partnership, 2.

1. An instrument promising for value received to pay a certain amount to a certain person if collected in her lifetime is not void as being either an attempt by her to dispose of property at death without the required formalities, or as an attempted gift without the requisite person making a complete delivery. *Perrin v. Chandler*, 17: 1239, 69 Atl. 874, — Vt. —. (Annotated)

Consideration.

2. While a promissory note given for the purchase price of property does not amount to a payment of the debt, in the absence of an agreement to the contrary, yet the contract of sale constitutes a valuable consideration for the note, and an action may be maintained thereon, even though the property has never been delivered and the title thereto has never passed. *Acme*

Food Co. v. Older, 17: 807, 61 S. E. 235, — W. Va. — (Annotated)
Acceptance.

3. A tortious refusal to return a check, on the part of the drawee, to the holder or collecting bank, is not necessary to render the drawee liable thereon under the provisions of the negotiable instruments law that, where the drawee refuses to return the bill within twenty-four hours, he will be deemed to have accepted it; but mere passive neglect to return is sufficient. *Wisner v. First Nat. Bank*, 17: 1266, 68 Atl. 955, 220 Pa. 21.

4. Delivering a check to a notary for protest does not, where by statute protest is not necessary, fulfil the duty of the drawee so as to relieve it from the operation of the section of the negotiable instruments law that, where the drawee refuses to return the bill within twenty-four hours, he will be deemed to have accepted it. *Wisner v. First Nat. Bank*, 17: 1266, 68 Atl. 955, 220 Pa. 21. (Annotated)

Indorsement and transfer.

Effect of unrestricted indorsement by bank, of note received for collection, see *Banks*, 10.

Indorsement by bank for collection, see *Banks*, 11.

Parol evidence to explain indorsement by bank, of note, see *Evidence*, 20.

Parol evidence as to indorsement of notes to cashier of bank as individual, see *Evidence*, 21.

5. Sureties who place their names on the face of a note as makers are primarily liable to a holder, notwithstanding any irregularity in the indorsements. *Johnston v. Schnabaum*, 17: 838, 109 S. W. 1163, — Ark. —

Transfer without indorsement.

6. A bank which takes without indorsement, from its cashier, negotiable paper indorsed to him without designation of his fiscal position, holds it subject to all equities existing in favor of the maker. *First Nat. Bank v. McCullough*, 17: 1105, 93 Pac. 366, — Or. — (Annotated)

Actions and defenses.

Damages in action by payee against maker of note given in consideration of executory contract of sale, see *Damages*, 8.

Who is real party in interest entitled to sue on promissory note, see *Parties*, 2.

Sufficiency of averment of promise to pay, in declaration in assumpsit on promissory note, see *Pleading*, 3.

Sufficiency of affirmation of title in action on promissory note, see *Pleading*, 7.

7. A stranger who pays the amount of a note and receives a delivery of it to himself will be held to be a purchaser until an intention to the contrary appears. *Johnston v. Schnabaum*, 17: 838, 109 S. W. 1163, — Ark. —

8. The maker of a negotiable note executed in consideration of an executory 17 L.R.A. (N.S.)

contract for the sale of goods may defeat or limit, on the theory of failure of consideration, in whole or in part, the amount of the recovery thereon in an action brought against him by the payee after maturity, by proving, in case the title to the property purchased passed, a total unexcused nonperformance on the part of the vendor of his contract to deliver the property, or loss on the part of the vendee of the benefit of the contract, occasioned by want of title in the vendor; or, where the title did not pass at the time of making the contract, by proving a refusal of the vendee to accept the property, and notice of his intention not to do so, before the title passed. *Acme Food Co. v. Older*, 17: 807, 61 S. E. 235, — W. Va. —

BLOOD POISONING.

Death from, following accidental abrasion of skin as one from external, violent, and accidental means, see *Insurance*, 21.

BOARDING HOUSES.

Regulation of construction and maintenance of, see *Constitutional Law*, 22, 23.

BOARDS.

Power of board of supervisors to fix situs of debt for purpose of taxation, see *Taxes*, 10.

Of health, see *Health*.

BONA FIDE PURCHASER.

Of checks, see *Checks*.

BONDS.

Effect of purchase by bank, of railroad-aid bonds, and placing amount of bid to credit of railroad company, see *Banks*, 4.

Right of county contracting for construction of building to bind contractor to pay claims of laborers and materialmen, see *Counties*.

Parol evidence to show intention of sureties on directors' bonds, see *Evidence*, 19.

Opinion as to value of particular bonds, see *Evidence*, 28.

Who may maintain action on contractor's bond, see *Parties*, 3.

BOOKS OF ACCOUNT.

Admissibility in evidence, see *Evidence*, 16.

BREAKING.

What constitutes, within meaning of law of burglary, see *Burglary*.

BRIDGES.

Right of property owner to erect platform on his lot to enable him to pass therefrom to bridge, see *Highways*, 2.

Right of municipality to erect bridge so as to raise surface of street to certain grade, see *Highways*, 5.

A bridge is a highway, under Idaho

Rev. Stat. 1887, § 850, and it is subject to the laws applicable to highways. *Sandpoint v. Doyle*, 17: 497, 95 Pac. 945, 14 Idaho, 749.

BROKERS.

A real estate broker is without authority to execute a contract of sale which shall be binding upon one who places real estate in his hands for sale, unless such authority is specially conferred. *Weatherhead v. Ettinger*, 17: 210, 84 N. E. 598, 78 Ohio St. 104. (Annotated)

BUILDING CONTRACT.

See Contracts, 18-20.

BURDEN OF PROOF.

See Evidence, 1-12.

BURGLARY.

Sufficiency of evidence to establish guilt of, see Evidence, 65.

1. Opening a screen door held shut by springs, with the intent to commit larceny, is a breaking within the meaning of the law of burglary. *State v. Henderson*, 17: 1100, 110 S. W. 1078, 212 Mo. 208. (Annotated)

2. Pushing up a window which is held down by its own weight only, and has been left open enough to admit the insertion of a hand under it, so as to form an aperture large enough to admit one's body, and entering the building through the aperture so made, is a sufficient breaking to constitute burglary. *People v. White*, 17: 1102, 117 N. W. 161, — Mich. —. (Annotated)

CANCELATION OF INSTRUMENTS.

Cancellation of contracts, see Contracts, 15, 16, 21-25.

CARRIERS.

Contract by company to establish station and stop trains at certain place, see Contracts, 12; Parties, 1; Pleading, 6.

Damages for carrying passenger beyond destination, see Damages, 9; Trial, 16, 28.

Punitive damages for refusing to carry passenger to destination, see Damages, 1.

By elevators, see Elevators.

Proof that agent in charge of railroad station was also agent of telegraph company, see Evidence, 59.

Injunction to prevent breach of covenant to run trains to and from track of covenantee, see Injunction, 4.

Refusal of telegraph company to transmit message informing superintendent of railroad that there was no fire in station, see Telegraphs.

Assault on passenger.

1. A passenger on a street car, who, being entitled to a transfer to another line, which is not given him before the transfer point is reached, continues to demand it after he has reached the ground at the transfer 17 L.R.A. (N.S.)

point in obedience to the conductor's command to get off the car and out of the way, has not lost his rights as a passenger, so as to absolve the company from liability for an assault upon him by the conductor, growing out of the altercation. *Blomness v. Puget Sound Electric R. Co.* 17: 763, 92 Pac. 414, 47 Wash. 620. (Annotated)

2. A street car company is not liable for an assault by its motorman upon a passenger who has left the car to stop a fight between the conductor and a person who has been ejected from the car. *Zeccardi v. Yonkers R. Co.* 17: 770, 83 N. E. 31, 190 N. Y. 389.

Riding on platform.

3. Freedom from contributory negligence cannot be declared as matter of law where a passenger injured by a train going into a washout voluntarily rode on the platform of the fast-moving train when there was room inside the car, in the nighttime, in the midst of or soon after a severe rain storm, and no one inside the car was injured. *Miller v. Chicago, St. P. M. & O. R. Co.* 17: 158, 115 N. W. 794, — Wis. —. (Annotated)

Injuries in getting on or off.

Doctrine of last clear chance where girl carried past destination stepped from moving street car, see Negligence, 14.

4. The failure of a street car conductor to exercise the highest degree of care possible to prevent a girl thirteen years of age and unaccustomed to riding upon the cars, from alighting from the moving car while frightened and frenzied by reason of having been carried past her announced destination, will render the company liable in damages for the injuries sustained by her. *Kruger v. Omaha & C. B. Street R. Co.* 17: 101, 114 N. W. 571, — Neb. —. (Annotated)

5. A railroad company is liable for injury to a passenger by the jerking of the train in starting, while he is standing on the platform, awaiting an opportunity to alight, after the train has stopped at his station, with cars standing and moving on parallel tracks so close to his train that any attempt to use the passageway between them is not unlikely to result in injury. *Smith v. North Carolina R. Co.* 17: 179, 61 S. E. 266, 147 N. C. 448. (Annotated)

Baggage.

Damages for failure to deliver traveling man's sample trunk, see Damages, 11.

6. A passenger who delivers his trunk to the baggageman at a railway station in proper season has the right to require that it shall be carried on the same train which he takes. *Conheim v. Chicago G. W. R. Co.* 17: 1091, 116 N. W. 581, 104 Minn. 312. (Annotated)

Freight carriers; duty to receive goods.

Damages for delay in furnishing cars, see Damages, 10.

Refusal of instruction requested by carrier as to contract to furnish shipper with cars, see Trial, 19.

7. A sufficient tender of stock to a carrier for shipment is made by notifying the carrier of the need of cars, and placing and keeping the stock within a short distance of the station in obedience to instructions of the station agent. *St. Louis, I. M. & S. R. Co. v. Ozier*, 17: 327, 110 S. W. 593, — Ark. —.

Loss of, or injury to, property.

Necessity of pleading, in defense to action by shipper for loss of property, noncompliance by shipper with contract, see Pleading, 17.

8. A railroad company cannot escape liability for injury through rust to metal loaded into one of its cars, by the facts that the car was sent to the shipper loaded with soda ash, the nature of which is to cause the boards of the car to shrink and expose its contents to the weather, and to cause metal to rust, and that he reloaded it with the metal without exercising reasonable care to ascertain whether or not it was in fit condition for the intended use. *Cleveland, C. C. & St. L. R. Co. v. Louisville Tin & S. Co.* 17: 1034, 111 S. W. 358, 33 Ky. L. Rep. 924. (Annotated)

Carrying live stock.

9. A provision of a contract for the transportation of live stock, that the rules, regulations, and conditions prescribed by the carrier shall be binding on the shipper, and that the signing of the contract by the shipper shall be conclusive evidence of his agreement to them, is invalid. *Houtz v. Union P. R. Co.* 17: 628, 93 Pac. 439, 33 Utah, 175.

Stipulations as to liability.

Burden of proving validity and reasonableness of contract limiting liability, see Evidence, 2.

10. A condition in a carriage contract requiring notice of loss within a specified time as a condition precedent to recovery for negligence does not apply to damages resulting from loss due to the falling of the market. *Houtz v. Union P. R. Co.* 17: 628, 93 Pac. 439, 33 Utah, 175.

11. Stipulations in contracts between carrier and shipper, when fairly entered into and found to be reasonable under all the circumstances, requiring the presentation of a claim for loss, are not in all cases against public policy, and, for that reason, ineffectual, merely because the claim pertains to a loss occasioned by negligence. *Houtz v. Union P. R. Co.* 17: 628, 93 Pac. 439, 33 Utah, 175.

12. A carriage contract which exempts the carrier from liability for loss occasioned by other than its gross negligence, in attempting to relieve the company from all liability for loss from ordinary negligence, is against public policy, and void. *Houtz v. Union P. R. Co.* 17: 628, 93 Pac. 439, 33 Utah, 175.

13. The provisions of a contract whereby a shipper of sheep assumes all the risk of damage which may be sustained by reason

of delay in the transportation, or loss or damage for any other cause or thing not resulting from wilful or gross negligence of the carrier; and all provisions exempting or limiting the liability for loss or damage resulting from the failure to exercise proper care,—contravene public policy, and are void. *Houtz v. Union P. R. Co.* 17: 628, 93 Pac. 439, 33 Utah, 175.

14. A stipulation in a carriage contract that, unless claims are presented within ten days, they shall be deemed to be waived, following stipulations relieving the carrier from liability for loss not resulting from its wilful or gross negligence, refers to claims resulting from such negligence, and cannot be treated merely as dealing with the question of the presentation of claims arising from loss of all kinds, including those arising from ordinary negligence, so as to give the contract the effect, not of exempting the carrier from liability for loss through its ordinary negligence, but as imposing a condition to the liability which the shipper must observe before he can enforce it. *Houtz v. Union P. R. Co.* 17: 628, 93 Pac. 439, 33 Utah, 175. (Annotated)

Governmental control; stopping trains.

Validity of rule of state railroad commission imposing penalty on carriers for failure to furnish cars for interstate shipments, see Commerce.

Conspiracy to induce commission of offense of receiving rebates, see Conspiracy, 5, 6; Criminal Law, 1; Evidence, 16, 47; Indictment, etc.

Review by courts of action of commission fixing rates and services for railroad transportation, see Constitutional Law, 2.

Review by court of orders of railroad commission, see Courts, 2, 3.

Sufficiency of evidence to establish unreasonableness of order of railroad commission, see Evidence, 63.

Question for court as to reasonableness of requiring railroad company to run trains over abandoned route, see Pleading, 23.

15. It is within the power of a railroad commission to require a railroad company to stop one local train each way a day at a platform half way between two stations between 7 and 8 miles apart for the accommodation of sixty-four families; and such an order is not so clearly unreasonable that courts will interfere with it when having power to vacate orders of the commission which are shown by clear and satisfactory evidence to be unreasonable. *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Com.* 17: 821, 116 N. W. 905, — Wis. —.

(Annotated)

CARS.

Injunction against storage of, in street, see Injunction, 14.

Liability of carrier for injury to goods through defective car, see Carriers, 8.

Damages for delay in furnishing, see Damages, 10.

CASUALTY INSURANCE.

See Insurance.

AUSE.

Question for jury as to cause of injury, see Trial, 4.

CERTIFICATE.

Of architect as to completion of building contract, see Contracts, 18-20.

CHAMPERTY.

Contract for contingent attorney fee, see Attorneys, 4.

Validity of agreement that client should not compromise or settle claim without consent of attorney, see Contracts, 10.

A contract for an attorney's fee contingent upon the amount to be recovered by judgment or settlement is ordinarily valid; but when such contract contains a stipulation that the client shall not compromise or settle his claim without the consent of the attorney, it is champertous and voidable at the option of the client. *Davy v. Fidelity & C. Ins. Co.* 17: 443, 85 N. E. 504, 78 Ohio St. 256.

CHARITIES.

Medical college as charitable institution, see Mandamus, 2.

Local auxiliary of foreign missionary society as charity exempt from taxation, see Taxes, 13.

As to exemption of religious societies from succession tax, see Taxes, 16-19.

See also Hospitals, 1-3.

A hospital maintained by a railroad for the benefit of its employees, to which they are required to contribute, is not a charitable institution within the rule which exempts such institutions from liability for negligence. *Phillips v. St. Louis & S. F. R. Co.* 17: 1167, 111 S. W. 109, 211 Mo. 419.

CHattel MORTGAGE.

Rights of attaching creditors in mortgaged personal property, see Attachment.

Burden of proving that increase of animals were conceived before mortgage thereon was given, see Evidence, 11.

A chattel mortgage on domestic animals and their increase, which is executed during the period of gestation and is duly filed for record, creates a lien upon the increase when the same are born, which will continue so long as the mortgage lasts, not only as between the mortgagor and mortgagee, but as against creditors, and bona fide purchasers of the mortgagor. *Holt v. Lucas*, 17: 203, 96 Pac. 30, — Kan. — 17 L.R.A. (N.S.)

CHECKS.

Guaranty of, by banks, see Banks, 1-3.
Payment of forged checks, see Banks, 6-9, 12.

Presumption of acceptance of, see Bills and Notes, 3, 4.

Evidence to establish husband's authority to sign checks for wife, see Evidence, 39.

Evidence as to person to whom maker of forged check intended that money should be paid, see Evidence, 56.

Inducing cashing of check by false pretenses, see False Pretenses, 2.

Forgery by indorsement upon check of name of fictitious person to whom it was made payable, see Forgery.

Question of good faith in purchase of check as one for jury, see Trial, 9.

1. Giving his own check in exchange for that of a third person constitutes one a holder of it for value; and such position is not lost by the fact that payment of the stranger's check is refused before his own has been negotiated or presented for payment. *Matlock v. Scheuerman*, 17: 747, 93 Pac. 823, — Or. — (Annotated)

2. Notice of infirmity in the contract is not given to the purchaser of a check by a statement of the indorser that the maker had requested him to wait two or three days before presenting it for payment. *Matlock v. Scheuerman*, 17: 747, 93 Pac. 823, — Or. —

3. A check negotiated at noon on the day following its date is not overdue so as to carry notice of its illegality or previous dishonor, although made and negotiated in the town in which the drawee is located. *Matlock v. Scheuerman*, 17: 747, 93 Pac. 823, — Or. —

4. One who, without notice of the invalidity of the check of a third person, has given his own check to the payee in exchange for it, is not bound to stop payment of his own check in case payment of the stranger's check is refused because of such invalidity. *Matlock v. Scheuerman*, 17: 747, 93 Pac. 823, — Or. —

5. A bona fide holder for value of a check given for a gambling debt, which is dishonored upon presentation for payment, is not bound to pursue the indorser for the protection of the maker, because of the original invalidity of the check. *Matlock v. Scheuerman*, 17: 747, 93 Pac. 823, — Or. —

CHILD LABOR.

Validity of statute forbidding, see Infants, 1.

CHILDREN.

See Infants.

CIVIL LIBERTY.

See Constitutional Law, 14.

CIVIL RIGHTS.

Effect of deprivation of, on validity of deed executed by convict while execution of judgment of conviction is stayed, see Deeds, 3.

The suspension of the civil rights of

a person sentenced to the penitentiary for a term less than life begins at the date of his imprisonment under the sentence. *Harmon v. Bower*, 17: 502, 96 Pac. 51, — Kan. — (Annotated)

CLAIMS.

Summary process to compel presentation of, before bankruptcy court, see *Bankruptcy*, 1.

CLASSIFICATION.

Of business for purpose of occupation tax, see *License*, 1, 4.

CLASS LEGISLATION.

See *Constitutional Law*.

CLUBS.

Summary closing of, on ground that liquor laws are being violated by, see *Injunction*, 11, 12; *Intoxicating Liquors*, 2.

COLLATERAL ATTACK.

On judgment, see *Judgment*.

COLLATERAL SECURITY.

See *Pledge*.

COLLECTIONS.

By banks, see *Banks*, 10-12.

COLLEGES.

Mandamus to compel issuance of diploma, see *Appeal and Error*, 11.
See also *Medical Colleges*.

COMBINATIONS.

See *Conspiracy*, 4; *Labor Organizations*.

COMMERCE.

What constitutes interstate commerce, see *Corporations*, 7.

A rule of a state railroad commission imposing a penalty upon railroad companies for failure to furnish, within four days from demand, cars which are needed for interstate shipments, is an invalid interference with interstate commerce, although it reserves power to suspend the operation of the rule if justice demands,—at least when applied to a state of facts which, because of shortage of cars, due to unprecedented demand, renders it impossible to comply with the rule without disobeying it in other parts of the state, or disobeying the rules of other states. *Southern R. Co. v. Com.* 17: 364, 60 S. E. 70, 107 Va. 771.

(Annotated)

COMMON CARRIERS.

See *Carriers*.

COMMUNITY PROPERTY.

See *Husband and Wife*, 5.

COMPENSATION.

Of attorney, see *Attorneys*, 4; *Champerly*.

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For property taken for eminent domain or consequential injuries, see *Eminent Domain*, 6-10.

Of tax collector, see *Tax Collectors*.

COMPLAINT.

Sufficiency of declaration or complaint, see *Pleading*.

COMPRESS COMPANY.

Imputing negligence of, to owner of cotton left with company to be baled, see *Negligence*, 13.

CONCLUSIONS.

See *Pleading*, 2.

CONDEMNATION PROCEEDINGS.

See *Eminent Domain*.

CONDITION.

See *Covenants and Conditions*.

CONFESSIONS.

Admissibility in evidence, see *Evidence* 34.

CONFIDENCE GAME.

See *False Pretenses*, 1.

CONFIDENTIAL COMMUNICATIONS.

See *Evidence*, 37.

CONFLICT OF LAWS.

1. An agreement in a deed whereby the grantee assumes and agrees to pay an existing mortgage on the land conveyed is a personal contract, and is governed by the laws of the state in which the deed is executed and delivered and in which the parties reside, rather than by the laws of another state in which the land conveyed is situated. *Clement v. Willett*, 17: 1094, 117 N. W. 491. — Minn. — (Annotated)

Marriage.

2. A marriage by one of the parties to a divorce proceeding within the time prohibited by statute, which the statute expressly declares shall be void whether contracted within or without the state, is not void if contracted in a foreign country, by whose laws it is valid, after the party has acquired a domicile there; but it is invalid if the parties went to the foreign country for the purpose of evading the local law and with the expectation of returning to their former home. *State v. Fenn*, 17: 800, 92 Pac. 417, 47 Wash. 561. (Annotated)

3. A legislative declaration that it shall not be lawful for a divorced person to marry again within a year from the date of the divorce declares a public policy which will prevent the recognition by the courts of the state of a marriage between its citizens who go to another state to avoid the provisions of the statute, and, after the ceremony, return to their former domicile. *Lanham v. Lanham*, 17: 804, 117 N. W. 787, — Wis. — Sale.

4. A sale of goods to be delivered to transportation companies at the place of

manufacture in another state is effected here, and is not affected by a statute of the state where the order was signed, relating to the sale of goods bearing a fraudulent mark of quality. *Loveland v. Dinan*, 17: 1119, 70 Atl. 634, 81 Conn. 111. Remedies.

5. A court of one state will not enforce a statute of another state making a wife liable jointly with her husband for family expenses, in case of purchases made by a citizen of the former state while he and his wife were temporarily in the latter. *Mannell Brothers v. Fogg*, 17: 426, 66 N. E. 198, 32 Mass. 582. (Annotated)

6. One who contracts a debt and agrees to pay it, in a state from which he subsequently goes to another, where he resides a sufficient length of time to bar a right of action thereon under the statutes of the latter state, will not be permitted to plead the bar of the statute in a third state to which he removes, where the statute of the state in which the contract was made has not yet run against the obligation. *West v. Theis*, 7: 472, 96 Pac. 932, — Idaho, —.

7. "A cause of action arises" in another state, within the meaning of Idaho Rev. Stat. 1887, § 4079, forbidding the maintenance of suits on causes of action barred by the statutes of limitations of the state in which they arise, at the time and place in the state when and where the debt is to be paid or the contract performed; and the cause of action thus arising continues and allows the debtor until such time as it is barred by the statute of limitations of the state in which it arose, or until the debtor has lived in the state of Idaho a sufficient length of time to bar it by the statute of limitations of that state. *West v. Theis*, 7: 472, 96 Pac. 932, — Idaho, —.

8. The phrase, "has arisen in another state," used in Idaho Rev. Stat. 1887, § 4079, providing that "when a cause of action has arisen in another state, . . . and, by the laws thereof, an action cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him" in the state of Idaho, refers to and means the state in which the foreign contract is to be paid or discharged, and has no application to an intermediate state through which the debtor may subsequently travel, or in which he may reside for a sufficient length of time to bar the action under the statute of limitations of such state. *West v. Theis*, 17: 472, 96 Pac. 932, — Idaho, —.

CONSEQUENTIAL INJURIES.

Damages for, see Eminent Domain, 8-10.

CONSIDERATION.

For notes, see Bills and Notes, 2, 8.

For contracts generally, see Contracts, 1-8.

Evidence to show consideration for deed, see Evidence, 22-25.

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CONSPIRACY.

Sufficiency of indictment for, see Indictment, etc.

1. One who comes into a conspiracy after it is concocted, with full knowledge of its existence and character, and with the purpose of furthering its design, is punishable as a conspirator. *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477.

2. The change, by the statutory revision commission, having no authority to alter the meaning of a statute, of the words "conspire to commit an offense against the laws of the United States," to "conspire to commit an offense against the United States," in a statute providing for the punishment thereof, does not limit the punishment to cases of conspiracy against the United States as such, but it extends to conspiracy to violate the simple penal provisions of its statutes. *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477.

3. A general statute punishing by imprisonment any conspiracy to violate a statute of the United States is not inapplicable to a conspiracy to commit an offense under a subsequent statute providing for the punishment of that offense by fine only, on the theory that its application would indirectly operate to subject the offender to punishment not warranted by law, or that the former statute was superseded by the latter. *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477.

Of laborers.

Injunctions against combination to further strike, see Injunction, 6.

4. A combination of employees to compel the employer to permit representatives of a union to adjust all differences between employer and employees, and to enforce compliance with the decision by a strike on the part of all, is illegal. *Reynolds v. Davis*, 17: 162, 84 N. E. 457, 198 Mass. 294.

As to rebates.

Acquittal of conspiracy to induce carrier to give rebates, as bar to prosecution for inducing shippers to receive them, see Criminal Law, 1.

As to evidence on trial of indictment for conspiracy to induce shipper to receive rebates, see Evidence, 16, 47.

5. The consummation of the offense of receiving a rebate contrary to law does not absolve from punishment for conspiracy strangers who conspired to induce the guilty party to commit the offense. *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477.

6. One who, in the guise of a transportation agent, induces a shipper to permit him to route his freight for a compensation to be secured from the railroad company to which the transportation is confided, in the guise of exaggerated claims for loss, damage, and overcharge or commissions, is punishable for conspiracy to induce viola-

tion of the "Elkins law." *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477, (Annotated)

CONSTITUTIONAL LAW.

As to imprisonment for debt, see Contempt, 4.

Duty of court to test legislative enactment by all constitutional limitations, see Courts, 5.

Provision that private property shall not be taken for public use without compensation, see Eminent Domain, 7-10.

Constitutionality of statute forbidding child labor, see Infants, 1.

Street railway as railroad within constitutional provision abolishing fellow-servant rules as to employees of railroad company, see Master and Servant, 25.

Delegation of power.

1. In the absence of a constitutional provision regulating or prohibiting the traffic in intoxicating liquors, the power to so regulate or prohibit is vested exclusively in the legislature, and that function cannot be delegated by it to the courts, nor lawfully usurped by the judicial branch of the government. *Re Phillips*, 17: 1001, 116 N. W. 950, — Neb. —.

2. The legislature, in delegating to a commission the power to ascertain and fix reasonable rates and service for railroad transportation, which rates and service, thus ascertained, shall thenceforth be enforced, may make the investigation of the commission subject to review, as to its reasonableness, by the courts. *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Com.* 17: 821, 116 N. W. 905, — Wis. —.

Equal protection and privileges.

As to constitutional provision requiring taxes to be for public purpose and uniformly assessed, see Taxes, 2.

3. A statute permitting the annexation of property belonging to women, to municipalities, without giving them an opportunity to make defense to the proceedings, does not deprive them of the equal protection of the laws. *Carrithers v. Shelbyville*, 17: 421, 104 S. W. 744, — Ky. —.

4. No constitutional right of a holder of property within a particular territory is infringed by its annexation to a municipality without first consulting him, even though the annexation is made to depend upon the consent of a selected class to which he does not belong. *Carrithers v. Shelbyville*, 17: 421, 104 S. W. 744, — Ky. —.

(Annotated)

5. Providing for the enforcement of mechanics' liens against the property of public service corporations, not by writ of *levari facias*, as in case of liens against other property, but by special *fieri facias*, which seizes the property as a whole so as not to stop the operations of the corporation and defeat its object, is special legislation and invalid. *Vulcanite Paving Co. v.* 17 L.R.A. (N.S.)

Philadelphia Rapid Transit Co. 17: 824, 61 Atl. 1117, 220 Pa. 603.

6. A statute imposing a tax on dogs to indemnify the owners of sheep killed by them does not violate a constitutional prohibition of the granting of exclusive separate public emoluments or privileges. *McGlone v. Womack*, 17: 855, 111 S. W. 688. — Ky. —.

7. An ordinance imposing a penalty on all who sell milk or cream in glass jars, for having in possession, with intent to use them, jars of less capacity than they purport to contain, is not special legislation although it does not apply to all milk dealers, or to all persons who vend substances in liquid form. *Chicago v. Bowman Dairy Co.* 17: 684, 84 N. E. 913, 234 Ill. 294.

8. A statute allowing an attorney's fee to one who establishes a mechanics' lien which is not allowed to other classes of litigants, violates the constitutional guaranty of equal protection of the laws, uniformity of laws, and equal rights in the acquisition and protection of property. *Builders' Supply Depot v. O'Connor*, 17: 909, 88 Pac. 952, 150 Cal. 265. (Annotated)

Property rights; due process of law. freedom of contract.

9. A statute providing for the commitment of inebriates, without their consent, to a public hospital conducted by the state for the treatment of inebriates, does not deprive them of their liberty without due process of law. *Leavitt v. Morris*, 17: 924, 117 N. W. 393, — Minn. —. (Annotated)

10. A municipality which prohibits a lot owner from exercising his right to go to and from his property over and by way of the street on which it abuts, or to employ the means necessary to reach the street, deprives him of his property without due process of law. *Sandpoint v. Doyle*, 17: 497, 95 Pac. 945, 14 Idaho, 749.

11. Requiring milk dealers to indicate indelibly their capacity upon glass jars which contain the milk sold does not unconstitutionally deprive them of their property in the old jars. *Chicago v. Bowman Dairy Co.* 17: 684, 84 N. E. 913, 234 Ill. 294.

12. Forbidding one, under penalty, to carry into a county where the sale of intoxicating liquor is prohibited, more than a half gallon of such liquor on any one day, deprives him of his constitutional property rights in case he has no intent to sell it. *State v. Williams*, 17: 299, 61 S. E. 61, 129 N. C. 618. (Annotated)

13. A statute permitting the owner of sheep killed by dogs to recover their value from the owner of the dogs, and requiring the dogs to be killed, does not deprive the owner of the dogs of his property without due process of law. *Holmes v. Murray*, 17: 431, 105 S. W. 1085, 207 Mo. 413.

14. To penalize resistance by judicial interference made in good faith to prevent the enforcement of a law is unreasonable and indefensible from any point of view.

ince it denies the equal protection of the laws, violates the constitutional guaranty to every person of a certain remedy in the law for all injuries to person and property, and violates every principle of civil liberty. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

15. A statute permitting service of process by publication on domestic corporations in counties where the cause of action arises, in which the corporation has no representative, does not deprive it of due process of law. *Ward Lumber Co. v. Henderson-White Mfg. Co.* 17: 324, 59 S. E. 476, 107 Pa. 626.

Police power.

Right of courts to determine what constitutes reasonable exercise of police power, see Courts, 6.

16. The measure of the reasonableness of a police regulation is not necessarily what is best, but what is fairly appropriate to the purpose under all the circumstances. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

17. Legislative authority under the police power cannot properly extend beyond such reasonable interferences as tend to reserve and promote the enjoyment generally of those "unalienable rights" which all men are endowed, and to secure which "governments are instituted among men." *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

18. A general police regulation down to minute particulars, of the construction and maintenance of tenement houses, rendering it impracticable to safely comply therewith in the absence of any official approval of plans and specifications in advance and containing no provision for such approval, is unreasonable. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —. (Annotated)

19. There must be reasonable ground, having regard for the public welfare, for legislative interference, under the police power, with the mode of constructing, equipping, and maintaining tenement houses, and the means adopted to accomplish the purpose in view must be reasonably necessary; and as to what is reasonable, the judicial authority will defer to legislative wisdom in doubtful cases; but where the interference is plainly excessive, it is the duty of the court to repel the encroachment. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

20. A law regarding the construction of tenement houses, requiring street courts to be 6 feet in width between the lot line and the opposite wall of the building under all conditions, and in all localities to be at least 6 feet wide, is an unreasonable interference. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

21. If the penal feature of a police regulation is so severe, having regard to the nature of the regulation, as efficiently to intimidate property owners from using their property at all for tenements or lodging-

house purposes, and from resorting to the courts for redress or defense as to their honestly supposed rights, it is highly unreasonable. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

22. A police regulation making every habitation, regardless of locality, a boarding or lodging house in case the proprietor allows a person not a member of his family to have a sleeping room in the house, and regulates the maintenance of the house as regards light, location of beds, and equipment with water-closets, is an unreasonable interference. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

23. The regulation and maintenance of tenements, lodging houses, and boarding houses is a proper subject for legislative interference; but the degree of regulation permissible varies greatly according to circumstances; and a police regulation in regard thereto which would not be excessive as to a large city might be unreasonable if applied to the state at large. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

24. Imposing a penalty on a milk dealer for having in possession, with intent to use them, any bottle or jar of less capacity than is marked on it, is a valid exercise of the police power, and does not unconstitutionally deprive him of his property rights. *Chicago v. Bowman Dairy Co.* 17: 684, 84 N. E. 913, 234 Ill. 294.

Impairing contract obligations.

25. The legislature cannot enlarge the dower rights of a widow as against the rights of one who has contracted for a judgment lien on the property of the husband in view of the constitutional provision against impairing the obligation of contracts, although the judgment is not actually entered until after the statute is passed. *Davidson v. Richardson*, 17: 319, 91 Pac. 1080, — Or. —. (Annotated)

26. A statute requiring that a statement of transfers of stock, as soon as shown upon the books of a corporation, shall be filed in the office of the secretary of state by the corporate officers, and which imposes upon the person selling the stock the duty of seeing that this is done in order to relieve himself from liability for the corporate debts, does not, as to one owning corporate stock at the time of its enactment, impair the obligation of his contract resulting from his ownership of the stock, so as to render its provisions obnoxious to the Federal Constitution. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

27. The application of Kan. Gen. Stat. 1901, § 1302 (repealed by Laws 1903, chap. 152), which substituted for all other methods of enforcing the individual liability of stockholders an action to be brought by a receiver, as against stockholders who became such prior to its enactment, did not constitute an impairment of the obligation of the contract arising out of their membership in the corporation, although the new remedy might, under some circumstances, prove

Cancellation; rescission.

See also *supra*, 15, 16.

Evidence to show mistake justifying cancellation, see *Evidence*, 26.

What constitutes fraud justifying rescission of, see *Fraud and Deceit*.

As to rescission of sale, see *Sale*.

21. One who has been induced to enter into a contract to perform public work by fraudulently underestimating the amount of work to be done and concealing from him the plans and specifications in accordance with which he is to do the work, or by mutual mistake based on erroneous estimates of the public's engineer of the amount of work to be done, may, in absence of laches or negligence on his part, maintain a bill for cancellation of the contract and recovery of whatever money may be incidentally necessary to afford full relief, if defendants can be put substantially into their original position. *Long v. Athol*, 17: 96, 82 N. E. 665, 196 Mass. 497.

22. One who has contracted to do public work according to the plans and specifications, in reliance upon the estimate of the engineer in charge of the work on behalf of the public, which believes the estimate to be correct, is not precluded from securing a cancellation in case the estimate is not even approximately correct, by the fact that the contract stipulates that the estimate is approximate only, and that he is satisfied therewith and has judged for himself as to all conditions affecting the cost of performance. *Long v. Athol*, 17: 96, 82 N. E. 665, 196 Mass. 497.

23. That work already done on a public contract shows that the original estimate is not correct, so that a new contract cannot be secured on as advantageous terms, will not prevent a cancellation of the contract for mutual mistake as to the amount of work required, on the theory that the public cannot be put *in statu quo*. *Long v. Athol*, 17: 96, 82 N. E. 665, 196 Mass. 497.

24. A municipal corporation which has induced a contractor to undertake public work by mutual mistake as to the amount to be done is placed *in statu quo*, so as to warrant cancellation of the contract, by being required to pay merely the full value of the labor and materials already furnished. *Long v. Athol*, 17: 96, 82 N. E. 665, 196 Mass. 497.

25. A municipal corporation cannot avoid cancellation of a contract for public work based on the estimate of its engineer, on the theory that it did not represent the estimate to be true, and did nothing to prevent full investigation by the contractors. *Long v. Athol*, 17: 96, 82 N. E. 665, 196 Mass. 497.

Actions; defenses.

26. A party cannot defeat, and is not entitled to be relieved from, the obligation of a written contract, merely by showing that he signed it without having read it and in ignorance of its contents; but he is at liberty to show that, by the artifice, deception, and fraud of the other party or 17 L.R.A. (N.S.)

his agent, he was induced to sign it without having read it, and upon the assurance and under the belief, superinduced by the other party, that it was a paper wholly different in character from the one signed. *Acme Food Co. v. Older*, 17: 807, 61 S. E. 235, — W. Va. —.

Public contracts.

See also *supra*, 15, 16, 21–25.

Right of county contracting for construction of building to bind contractor to pay claims of laborer and materialmen, see *Counties*.

Parol evidence to show intention of sureties on contractor's bond, see *Evidence*, 19.

27. One bidding for public work is not bound to employ a skilled engineer to test the accuracy of the estimates of the public engineer of the amount of work to be done, which is given out as the basis for bids. *Long v. Athol*, 17: 96, 82 N. E. 665, 196 Mass. 497.

CONTRIBUTORY NEGLIGENCE.

See *Negligence*, 9–12.

CONVICTS.

When suspension of rights of, begins, see *Civil Rights*.

Effect of deprivation of civil rights on validity of deed executed by convict while execution of judgment of conviction is stayed, see *Deeds*, 3.

CORONER.

Admissibility in evidence of statement of accused before coroner's jury, see *Evidence*, 34.

CORPORATIONS.

Providing special means for enforcement of mechanics' liens against property of public service corporations, see *Constitutional Law*, 5.

Due process in service on domestic corporations by publication, see *Constitutional Law*, 15.

Requiring statement of transfers of stock to be filed in office of secretary of state by persons selling, see *Constitutional Law*, 26.

Sufficiency of evidence to show that money on deposit was property of bankrupt corporation, see *Evidence*, 58.

Officers and their acts.

1. The secretary-treasurer of a corporation, who is also its manager, has no implied authority to contract for the services of an employee for a term extending beyond not only the term of his own office, but that of the board of directors, in the absence of custom or his being held out by the directors as having such authority. *Laird v. Michigan Lubricator Co.* 17: 177, 116 N. W. 534, — Mich. —. (Annotated.)

Liability of stockholders.

Changing method of enforcing individual liability of stockholders, see *Constitutional Law*, 27.

When limitations begin to run against enforcement of stockholders' liability, see Limitation of Actions, 9.

When right of action to enforce stockholder's liability is barred, see Limitation of Actions, 17.

Effect of repeal of statute prescribing methods of procedure to enforce stockholders' liability in case of insolvency of corporation, see Statutes, 11, 12.

2. The provision of Kan. Gen. Stat. 1889, § 1192 (repealed in 1899), authorizing the owner of a judgment against a corporation, upon which an execution had been returned unsatisfied, to proceed against any of the stockholders, and hold them liable thereon to the extent of the amount of their stock, imposed upon stockholders a liability to that extent for the payment of corporate obligations, including those founded upon tort. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

3. The right conferred by Kan. Gen. Stat. 1889, § 1192 (repealed in 1899), upon the owner of a judgment against a corporation upon which an execution had been returned unsatisfied, to proceed against any of the stockholders, and hold them liable to the extent of the amount of their stock, applied to judgments founded on tort as well as upon contract, although elsewhere in the same act the person to whom the right is given is described as a creditor of the corporation, and the claim against it is a debt. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

4. The word "dues" in the provision of Kan. Const. art. 12, § 2 (repealed in 1906), declaring that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder," is used in a sense broad enough to cover a judgment rendered against a corporation in an action founded upon tort. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

5. The provisions of Kan. Gen. Stat. 1901, §§ 1302, 1315, now repealed, which declared the double liability of stockholders to be an asset of an insolvent corporation, and authorized the appointment of a receiver to enforce it for the benefit of corporate creditors, protected the owner of a judgment founded on tort, as well as claimants whose demands originated in contract. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

6. The requirement of Kan. Gen. Stat. 1901, § 1283, that the president and secretary of a corporation shall file with the secretary of state a statement of each transfer of stock made upon the books of the corporation, and that no transfer of stock shall be legal or binding until such statement is so made, imposes upon those owning and selling corporate stock the duty, in order to relieve themselves of liability for the debts of the corporation, of taking some further step if necessary, after having

caused the transfer to be duly entered on the books of the company, to cause the public record to be made. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

Foreign corporations.

7. A transaction by which a foreign corporation agrees to furnish its product manufactured at its place of business in another state through a contract approved there, free on board cars at the point of consummation within the state, for use in a public building, is interstate commerce, not within the provisions of a local statute denying foreign corporations the right to enforce claims in the local courts without complying with its laws. *United States Gypsum Co. v. Gleason*, 17: 906, 116 N. W. 238, — Wis. —.

8. A statute denying to a foreign corporation which has not complied with the local laws the right to maintain an action in the state courts does not prevent its defending an action brought against it there. *American Deforest Wireless Teleg. Co. v. Superior Court*, 17: 1117, 96 Pac. 15, 153 Cal. 533. (Annotated)

COUNTIES.

Liability for interest, see Interest.

Power of board of supervisors to fix situs of debt for purpose of taxation, see Taxes, 10.

Statutory authority to contract for the construction of county buildings authorizes a county to bind the contractor to pay the claims of laborers and materialmen, although such contract is for their benefit. *United States Gypsum Co. v. Gleason*, 17: 906, 116 N. W. 238, — Wis. —.

COURTS.

Jurisdiction of highest state court on appeal, see Appeal and Error, 3.

Of bankruptcy, see Bankruptcy.

As to contempt, see Contempt.

Refusal of courts to enforce promise to repay money advanced to buy stock on margins, see Contracts, 14.

Jurisdiction to appoint administrator, see Executors and Administrators.

Jurisdiction to modify judgment, see Judgment, 3.

Original jurisdiction of United States circuit court, see Removal of Causes.

Effect on jurisdiction of, of defects in proceedings to obtain jurisdiction, see Writ and Process, 3.

1. The court within whose jurisdiction a fraudulent scheme is first devised has jurisdiction of the offense regardless of where the formal contract was executed. *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477.

Relation to other departments of government.

Review by, of orders of railroad commission, see Carriers, 15.

Delegation of legislative power to courts, see Constitutional Law, 1, 2.

2. A court having power to review or

Co. v. Older, 17: 807, 61 S. E. 235, — W. Va. —.

Discharge of passenger at wrong place.

9. A passenger on a railroad who is negligently carried beyond his destination is entitled, in the absence of other exculpatory circumstances, to recover as damages therefor a reasonable sum for loss of time, necessary expenses incurred, and, in addition thereto, a fair compensation for inconvenience experienced, if any, on account of such action of the railroad company. *Dalton v. Kansas City, Ft. S. & M. R. Co.* 17: 1226, 96 Pac. 475, — Kan. —. (Annotated)

Delay in furnishing cars.

10. Damages for delay in furnishing cars for the shipment of stock may include an allowance for the expense of keeping it after the carrier had been notified that it was ready for shipment. *St. Louis, I. M. & S. R. Co. v. Ozier*, 17: 327, 110 S. W. 593, — Ark. —.

Baggage.

11. The proper measure of damages for the failure of a railway company to deliver a traveling man's trunk containing samples is the value of the use of the property during the delay, including such incidental expenses and damages as were in the contemplation of the parties when the contract for carriage was entered into. *Conheim v. Chicago G. W. R. Co.* 17: 1091, 116 N. W. 581, 104 Minn. 312.

Personal injuries; death.

12. A pregnant woman injured by another's negligence so as to cause the child to be born deformed cannot hold the negligent person liable to her for the pain and suffering and inability to labor of the child. *Prescott v. Robinson*, 17: 594, 69 Atl. 522, 74 N. H. 460.

13. In determining the damages which a woman is entitled to recover for personal injuries negligently inflicted and resulting in a miscarriage, the pain and suffering which she would have endured had the child been born in the natural course of events cannot be deducted from the pain and suffering occasioned by the miscarriage. *Morris v. St. Paul City R. Co.* 17: 598, 117 N. W. 500, — Minn. —. (Annotated)

14. A verdict for \$4,000, awarded in an action brought to recover for personal injuries negligently inflicted upon a pregnant woman and resulting in a miscarriage, is not so large as to suggest that it is the result of passion and prejudice on the part of the jury. *Morris v. St. Paul City R. Co.* 17: 598, 117 N. W. 500, — Minn. —.

15. In an action brought against a railway company by parents to recover damages for the death of their two children alleged to have been killed at a railway crossing by the negligent operation of a train of the defendant company, a judgment for \$30,000 in favor of the plaintiffs should be reduced to \$12,000, where the case is not one for the allowance of punitive damages. *Cherry v. Louisiana & A. R. Co.* 17: 505, 46 So. 506, 121 La. 471.
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Injury to water rights.

16. The measure of damages sustained by a homesteader whose premises are overflowed by reason of the wrongful obstruction of a natural water way is not the same as if he owned the land in fee, but depends upon the improved condition of the premises, the length of time the homestead has existed, and all other facts that go to make up its value. *McLeod v. Spencer*, 17: 958, 95 Pac. 754, — Okla. —.

Eminent domain cases.

See also *infra*, 20.

17. Testimony by commissioners, who fixed the damages for land taken by right of eminent domain, five years after the award, aided by memoranda furnished by one of them, that they allowed a certain amount for interruption of business, is not sufficient to reduce the award by that amount, where there was evidence before them that the market value of the land was more than the sum awarded. *Fitzhugh v. Chesapeake & O. R. Co.* 17: 124, 59 S. E. 415, 107 Va. 158.

Mental anguish.

Presumption as to mental suffering because of deprivation of opportunity to attend funeral, see *Evidence*, 12.

18. Damages for personal injuries to a pregnant woman may include compensation for mental suffering because of probable deformity of the child because of the injury, as well as for her disappointment at the birth of a deformed child, but not for regret because of the child's suffering on account of the deformity. *Prescott v. Robinson*, 17: 594, 69 Atl. 522, 74 N. H. 460.

(Annotated)

19. A pregnant woman who, by reason of injuries negligently inflicted, suffers a miscarriage, is entitled to recover such damages as will fairly compensate her for the pain and suffering occasioned by the miscarriage, but not for the pain and suffering occasioned by the loss of the child. *Morris v. St. Paul City R. Co.* 17: 598, 117 N. W. 500, — Minn. —.

Loss of profits.

20. The owner of land is not entitled to compensation for injury to the business conducted on property all of which is taken for public use, caused by loss of profits during its removal, under a constitutional provision requiring the making of just compensation for property taken for public use. *Fitzhugh v. Chesapeake & O. R. Co.* 17: 124, 59 S. E. 415, 107 Va. 158. (Annotated)

DEATH.

Abatement of action by, see *Abatement and Revival*.

Sufficiency of evidence to show that death was accidental, see *Evidence*, 57.

A statute giving the widow a right of action for the negligent killing of her husband operates in favor of a nonresident alien. *Ferrara v. Auric Min. Co.* 17: 964, 95 Pac. 952, — Colo. —.

DEBT.

Situs of, for purpose of taxation, see Taxes, 8-10.

DEBTOR AND CREDITOR.

Preferences by insolvent debtor, see Insolvency.

DECEIT.

See Fraud and Deceit.

DECLARATION OR COMPLAINT.

See Pleading.

DECLARATIONS.

Admissibility in evidence, see Evidence, 37, 38.

Sufficiency of declaration or complaint, see Pleading.

DEDICATION.

Sufficiency of finding as to, see Trial, 27.

1. That a desert entryman and his successors in interest intended that the occupants of a town site should have the free use of water on the streets of such town site is not sufficient to show a perpetual dedication of said water to a public use. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.

2. Purchasers of building lots which were laid out on the plat of a town site upon a desert entry, to which locality water was brought by ditches and used on the streets of the town for irrigation and domestic purposes continuously and uninterruptedly for a period of over twenty years, acquired a right to use the water by dedication, within the meaning of Idaho Const. art. 15, § 4, and the statutes of the state; and the water cannot be withheld from the streets and lots of the town so long as the consumers pay the reasonable and legally established rental therefor. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.

3. To constitute dedication of water rights by user, it is necessary to find the probative facts which, of themselves, constitute dedication; and it is not enough to find facts which merely have a tendency to prove dedication, since the use found to exist must be inconsistent with a permissive use or a mere license. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.

4. Long-continued use, with the knowledge of the owner, of water upon streets and alleys in a municipality, is not inconsistent with a permissive use and a license to use the same, and does not show an intention to perpetually dedicate the water to a public use. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.

By map or plat.

5. The making and filing of a plat laying out a town site upon a desert entry will not dedicate to the public the water used upon the streets and alleys of the town site, under a water right subsequently located and acquired. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.
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DEEDS.

Covenants or conditions in, see Covenants and Conditions.

Evidence to show consideration for, see Evidence, 22-25.

Rights of grantees of land containing artesian wells, see Waters, 4.

Delivery; sufficiency.

Delivery in escrow, see Escrow.

1. The manual deposit of a deed with a third party to receive and hold for the grantee, with intent thereby to give it effect as a conveyance and to place it beyond the custody and control of the grantors, with a declared or manifest purpose of making a present transfer of title, is a sufficient delivery. *Harmon v. Bower*, 17: 502, 96 Pac. 51, — Kan. —.

2. No title will pass by a deed which is not delivered by the grantor or someone duly authorized by him. *Horne v. Spencer*, 17: 622, 95 Pac. 757, — Okla. —.

Validity.

3. A sentence to the penitentiary for a term of years does not make void a conveyance duly executed by the convict before he is imprisoned under the sentence, and while execution of the judgment of conviction is stayed by proceedings upon appeal to the supreme court. *Harmon v. Bower*, 17: 502, 96 Pac. 51, — Kan. —.

What passes by.

4. A conveyance of real estate carries with it an appurtenant right of way. *Corea v. Higuera*, 17: 1018, 95 Pac. 882, 153 Cal. 451.

DE FACTO OFFICERS.

Right to compensation, see Officers, 1.

DEFINITIONS.

Meaning of word "damages" in constitutional provision against damaging private property for public use without compensation, see Eminent Domain, 7.

Meaning of word "immediate" in insurance policy providing for notice of accident or injury, see Insurance, 14.

DELAY.

Damages for delay in furnishing cars, see Damages, 10.

DELEGATION.

To servant of master's duty, see Master and Servant, 21.

DELEGATION OF POWER.

See Constitutional Law, 1, 2.

DELIVERY.

Of deed, see Deeds, 1, 2.

Sufficiency of delivery to pass title to bank account, see Gifts, 2.

DEMAND.

Necessity of, to start limitations against liability on open bank account, see Limitation of Actions, 8.

DEMURRER.

See Pleading, 22, 23.

DEPARTURE.

In pleading, see Appeal and Error, 5.

DEPOSITS.

See Banks.

DEPOT.

Validity of contract to establish, at certain place, see Contracts, 12.

Who may compel performance of contract to establish, at certain places, see Parties, 1.

Sufficiency of allegations in bill for specific performance of contract to establish, at certain place, see Pleading, 6.

DESCENT AND DISTRIBUTION.

Precedence of foreign assignment in bankruptcy over claim of assignor to share as next of kin in personal estate of a decedent, see Bankruptcy, 14.

Right of heirs of beneficiary in benefit certificate to take fund by inheritance where she died before insured, see Insurance, 26.

DESERT ENTRY.

Dedication by desert entryman of water to public use, see Dedication, 1, 5.

DIPLOMA.

Mandamus to compel issue of, see Appeal and Error, 11; Mandamus.

DIRECTING VERDICT.

See Trial, 18.

DIRECT TAX.

Occupation tax as, see License, 3.

DISBARMENT.

Of attorneys, see Attorneys, 1-3.

DISCRETION.

Review on appeal of discretionary matters, see Appeal and Error, 13-16.

DISMISSAL.

Effect of failure to demur to declaration on right to remove to dismiss action, see Abatement and Revival, 1.

Dismissal of action on merits as bar to subsequent action, see Judgment, 5.

DIVORCE AND SEPARATION.

Conflict of laws as to validity of remarriage of divorced person, see Conflict of Laws, 2, 3.

Commitment for contempt in refusing to obey order to pay suit money and alimony, see Contempt, 4.

Effect of redemption by wife of land of husband sold on foreclosure, where parties were subsequently divorced, see Mortgage, 6.

DOCUMENTARY EVIDENCE.

See Evidence, 13-17.

DOGS.

See Animals.

DOUBLE TAXATION.

See Taxes, 1.

DOWER.

Enlarging rights of, as against holder of judgment lien on property, see Constitutional Law, 25.

Antenuptial agreement to bar dower, see also Husband and Wife, 6.

Entry of judgment *nunc pro tunc* against dower rights of wife of one confessing judgment, where her dower rights are subsequently enlarged by statute, see Judgment, 2.

1. Under a statute providing that a jointure settled upon a wife shall bar her right of dower, such right is not lost by an antenuptial contract by the terms of which she receives no freehold estate in the lands of her intended husband. *Rieger v. Schaible*, 17: 866, 115 N. W. 560, — Neb. —.

2. At common law the right of dower cannot be waived or lost by an antenuptial agreement. *Rieger v. Schaible*, 17: 866, 115 N. W. 560, — Neb. —.

3. An antenuptial contract made in good faith between parties, each of whom owned real and personal property not disproportionate in value, providing that, in consideration of marriage, each party thereto waived and released, and forever quitclaimed and renounced, all dower and other interest in and to the real estate and personal property which the other party had or should thereafter acquire, the expressed intention being that all the property of each should descend to his or her lawful heirs, released and divested of all claims of dower, curtesy, or other interest that the other contracting party might have as husband or wife, widower or widow, under the laws of the state is sufficient to bar the widow's statutory allowance; the rights of children not being involved. *Rieger v. Schaible*, 17: 866, 115 N. W. 560, — Neb. —.

4. A statutory provision that jointure is a bar to dower does not ordinarily deprive an intended wife of the power to bar her dower by any other form of antenuptial contract. *Rieger v. Schaible*, 17: 866, 115 N. W. 560, — Neb. —. (Annotated)

DROWNING.

Sufficiency of evidence to establish facts of drowning accident, see Evidence, 57.

Right to recover for death from drowning, under policy insuring against personal injury leaving external marks upon body, see Insurance, 22.

DRUNKENNESS.

- Compulsory treatment of inebriates, see Constitutional Law, 9.
- Setting aside percentage of liquor license fees for purpose of establishing hospital for inebriates, see Taxes, 14.
- Rescission of sale because of, see Equity, 2, 3.
- Sufficiency of evidence to show incapacity of person to contract because of, see Evidence, 64.

DUE PROCESS OF LAW.

- See Constitutional Law, 9-15.

DUPLICITY.

- In indictment, see Indictment, etc.
- In pleading, see Pleading, 3.

DYING DECLARATIONS.

- Admissibility of evidence to discredit, see Evidence, 49.

EASEMENTS.

- Effect of findings as to use of way prior to conveyance of land to which it is claimed to be appurtenant, see Appeal and Error, 6.
- Effect of deed to carry appurtenant right of way, see Deeds, 4.
- Of abutting owners in highway, see Highways.
- Finding that right of way is appurtenant to land, see Trial, 24.

The absence of a constructed track for teams to a road on which a grant of land is bounded is not sufficient to give the grantee a way of necessity over remaining land of the grantor. *Corea v. Higuera*, 17: 1018, 95 Pac. 882, 153 Cal. 451.

(Annotated)

EGRESS.

- Right of egress from property, see Highways, 1, 3, 5.

EJECTMENT.

- Adverse judgment in action to recover value of timber wrongfully taken from land, as bar to action to recover possession of land, see Judgment, 6.

ELECTION OF REMEDIES.

1. The remedy afforded by statute to one forcibly expelled by the owner from the wrongful possession of land is exclusive. *Walker v. Chanslor*, 17: 455, 94 Pac. 606, 153 Cal. 118.
2. One who waives the trespass of another who has entered upon his land and cut timber therefrom, by bringing an action for the value of the timber, cannot subsequently maintain another action to recover for the trespass. *Roberts v. Moss*, 17: 280, 106 S. W. 297, — Ky. —.

ELECTRICITY.

- Negligence of child in taking hold of electric wire, see Negligence, 11.
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ELEVATORS.

- Measure of damages for failure to perform contract to erect, see Damages, 2.
- Liability of municipality for negligence in operation of, see Municipal Corporations, 5.
- Injury to infant by falling down unguarded elevator shaft, see Negligence, 8.
- Question for jury as to contributory negligence of one injured by falling into elevator well, see Trial, 12.

The owner of a building is not liable for injury to one using its elevator to deliver merchandise therein, by its fall, which was caused by a latent defect in a bolt embedded in a beam, which had been put in by a competent workman in repairing the elevator, which repairs had been approved by a casualty company and official public inspectors. *Sack v. Ralston*, 17: 104, 69 Atl. 671, 220 Pa. 216. (Annotated)

ELKINS ACT.

- Conspiracy to induce violation of, see Conspiracy, 6.
- Evidence on trial of indictment for conspiracy to violate, see Evidence, 16, 47.
- Sufficiency of indictment for conspiracy to violate, see Indictment, etc.

EMBEZZLEMENT.

Money delivered by an agent who sells an article from a stock in charge of another agent, to the latter to be carried to the principal, comes into his possession by virtue of his agency or employment, within the meaning of a statute providing for the punishment of one who shall fraudulently misappropriate or convert to his own use money so obtained, although the contracts of the agents require each to report to the principal on his own account. *Smith v. State*, 17: 531, 109 S. W. 118, 53 Tex. Crim. Rep. 117. (Annotated)

EMINENT DOMAIN.

- As to damages, see Damages, 17, 20.
- Limitation of time for action for damages occasioned by mill dam, see Limitation of Actions, 3.

What may be taken.

1. The rights of an owner of riparian land, such as access to the navigable portion of the stream, light and air and other kindred intangible rights appurtenant to real estate, are subject to condemnation for public use without an appropriation of the land itself. *State ex rel. Burrows v. Superior Court*, 17: 1005, 93 Pac. 423, 48 Wash. 277. (Annotated)

Attempt to agree.

2. One who has enjoined a public service corporation from interfering with his property cannot, in the condemnation proceeding, raise the objection that, prior to the proceeding, no endeavor was made to obtain the rights by purchase. *State ex*

rel. *Burrows v. Superior Court*, 17: 1005, 93 Pac. 423, 48 Wash. 277.

Sufficiency of plat.

3. That a slough sought to be condemned for public use is not shown by the government plat from which the plat for condemnation is made, as required by statute, does not make the proceeding insufficient if it is part of the contiguous land which is shown in the condemnation plat, and is therefore subject to condemnation. *State ex rel. Burrows v. Superior Court*, 17: 1005, 93 Pac. 423, 48 Wash. 277.

Rights and remedies of owners generally.

4. A property owner cannot defeat a proceeding to condemn for public use certain rights in the property, on the ground that the rights sought will be insufficient to enable petitioner to transact its business without using additional property of objector, not sought to be appropriated. *State ex rel. Burrows v. Superior Court*, 17: 1005, 93 Pac. 423, 48 Wash. 277.

What constitutes a taking.

5. The extension of the limits of a municipal corporation for 6 miles along the line of a turnpike road, and the removal by the municipal authorities of the tollgates within the limits as so extended, is a taking of property of the turnpike company for which compensation must be made. *Belleville v. St. Clair County Turnp. Co.* 17: 1074, 84 N. E. 1049, 234 Ill. 428. (Annotated)

Compensation.

6. The police power will not authorize a municipal corporation to extend its limits 6 miles along a toll road and remove the gates without making compensation to the owner, where nothing in the increase of population, topography of the ground, nor any other reason in connection with the health, safety, or comfort of the community, is shown to require it. *Belleville v. St. Clair County Turnp. Co.* 17: 1074, 84 N. E. 1049, 234 Ill. 428.

7. The word "damaged," as used in a constitutional provision forbidding the enactment of a law whereby property shall be damaged for public use without just compensation, is not confined to acts which would give a cause of action if done by an individual. *Tidewater R. Co. v. Shartzter*, 17: 1053, 59 S. E. 407, 107 Va. 562.

Consequential injuries.

8. A statute requiring compensation to be made for injuries to adjacent property not taken by corporations exercising the right of eminent domain is within the legitimate scope of legislative power, where the Constitution forbids the legislature to enact any law whereby private property shall be taken or damaged for public purposes without just compensation. *Tidewater R. Co. v. Shartzter*, 17: 1053, 59 S. E. 407, 107 Va. 562.

9. Loss through diminution in the value of property for residence purposes because of the location of a cemetery near it is not within the meaning of a constitutional pro-
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vision requiring compensation in case property is damaged for public use. *Lambert v. Norfolk*, 17: 1061, 61 S. E. 776, — Va. —.

10. Damages for diminution in the market value of property not taken, by smoke, noise, dust, and cinders arising from the proper, ordinary, and lawful operation of a railroad seeking a right of way, may be allowed the owner under provisions of a Constitution that the legislature shall not enact any law whereby private property shall be taken or damaged for public purposes without just compensation, and of a statute that damages shall be awarded which result from injuries to the property of any person from the construction and operation of the works. *Tidewater R. Co. v. Shartzter*, 17: 1053, 59 S. E. 407, 107 Va. 562. (Annotated)

ENCUMBRANCES.

Breach of covenant against, see Covenants and Conditions, 1, 2.

When covenant against encumbrances is breached so as to start running of limitations, see Limitation of Actions, 11, 13, 14.

EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law, 3-8.

EQUITABLE ASSIGNMENT.

See Assignment.

EQUITY.

Right to state account between parties, see Accounting.

Necessity of filing motion for new trial in lower court to secure review of equity case, see Appeal and Error, 4.

As to injunction, see Injunction.

Sale under execution of equitable asset of debtor, see Levy and Seizure, 1, 2.

As to specific performance of contract, see Specific Performance.

Remedy at law.

1. The equitable jurisdiction of the court to rescind a sale for fraud is not ousted by the existence of a remedy at law to recover possession of the property conveyed. *Swan v. Talbot*, 17: 1066, 94 Pac. 238, 152 Cal. 142.

Cases of fraud.

2. An action to set aside a sale for knowingly taking advantage of the seller when he was incapacitated by intoxication is one addressed to the equitable consideration of the court. *Swan v. Talbot*, 17: 1066, 94 Pac. 238, 152 Cal. 142.

3. Equity will set aside a sale of property obtained from a person when incapacitated by intoxication, when the consideration was grossly inadequate. *Swan v. Talbot*, 17: 1066, 94 Pac. 238, 152 Cal. 142.

(Annotated)

ERASURES.

In will; burden of proof as to, see Evidence, 7.

Expert evidence as to erasures in wills, see Evidence, 31.

Question for jury as to time when erasure in will was made, see Trial, 13.

ESCROW.

If possession of an escrow is obtained without performance of the condition upon which a delivery to the grantee was to be made, no title passes. *Horner v. Spencer*, 17: 622, 95 Pac. 757, — Okla. —.

ESTATES TAIL.

See Wills, 5.

ESTOPPEL.

By architect's certificate as to compliance with building contract, see Contracts, 19.

To object that no attempt to purchase property was made by public service corporation, see Eminent Domain, 2.

Evidence to show estoppel of insurance company, see Evidence, 51.

Of insurance company, see Insurance, 9, 10.

To deny validity of marriage.

1. One who, having a wife living, contracts marriage with another and cohabits with her, is not estopped from denying the validity of the marriage for the purpose of defeating the right of her heirs to share in their estate as community property. *Sloan v. West*, 17: 960, 96 Pac. 684, — Wash. —.

2. Petitioning for administration on the estate of one with whom petitioner contracted a marriage does not estop him from disputing the validity of the marriage because of the fact that he had a prior wife living. *Sloan v. West*, 17: 960, 96 Pac. 684, — Wash. —.

By silence or acquiescence.

3. The doctrine of estoppel *in pais* cannot be applied in favor of the inhabitants of a town against one controlling a ditch which furnishes the public water supply, unless by his action or silence he has concurred in allowing the public and individuals to so use and enjoy the water that to thereafter deprive them of it would work an injustice or fraud upon them, and invade the right founded on the presumption he has allowed to be raised. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.

By inconsistency in acts or claims.

4. One who has sought to have the rights as between defendant and himself adjudicated in an action cannot, after the decision, urge error because other parties whose rights may be affected by the adjudication have not been brought in. *Seven Lakes Reservoir Co. v. New Loveland & G. Irrig. & L. Co.* 17: 329, 93 Pac. 485, 40 Colo. 382.

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EVIDENCE.

Sufficiency of incorporation of, in bill of exceptions, see Appeal and Error, 9.

Right on appeal to open up case and take additional evidence, see Appeal and Error, 11.

Prejudicial error in admission of, see Appeal and Error, 25-28.

Review on appeal, of evidence on which finding is based, see Appeal and Error, 22, 23.

Reception of, on trial, see Trial, 2, 3.

Discretion of trial court as to order of proof, see Appeal and Error, 15.

Discretion of trial court as to reopening case to receive additional evidence, see Appeal and Error, 16.

Presumptions and burden of proof.

As to sufficiency of evidence to overcome presumption, see *infra*, 62.

Sufficiency of evidence to justify presumption, see *infra*, 65.

Sufficiency of allegation of ownership of land at time twenty years before bill was filed to raise presumption of present ownership, see Pleading, 8.

1. In case of the defense of death by suicide being interposed in an action on a life insurance policy, the burden of proof is on the defendant to establish such defense. *Cady v. Fidelity & C. Co.* 17: 260, 113 N. W. 967, 134 Wis. 322.

2. In an action where there is a plea of a special contract in defense, limiting or conditioning the carrier's liability, the burden is upon the carrier not only to show a valid special contract, but also to allege and prove the facts and circumstances showing the stipulations to be reasonable. *Houtz v. Union P. R. Co.* 17: 628, 93 Pac. 439, 33 Utah, 175.

3. The authority of the official performing a marriage ceremony and all the prerequisites of a valid marriage will be presumed until the contrary is made to appear. *Sloan v. West*, 17: 960, 96 Pac. 684, — Wash. —.

4. The presumption attaching to a second marriage of a person is not sufficient to overcome direct testimony of himself and his former wife and disinterested witnesses, that the first marriage was legally solemnized. *Sloan v. West*, 17: 960, 96 Pac. 684, — Wash. —.

5. Undue influence in the making of a will cannot be inferred from the mere fact that it was in favor of one with whom testator had maintained illicit relations, and was contrary to his expressed intention of leaving his property to a dependent sister, who had cared for him in his youth. *Saxton v. Krumm*, 17: 477, 68 Atl. 1056, — Md. —.

(Annotated)

6. In the absence of evidence as to how long a cart which the driver was attempting to repair in a public street had been out of repair, or what caused it to be so, it may be found that it would not have been

out of repair but for the negligence of the owner. *Hollidge v. Duncan*, 17: 982, 85 N. E. 186, 199 Mass. 121.

7. In an action to contest a will on the ground of alleged alterations, the burden of proof to explain an erasure in the instrument is not upon the defendant in the first instance, but it is incumbent upon the plaintiff to overcome the evidence afforded by the fact of the probate of the instrument, and to show its invalidity by a preponderance of all the evidence. *Scott v. Thrall*, 17: 184, 95 Pac. 563, — Kan. — (Annotated)

8. In an action to contest a will, a probate of the instrument is prima facie evidence of its due attestation, execution, and validity. *Scott v. Thrall*, 17: 184, 95 Pac. 563, — Kan. —

9. The presumption of payment of the debt upon twenty years' undisturbed and unexplained possession of mortgaged land by the mortgagor may be repelled by any act recognizing the validity of the mortgage. *Frye v. Hubbell*, 17: 1197, 68 Atl. 325, 74 N. H. 358.

10. The law will not presume that payment of a year's interest upon a note six months after due is to be applied partly for past and partly for future interest. *Davies County Bank & T. Co. v. Wright*, 17: 1122, 110 S. W. 361, — Ky. —

11. In an action between the holder of a chattel mortgage on domestic animals and their increase, and a creditor of the mortgagor, involving the right to the possession of the increase, the burden is upon the mortgagee to establish that the increase were conceived before the mortgage was given, and were, therefore, in actual or potential existence. *Holt v. Lucas*, 17: 203, 96 Pac. 30, — Kan. — (Annotated)

12. Mental suffering will not be presumed to exist for deprivation of opportunity to attend the funeral of one's first cousin. *Johnson v. Western U. Teleg. Co.* 17: 1002, 62 S. E. 244, — S. C. —

Documentary evidence.

See also *infra*, 22, 23.

13. A letter bearing a typewritten signature is admissible in evidence as proof of the receipt of a remittance acknowledged therein, without authentication of the signature, where it was sent in response to a letter containing notification of the remittance. *Lancaster v. Ames*, 17: 229, 68 Atl. 533, 103 Me. 87. (Annotated)

14. A letter written by the surgeon in charge of a railroad hospital to the head of the department who sent an employee to the institution, that the employee was insane, which fact, according to the rules, deprived him of the right of treatment in the hospital, and asking that his family be requested to protect him, is admissible in evidence in a suit against the railroad company to recover for the death of the employee, alleged to have been due to the negligence of the hospital authorities in permitting him to leave the hospital without attendants. *Phillips v. St. Louis & S. F. R. Co.* 17: 1167, 111 S. W. 109, 211 Mo. 419, 17 L.R.A. (N.S.)

15. In an action of debt on a negotiable note, the instrument declared on is admissible in evidence under an allegation in the declaration that "the defendant made and signed his certain promissory note in writing," which is followed by a full description of the note, including the place of payment. *Boyd v. Beebe*, 17: 660, 61 S. E. 304, — W. Va. —

16. Upon trial of a charge of conspiracy to induce a shipper to receive rebates in violation of the "Elkins act," after it has been shown that he received money from some source in some way related to his shipments, and that the account was not carried on the books of his business, evidence of the contents of a private memorandum book with reference to them is admissible. *Thomas v. United States*, 17: 725, 156 Fed. 897, 84 C. C. A. 477.

17. A mortality table printed in a law book is not admissible in evidence, where it is not shown to have been in actual use for the purpose for which such tables are intended, or to have acquired a reputation for accuracy, unless its authenticity is established by competent evidence. *Notto v. Atlantic City R. Co.* 17: 1138, 69 Atl. 96, — N. J. — (Annotated)

Parol and extrinsic concerning writings.

See also *infra*, 50.

Parol testimony to explain latent ambiguity in will, see *Wills*, 4.

18. Oral evidence of the contents of a telegram is admissible in an action to hold the company liable for refusal to transmit it. *Western U. Teleg. Co. v. Lillard*, 17: 836, 110 S. W. 1035, — Ark. —

19. Parol evidence is not admissible to show the intention of the sureties on the contractor's bond, under a contract to erect a building for a county and pay all claims for labor performed and materials furnished, and give bond to that effect, and the bond conditioned that, if the contractor shall pay all claims for labor performed and materials furnished, then the obligation shall be void. *United States Gypsum Co. v. Gleason*, 17: 906, 116 N. W. 238, — Wis. —

20. A bank which, in order to facilitate the collection of a customer's note, places its unrestricted indorsement thereon, may explain such indorsement by parol evidence as against a purchaser with notice. *Johnston v. Schnabaum*, 17: 838, 109 S. W. 1163, — Ark. — (Annotated)

21. Parol evidence is not admissible to show that the indorsement of notes to an individual not designated as the cashier of a bank was such a transfer as to vest the legal title in the bank, and preclude a defense which would be good against the payee. *First Nat. Bank v. McCullough*, 17: 1105, 93 Pac. 366, — Or. —

22. Upon the question of the consideration for land deeded to a railroad company for a right of way, letters written after execution of the deed, by persons not shown to have been the authorized agents of the railroad company or to have had anything

to do with the making of the contract, are inadmissible. *Trout v. Norfolk & W. R. Co.* 17: 702, 59 S. E. 394, 107 Va. 576.

23. Upon the question whether or not an agreement to construct a pass way was part of the consideration for a grant of land to a railroad company for a right of way, letters which throw no light upon the question are not admissible in evidence. *Trout v. Norfolk & W. R. Co.* 17: 702, 59 S. E. 394, 107 Va. 576.

24. Parol evidence is not admissible to show that the true consideration for a deed, which is recited to be a sum of money, was, in addition thereto, a contract to build a pass way across the property conveyed, since the effect would be to establish the reservation of an easement inconsistent with the terms of the deed. *Trout v. Norfolk & W. R. Co.* 17: 702, 59 S. E. 394, 107 Va. 576.

(Annotated)

25. In an action to recover the purchase price of land conveyed to a railroad company for a right of way, recovery cannot be had for breach of a contract to establish across it a pass way which is not mentioned in the deed. *Trout v. Norfolk & W. R. Co.* 17: 702, 59 S. E. 394, 107 Va. 576.

(Annotated)

26. A contractor for public work who seeks cancellation of the contract because of mutual mistake as to the quantity of work to be done may show that, in making his bid, he acted on a mistake caused by an erroneous estimate by the public's engineer of the amount of work to be done. *Long v. Athol*, 17: 96, 82 N. E. 665, 196 Mass. 497.

Opinions and conclusions.

27. One who saw an injured person at the time of the accident in question may properly state that the expression upon her face was that of a person in great pain. *Morris v. St. Paul City R. Co.* 17: 598, 117 N. W. 500, — Minn. —.

28. A dealer in bonds cannot be allowed to give his opinion as to the value of particular bonds which he has never dealt in, or seen, except those before the court. *People v. Turpin*, 17: 276, 84 N. E. 679, 233 Ill. 452.

29. A buyer of jewelry, who has attempted to rescind the order, may point out to the jury the articles covered by the different items of the order, when the order and the jewelry are before them, if it does not require an expert to do so. *Loveland v. Dinnan*, 17: 1119, 70 Atl. 634, 81 Conn. 111.

30. In an action for the price of jewelry the order for which the buyer has attempted to rescind, expert evidence is admissible to show that articles in the order were marked so as to indicate that they were made of better material than that actually used. *Loveland v. Dinnan*, 17: 1119, 70 Atl. 634, 81 Conn. 111.

31. It is not error to refuse to permit an expert in handwriting to testify, from an examination of a will and an erasure therein, that a person who wrote with a nervous hand would be unable to make such an erasure, although the witness might properly testify that the hand of the person who wrote the will was nervous and unsteady. *Scott v. Thrall*, 17: 184, 95 Pac. 563, — Kan. —.

32. One who has served as motorman and conductor on electric cars, but has had no experience in superintending the construction of the trolley wires for cross-over tracks, is not qualified to express his opinion as to the practicability of such device. *Norfolk & P. Traction Co. v. Ellington*, 17: 117, 61 S. E. 779, — Va. —.

33. Expert evidence is not admissible upon the question whether a person doing the things upon which the parties agree is practicing medicine, that being a question for the court to decide. *Com. v. Porn*, 17: 94, 82 N. E. 31, 196 Mass. 328.

Confessions or evidence wrongfully obtained.

34. Confessions or inculpatory statements elicited from persons accused of homicide, on their examination before a coroner's jury, are not admissible against them on their subsequent trial, where they are taken in custody before the coroner's jury, and, without being informed that they are not compelled to testify, are sworn and examined as witnesses, not on their own motion, but on that of the coroner or the jury, in regard to the homicide and their connection with it. *Adams v. State*, 17: 468, 58 S. E. 822, 129 Ga. 248.

35. Testimony of persons who make a peephole into a saloon, as to what they observed inside, and that they took some articles from the room and brought them to court, is not inadmissible in a prosecution for illegal liquor selling as being an unreasonable search or seizure, or as compelling one to become a witness against himself. *Cohn v. State*, 17: 451, 109 S. W. 1149, — Tenn. —.

(Annotated)

Declarations; *res gestæ*.

36. Evidence of the vicious acts of a cow on the morning after she has inflicted injury on a person is not inadmissible, in an action to hold her owner liable for the injury, on the theory that they are not part of the *res gestæ*. *Thornton v. Layle*, 17: 1233, 111 S. W. 279, 33 Ky. L. Rep. 382.

(Annotated)

37. The privilege with respect to communications to an attorney does not attach to statements made by him or testator during the preparation of a will, in a proceeding to contest the will on the ground of coercion, duress, and undue influence, either at common law, or under a statute merely declaratory of the common-law privileges. *Re Young*, 17: 108, 94 Pac. 731, 33 Utah, 382.

(Annotated)

38. Declarations of a party to a contract, as to its terms, are not admissible as part of the *res gestæ*, when made after the contract is completed, and not in the presence of the parties, although made very soon after the parties separated. *State v. Murphy*, 17: 609, 115 N. W. 84, — N. D. —.

Relevancy and materiality.

39. Evidence that a husband frequently signed his wife's name to checks, with her knowledge and consent, is competent for the purpose of establishing his authority generally to sign checks upon her account. *Hawkins v. Windhorst*, 17: 219, 96 Pac. 48, — Kan. — (Annotated)

40. Evidence of the provision of a former will is not immaterial in a will contest on the ground of undue influence, unless it is made clear beyond a reasonable doubt that the changes made in preparing the later will would in no event affect the result of the contest. *Re Young*, 17: 108, 94 Pac. 781, 33 Utah, 382.

41. Upon the question of good faith and use of excessive force by a property owner who, in attempting to enter upon the property when it was in the wrongful possession of a trespasser, used firearms and shot an employee of the trespasser, for which he is being sued for damages, evidence is admissible that the trespasser gained possession of the property by the use of firearms, and had remained armed up to the time of attempted entry. *Walker v. Chancellor*, 17: 455, 94 Pac. 606, 153 Cal. 118.

42. In a prosecution against a railroad company for nuisance in the manner of running trains over a street crossing, evidence is admissible that it acted on the suggestion of the railroad commissioners and placed a watchman at the crossings, as tending to show its good faith in attempting to protect persons using the crossing, against the dangers arising from the passing of its trains. *Cincinnati, N. O. & T. P. R. Co. v. Com.* 17: 561, 104 S. W. 771, — Ky. —

43. That the defendant in an action for maliciously levying an attachment on exempt property acted under the advice of counsel is not a defense, but the fact may be shown in mitigation of damages. *Grimstad v. Lofgren*, 17: 990, 117 N. W. 515, — Minn. —

44. Upon the question of exemplary damages for assault in attempting to force an occupant off from land, evidence is admissible that defendant had title to the property, took advice of counsel, and as to his intention in entering upon the land. *Walker v. Chancellor*, 17: 455, 94 Pac. 606, 153 Cal. 118.

45. In a suit to hold one liable for the value of sheep killed by a dog owned by his daughter who lives with him, in which he denies that the dog did the killing, evidence is not admissible that, without his knowledge, his daughter killed the dog soon after the transaction upon which the suit is based,—especially where it appears that she did so because she thought there was danger of trouble between her father and plaintiff. *Holmes v. Murray*, 17: 431, 105 S. W. 1085, 207 Mo. 413.

46. Evidence of the state of health of an insured person for a considerable period of time prior to his death, where it is claimed he died by suicide, is proper as bearing on whether the deceased came to his death as the result of a suicidal intent. *Cady v.* 17 L.R.A. (N.S.)

Fidelity & C. Co. 17: 260, 113 N. W. 967, 134 Wis. 322.

47. Upon trial of an indictment for conspiracy to induce a shipper to receive rebates in violation of the "Elkins law," evidence is admissible of similar dealings with other merchants. *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477.

48. Proof of similar offenses by one on trial for forgery is admissible only as bearing on the question of intent, although the accused admits that he signed to the instrument in question the name of the person whose name is claimed to have been forged, and uttered the instrument, knowing that he had done so, and even though the jury, without proof of such similar offenses, would be justified in finding a fraudulent intent on the part of the accused if he was not authorized to sign the name of such person to the instrument. *State v. Murphy*, 17: 609, 115 N. W. 84, — N. D. —

49. Evidence that deceased did not believe in a Supreme Being, offered to discredit his dying declaration, is not rendered inadmissible by the fact that it relates to a time a year before his death. *Gambrell v. State*, 17: 291, 46 So. 138, — Miss. —

50. Proof of affliction with bronchitis is admissible in support of an allegation of breach of warranty of freedom from bodily infirmities and soundness of physical condition, in defense of an action on an insurance policy, and does not raise a new and distinct issue as to breach of a warranty, against that disease which is not pleaded. *French v. Fidelity & C. Co.* 17: 1011, 115 N. W. 869, — Wis. —

51. Evidence as to the manner in which an application for life insurance was prepared is admissible in an action on the policy, to estop the company from availing itself of the falsity of statements contained therein as a defense. *Roe v. National Life Ins. Asso.* 17: 1144, 115 N. W. 500, — Iowa. —

52. Evidence of the examining physician that his recommendation of an applicant for insurance would not have been prevented by knowledge that his attending physician thought he had heart disease, since he would have relied on his own examination, is admissible in an action upon the policy, as pertinent to the issue whether or not he was misled by answers in the application. *Roe v. National Life Ins. Asso.* 17: 1144, 115 N. W. 500, — Iowa, —

53. When the actual effect produced on the medical examiner by erroneous answers given by an applicant for insurance to questions propounded to him is shown, evidence is not admissible as to what weight might have been given by physicians generally to the answers had they been correct. *Roe v. National Life Ins. Asso.* 17: 1144, 115 N. W. 500, — Iowa, —

54. To show the animus probably existing between a murderer and his victim, evidence is admissible of quarrels months be-

fore the homicide. *State v. Brooks*, 17: 483, 60 S. E. 518, 79 S. C. 144.

55. Evidence of ownership of the property is admissible in defense of an action for assault upon one in wrongful possession, made during an attempt to effect an entry thereon. *Walker v. Chanslor*, 17: 455, 94 Pac. 606, 153 Cal. 118.

56. In an action by a bank which has returned money paid on a forged check, to recover the amount from the bank to which it paid the check and which guaranteed prior indorsements, evidence is admissible which tends to show that the one who made the first indorsement was the one whom the maker of the check intended should receive the money. *Central Nat. Bank v. National Metropolitan Bank*, 17: 520, 31 App. D. C. 391.

Weight and sufficiency.

Necessity of proving that woman had become quick, in prosecution for abortion, see *Abortion*.

Effect of interest of witness on weight and quality of his evidence, see *Appeal and Error*, 14.

Impeaching award of damages in eminent domain case by testimony of commissioners fixing, see *Damages*, 17.

Sufficiency of, to show negligence in failing to promulgate rules, see *Master and Servant*, 6.

57. The facts and circumstances of a drowning accident are sufficiently established, within the meaning of an accident-insurance policy limiting the amount of recovery in case they are not so established, where witnesses testify to having seen deceased in a cranky canoe, with a companion, within three or four minutes of the time of accident, and to having seen the overturned canoe and evidence of its having recently capsized, within a few minutes after it, although they did not actually see the craft overturn. *Lewis v. Brotherhood Accident Co.* 17: 714, 79 N. E. 802, 194 Mass. 1.

58. Evidence that an officer of an insolvent corporation overdrew his account with the corporation, and paid the amount in discharge of an alleged indebtedness to his son, who, knowing the source from whence the money came, deposited it in a bank, is sufficient to support a finding, in an action by the trustee in bankruptcy of the corporation, that the money on deposit is the property of the bankrupt corporation. *Drew v. Myers*, 17: 350, 116 N. W. 781, — Neb. —.

59. That the agent in charge of a railroad station was the agent of a telegraph company to receive messages for transmission over its lines may be established by proof that, in the absence of the operator, he did receive such messages. *Western U. Tele. Co. v. Lillard*, 17: 836, 110 S. W. 1035, — Ark. —.

60. That a letter was written in response to another sufficiently appears from evidence that it was dated the day after the latter, and referred to checks transmitted in it and 17 L.R.A. (N.S.)

to receipts to be sent to persons from whom the money, represented by them, was alleged to have been received. *Lancaster v. Ames*, 17: 229, 68 Atl. 533, 103 Me. 87.

61. That the owner of a tenement building placed, or caused to be placed, a mat at the outer door, may be found from the facts that it was in such place and was owned by him. *McGowan v. Monahan*, 17: 928, 85 N. E. 105, 199 Mass. 296.

62. Testimony of both of the contracting parties to a marriage ceremony, that it was not dissolved until after the death of a person with whom one of the parties went through a subsequent ceremony, overcomes any presumption which the court might otherwise have indulged as to the dissolution of the first marriage before the second was entered into. *Sloan v. West*, 17: 960, 96 Pac. 684, — Wash. —.

63. The statutory burden placed upon one complaining of an order of a railroad commission, to establish its unreasonableness or unlawfulness by clear and satisfactory evidence, requires the *quantum* of evidence necessary to establish fraud or prove mistake in a written instrument by one on whom the burden rests to establish such facts. *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Com.* 17: 821, 116 N. W. 905, — Wis. —.

64. A finding of incapacity on the part of one executing a sale of property is supported by evidence that he had been having a protracted debauch, and, before the execution of the contract, he was so drunk that he fell in the street, and, three hours after executing the instrument, was so drunk that he collapsed and had to be put to bed, and recalled nothing of the transaction. *Swan v. Talbot*, 17: 1066, 94 Pac. 238, 152 Cal. 142.

65. Possession, by persons who had been seen in the yard of a burglarized house about the time the crime was committed, of the stolen property when overtaken by its owner on the road shortly after the burglary, is sufficient to justify a presumption of guilt in the absence of satisfactory evidence as to how they came into possession of the property, consistent with their innocence. *State v. Henderson*, 17: 1100, 110 S. W. 1078, 212 Mo. 208.

Variance.

66. In an action for damages resulting from injury by negligence, a variance of the evidence from the declaration in respect to specification of mere matters of detail concerning the matter, not the time or place at which, or the instrumentalities by which, the injury was inflicted, is immaterial. *Knicely v. West Virginia M. R. Co.* 17: 370, 61 S. E. 811, — W. Va. —.

EXCEPTIONS.

See *Appeal and Error*, 10.

EXECUTION.

Sale under execution of equitable asset of debtor, see *Levy and Seizure*, 1, 2.

Of will, see *Wills*.

EXECUTORS AND ADMINISTRATORS.

Postponing suit on promise of debtor to pay, as raising new obligation for benefit of estate of payee, see Contracts, 3.

Leaving liability of estate for mortgage indebtedness unadjudicated, see Judgment, 7.

When cause of action for breach of covenant against encumbrances arises, so as to be enforceable against estate, see Limitation of Actions, 14.

Effect of statute suspending, in favor of, running of limitations as to actions existing in favor of deceased, see Limitation of Actions, 18.

Sufficiency of payment of mortgage to administrator of mortgagee, where will is afterwards discovered and executor appointed in other county, see Mortgage, 3.

Necessity of making administrator of mortgagor party to suit to foreclose mortgage after mortgagor's decease, see Mortgage, 5.

Authority of administrator to extend time on note by intestate so as to release sureties thereon, see Principal and Surety, 2.

1. The appointment of an administrator upon a finding of decedent's death and possession of property within the county is conclusive of the authority of the court to make the appointment until set aside on direct attack, although a will is found and subsequently probated in another county. *Zeigler v. Storey*, 17: 878, 69 Atl. 894, 220 Pa. 471.

2. The presentation of a will to the register of one county, and its proof by the attesting witnesses, does not nullify the act of a register in another county in granting letters of administration upon testator's estate without notice of the will and before the entry of a decree admitting it to probate. *Zeigler v. Storey*, 17: 878, 69 Atl. 894, 220 Pa. 471.

EXEMPLARY DAMAGES.

See Damages, 1.

EXEMPTIONS.

Evidence that persons levying on exempt property acted under advice of counsel, see Evidence, 43.

Exemption from taxation, see Taxes, 13, 14, 16-19.

A debtor who has sold all his nonexempt property, and started to remove to another state, with the intention of establishing a residence there, is a "resident of the state" within the meaning of the exemption law, and entitled to claim his exemptions, where, while yet within the state, an attachment is levied on his horse. *Grimestad v. Lofgren*, 17: 990, 117 N. W. 515, — Minn. —.

EXHIBITIONS.

1. A student association of a university, which erects through one of its directors

a stand upon the athletic field to accommodate patrons of athletic exhibitions given thereon, is liable for injuries to a patron through the collapse of the stand due to its negligent construction, although it could not have been constructed without consent of the authorities of the university, and the director who supervised its erection was employed and paid by the university as adviser of the athletic policy of the association. *Scott v. University of Mich. Athletic Asso.* 17: 234, 116 N. W. 624, — Mich. —.

2. The mere employment, by persons about to give an athletic exhibition to which the public is invited upon payment of an admission fee, of competent persons to build and inspect a stand for the accommodation of patrons, will not absolve them from liability for injuries to a patron from the collapse of the stand through a patent defect discoverable by the exercise of proper care. *Scott v. University of Mich. Athletic Asso.* 17: 234, 116 N. W. 624, — Mich. —.

EXPERTS.

Testimony of, see Evidence, 31-33.

EXTRADITION.

What questions may be passed upon in habeas corpus to release person held under extradition proceedings, see Judgment, 4.

FALLING OBJECTS.

See Master and Servant, 36; Negligence, 1; Trial, 4.

FALSE PRETENSES.

1. One who trades to another properties at fictitious and greatly exaggerated value, as to which there is no evidence that he had title, it not within the protection of a statute against obtaining property by means of the confidence game, so as to render one guilty who trades to him, in return for his property, worthless securities. *People v. Turpin*, 17: 276, 84 N. E. 679, 233 Ill. 452. (Annotated)

2. That one drawing a check which he induces another to cash does not state that he has funds in bank, or that it will be paid, will not prevent his conviction for obtaining money by false pretenses, if he knows that it will not be paid, and draws it with intent to defraud. *State v. Ham-melsy*, 17: 244, 96 Pac. 865, — Or. —. (Annotated)

FALSE REPRESENTATIONS.

See Fraud and Deceit.

FEDERAL COURTS.

See Courts.

FELLOW SERVANTS.

See Master and Servant, 23-31.

FELONY.

What constitutes gaming within meaning of statute making gaming a felony, see Gaming, 2.

FICTITIOUS PAYEE.

Of check, see Banks, 6, 8, 9; Forgery.

FILING.

Right of mechanics' lien claimant to cost of filing his lien, see Mechanics' Liens, 3.

FINALITY.

Of decision for purpose of review, see Appeal and Error, 1, 2.

FINDINGS.

Jurisdiction of court to vacate and make new findings, see Judgment, 3.

Review of findings of state board of health in proceeding to revoke physician's license, see Physicians and Surgeons, 3.

In general, see Trial.

FINE.

Enforcing payment of license and occupation taxes by, see License.

FIRE INSURANCE.

See Insurance.

FIRES.

Liability of railroads as to, see Railroads.

FIXTURES.

Right of tenant to remove, see Landlord and Tenant, 1.

Question for jury as to what constitute, see Trial, 7.

A gas stove and window shades running on rollers, attached by the owner to his dwelling house designed for a single family, are not fixtures which will pass with a mortgage of the realty. *Hook v. Bolton*, 17: 699, 85 N. E. 175, 199 Mass. 244. (Annotated)

FOOD.

Validity of ordinance regulating size and character of milk jars, see Constitutional Law, 7, 11, 24.

One having in possession for use glass jars for the sale of milk of less capacity than is indicated upon them cannot escape the penalty imposed by ordinance therefor, by showing that he had not informed himself as to their capacity. *Chicago v. Bowman Dairy Co.* 17: 684, 84 N. E. 913, 234 Ill. 294.

FORCIBLE ENTRY AND DETAINER.

Assault in attempting to enter on one's own property in possession of wrongdoer, see Appeal and Error, 24; Assault, 1; Evidence, 41, 56.

Exclusiveness of remedy afforded by statute, see Election of Remedies, 1.

FORECLOSURE.

Of mortgage, see Mortgage.
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FOREIGN BANKRUPTCY.

See Bankruptcy, 13, 14.

FOREIGN CORPORATIONS.

See Corporations, 7, 8.

FORFEITURE.

Of insurance policy, see Insurance, 7, 8.

FORGERY.

As to payment of forged checks, see Banks, 6-9, 12.

Evidence as to person to whom maker of forged check intended that money should be paid, see Evidence, 56.

Proof of similar offenses on trial for forgery, see Evidence, 43.

The indorsement upon a check of the name of a fictitious person to whom it was, by fraudulent procurement, made payable, is forgery. *Harmon v. Old Detroit Nat. Bank*, 17: 514, 116 N. W. 417, — Mich. —.

FORMER JEOPARDY.

See Criminal Law, 1.

FRAUD AND DECEIT.

Right of assignees for creditors to goods procured by insolvent by fraudulent representations, see Assignment for Creditors.

Conflict of laws as to sale of goods bearing fraudulent mark of quality, see Conflict of Laws, 4.

Cancellation of contract for, see Contracts, 21.

In inducing signature of contract, see Contracts, 26.

Jurisdiction of court at place where fraudulent scheme is devised, see Courts, 1.

Rescission of sale for, see Equity, 1.

By insolvent debtor in preferring creditor, see Insolvency.

Effect of silence of one obtaining money by fraud to prevent running of statute of limitations, see Limitation of Actions, 10.

Liability of manufacturer of beverage for fraudulent representations of agent, see Principal and Agent, 2.

As to false pretenses, see False Pretenses.

As to fraudulent conveyances, see Fraudulent Conveyances.

1. Misrepresentation as to the amount an order for a specified number of steel bars at a specified price per pound will come to is not a ground for avoiding the sale, where there is no trust relation between the parties, and the buyer is experienced in the business and can easily ascertain for himself what the steel will weigh and therefore what it will cost. *Dalhoff Constr. Co. v. Block*, 17: 419, 157 Fed. 227, 85 C. C. A. 25. (Annotated)

2. The sale of a remainder at the price it was worth if the life tenant was in good health will be set aside, where the purchaser, with knowledge that the life tenant was on his deathbed, bought the remainder-

man, and, with knowledge of his ignorance of the facts, gave a misleading answer to a question as to how the life tenant was getting along, with the object of affirmatively deceiving him, and thereby secured the trade. *Hays v. Meyers*, 17: 284, 107 S. W. 287, 32 Ky. L. Rep. 832. (Annotated)

3. One who buys an ice plant with knowledge that its operation had been abandoned because its output did not equal its capacity, and after having full opportunity to investigate its condition, cannot avoid paying the purchase price because the vendor stated that, with some repairs, it would turn out about a certain amount per day. *Williamson v. Holt*, 17: 240, 61 S. E. 384, 147 N. C. 515.

FRAUDULENT CONVEYANCES.

The transfer by an insolvent debtor of all his assets to a corporation the stock of which was issued to relatives to whom he was indebted was fraudulent and void as to a creditor not assenting thereto, although the corporation undertook to pay certain creditors of the insolvent, where the relatives knew of the existence of other debts due by the failing debtor, who was retained as president and manager of the corporation at a specified salary. *Hoppe Hardware Co. v. Bain*, 17: 310, 95 Pac. 765, — Okla. —.

FREIGHT.

See Carriers, 7-14.

GAMING.

Check given for gambling debt, see Checks, 5.

Enforcing promise to repay money advanced for use in buying stock on margins, see Contracts, 14.

Effect of statute making gaming a felony to supersede prior ordinance as to punishment of gambling, see Criminal Law, 2.

1. A gambling game within the general language of an ordinance prohibiting the playing of any such game is not taken out of the operation of the ordinance by the fact that the general language is preceded by an enumeration of prohibited games which does not include the particular one in question. *Seattle v. MacDonald*, 17: 49, 91 Pac. 952, 47 Wash. 298.

2. Playing cards for money on a blanket in a shed as an attachment of a dance does not warrant conviction under a statute providing that any person who shall, for the purpose of gaming, exhibit any gaming table, bank, or device, shall be guilty of felony. *Hanks v. State*, 17: 1210, 111 S. W. 402, — Tex. Crim. Rep. —. (Annotated)

GAS.

Injunction to compel furnishing or to restrain cutting off of, see Injunction, 1, 2.

As to oil and gas lease, see Mines.

Assignees for creditors are not identified with the assignor, so as to entitle a 17 L.R.A. (N.S.)

corporation which has been supplying gas to the assignor to refuse to supply it to the assignees, who desire temporarily to continue the business, until the amount due by the assignor is paid, under a statute giving it permission to shut off gas from the premises of one who refuses to pay the amount due therefor, but forbidding it to do so merely because a bill remains unpaid by a previous occupant of the premises. *Cox v. Malden & M. Gaslight Co.* 17: 1235, 85 N. E. 180, 199 Mass. 324.

GAS STOVE.

As fixture, see Fixtures.

GIFT.

Note payable only if collected in lifetime of payee, as attempted gift without complete delivery, see Bills and Notes, 1.

1. A valid gift of a savings-bank deposit is not prevented by a reservation by the donor of the right to the interest during life if needed. *Goodrich v. Rutland Sav. Bank*, 17: 181, 69 Atl. 651, — Vt. —.

2. A delivery sufficient to pass title to a savings-bank account is shown by the delivery to one having possession of the book as bailee for the owner of an order on the bank to pay the account to him, accompanying a parol gift of it, followed by a holding of the book by the donee as owner. *Goodrich v. Rutland Sav. Bank*, 17: 181, 69 Atl. 651, — Va. —. (Annotated)

GOOD FAITH.

Evidence to show, see Evidence, 41, 42.
As question for jury, see Trial, 9.

GOVERNMENTAL CONTROL.

Over carriers, see Carriers, 15.

GRADING.

Of highway, see Highways, 5.

GRAND JURY.

Contempt by grand juror, see Contempt, 1, 3.

GRAND STAND.

Liability for injury from fall of stand used at athletic exhibitions, see Exhibitions.

GRANT.

Exclusive grant of right to take water from artesian well, see Waters, 4, 5.

GUARANTY.

Of check by national bank, see Banks, 1-3.

By married woman, see Husband and Wife, 3.

HABEAS CORPUS.

Discharge or because of insufficiency of indictment, as bar to prosecution upon same indictment in other jurisdiction, see Judgment, 4.

HEALTH.

Representations as to, in application for insurance, see Insurance, 4-6.

Sufficiency of plea to raise question of breach of warranty by insured as to health, see Pleading, 20.

Noise interfering with, as nuisance, see Nuisances, 2.

Proceedings before board of health to revoke physician's license, see Physicians and Surgeons, 1-3.

Judicial interference with act of board of health in revoking physician's license, see Courts, 4.

Right to jury in proceedings by state board of health to revoke physician's license, see Jury.

Sufficiency of complaint filed with state board of health to procure revocation of physician's license, see Pleading, 16.

Requiring vaccination as condition of right to attend public schools, see Schools.

The occasional recurrence of small-pox in a city does not present an emergency for which the health commissioner may make and enforce rules not prescribed or approved by the legislative authority of the city. *People ex rel. Jenkins v. Board of Education*, 17: 709, 84 N. E. 1046, 234 Ill. 422.

HIGHWAYS.

See also Bridges.

Rights of abutting owner generally.

Prohibiting lot owner from exercising right of access to, see Constitutional Law, 10.

Necessity that abutting owner show special injury from obstruction of street, to enable him to compel removal of, see Nuisances, 7.

1. A lot owner has a special and peculiar right not given to other citizens, in the particular street or highway on which his property abuts, since it affords him the means of going to and from his premises; and such right is a property right appurtenant to his lot. *Sandpoint v. Doyle*, 17: 497, 95 Pac. 945, 14 Idaho, 749.

2. A village which has constructed a bridge 450 feet long across a small stream 25 feet wide and the adjacent ravine or depression in the natural surface of the ground, and has built the bridge at a height of 20 feet from the ground at a place where it passes an abutting property owner's lot, is without power and authority unqualifiedly to prohibit the property owner from erecting a platform on his own lot to such a height as to enable him to go from his building to the bridge, and to connect such platform with the bridge by proper and substantial railings, and to exercise in such manner the right of ingress and egress. *Sandpoint v. Doyle*, 17: 497, 95 Pac. 945, 14 Idaho, 749.

3. The owner of a lot abutting on a street or highway has the right of ingress

and egress, and may maintain an action for the protection of such right. *Sandpoint v. Doyle*, 17: 497, 95 Pac. 945, 14 Idaho, 749.

Use and obstruction by railroads.

Injunction against railroad tracks in, see Injunctions, 13.

Injunction against storage of cars in street, see Injunction, 14.

Effect of laches on right to injunction against operation of railroad in, see Limitation of Actions, 1.

Running of limitations against action for injuries from operation of railroad in highway, see Limitation of Actions, 2.

Right of municipality to regulate speed of trains on, see Municipal Corporations, 4.

Increase of trains, noise, and smoke upon railroad track and street as nuisance, see Nuisances, 3.

4. An abutting owner may maintain an action against a railroad company which lays its tracks in a public street, for the injury to his easements therein, although the tracks are laid under authority of the municipality, and the fee of the street is in the public. *Staton v. Atlantic C. L. R. Co.* 17: 949, 61 S. E. 455, 147 N. C. 428.

Grading.

5. A municipality has a right to establish its grades, and to fill in or bridge or plank its street and right of way, so as to raise the surface of such grade; but by doing so it cannot preclude the abutting property owner from employing and using such reasonable means, or making such reasonable improvements, as may be necessary to enable him to go from his property to the street, and exercise and enjoy the right of ingress and egress. *Sandpoint v. Doyle*, 17: 497, 95 Pac. 945, 14 Idaho, 749.

Liability for injuries on.

Presumption of negligence of owner of cart whose driver attempts to repair it in public street, see Evidence, 6.

Liability of master for act of stranger whom servant calls to assist him to repair cart in street, see Master and Servant, 2.

Liability for negligence of independent contractor permitting fall of object on pedestrian, see Master and Servant, 36.

6. The owner of a cart who permits it to be out of repair is liable for injury to a person on the street, by the fall of the pole while the driver is attempting to repair it, which would not have happened but for the condition of the cart. *Hollidge v. Duncan*, 17: 982, 85 N. E. 186, 199 Mass. 121.

7. The abutting property owner is liable for injury to a pedestrian in falling over a covering which constitutes an obstruction to footmen, placed by an independent contractor over a repaired sidewalk without signals or guard to protect the public from injury after dark. *Kampmann v. Rothwell*, 17: 758, 109 S. W. 1089, — Tex. —.

(Annotated)

8. One undertaking to repair a sidewalk for a property owner without supervision, or direction, from him, is liable to him for any sum he is required to pay because of injury to a pedestrian due to failure to place proper signals or barriers to protect the public from injury after dark whether he is an independent contractor, or a mere employee. *Kampmann v. Rothwell*, 17: 758, 109 S. W. 1089, — Tex. —.

9. Negligence cannot be imputed to a street car company merely because the wheel of a carriage passing along the street falls into a cable slot. *Miller v. United R. & E. Co.* 17: 978, 69 Atl. 636, — Md. —.

10. A municipal ordinance requiring street railways to keep the space covered by their tracks in thorough repair does not make them insurers of the safety of passengers using such portion of the street. *Miller v. United R. & E. Co.* 17: 978, 69 Atl. 636, — Md. —.

11. A pedestrian is negligent, as matter of law, who, upon a clear day, with nothing to obstruct her vision, stumbles over a place in the sidewalk where one paving stone is raised 4 inches above the adjoining one, which fact she is well acquainted with. *Kennedy v. Philadelphia*, 17: 194, 69 Atl. 748, 220 Pa. 273. (Annotated)

HOLIDAYS.

A judgment entered on a judicial day will not be declared void because evidence was taken and arguments heard without objection on a day which had, without knowledge of the court, been proclaimed by the governor to be a holiday. *State ex rel. Walter v. Superior Court*, 17: 257, 94 Pac. 665, 49 Wash. 1.

HOMESTEAD.

Overflow of lands of, by wrongful obstruction of water way, see Damages, 16; Waters, 1.

As community estate, see Husband and Wife, 5.

Question for jury as to interest of homestead settler in action for injury to property, see Trial, 14.

HOMICIDE.

Admissibility of confessions or inculpatory statements on examination before coroner's jury, see Evidence, 34.

Evidence of quarrels months before commission of crime, see Evidence, 54.

Negligent homicide.

1. One is guilty of manslaughter who killed another with a gun intentionally pointed at him, although it was believed to have been unloaded, where such pointing of a gun is, by statute, made a misdemeanor, and the gun had not been handled for several weeks, so that accused was culpably negligent. *State v. Stitt*, 17: 308, 61 S. E. 566, 146 N. C. 643.
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What reduces crime to manslaughter.

Correctness of instruction defining manslaughter, see Trial, 23.

Whether provocation was sufficient to reduce crime to manslaughter as question for court, see Trial, 17.

2. The killing of a motorman by shooting him will not be reduced to manslaughter by the fact that, being a powerful man, he had just assaulted a smaller man, a friend of the one doing the shooting, because of misunderstanding as to payment of fare, if the assault had ceased, and he was retiring from the combat. *Corn. v. Paese*, 17: 795, 69 Atl. 891, 220 Pa. 371. (Annotated)
Self-defense.

3. One assaulted by a trespasser with a deadly weapon when within a few feet of his doorstep is not bound to retreat, but may meet force with force, even though the result is the death of his adversary. *State v. Brooks*, 17: 483, 60 S. E. 518, 79 S. C. 144.

HOSPITAL.

Committing inebriates to, for treatment without their consent, see Constitutional Law, 9.

Admissibility in evidence, of letter by surgeon in charge of, to head of department, who sent employee to institution, see Evidence, 14.

Setting aside percentage of liquor license fees for purpose of establishing hospital for inebriates, see Taxes, 14.

See also Charities.

1. The mere employment of competent attendants does not exempt a hospital maintained by a railroad company for the benefit of its employees, to which they are compelled to contribute, from liability for injuries caused by the negligence of such attendants. *Phillips v. St. Louis & S. F. R. Co.* 17: 1167, 111 S. W. 109, 211 Mo. 419.

(Annotated)

2. A corporation organized by the officers of a railroad company to operate a hospital for the benefit of employees of the road, to which they are compelled to contribute, is not a separate institution, for the acts of which the railroad company is not responsible, where it is organized for the benefit of the road, and the beneficiaries are determined by its officers, and the surgeons of the hospital and the road are the same. *Phillips v. St. Louis & S. F. R. Co.* 17: 1167, 111 S. W. 109, 211 Mo. 419.

3. A hospital which has assumed to treat a person who is discovered to be insane is liable for his death in case it permits him to leave the hospital unattended and without notice to his friends, if he is killed because of inability to care for himself. *Phillips v. St. Louis & S. F. R. Co.* 17: 1167, 111 S. W. 109, 211 Mo. 419.

HOTEL.

See Innkeepers.

HUNTING.

Injunction to prevent interference with rights, see Injunction, 3.

HUSBAND AND WIFE.

Abatement of husband's right of action for injury to wife by her death, see Abatement and Revival, 2.

Finality of order of probate court as to allowance to widow, for purpose of appeal, see Appeal and Error, 2.

Enforcement of statute of other state making wife liable with husband for family expenses, see Conflict of Laws, 5.

Damages for injury to pregnant woman, see Damages, 12-14, 18, 19.

Evidence to establish husband's authority to sign checks for wife, see Evidence, 39.

Effect of redemption by wife of land of husband sold on foreclosure, see Mortgage, 6.

As to divorce, see Divorce.

As to dower, see Dower.

As to marriage, see Marriage.

Wife's power to contract.

1. The statutory power of a married woman to contract with reference to her separate property is not an absolute and unlimited right of contract on all matters, but is confined to those contracts that have reference to her separate estate. *Bank of Commerce v. Bowers*, 17: 676, 93 Pac. 504, 14 Idaho, 75.

2. A married woman, although authorized by Idaho Laws 1903, p. 346, § 2, to contract with reference to her separate property to the same extent and with like effect as a married man, cannot bind herself personally, in view of the other provisions of the Code, for the payment of a debt that is not contracted for her own use and benefit, or for the use and benefit of her separate estate, or in connection with its control and management, or in carrying on or conducting business therewith, unless the contract and obligation is made so as to create a lien or encumbrance on her separate estate, or some portion of it, as security for the payment of the debt. *Bank of Commerce v. Bowers*, 17: 676, 93 Pac. 504, 14 Idaho, 75.

3. The right to control and dispose of her separate property, conferred by Idaho Laws 1903, p. 346, upon a married woman, together with all the rights and privileges necessary to its complete enjoyment or the power of disposing of it, does not authorize her to become a surety or guarantor for the debts of others, but her power is limited to contracts necessary or essential to the complete enjoyment of her separate estate. *Bank of Commerce v. Bowers*, 17: 676, 93 Pac. 504, 14 Idaho, 75. (Annotated)

4. A married woman pledging her general estate, with the consent of her husband, as collateral for the debt of another, cannot defeat the lien on the ground of her coverture. *Daviess County Bank & T. Co. v. Wright*, 17: 1122, 110 S. W. 361, — Ky. —. 17 L.R.A. (N.S.)

Community property.

5. A homestead donation entered by a man and wife, the title to which is finally secured by his performance of the legal requirements, is the community estate of such persons, although before expiration of the time required for perfecting the title the wife dies and the man remarries. *Creamer v. Briscoe*, 17: 154, 109 S. W. 911, — Tex. —. (Annotated)

Antenuptial agreement.

As to loss of dower by antenuptial contract, see Dower.

6. That an antenuptial contract, by the terms of which each of the parties thereto released all interest in the property of the other, is insufficient to bar the wife's life estate in the homestead of the husband, does not render the contract void *in toto*. *Rieger v. Schaible*, 17: 866, 115 N. W. 560, — Neb. —.

7. Antenuptial contracts between persons contemplating matrimony, determining the prospective rights of each in the property of both parties during and after marriage, are not against public policy, and are enforceable. *Rieger v. Schaible*, 17: 866, 115 N. W. 560, — Neb. —.

8. An antenuptial contract in consideration of marriage and the release by each party of all interest in the property of the other is based upon a sufficient consideration as to both parties, when each is the owner of property in which the other would acquire an interest by reason of the marriage but for the antenuptial agreement, and is sufficient, when equitable and fair in its terms and entered into in good faith, to constitute an equitable bar to dower. *Rieger v. Schaible*, 17: 866, 115 N. W. 560, — Neb. —.

IOE PLANT.

Operation of, as nuisance, see Nuisances, 4.

IDENTITY.

Competency of witness to identify articles before jury, see Evidence, 29.

IMPAIRMENT OF OBLIGATION OF CONTRACTS.

See Constitutional Law, 25-27.

IMPEACHMENT.

Of award of damages in eminent domain case, see Damages, 17.

IMPLIED WARRANTY.

See Sale, 1.

IMPRISONMENT.

Enforcing payment of license and occupation taxes by, see License.

IMPRISONMENT FOR DEBT.

Commitment for contempt for refusing to pay suit money and temporary alimony as, see Contempt, 4.

IMPROVEMENTS.

Recovery of value of, by grantee upon breach of covenant of title, see Damages, 4.

IMPUTED NEGLIGENCE.

See Negligence, 13.

INCOMPETENT PERSONS.

Negligence of hospital in permitting incompetent person to leave hospital unattended, see Hospitals, 3.

Effect of burning of property by insured while insane, see Insurance, 17.

Suicide of insured while insane, see Insurance, 18-20.

INCORPOREAL RIGHTS.

Condemnation of, see Eminent Domain, 1.

INCREASE.

Of animals, see Animals.

INDEBITATUS.

Indebitatus count for goods bargained and sold in action to recover purchase price, see Pleading, 9.

INDEPENDENT CONTRACTORS.

Who are, see Master and Servant, 37.

Liability of master for negligence of, see Master and Servant, 23-36.

Liability of abutting owner for negligence of, in leaving obstruction in street, see Highways, 7, 8.

INDICTMENT, INFORMATION, AND COMPLAINT.

Permitting witness whose name is not indorsed on indictment to testify, see Witnesses, 2.

Duplicity.

1. An indictment for conspiracy to induce a shipper to violate the "Elkins law" by receiving rebates is not bad for duplicity in charging that the conspiracy was to induce him to "accept and receive" rebates. *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477.

Description of offense.

2. A charge in an indictment for conspiracy to induce a shipper to violate the "Elkins law" by receiving rebates, that the money was to be received from the railroads in the way or guise of pretended claims, commissions, and allowances, and, when so received, was to be turned over to the shipper, is sufficient to show how the rebate was to be effected. *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477.

3. An indictment of a transportation agent for conspiring to induce a shipper to receive rebates in violation of the act of Congress known as the "Elkins act" is not insufficient because it fails to set out the name of the proposed giver,—at least where the givers are described as the railroads and their connecting lines engaged in carrying on interstate commerce between the points 17 L.R.A. (N.S.)

of shipment and destination of the shipper's traffic. *Thomas v. United States*, 17: 720, 156 Fed. 897, 84 C. C. A. 477.

INDORSEMENT.

By fictitious payee of check, see Banks, 12.

Of note for collection, see Banks, 10, 11.

Of bills and notes generally, see Bills and Notes.

Of checks, see Checks.

INEBRIATES.

Statute providing for compulsory treatment of, see Constitutional Law, 9.

Setting aside percentage of liquor license fees for purpose of establishing hospital for, see Taxes, 14.

INFANTS.

Duty of carrier toward infant passenger, see Carriers, 4.

Damages for negligent killing of, on railroad, see Damages, 15.

Violation of statute forbidding employment of, as negligence *per se*, see Master and Servant, 5.

Liability for negligence toward, generally, see Negligence, 7, 8.

Contributory negligence of, see Negligence, 11.

Wrongful employment of infant, as proximate cause of injury to him, see Proximate Cause, 2.

1. Forbidding the employment of children under twelve years of age in factories or manufacturing establishments does not violate the constitutional rights of the child or its parent. *Starnes v. Albion Mfg. Co.* 17: 602, 61 S. E. 525, 147 N. C. 556.

(Annotated)

2. The interest of minors in land conveyed by deed of trust does not pass thereunder, where they are not parties to the deed or to the proceedings in court upon which it is based. *Talley v. Ferguson*, 17: 1215, 62 S. E. 456, — W. Va. —.

INFORMATION.

See Indictment, Information, and Complaint.

INGRESS.

Right of ingress to property, see Highways, 1, 3, 5.

INHERITANCE TAX.

See Taxes, 20.

INJUNCTION.

Against public service corporation for interfering with property, see Eminent Domain, 2.

Unincorporated labor unions as parties to suit to enjoin strike by members, see Parties, 5.

Making representatives of labor organization parties where members too numerous to be sued individually, see Parties, 4.

Mandatory injunction.

1. Equity has no jurisdiction of a suit for mandatory injunction to compel a gas company to furnish, under its duty to the public, gas to a consumer with whom it has no contract, since he has a complete remedy at law by mandamus. *Cox v. Malden & M. Gaslight Co.* 17: 1235, 85 N. E. 180, 199 Mass. 324.

Against refusal to furnish gas.

2. Injunction will not lie to restrain a gas company from continuing to refuse to perform its public duty to furnish gas to an applicant with whom it has no contract. *Cox v. Malden & M. Gaslight Co.* 17: 1235, 85 N. E. 180, 199 Mass. 324.

To protect right to hunt.

3. Injunction will lie to prevent threatened repeated wrongful interference with the attempt of a citizen to take wild fowl upon the public navigable waters of the state. *Ainsworth v. Munoskong Hunting & F. Club*, 17: 1236, 116 N. W. 992, — Mich. — (Annotated)

Contract rights.

4. A railroad company will not be enjoined from breaking its covenant to run freight and passenger trains to and from the property of the covenantee after it has, for the public welfare, changed its route, where the burden would be wholly out of proportion to the benefit which would accrue to the covenantee. *Whalen v. Baltimore & O. R. Co.* 17: 130, 69 Atl. 390, — Md. —

Illegal or tortious acts.

Against nuisance, see Nuisances, 4, 8.

5. Equity will not enjoin employees who have quit the service of their employer from attempting, by proper argument, to persuade others from taking their places, so long as they do not resort to force or intimidation, or obstruct the public thoroughfares. *Jones v. E. Van Winkle Gin & Mach. Works*, 17: 848, 62 S. E. 236, — Ga. —

6. Members of a labor union may be enjoined from combining together to further a strike for an illegal purpose and from doing any acts whatever, peaceful or otherwise, in furtherance thereof, including the payment of strike benefits or putting their employers on the unfair list. *Reynolds v. Davis*, 17: 162, 84 N. E. 457, 198 Mass. 294. (Annotated)

7. Workmen who quit the service of their employer, and, as a means of inducing him to accede to their demands, establish pickets at or near the approaches to his premises for the purpose of dissuading others from remaining in or entering into his employment, will be enjoined, together with their confederates, from maintaining patrols, when such patrols resort to intimidation or any manner of coercion to prevent others from entering into or remaining in the service of their late employer, to the irreparable damage of his business. *Jones v. E. Van Winkle Gin & Mach. Works*, 17: 848, 62 S. E. 236, — Ga. —

8. An injunction lies against the maintenance of a nuisance without establishing 17 L.R.A. (N.S.)

the fact of nuisance at law, where the evidence clearly shows the maintenance of a nuisance to the injury of complainant. *Oehler v. Levy*, 17: 1025, 85 N. E. 271, 234 Ill. 595.

9. An injunction may issue in a proper case to restrain persons from attempting, by threats, violence, or intimidation, or other unlawful means, to prevent any person from engaging in, remaining in, or performing the business, labor, or duties of any lawful enterprise or occupation, although the acts sought to be restrained, if committed, constitute a crime. *Jones v. E. Van Winkle Gin & Mach. Works*, 17: 848, 62 S. E. 236, — Ga. —

Legal proceedings.

10. A landlord is not prevented from shutting off the heat of the leased apartment because of breach of covenant to pay rent, by an injunction against the prosecution of proceedings in forcible entry and detainer; nor is the tenant released from his covenant not to sue for injuries caused by re-entry in case of such breach. *Howe v. Frith*, 17: 672, 95 Pac. 603, — Colo. —

Against officers.

Action against state officials to enjoin enforcement of unconstitutional statute as one against state, see State.

11. Injunction against the arbitrary closing of a clubhouse because of alleged violation of an ordinance against dispensing intoxicating liquors within the city is not prevented by a statute providing that no injunction shall issue to restrain the enforcement of a penal ordinance, since the statute refers only to its judicial enforcement. *Canon City v. Manning*, 17: 272, 95 Pac. 537, — Colo. —

12. A municipal corporation may be enjoined from proceeding to enforce its order to close a clubroom, based upon an arbitrary *ex parte* determination that the furnishing by the club of intoxicating liquors to its members violates the ordinance against dispensing such liquors in the city. *Canon City v. Manning*, 17: 272, 95 Pac. 537, — Colo. —

Against railroad in street.

Effect of laches on right to injunction against operation of railroad in street, see Limitation of Actions, 1.

13. One purchasing property abutting on a street in which a railroad is in operation will not be permitted to enjoin the use of the tracks in a proper manner. *Staton v. Atlantic C. L. R. Co.* 17: 949, 61 S. E. 455, 147 N. C. 428.

Storage of cars in street.

14. The use of a railroad track laid in a public street for the storage of cars and delivery of freight from the cars to merchants gives an abutting owner whose property is injured thereby a right to injunction and damages. *Staton v. Atlantic C. L. R. Co.* 17: 949, 61 S. E. 455, 147 N. C. 428.

Speed of trains.

15. An abutting property owner cannot

enjoin the running of trains in a public street at a speed prohibited by the municipal ordinance, since his remedy by appeal to the municipal authorities, or to a magistrate, is adequate. *Staton v. Atlantic C. L. R. Co.* 17: 949, 61 S. E. 455, 147 N. C. 428.

INNKEEPERS.

Liability of lessor of hotel to guest injured on premises, see *Landlord and Tenant*, 4.

Contributory negligence of guest injured while walking about grounds, see *Negligence*, 12.

1. The change by a hotel keeper who has paid a hotel-license fee from the American to the European plan does not subject him to the payment of an additional fee as a restaurant keeper, although he may serve meals to persons not rooming in the hotel, and the ordinance defines a restaurant as a place where food is prepared for casual customers, and sold for consumption therein. *New Galt House Co. v. Louisville*, 17: 566, 111 S. W. 361, — Ky. — (Annotated)

2. A house in which furnished rooms are let for a single night or longer time, and which is open at all hours for the reception of guests, who, upon registering their names, are provided with lodging, is a public hotel although the guests are not supplied with food; and the proprietor is liable to a guest, in the absence of negligence by either party, for money stolen in the nighttime from him while he is in his room. *Nelson v. Johnson*, 17: 1259, 116 N. W. 828, 104 Minn. 440. (Annotated)

INSANITY.

See *Incompetent Persons*.

INSOLVENCY.

Assumption of debts of insolvent partnership as consideration for conveyance of interest in partnership property, see *Contracts*, 2.

Of corporations, see *Corporations*.

As to fraudulent conveyances, see *Fraudulent Conveyances*.

Of partnership, see *Partnership*, 3, 4.

See also *Bankruptcy*.

While a failing or insolvent debtor may prefer one or more of his creditors, yet, if the arrangement by which he does so stipulates or provides a benefit for himself, it is fraudulent on his part; and, if the preferred creditors know of the existence of other debts due by the debtor, they are chargeable with participation in the fraud. *Hoppe Hardware Co. v. Bain*, 17: 310, 95 Pac. 765, — Okla. — (Annotated)

INSTRUCTIONS.

See *Trial*, 19-23.

INSURANCE.

Question for jury as to meaning of check mark in application, see *Trial*, 8.

1. An insurance company is bound by 17 L.R.A. (N.S.)

the act of its medical examiner in reporting an applicant to be a fit subject for insurance, unless he was purposely misled by the applicant, and inveigled into recommending him as a fit subject for insurance when but for such deception he would not have done so. *Roe v. National Life Ins. Asso.* 17: 1144, 115 N. W. 500, — Iowa. —

Warranties; representations.

Evidence as to what weight would have been given by physicians generally to answers in application, see *Evidence*, 53.

Evidence to show breach of warranty as to physical condition, see *Evidence*, 50.

Sufficiency of plea to raise question of breach of warranty by applicant as to health, see *Pleading*, 20.

Question for jury as to breach of warranty in policy, see *Trial*, 6.

2. False statements in an application for life insurance will not defeat liability on the policy on the theory that they misled the medical examiner, where he testifies that he made his report on his own examination, and paid no attention to such answers. *Roe v. National Life Ins. Asso.* 17: 1144, 115 N. W. 500, — Iowa, —

3. An applicant for insurance who, after producing, at the request of the agent, a policy written previously, from which answers to the questions are copied, and, upon being told that the application is prepared according to the rules and regulations of the association, signs it, cannot be charged with bad faith merely because some of the answers are untrue at the time of the signature. *Roe v. National Life Ins. Asso.* 17: 1144, 115 N. W. 500, — Iowa, —

4. A warranty of freedom from bodily infirmity, in an application for accident insurance, includes only an ailment or disorder of a somewhat established or settled character, and not merely a temporary disorder arising from a sudden and unexpected derangement of the system. *French v. Fidelity & C. Co.* 17: 1011, 115 N. W. 869, — Wis. —

5. A warranty that an applicant for accident insurance has never had bronchitis does not refer to a temporary acute attack of the disease, followed by complete recovery. *French v. Fidelity & C. Co.* 17: 1011, 115 N. W. 869, — Wis. —

6. A local affection is not a local disease within the meaning of a warranty in a policy of insurance, unless such affection has sufficiently developed to have some bearing on the general health. *Cady v. Fidelity & C. Co.* 17: 260, 113 N. W. 967, 134 Wis. 322.

Forfeiture.

7. No declaration of forfeiture is necessary to terminate the rights of a member of a mutual benefit society for nonpayment of dues where the by-laws provide that any member shall *ipso facto* forfeit his membership who fails to pay his assessment for thirty days after notice. *Knights of Co-*

Lumbus v. Burroughs, 17: 246, 60 S. E. 40, 107 Va. 671. (Annotated)

8. Forfeiture of the rights of a member of a mutual benefit society for the nonpayment of dues is not prevented by the fact that they were paid by the local branch of the order to which he belonged, where the local branch forwarded the money without complying with the provisions of a by-law that no money shall be paid from the treasury unless by a two-thirds vote of the members at a regular meeting held subsequently to a regular meeting at which notice of intention to pay and the purpose and amount are given and read. **Knights of Columbus v. Burroughs**, 17: 246, 60 S. E. 40, 107 Va. 671.

Waiver and estoppel.

See also *supra*, 5; *infra*, 29.

Evidence as to manner in which application for life insurance was prepared to estop company, see *Evidence*, 51.

9. An insurance company whose agent prepares an application by securing his information from other applications which had been signed by the applicant, is estopped from setting up the falsity of the answers in defense to its liability on the policy, where the applicant, without knowing what the answers are, signs the application at the request of the agent upon being assured that it is prepared according to the rules and regulations of the insurer. **Roe v. National Life Ins. Asso.** 17: 1144, 115 N. W. 500, — Iowa, —.

10. The receipt by the supreme body of a mutual benefit society of money from a local lodge to pay the dues of a delinquent member, without knowledge that it is not his money, but an advancement by the lodge, does not estop it from contesting liability on his certificate because of his nonpayment of dues. **Knights of Columbus v. Burroughs**, 17: 246, 60 S. E. 40, 107 Va. 671.

The loss; notice; proofs of loss.

See also *infra*, 29.

11. Service of notice of claim by a beneficiary in an accident-insurance policy, made as soon as practicable after obtaining knowledge of the existence of the policy, is sufficient. **Cady v. Fidelity & C. Co.** 17: 260, 113 N. W. 967, 134 Wis. 322.

12. The provision of **Wis. Laws 1901**, chap. 235, p. 313, prohibiting any accident or casualty company from limiting the time for an insured person to serve notice of any injury for which he is entitled to make a claim to less than twenty days, and providing that a memorandum in respect to the matter shall be clearly and conspicuously placed on the face of the policy, and further providing that a specified manner of service shall be sufficient, does not relate to the claim of a beneficiary after the death of the insured person. **Cady v. Fidelity & C. Co.** 17: 260, 113 N. W. 967, 134 Wis. 322.

13. A memorandum placed in a policy issued by an accident or casualty company in an attempt to comply with the terms of 17 L.R.A. (N.S.)

Wis. Laws 1901, chap. 235, p. 313, prohibiting any such company from limiting the time for an insured person to serve notice of any injury for which he is entitled to make a claim, to less than twenty days, and providing that any memorandum in respect to the matter shall be clearly and conspicuously placed on the face of the policy does not apply to the claim of a beneficiary after the death of the insured person, unless the language of the memorandum is unmistakable. **Cady v. Fidelity & C. Co.** 17: 260, 113 N. W. 967, 134 Wis. 322.

14. The word "immediate," in an insurance policy, in respect to giving notice of any accident or injury for which a claim is to be made, by settled judicial construction antedating the policy and so a part thereof, means as soon as practicable under the circumstances of the case, in the absence of some unmistakable limitation to the contrary. **Cady v. Fidelity & C. Co.** 17: 260, 113 N. W. 967, 134 Wis. 322.

15. Affirmative proof of loss under an accident-insurance policy is given where the insurer is notified of the death of the insured, and its surgeon takes part in a post mortem examination, although formal blanks are not filled out until afterwards. **French v. Fidelity & C. Co.** 17: 1011, 115 N. W. 869, — Wis. —.

Arbitration.

16. A provision near the end of an accident-insurance policy which has prescribed certain benefits on certain conditions, to the effect that, in case of disagreement between the parties as to the liability of the insured, such liability shall be determined by arbitration, is an attempt to oust the courts of their jurisdiction, and is void. **Lewis v. Brotherhood Accident Co.** 17: 714, 79 N. E. 802, 194 Mass. 1.

Risks and causes of loss or injury.

Burden of proving death by suicide, see *Evidence*, 1.

Admissibility of evidence on question of suicide, see *Evidence*, 46.

Sufficiency of evidence to establish facts of drowning accident, see *Evidence*, 57.

17. The burning of property by the insured while insane will not absolve the insurer from liability in the absence of any provision to that effect in the policy. **Bindell v. Kenton County A. F. Ins. Co.** 17: 189, 108 S. W. 325, — Ky. —. (Annotated)

18. The term, "death by suicide, sane or insane," does not include death by the act of the assured without any mental purpose of self-destruction. **Cady v. Fidelity & C. Co.** 17: 260, 113 N. W. 967, 134 Wis. 322. (Annotated)

19. The distinction between suicide by a sane person and suicide by an insane person, within the meaning of a policy clause, "death by suicide, sane or insane," lies in the mental capability, in the one case, and the absence of it, in the other, to appreciate the moral nature and quality of the purpose. **Cady v. Fidelity & C. Co.** 17: 260, 113 N. W. 967, 134 Wis. 322.

20. If one in a fit of delirium or other condition of irresponsibility, without intention to take his own life, does some act from which his death ensues, such death is by accident, not by suicide. *Cady v. Fidelity & C. Co.* 17: 260, 113 N. W. 967, 134 Wis. 322.

21. Death from blood poisoning following a slight accidental abrasure of the skin is within an accident-insurance policy against bodily injuries sustained through external, violent, and accidental means independently of all other causes. *French v. Fidelity & C. Co.* 17: 1011, 115 N. W. 869, — Wis. —.

22. Drowning, although not accompanied by external marks, is covered by a policy insuring against personal injury leaving upon the body external marks, where drowning appears in the list of accidents insured against, and a separate provision limits the liability, in case of drowning, to a certain percentage of the face of the policy in the absence of an eyewitness. *Lewis v. Brotherhood Accident Co.* 17: 714, 79 N. E. 802, 194 Mass. 1.

Interest in proceeds.

23. Making the proceeds of an accident-insurance policy, in case of the death of the insured, payable to his estate, does not violate the statutes authorizing such insurance solely for the benefit of heirs, where the policy expressly provides that the estate shall receive the fund in trust for, and pay it forthwith to, the heirs. *Lewis v. Brotherhood Accident Co.* 17: 714, 79 N. E. 802, 194 Mass. 1.

24. A member of a mutual benefit society has no interest in the certificate which can be disposed of by will, nor will his testamentary designation of a new beneficiary be held effectual where the rules and by-laws of the order and the contract of insurance provide a method by which a change of beneficiary may be made by the member, since in that case such method must be followed. *Modern Woodmen of America v. Puckett*, 17: 1083, 94 Pac. 132, — Kan. —.

25. A member of a mutual benefit society who holds a certificate of insurance therein has no interest in the fund; and neither the certificate nor its proceeds becomes a part of the estate of the member, but he possesses simply the power of appointing a beneficiary, which, if not exercised, becomes inoperative. *Modern Woodmen of America v. Puckett*, 17: 1083, 94 Pac. 132, — Kan. —.

26. The only interest of a beneficiary named in a benefit certificate issued by a mutual benefit society is an expectancy, which ceases at her death; and where she dies before the insured member, her heirs cannot take the fund by inheritance. *Modern Woodmen of America v. Puckett*, 17: 1083, 94 Pac. 132, — Kan. —.

27. The proceeds of a mutual benefit certificate pass to the heirs of the holder in the event of his death subsequent to the death of the beneficiary and without 17 L.R.A. (N.S.)

having designated a new beneficiary, where the rules and by-laws of the society, which are a part of the contract of insurance, so provide. *Modern Woodmen of America v. Puckett*, 17: 1083, 94 Pac. 132, — Kan. —. (Annotated)

28. One not within the class of persons authorized by the rules of a mutual benefit society to become beneficiaries is not entitled to share in the proceeds of a certificate issued by the society. *Modern Woodmen of America v. Puckett*, 17: 1083, 94 Pac. 132, — Kan. —.

Actions.

29. Denial of any liability on an accident-insurance policy waives a provision that suit cannot be brought on the policy until the lapse of a certain time after proof of loss. *French v. Fidelity & C. Co.* 17: 1011, 115 N. W. 869, — Wis. —.

INTENT.

Parol evidence to show, see Evidence, 19.

Proof of similar offenses to show intent, see Evidence, 48.

Effect of good intent in passage of law on validity thereof, see Statutes, 2.

Controlling effect of intention of legislature in interpretation thereof, see Statutes, 9.

Question for jury as to intention of insured in making check mark on policy, see Trial, 8.

INTEREST.

Effect of, to disqualify witness, see Appeal and Error, 14; Witnesses, 1. Presumption as to application of payments for, see Evidence, 10.

1. In an action by a taxpayer against county officers to recover taxes wrongfully exacted over the protest of the taxpayer and through the compulsion of a tax warrant, interest on the money from the time it was paid, it then being due, cannot be recovered. *Board of County Comrs. v. Kaul*, 17: 552, 96 Pac. 45, — Kan. —.

2. A general interest statute allowing creditors to receive, in the absence of contract, interest upon money after it becomes due, imposes no liability in that regard upon a county, which is a political subdivision of the state, organized for purely governmental purposes, and endowed with quasi corporate powers only. *Board of County Comrs. v. Kaul*, 17: 552, 96 Pac. 45, — Kan. —. (Annotated)

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUOR.

Delegating power to courts to regulate sale of, see Constitutional Law, 1.

Providing for compulsory treatment of inebriates, see Constitutional Law, 9.

Regulating amount of liquor that may be carried into county where sale is prohibited, see constitutional Law, 12.

Admissibility of testimony of persons making peephole into saloon, of what was observed inside, see Evidence, 35.

Injunction against arbitrary closing of club house dispensing intoxicating liquors, see Injunction, 11, 12.

Binding effect on seller of beverage of warranty by agent that it is non-alcoholic and not subject to tax, see Principal and Agent, 1.

Implied warranty that beverage is non-alcoholic, see Sale, 1.

Setting aside percentage of liquor license fees for purpose of establishing hospital for inebriates, see Taxes, 14.

1. In a contest over an application for a license under Cobbe's (Neb.) Stat. 1907, §§ 7150 et seq., where the sole objection urged against the character of the applicant was that no man of respectable character would apply for a license to retail intoxicating liquors, and the only evidence presented to the city council upon that point was the testimony of a witness who stated under oath that the applicant was a man of good reputation and respectable character and standing, the city council properly determined that issue in favor of the applicant. *Re Phillips*, 17: 1001, 116 N. W. 950, — Neb. —.

2. A municipal corporation cannot determine for itself that a club is violating the city ordinance against dispensing intoxicating liquors by furnishing them to its members, and proceed summarily to close the club on that ground. *Canon City v. Manning*, 17: 272, 95 Pac. 537, — Colo. —.

INTOXICATION.

See Drunkenness.

IRRIGATION.

Dedication of water for, see Dedication, 2.

Right to store water for irrigation, see Waters, 3.

JEOPARDY.

See Criminal Law, 1.

JOINDER.

Of parties defendant, see Parties, 6.

JOINTURE.

As barring right to dower, see Dower, 1, 4.

JUDGES.

Disbarment of trial judge for entry on records as to action of supreme court, see Attorneys, 1.

Denial of motion for change of, see Trial, 1.

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JUDGMENT.

Sustaining judgment based on erroneous ruling upon ground not called to attention of trial court, see Appeal and Error, 17.

Reversal of judgment for lump sum where the complaint seeks damages on several grounds, and incompetent evidence is admitted in support of one of them, see Appeal and Error, 25.

Enlarging rights of dower as against holder of judgment lien on property, see Constitutional Law, 25.

Right of holder of judgment against corporation to enforce against stockholders, see Corporations, 2-5.

Judgment in partition suit establishing existence of superior title as breach of covenant by vendor, see Covenants and Conditions, 2.

Validity of judgment where evidence was taken and arguments heard on legal holiday, see Holidays.

Personal judgment against owner of property in action to enforce mechanics' liens, see Mechanics' Liens, 4.

Right of defendant to judgment because of failure of plaintiff to reply to defense, see Pleading, 21.

1. A money judgment against one whose purchase of property from another is rescinded for fraud when the return of the property has become impracticable should not include the face value of a note of a third person which passed by the sale, where the maker denies liability on it, and there is no evidence as to his responsibility or the value of the note. *Swan v. Talbot*, 17: 1066, 94 Pac. 238, 152 Cal. 142.

Entry nunc pro tunc.

2. The wife of one who confesses judgment on his real estate, and whose dower rights in the property are enlarged by statute subsequently passed, is not an intervening party against whose rights judgment cannot thereafter be entered upon the confession *nunc pro tunc*. *Davidson v. Richardson*, 17: 319, 91 Pac. 1080, — Or. —.

Modification.

3. The district court has jurisdiction and power to correct its own errors, and may, in the exercise of its discretion, on notice and motion, vacate its findings and judgment in a pending action in which a jury trial was waived, and make new findings and enter a new and different judgment. *Plano Mfg. Co. v. Doyle*, 17: 606, 116 N. W. 529, — N. D. —.

Conclusiveness.

Acquittal of conspiracy to induce carrier to give rebates as bar to prosecution for inducing shippers to receive them, see Criminal Law, 1.

Effect of deed of trust to pass interest of minors in land where they were not parties to deed, see Infants, 2.

Conclusiveness of findings of state board of health in proceeding to revoke physician's license, see Physicians and Surgeons, 3.

4. A decision of a Federal court in the district where a person indicted for crime in another jurisdiction is found, discharging him under a writ of habeas corpus because of insufficiency of the indictment, from custody to which he had been committed under warrant of the United States marshal in extradition proceedings, is no bar to the prosecution of accused upon the same indictment when he is subsequently arrested under a bench warrant in the jurisdiction where the indictment was found, since the court had no power to pass upon the merits of the case in the habeas corpus proceeding. *Benson v. Palmer*, 17: 1247, 31 App. D. C. 561.

5. The dismissal of an action on the merits based on the facts as shown by the pleadings is a bar to a subsequent action based on the same cause. *Roberts v. Moss*, 17: 280, 106 S. W. 297, — Ky. —.

6. Adverse judgment, in an action to recover the value of timber alleged to have been wrongfully taken from land, does not bar an action by plaintiff to recover possession of the land. *Roberts v. Moss*, 17: 280, 106 S. W. 297, — Ky. —.

7. The liability of an estate for a mortgage indebtedness, and to a covenantee under a deed of the mortgaged premises, executed by the decedent in her lifetime, was left wholly adjudicated in a foreclosure action to which the administrator and the grantee of the mortgaged premises were made parties, and in which a decree declaring the administrator to be personally liable in his representative capacity for the mortgaged indebtedness was reversed on appeal and the cause dismissed as to him because it was not proper to settle in the action the question of the liability of the estate for the indebtedness. *Re Hanlin*, 17: 1189, 113 N. W. 411, 133 Wis. 140.

JURY.

Sufficiency of plea to require submission to jury of issue sought to be raised thereby, see Pleading, 19.

Questions for, see Trial.

As to grand jury, see Grand Jury.

Proceedings by the state board of health to revoke a physician's license for cause are summary in their nature, and are triable before the board without the intervention of a jury. *Munk v. Frink*, 17: 439, 116 N. W. 525, — Neb. —.

LABOR.

As to Sunday labor, see Sunday.

LABOR ORGANIZATIONS.

Illegal combinations, see Conspiracy, 4.

Injunction to restrain attempt to prevent persons from engaging in or remaining in employment, see Injunction, 9.

Injunctions against combination to further strike, see Injunction, 6.

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Suit against representatives of, where members are too numerous to be made parties individually, see Parties, 4.

Suit against unincorporated labor unions, see Parties, 5.

LACHES.

See Limitation of Actions, 1.

LANDLORD AND TENANT.

Sale under execution of interest of lessee having option to purchase, or, in event of failure to do so, to be paid for improvements, see Levy and Seizure, 2.

Notice to purchaser of tenant's rights, see Notice.

Fixtures.

1. The execution of a new lease, in which the tenant does not expressly reserve fixtures or improvements erected by him under a preceding lease, does not deprive him of the right to remove them. *Ogden v. Garrison*, 17: 1135, 117 N. W. 714, — Neb. —.

Liability of landlord.

2. The placing of an ordinary mat on a narrow landing before the outer door of a tenement house, in a common passageway which is not to be lighted during the night, without warning to the tenants, is not negligence which will render the landlord liable to a tenant falling over it. *McGowan v. Monahan*, 17: 928, 85 N. E. 105, 199 Mass. 296.

3. The lessee of a room in a tenement building cannot complain that the common passageways are not lighted in the nighttime in the absence of any agreement on the part of the landlord to light them. *McGowan v. Monahan*, 17: 928, 85 N. E. 105, 199 Mass. 296.

4. The lessor of a hotel, who is to receive a share of the gross receipts as rental, is not liable to a guest of the hotel who leaves the building at midnight for a purpose of his own, and, in wandering about in the darkness, falls over a wall and is injured. *Watson v. Manitou & P. P. R. Co.* 17: 916, 92 Pac. 17, 41 Colo. 138.

Re-entry.

Effect of injunction against prosecutions of forcible entry and detainer to prevent landlord from shutting off heat because of breach of covenant as to rent, see Injunction, 10.

5. A landlord is not liable for injuries to his tenant by shutting off the heat from the tenement after the tenant is in arrears for rent, where the lease provides for forfeiture in case of nonpayment of rent, and for re-entry by the use of such force as is necessary, in which event no action shall be brought by the tenant. *Howe v. Frith*, 17: 672, 95 Pac. 603, — Colo. —.

(Annotated)

LAST CLEAR CHANCE.

See Negligence, 14.

LEASE.

See Mines.

LEGAL PROCEEDINGS.

Injunction against, see Injunction, 10.

LEGISLATURE.

Right to delegate power to courts, see Constitutional Law, 1, 2.

LETTERS.

Admissibility in evidence, see Evidence, 13, 14, 22, 23.

Sufficiency of evidence to show authenticity of, see Evidence, 60.

As will, see Wills, 1.

LEVY AND SEIZURE.

Evidence that person levying on exempt property acted under advice of counsel, see Evidence, 43.

As to exemptions, see Exemptions.

1. An equitable asset of a debtor can be reached only by proper proceedings in a court of equity, and is not subject to levy and sale under an execution at law issued upon a judgment recovered against such debtor, or upon a deficiency decree rendered against him in a suit for the foreclosure of a mortgage; and, where such levies and sales are made, and deeds executed, by the sheriff, they are all nullities, and vest no title in the purchasers. *Thalheimer v. Tischler*, 17: 841, 46 So. 514, — Fla. —.

2. A lease of real estate for a term of years, wherein the lessee is given the option, at any time after the expiration of a certain fixed period, to purchase the leased property for a designated price, and, in the event of his failure to do so, is given the right, at the expiration of the term, to be paid half of the valuation of the improvements he has placed on the leased premises as fixed by three disinterested persons,—does not give the lessee such an interest in the leased premises as can be subjected to sale under an execution at law. *Thalheimer v. Tischler*, 17: 841, 46 So. 514, — Fla. —. (Annotated)

LICENSE.

Right to charge hotel keeper additional fee as restaurant keeper where he changes from American to European plan, see Innkeepers, 1.

For sale of intoxicating liquors, see Intoxicating Liquors, 1.

Of physician or surgeon, see Physicians and Surgeons.

1. A classification, for the purpose of an occupation tax, of businesses employing a capital of over \$500,000 as one class, and those whose capital is between each \$100,000 below that as a separate class, and dividing those employing certain numbers of thousands of dollars below \$100,000 into classes, is not legally unreasonable. *Salt Lake City v. Christensen Co.* 17: 898, 95 Pac. 523, — Utah, —.

2. A license tax based on the capital
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stock employed in trade is not within a constitutional provision for uniform taxation according to value, where the Constitution also provides that nothing in it shall be construed to prevent the legislature from enforcing an occupation tax. *Salt Lake City v. Christensen Co.* 17: 898, 95 Pac. 523, — Utah, —.

3. A license tax upon business, based upon the amount of capital employed, is not a direct tax upon property, within a constitutional provision requiring taxation to be uniform. *Salt Lake City v. Christensen Co.* 17: 898, 95 Pac. 523, — Utah, —.

4. A classification of business according to the capital employed, for the purpose of levying an occupation tax, does not violate the provisions of a statute that all license fees shall be uniform in respect to the class upon which they are imposed. *Salt Lake City v. Christensen Co.* 17: 898, 95 Pac. 523, — Utah, —. (Annotated)

Enforcement of license tax.

5. The payment of license and occupation taxes may be enforced by fine and imprisonment. *Salt Lake City v. Christensen Co.* 17: 898, 95 Pac. 523, — Utah, —.

LICENSEES.

Negligence toward, see Negligence, 5, 6.

LIENS.

Of chattel mortgage on increase of animals, see Chattel Mortgage.

Of judgment, see Judgment.

As to mechanics' liens, see Mechanics' Liens.

Priority of lien for money loaned to erect buildings on lot over after-acquired judgments or deficiency decrees in mortgage foreclosure, see Mortgage, 1.

In favor of wife for amount paid to redeem husband's property on foreclosure sale, see Mortgage, 6.

Of partnership creditors on property of insolvent partnership, see Partnership, 3, 4.

Of tax, see Taxes.

Effect of ordinance authorizing turning off of water upon failure to pay rents to give lien against the property, see Waters, 9.

LIFE INSURANCE.

See Insurance.

LIFE TABLES.

Admissibility in evidence, see Evidence, 17.

LIGHT.

Condemnation of riparian owner's right to, see Eminent Domain, 1.

LIMITATION OF ACTIONS.

Requiring notice to carrier of claim for loss within specified time, see Carriers, 10, 14.

Conflict of laws as to, see Conflict of Laws, 6-8.

Effect of failure to plead, in action by shipper for loss of goods, noncompliance with provision of contract limiting time for making of claim, see Pleading, 17.

Demurrer on ground that action is barred, see Pleading, 22.

Necessity of making finding upon defense of statute of limitations, see Trial, 26.

Laches.

1. One who delays seeking an injunction against the operation of a railroad in a public street for a period of seventeen years, until its removal would seriously affect public interests, will be denied such relief. *Staton v. Atlantic Coast Line R. Co.* 17: 949, 61 S. E. 455, 147 N. C. 428.

By and against whom available.

2. That the statute prevents the acquisition, by lapse of time, of an exclusive right in a public street against a municipality, does not prevent the running of the statute of limitations against actions for injuries to abutting property by the operation of a railroad therein. *Staton v. Atlantic Coast Line R. Co.* 17: 949, 61 S. E. 455, 147 N. C. 428.

To what claims applicable.

3. The provision of Minn. Gen. Stat. 1894, § 2369, that no action for damages occasioned by a milldam shall be sustained unless brought within two years, applies to any dam used for mill purposes, although the right to erect and maintain it has not been acquired by the exercise of the right of eminent domain. *Priebe v. Ames*, 17: 206, 116 N. W. 829, 104 Minn. 419.

(Annotated)

When statute runs.

4. In the absence of fraudulent concealment, the statute of limitations begins to run against a claim upon an attorney for money collected by him, from the time the money should have been paid over, which is within a reasonable time after the collection, under the circumstances of the case. *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17: 667, 69 Atl. 160. — Vt. —

(Annotated)

5. A cause of action does not accrue until the party owning it is entitled to begin and prosecute an action thereon. *Re Hanlin*, 17: 1189, 113 N. W. 411, 133 Wis. 140.

6. The statute of limitations, Wis. Stat. 1898, § 3860, providing that if the claim of any person against the estate of another shall accrue or become absolute after the time limited for creditors to present their claims, then such claim may be presented to the county court and proved at any time within one year after it accrues, bears on a right from the time there is a cause of action to enforce it. *Re Hanlin*, 17: 1189, 113 N. W. 411, 133 Wis. 140.

7. The mere lapse of two months after the collection of money by an attorney for his client is not sufficient to establish the passing of a reasonable time for its payment 17 L.R.A. (N.S.)

over, so as to set in motion the statute of limitations, without anything to show his state of health, business, absence from home, or other facts bearing upon the question. *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17: 667, 69 Atl. 160. — Vt. —

8. The statute of limitations does not run against liability on an open bank account before demand of payment by the depositor, or refusal to pay on his order. *Missouri P. R. Co. v. Continental Nat. Bank*, 17: 994, 111 S. W. 574, 212 Mo. 505.

9. Under a statute authorizing the appointment of a receiver of an insolvent corporation to enforce the personal liability of stockholders for the benefit of corporate creditors, whenever an execution on a judgment against a corporation shall be returned *nulla bona*, in the absence of special circumstances demonstrating insolvency in some other manner, the statute of limitations does not begin to run against a creditor who wishes to invoke that remedy, until the rendition of a judgment and the issuance and return of an execution, provided he shows reasonable diligence in causing these steps to be taken. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

10. Mere silence on the part of one obtaining money by fraud will not prevent the running of the statute of limitations from the commencement of the transaction, against an action to recover it back; but to produce that result, investigation must be prevented by affirmative acts on the part of the wrongdoer. *Boyd v. Beebe*, 17: 660, 61 S. E. 304. — W. Va. — (Annotated)

11. A covenant against encumbrances runs with the land and inures to the owner who suffers ouster, or who is damaged by being compelled to extinguish the encumbrance; but such covenant is not breached, except technically, in advance of eviction or the suffering of actual damages, and no right of action for such a breach accrues until such time. *Re Hanlin*, 17: 1189, 113 N. W. 411, 133 Wis. 140.

12. A covenantor's right of action to recover damages for breach of a covenant of seisin does not date from the delivery of the deed, so as to be barred by the statute of limitations at the end of six years thereafter, but should be computed from the time the superior outstanding title is actually asserted against him, so that he is compelled to yield, and does yield, his claim thereto. *Brooks v. Mohl*, 17: 1195, 116 N. W. 931, 104 Minn. 404.

13. The right of action for substantial damages for breach of a covenant against encumbrances, which runs with the land, is regarded as distinct from the technical breach occurring at the time of the delivery of the deed; and the time when the cause of action to remedy the one accrues bears no relation to the time when the cause of action arises to remedy the other. *Re Hanlin*, 17: 1189, 113 N. W. 411, 133 Wis. 140.

14. A cause of action for breach of covenant against encumbrances made by a per-

son subsequently deceased does not arise, so as to be enforceable against his estate, until the covenant, or some person entitled to the benefit of the covenant, shall have suffered actual damages. *Re Hanlin*, 17: 1189, 113 N. W. 411, 133 Wis. 140.

(Annotated)

15. Under Minn. Gen. Stat. 1894, § 2369, providing that no action for damages occasioned by a milldam shall be sustained unless brought within two years, no action for damages for overflowing lands by the erection and maintenance of such a dam, which is a permanent structure, can be maintained unless brought within two years after damages are first sustained by reason of the dam. *Priebe v. Ames*, 17: 206, 116 N. W. 829, 104 Minn. 419.

16. The provision of Idaho Rev. Stat. 1887, § 4069, that when a cause of action accrues against a person who is out of the state, an action may be brought against him within the time limited therefor after his "return to the state," applies to a non-resident debtor who enters into a contract in a foreign state, and thereafter comes into the state of Idaho, as well as to a citizen who enters into a contract within that state, and thereafter departs from it. *West v. Theis*, 17: 472, 96 Pac. 932, — Idaho, —.

When action is barred.

17. A creditor who, at the time of recovering judgment against a corporation, consented to a stay of execution for five months pending the making of a case for review, did not show a want of diligence, and his right of action to enforce the statutory double liability of stockholders of the corporation is not barred by the three years' statute of limitations, if brought within three years from the expiration of such stay. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

18. A statute suspending, in favor of an executor, the running of the statute of limitations as to all rights of action existing in favor of the deceased at his death if suit is brought within two years, does not prevent the bringing of a suit after that time if the limitation period is not complete. *Frye v. Hubbell*, 17: 1197, 68 Atl. 325, 74 N. H. 358.

Interruption of statute.

19. The statute of limitations does not cease to run against offsets of the defendant until the time he files his plea of offsets in the case. *Boyd v. Beebe*, 17: 660, 61 S. E. 304, — W. Va. —.

LIVE STOCK.

Transportation of, see Carriers, 9, 13.

LODGING HOUSES.

Regulation of, see Constitutional Law, 21-23.

LOGS AND LOGGING.

Partnership in logging business, see Partnership, 5.

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MANDAMUS.

To compel medical college diploma, see also Appeal and Error, 11.

Effect of remedy by, on right to injunction, see Injunction, 1.

1. If the dean of the faculty of a medical college, in pursuance of his authority under the by-laws of the corporation to pass upon the standing of students applying for graduation, reports to the directors that a student has fulfilled all demands of the institution and has passed all examinations so as to entitle her to a diploma, and the board of directors arbitrarily and capriciously refuses to graduate the student and issue her diploma, it is the duty of the district court, upon proof of the facts, to issue a writ of mandamus to compel the college corporation and its directors to discharge their duty. *State ex rel. Nelson v. Lincoln Medical College*, 17: 930, 116 N. W. 294, — Neb. —.

2. A medical college organized under Neb. Comp. Stat. 1907, chap. 16, §§ 15 et seq., is a private eleemosynary institution, and the duty cast by law upon its directors, to graduate students who have complied with the regulations of the institution and taken its required course of study, is a statutory duty to such an extent as to give the court jurisdiction, in a proper case, to compel by mandamus the exercise of that function. *State ex rel. Nelson v. Lincoln Medical College*, 17: 930, 116 N. W. 294, — Neb. —.

MANDATORY INJUNCTION.

See Injunction, 1.

MANSLAUGHTER.

See Homicide.

MAPS.

Dedication by, see Dedication, 5.

Sufficiency of, see Eminent Domain, 3.

MARRIAGE.

Conflict of laws as to, see Conflict of Laws, 2, 3.

Estoppel to deny validity of, see Estoppel, 1, 2.

Presumption of validity of, see Evidence, 3, 4.

Evidence to overcome presumption of validity of, see Evidence, 62.

Effect of interest of witness to disqualify him from testifying to validity of, see Witnesses, 1.

1. The heirs of a woman who entered into meretricious relations with a man having a wife living, because of which relations their property was kept separate and apart, have no right or interest in his property after her death. *Sloan v. West*, 17: 960, 96 Pac. 684, — Wash. —.

Validation of void marriage.

2. Continued cohabitation by persons who contracted marriage in contravention of the statute forbidding marriage within a specified time after divorce, after the expira-

tion of the specified time, will not establish a valid common-law marriage. *Lanham v. Lanham*, 17:804, 117 N. W. 787, — Wis. —.

MARRIED WOMAN.

See Husband and Wife.

MASTER AND SERVANT.

Validity of statute forbidding child labor, see Infants, 1.

When relation exists.

1. An assistant employed by a servant who is paid according to the work done, instead of the time of service, is a voluntary servant of the person in whose business his immediate employer is engaged. *Knicey v. West Virginia M. R. Co.* 17:370, 61 S. E. 811, — W. Va. —.

2. The owner of a cart which the driver is trying to repair in a public street, after raising the pole into the air, is liable for the act of a stranger whom the driver calls to his assistance, in negligently causing the pole to fall on one looking into a shop window near by. *Hollidge v. Duncan*, 17:982, 85 N. E. 186, 199 Mass. 121.

Interference with employment.

Injunction to restrain former employees from preventing others from entering into or remaining in the master's employ, see Injunction, 5, 7.

3. It is unlawful for any person or association of persons to interfere with the business of another by means of force, menaces, or intimidation, so as to prevent others from entering into or remaining in his service. *Jones v. E. Van Winkle Gin & Mach. Works*, 17:848, 62 S. E. 236, — Ga. —.

Liability to servant generally.

Liability of owner of vicious cow for injury to one employed to milk it, see Animals, 1.

Sufficiency of allegations in action to recover for death of servant, see Pleading, 2, 10-15.

Wrongful employment of infant as proximate cause of injury to him, see Proximate Cause, 2.

Removal to Federal court of action by employee for injury caused by violation of Federal statute as to use of automatic couplers, see Removal of Causes,

Correctness of instruction in action for injury to servant, see Trial, 22.

4. A master is liable for injury to his employee, due to his negligence in failing to furnish a suitable number of servants to do the work required of them. *Di Bari v. J. W. Bishop Co.* 17:773, 85 N. E. 89, 199 Mass. 254. (Annotated)

5. Violation of a statute forbidding the employment in a factory of a child under twelve years of age is negligence *per se*. *Starnes v. Albion Mfg. Co.* 17:602, 61 S. E. 525, 147 N. C. 556.

Duty to provide rules.

6. A charge of negligence against a street car company in failing to promulgate adequate rules for the use of a cross-over 17 L.R.A. (N.S.)

track is not supported by evidence merely that employees were instructed to look out when using the cross-over, and see that there was nothing approaching. *Norfolk & P. Traction Co. v. Ellington*, 17:117, 61 S. E. 779, — Va. —.

Duty to warn or instruct.

7. An employer who provides a dressing room for employees through which runs a shaft enclosed in a box which is likely to be left off and thereby expose the machinery while in motion, without warning them of the danger, may be found not to have used due care in furnishing them a safe place. *Flynn v. Prince, C. & M. Co.* 17:568, 84 N. E. 321, 198 Mass. 224.

Duty as to place and appliances.

8. A master may be found to be negligent in providing, without hinges or fastenings to guide or hold it into place, a trap door for an opening in the floor, so much smaller than the opening that, when close to the floor at one end, it will slip past the supporting cleat on the other, and precipitate a person stepping onto it through the aperture. *Burnside v. Peterson*, 17:76, 96 Pac. 256, — Colo. —.

9. A railroad company is not shown to be negligent, so as to be liable for the death of an engineer caused by his running into an open switch, by the fact that it permitted the color of the target to become obscured by ice, where there is nothing to show that the condition of the switch might not have been seen by the shape of the target wings, although the color was obscured. *Chicago, I. & L. R. Co. v. Barker*, 17:542, 83 N. E. 369, 169 Ind. 670.

10. A street railway company is not negligent in operating a cross-over between two tracks without a trolley wire, so as to render it liable for the death of a motorman killed while trying to run his car over it, where it had been in constant use without accident, and the only evidence that such wire was practicable was the opinion of one who had formerly served as conductor and motorman on electric cars. *Norfolk & P. Traction Co. v. Ellington*, 17:117, 61 S. E. 779, — Va. —.

Liability to volunteers or servants of third persons.

11. An employee of a general contractor, who is requested by servants of a subcontractor, who are about to lower planks from the girders of a building, to take his wheelbarrow out of the way, is not, as matter of law, a mere volunteer, but is within the protection of the rule requiring the exercise of due care, where, while attempting to comply with the request, he is injured by a falling plank. *Kelly v. Tyra*, 17:334, 114 N. W. 750, 115 N. W. 636, 103 Minn. 176.

12. If the servant of a general contractor has an interest, in any proper capacity, in work being carried on with the assistance of servants of a subcontractor, and, at the request or with the consent of the servants of the latter, undertakes to assist in the work, he does not do so at his own risk; and, if he is injured by reason of the negligence of the

servants of the subcontractor, the latter is responsible to him in tort. *Kelly v. Tyra*, 17:334, 114 N. W. 750, 115 N. W. 636, 103 Minn. 176.

13. One employed by a general contractor in the construction of a building, and injured by the servants of a subcontractor, who, after calling to him to remove his wheelbarrow, let a plank fall upon him, was rightfully, as a licensee with interest, at the place where he was injured. *Kelly v. Tyra*, 17:334, 114 N. W. 750, 115 N. W. 636, 103 Minn. 176.

14. A subcontractor for the erection of a building is responsible for the tort of his servant who, after calling to a servant of the general contractor to remove his wheelbarrow, lets a plank fall upon him to his injury. *Kelly v. Tyra*, 17:334, 114 N. W. 750, 115 N. W. 636, 103 Minn. 176.

Assumption of risk.

15. One employed to assist in setting poles cannot be said, as matter of law to have assumed the risk of injuries from the work, where he had only been in the country two months, did not understand the language, had been at work only one day, and had no previous experience. *Di Bari v. J. W. Bishop Co.* 17:773, 85 N. E. 89, 199 Mass. 254.

16. An employee does not assume the risk of injury from a shaft running through the dressing room should the box be left off, by agreeing to work in the factory, where it is inclosed in a box, and runs so smoothly that its presence is not known to him. *Flynn v. Prince, C. & M. Co.* 17:568, 84 N. E. 321, 198 Mass. 224.

17. A servant does not assume the risk of injury from the absence of fastenings upon a trapdoor to prevent its sliding on its supports so as to let him through in case he steps on it, merely because he knows that there are no hinges upon it, where such fastenings might have been placed upon the under side, which he never had occasion to examine, and in fact did not see. *Burnside v. Peterson*, 17:76, 96 Pac. 256, — Colo. —. (Annotated)

Contributory negligence.

18. One sent to paint a car is not negligent, as matter of law, in failing to place his scaffold so that it will clear the car steps in case the car moves where he has a right to rely on the car not being moved without warning. *Koerner v. St. Louis Car Co.* 17:292, 107 S. W. 481, 209 Mo. 141.

19. It cannot be said to be negligence, as matter of law, for one operating a lathe to lean over near exposed gearing to secure a stick needed in the work, so as to prevent a recovery for the injury in case his clothing is caught in the gearing and his arm drawn into it. *Klotz v. Power & M. Machinery Co.* 17:904, 116 N. W. 770, — Wis. —.

20. The defense of contributory negligence is not barred by a statutory provision that continuance of a servant in his employment with knowledge that the employer has failed to guard his machinery, as required 17 L.R.A. (N.S.)

by law, shall not operate as a defense to an action for injuries due to such omission. *Klotz v. Power & M. Machinery Co.* 17:904, 116 N. W. 770, — Wis. —.

Delegation to servant of master's duty.

21. A master who, in order to render safe a dressing room for employees through which runs a shaft, incloses it in a box the removal of which is not required in the daily operation of the factory, has the burden of keeping the box in place, which cannot be delegated to an employee. *Flynn v. Prince, C. & M. Co.* 17:568, 84 N. E. 321, 198 Mass. 224. (Annotated)

22. A car manufacturer who sets a painter to work on a car owes him the duty of seeing that other cars are not run against it, and that cars pulled out are not attached to it without giving him warning of intention to move the car; and is responsible for the negligence of his servant, of whatever grade, to whom he delegates the performance of the duty. *Koerner v. St. Louis Car Co.* 17:292, 107 S. W. 481, 209 Mo. 141.

Change of fellow servant rule by statute.

23. The painted target on a switch is not a signal or a single switch at a siding a switch yard, within the meaning of a statute making a railroad company liable for the negligence of an employee having charge of any signal or switch yard. *Chicago, I. & L. R. Co. v. Barker*, 17:542, 83 N. E. 369, 169 Ind. 670.

24. A railroad company is not, under a statute making it liable for the negligence of an employee having charge of a signal, liable for the death of an engineer who ran into a switch negligently left open by such employee, where the signal upon the switch showed that it was open, and, in any event, it could not be seen because of weather conditions. *Chicago, I. & L. R. Co. v. Barker*, 17:542, 83 N. E. 369, 169 Ind. 670.

25. A street railway company is not within the operation of a constitutional provision abolishing the fellow-servant rules as to employees of a "railroad company," where the language of the provision deals with signal points, locomotive engines, switches, despatches, and telegraphic orders, which is not applicable to street railways. *Norfolk & P. Traction Co. v. Ellington*, 17:117, 61 S. E. 779, — Va. —. (Annotated)

Who are fellow servants.

26. All persons engaged in the business of a common master, and so related that each, in the exercise of ordinary sagacity, ought to foresee, when accepting his employment, that he will be exposed to injury in the event of negligence on the part of others, and they to injury from his negligence, are fellow servants. *Knicely v. West Virginia M. R. Co.* 17:370, 61 S. E. 811, — W. Va. —.

27. One employed to paint cars in a very large car-manufacturing plant requiring various and distinct branches of labor, and who works under the general paint foreman, is not a fellow servant of the switching crew

employed and superintended by the general superintendent to move cars as the exigencies of the work require, over whom the paint foreman has no authority. *Koerner v. St. Louis Car Co.* 17: 292, 107 S. W. 481, 209 Mo. 141.

28. A servant in the hire of a general employer and servants of his subcontractor, or of an independent contractor, are not follow servants unless the circumstances show that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that person as his master for the purpose of the common employment. *Kelly v. Tyra*, 17: 334, 114 N. W. 750, 115 N. W. 636, 103 Minn. 176.

(Annotated)

29. Persons employed by different masters, although engaged in a common work, are not ordinarily fellow servants. *Kelly v. Tyra*, 17: 334, 114 N. W. 750, 115 N. W. 636, 103 Minn. 176.

30. A person hired by one employed by a railroad company to unload lumber from cars was a fellow servant with a switching crew which ran a train against the car on which he was at work, so that he fell from it, and was injured. *Knically v. West Virginia M. R. Co.* 17: 370, 61 S. E. 811, — W. Va. —.

Vice principal.

31. A railroad company is not liable for the death of an engineer through the negligence of its section foreman in leaving a switch open. *Chicago, I. & L. R. Co. v. Barker*, 17: 542, 83 N. E. 369, 169 Ind. 670.

(Annotated)

Liability to third person.

Liability of carrier for assault on passenger by servant, see Carriers, 1, 2.

Liability of employer maintaining hospital for benefit of employees for negligence, see Charities.

Admissibility of letter by surgeon in charge of railroad hospital to head of department sending employee to institution, as to employee's condition, see Evidence, 14.

Liability of hospital for negligence of attendants, see Hospital, 1-3.

32. A servant of a subcontractor for the erection of a building is engaged in his master's work at the time of inflicting a negligent injury, where, after calling to a servant of the general contractor to remove his wheelbarrow, he lets a plank fall upon him. *Kelly v. Tyra*, 17: 334, 114 N. W. 750, 115 N. W. 636, 103 Minn. 176.

33. The mere direction of a foreman of a railroad company, to an independent contractor engaged by the company to burn a fire guard along its tracks, to begin the work on a certain day, will not render the company liable for damages sustained by third parties, due to the fact that on the day specified there was a strong wind blowing which caused the fire to escape control. *St. Louis & S. F. R. Co. v. Madden*, 17: 788, 93 Pac. 586, — Kan. —.
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34. A railroad company, by employing an independent contractor to burn a fire guard along its right of way, is not thereby absolved from the duty of seeing that measures are taken to prevent injury to the property of third persons from fire which escapes control. *St. Louis & S. F. R. Co. v. Madden*, 17: 788, 93 Pac. 586, — Kan. —.
(Annotated)

35. Work done by one who contracts with a railroad company to burn a fire guard along its right of way is performed by the company in the operation of its road; and the company cannot, by delegating the work to an independent contractor, avoid liability for injury caused to property when the fire escapes control through the negligence of the contractor. *St. Louis & S. F. R. Co. v. Madden*, 17: 788, 93 Pac. 586, — Kan. —.

36. One who employs an independent contractor to erect a bridge over a public street the work on which will render the street under it dangerous for travel by the public cannot avoid liability for injury to a pedestrian from the fall of a tool in case he takes no precautions to safeguard the public during the performance of the work, or to see that it is done. *Philadelphia, B. & W. R. Co. v. Mitchell*, 17: 974, 69 Atl. 422, — Md. —.

37. Although a person is paid for work by the "job," and has the right to employ assistants to be paid by himself, he is a servant, and not an independent contractor, where he is merely working under a general employment, has no dominion or control over the premises, and is subject at all times to the order of his employer as to when and how he shall work and the results to be accomplished, and may be discharged at any time. *Knically v. West Virginia M. R. Co.* 17: 370, 61 S. E. 811, — W. Va. —.

(Annotated)

MAXIMS.

1. A marriage valid where contracted is valid everywhere. *State v. Fenn*, 17: 800, 92 Pac. 417, 47 Wash. 561.

2. A smaller sum cannot be a satisfaction of a larger debt. *Frye v. Hubbell*, 17: 1197, 68 Atl. 325, 74 N. H. 358.

3. *Damnum absque injuria*. *Erickson v. Crookston Waterworks Power & L. Co.* 17: 650, 117 N. W. 435, — Minn. —; *Lambert v. Norfolk*, 17: 1061, 61 S. E. 776, — Va. —.

4. Equity considers that done which ought to be done. *Godwin v. Murchison Nat. Bank*, 17: 935, 59 S. E. 154, 145 N. C. 320.

5. *Mobilia sequuntur personam*. *Adams v. Colonial & U. S. Mortg. Co.* 17: 138, 34 So. 482, 82 Miss. 263.

6. *Omnia præsumuntur contra spoliatores*. *Missouri P. R. Co. v. Continental Nat. Bank*, 17: 994, 111 S. W. 574, 212 Mo. 505.

7. One must use his own so as not to

injure another. *Erickson v. Crookston Waterworks Power & L. Co.* 17: 650, 117 N. W. 435, — Minn. —.

8. *Respondent superior.* *Kelly v. Tyra.* 17: 334, 114 N. W. 750, 103 Minn. 176; *Houtz v. Union P. R. Co.* 17: 628, 93 Pac. 439, 33 Utah, 175.

9. *Sic utere tuo ut alienum non lædas.* *McGlone v. Womack,* 17: 855, 111 S. W. 688, — Ky. —; *Erickson v. Crookston Waterworks Power & L. Co.* 17: 650, 117 N. W. 435, — Minn. —.

10. *Simplex commendatio non obligat.* *Williamson v. Holt,* 17: 240, 61 S. E. 384, — N. C. —.

11. So use your own property as not to injure the rights of another. *Tidewater R. Co. v. Shartzer,* 17: 1053, 59 S. E. 407, 107 Va. 562.

12. *Stare decisis.* *Koerner v. St. Louis Car Co.* 17: 292, 107 S. W. 481, 209 Mo. 141.

13. Whose the soil is, his it is from the heavens to the depths of the earth. *Erickson v. Crookston Waterworks Power & L. Co.* 17: 650, 117 N. W. 435, — Minn. —.

MECHANICS' LIENS.

Providing special means for enforcement of mechanics' liens against property of public service corporations, see *Constitutional Law*, 5.

Allowing attorneys' fees in mechanics' lien case, see *Constitutional Law*, 8.

1. The deduction from the contract price of damages provided by the contract for delay in finishing the building is not prevented in an action to enforce liens of subcontractors, by a statute providing that as to all liens, except that of the contractor, the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the reputed owner, and against the contractor. *Builders' Supply Depot v. O'Connor,* 17: 909, 88 Pac. 982, 150 Cal. 265.

2. A mechanics' lien must fall if the method provided for enforcing it is inoperative. *Vulcanite Paving Co. v. Philadelphia Rapid Transit Co.* 17: 884, 69 Atl. 1117, 220 Pa. 603.

3. The legislature may lawfully allow a mechanics' lien claimant the cost of filing his lien, against the property subject to it. *Builders' Supply Depot v. O'Connor,* 17: 909, 88 Pac. 982, 150 Cal. 265.

4. Personal judgments against the owners of the property cannot be rendered in actions by subcontractors to enforce mechanics' liens. *Builders' Supply Depot v. O'Connor,* 17: 909, 88 Pac. 982, 150 Cal. 265.

MEDICAL COLLEGES.

Mandamus to compel issuance of diploma, see *Appeal and Error*, 11; *Mandamus*.

The report of the dean of the faculty of a medical college to the board of directors, 17 L.R.A. (N.S.)

ors, that a student has complied with the regulations of the college and has passed in all studies a grade entitling her to graduation, is equivalent to a recommendation of the faculty to the board of directors, where, under the by-laws of the institution, the dean has the right and it is his duty to pass upon the standing of students applying for graduation. *State ex rel. Nelson v. Lincoln Medical College,* 17: 930, 116 N. W. 294, — Neb. —.

MEMORANDUM.

Admissibility of, in evidence, see *Evidence*, 16.

MENTAL ANGUISH.

Damages for, see *Damages*, 18, 19.
Presumption as to, see *Evidence*, 12.

MIDWIFERY.

Necessity of physician's license to practise, see *Physicians and Surgeons*, 4, 5.

MILK.

See *Food*.

MILLDAMS.

Limitation of time for bringing action for damages occasioned by, see *Limitation of Actions*, 3, 15.

MINES.

Taxation of interest of lessee in oil and gas lease, see *Taxes*, 3, 7, 15.

MINORS.

See *Infants*.

MISCARRIAGE.

Damages for negligently causing, see *Damages*, 13, 14, 19.

MISSIONARY SOCIETY.

Exemption of local auxiliary of foreign missionary society from taxation, see *Taxes*, 13.

MISTAKE.

Recovery upon *quantum meruit* upon cancellation of contract because of, see *Contracts*, 15.

Cancellation of contract for, see *Contracts*, 21, 23-25.

Evidence to show, see *Evidence*, 26.

MODIFICATION.

Of judgment, see *Judgment*, 3.

MORTALITY TABLES.

Admissibility in evidence, see *Evidence*, 17.

MORTGAGE.

As to chattel mortgage, see *Chattel Mortgage*.

Outstanding mortgage against property conveyed as breach of covenant against encumbrances, see *Covenants and Conditions*, 1.

Provision in deed that grantee shall assume and pay existing mortgage, see Covenants and Conditions, 5.

What are fixtures passing with mortgage of realty, see Fixtures; Trial, 7.

Sufficiency of deed of trust to pass interest of minors in land where they were not parties thereto, see Infants, 2.

Leaving liability of decedent's estate for, unadjudicated, see Judgment, 7.

Situs of, for purpose of taxation, see Taxes, 11, 12.

Power of trustee to execute deed of trust, see Trusts, 1.

Priority.

1. One who loaned money to another for the purpose of erecting a building on a lot, upon the faith of a verbal agreement based upon the prior assignment of a lease combined with an option to purchase, has an equity against such debtor for the amount of money so advanced or loaned, superior to that of after-acquired judgments or deficiency decrees in a mortgage foreclosure against him, or to the equity, if any, of a volunteer purchaser at an illegal execution sale of the debtor's interest in the property, although the judgments against such debtor on which the execution was issued may have been recovered prior to the time the loan was made. *Thalheimer v. Tischler*, 17: 841, 46 So. 514, — Fla. —.

Grantee's liability to mortgagee.

What law governs agreement of grantee to assume mortgage debt, see Conflict of Laws, 1.

2. The owner of a mortgage cannot enforce an agreement contained in a deed to assume a mortgage on the premises conveyed, unless the grantor in the deed is personally liable to pay the mortgage debt, or owes the owner of it some duty or obligation respecting the subject-matter of the promise. *Clement v. Willett*, 17:1094, 117 N. W. 491, — Minn. —.

Satisfaction; discharge.

Acquisition by mortgagee of right to rents as consideration for promise to accept amount received at foreclosure sale in satisfaction of mortgage, see Contracts, 6.

Part payment of mortgage debt as consideration for release of whole of it, see Contracts, 5, 7.

Presumption of payment of, from long-continued possession by mortgagor, see Evidence, 9.

3. A bona fide payment of a mortgage to an administrator of the mortgagee, to whom letters have been regularly issued by an authority having jurisdiction to do so is a legal discharge of the indebtedness, and a second payment cannot be enforced by an executor subsequently appointed in another county, although the will had been discovered and presented for probate prior to such payment. *Zeigler v. Storey*, 17: 878, 69 Atl. 894, 220 Pa. 471. (Annotated) 17 L.R.A. (N.S.)

Enforcement.

Sale under execution of equitable asset of debtor upon deficiency decree in suit for foreclosure of mortgage, see Levy and Seizure, 1.

4. The retention of mortgaged premises for one year after foreclosure by the mortgagee, so as to complete the foreclosure proceedings under the statute, is not established, as matter of law, where the occupation was by one of the mortgagors, and there is a controversy as to the character of such occupation. *Frye v. Hubbell*, 17: 1197, 68 Atl. 325, 74 N. H. 358.

5. In a suit brought to foreclose a mortgage after the decease of the mortgagor and the appointment of an administrator of his estate, the latter is not a proper party for the purpose of establishing the liability of the estate for the mortgage indebtedness since such liability is enforceable only in the proper county court. *Re Hanlin*, 17: 1189, 113 N. W. 411, 133 Wis. 140.

Redemption.

6. The redemption by a wife, in order to protect her statutory rights, of land of the husband sold on foreclosure sale, annuls the sale, and the title thereto will pass to one to whom the husband, after being divorced, conveys his interest in the premises; but such title is subject to a lien in favor of the wife for the amount she pays to redeem with interest, less the net value of the use of the land while in her possession. *Kopp v. Thele*, 17: 981, 116 N. W. 472, 104 Minn. 267.

MORTUARY TABLES.

Admissibility in evidence, see Evidence, 17.

MOTIONS AND ORDERS.

Order striking proposed statement from files where not presented in time, see Appeal and Error, 7.

MOTIVE.

Evidence to show, see Evidence, 41.

Effect of motive in passage of law on validity thereof, see Statutes, 2.

MUNICIPAL CORPORATIONS.

Right to annex territory to municipality without consent of all the owners, see Constitutional Law, 3, 4.

Cancellation for mistake of contract with, for public work, see Contracts, 24, 25.

When ordinance is superseded by subsequent statute on same subject, see Criminal Law, 2.

Extending limits of municipality along turnpike road, and removal of toll gates, see Eminent Domain, 5, 6.

What constitutes gaming within meaning of ordinance, see Gaming, 1.

As to power to grade streets, see Highways, 5.

Right summarily to close club on ground that liquor laws are being violated, see Injunction, 11, 12; Intoxicating Liquors, 2.

Validity of ordinance providing that acting mayor shall be entitled to salary of mayor, see Officers.

Sufficiency of complaint for violation of ordinance as to Sunday labor, see Pleading, 1.

Power of municipality to make vaccination a condition precedent to attending public schools, see Schools.

Ordinance as to turning off of water upon failure to pay rents, see Waters, 9, 10.

Statute setting aside percentage of liquor license fees received by, for purpose of state hospital for inebriates as a tax on public property, see Taxes, 14.

1. An ordinance enacted by the council of a city of the first class, which provides that it shall take effect upon publication in book form, is sufficiently published and will take effect, where it is issued in a book printed by the authority of the city, and of which more than fifty copies are published as required by Kan. Laws 1903, chap. 122, p. 240, § 191, declaring that the issue of that number of copies of a book of ordinances shall be deemed a publication. *Topeka v. Crawford*, 17: 1156, 96 Pac. 862, — Kan. —.

2. An invalid municipal ordinance cannot be validated by a curative act of the legislature. *McGillic v. Corby*, 17: 1263, 95 Pac. 1063, — Mont. —.

3. An ordinance void under a statute existing at the time of its enactment is not validated by amendment of the statute so that it might be validly enacted under the amended law. *McGillic v. Corby*, 17: 1263, 95 Pac. 1063, — Mont. —.

4. Charter authority to enact and enforce all local, police, sanitary, and other regulations as do not conflict with general laws empowers a municipality to require railroads running through its limits to adopt such precautions as to speed of trains crossing its streets as may be needed for the safety of the public. *Cincinnati, N. O. & T. P. R. Co. v. Com.* 17: 561, 104 S. W. 771, — Ky. —. (Annotated)

Liability for damages.

Necessity of pleading that act causing injury to one suing a municipality was in exercise of its governmental functions, see Pleading, 18.

5. The operation by a municipal corporation of an elevator in a police station is part of its governmental duty, for negligence in which it is not liable to an individual injured thereby. *Wilcox v. Rochester*, 17: 741, 82 N. E. 1119, 190 N. Y. 137. (Annotated)

MURDER.

See Homicide.

MUTUAL BENEFIT ASSOCIATION.

See Benevolent Societies.

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MUTUAL INSURANCE COMPANY.

See Insurance.

NAME.

Effect of mistake in middle initial of name in publication of summons, see Writ and Process, 1, 2.

NATIONAL BANKS.

See Banks, 1-3.

NEGLIGENCE.

Of carrier, see Carriers.

As to measure of damages for negligent injury, see Damages.

In operation of elevator, see Elevators. Presumptions and burden of proof as to, see Evidence.

On or in regard to highway, see Highways, 6-11.

As to negligent homicide, see Homicide, 1.

Of landlord, see Landlord and Tenant. Of master, see Master and Servant.

Violation of statute forbidding employment of children under certain age as negligence *per se*, see Master and Servant, 5.

Of municipal corporations, see Municipal Corporations.

Of physician, see Physicians and Surgeons, 6, 7.

As to proximate cause of injury, see Proximate Cause.

Of railroad, see Railroads.

As question for jury, see Trial, 10.

1. The rupture of an artery due to a muscular contraction in attempting to avoid injury from an article which falls upon one's umbrella may be the basis of a recovery against the one responsible for the fall. *Philadelphia. B. & W. R. Co. v. Mitchell*, 17: 974, 69 Atl. 422, — Md. —.

2. The owner of an apartment building, who insists on his janitor's compelling the removal of his relative who has become ill with an infectious disease while temporarily in the janitor's apartments, is not liable for aggravation of the illness due to the excitement attending the removal, where the patient was not confined to bed, and there is nothing to show that she might not, with comparative safety, have been taken home in a cab or hack, or that he had any knowledge as to her pecuniary ability to secure one, or that he might have inferred that aggravation of the disease would follow the removal. *Tucker v. Burt*, 17: 510, 115 N. W. 722, 152 Mich. 68. (Annotated)

3. In an action for damages for personal injuries alleged to have been inflicted by the negligence of another, a recovery can be had for such consequences only, of the act complained of, as ought reasonably and probably to have been anticipated to flow therefrom. *Johnston v. New Omaha Thomson-Houston E. L. Co.* 17: 435, 110 N. W. 711, 113 N. W. 526, — Neb. —.

Collapse of wharf.

4. The owner of a wharf which collapsed while being put to the use for

which it was intended is responsible in damages to one who was legitimately upon it at the time and was injured, whether present as a guest or as a visitor of the lessee of the wharf. *Cristadoro v. Von Behren*, 17: 1161, 44 So. 852, 119 La. 1025. (Annotated) **Liability to licensees and trespassers.**

5. A railroad company is not liable to a guest in a hotel adjoining its property for failure to light or guard a retaining wall between the properties, over which the guest falls while wandering about the hotel grounds in the night on business of his own. *Watson v. Manitou & P. P. R. Co.* 17: 916, 92 Pac. 17, 41 Colo. 138. (Annotated)

6. A police officer who accompanies an express wagon, to protect it from strikers, to a building, and who, upon its backing up to the elevator opening to receive its load, steps into the opening either to get out of the way of those loading the goods, or to protect the employees of the express company in taking possession of them, is either a trespasser or a licensee, to whom the owner of the building owes no duty except to refrain from wilfully or wantonly injuring him; and he is therefore not liable for the officer's death by falling down the shaft, although the opening is unlighted and unguarded, and the elevator not at the opening. *Casey v. Adams*, 17: 776, 84 N. E. 933, 234 Ill. 350.

Injury to children.

As to contributory negligence of infants, see *infra*, 11.

7. In an action for damages for personal injuries to an infant, alleged to have been caused by the negligence of another, the foundation for recovery, if there is any, is not the tender years of the child, but the culpable negligence of the defendant. *Johnston v. New Omaha Thomson-Houston E. L. Co.* 17: 435, 110 N. W. 711, 113 N. W. 526, — Neb. —.

8. An infant injured by falling down an unguarded elevator shaft in a wholesale grocery store is not entitled to recover damages therefor, where he did not come upon the premises by invitation, express or implied, of the owner, who is not shown to have been under any obligation to protect him from injury. *Faurot v. Oklahoma Wholesale Grocery Co.* 17: 136, 95 Pac. 463, — Okla. —.

Contributory negligence.

Of passenger in riding on platform, see *Carriers*, 3.

Of person on highway, see *Highways*, 11.

Of servant, see *Master and Servant*, 18-20.

Of patient aggravating injury caused by physician's negligence, see *Physicians and Surgeons*, 7.

Of person injured on or near railroad track, see *Railroads*, 6-8.

As question for jury, see *Trial*, 11, 12.

9. One who is negligent in a situation of danger, the existence and nature of which he knows, is not entitled to recover damages for an injury which his negligent con-

duct invites, because such injury is greater than he anticipated. *Johnston v. New Omaha Thomson-Houston E. L. Co.* 17: 435, 110 N. W. 711, 113 N. W. 526, — Neb. —.

10. One cannot be said to be negligent, as matter of law, because in a moment of peril he fails to use the best means of escape. *Di Bari v. J. W. Bishop Co.* 17: 773, 85 N. E. 89, 199 Mass. 254.

11. An ordinarily bright and intelligent boy, twelve years old, living in a city in which electric light and power wires are in constant use on nearly all of the principal streets and highways, who, having knowledge of the danger, but not of its extent, purposely takes hold of such a wire in order to obtain a shock, and is injured thereby, is, as a matter of law, guilty of contributory negligence. *Johnston v. New Omaha Thomson-Houston E. L. Co.* 17: 435, 110 N. W. 711, 113 N. W. 526, — Neb. —.

12. A guest of a hotel on a mountain top, who, for a purpose of his own, leaves the hotel and lighted path in the night, and without inquiring as to conditions, walks some distance in the dark, is guilty of negligence which will preclude his recovery for injuries caused by falling over a retaining wall. *Watson v. Manitou & P. P. R. Co.* 17: 916, 92 Pac. 17, 41 Colo. 138.

Imputed negligence.

Imputing to bank paying forged check, negligence of other banks through which check has come, see *Banks*, 6.

13. An owner of cotton who leaves it with a compress company to be baled is not chargeable with the latter's negligence which, combined with that of a railroad company, results in the destruction of the cotton by fire, so as to prevent him or the insurer of the cotton, who is subrogated to his rights, from holding the railroad company liable for the loss. See *Ins. Co. v. Vicksburg, S. & P. R. Co.* 17: 925, 159 Fed. 676, 86 C. C. A. 544. (Annotated)

Last clear chance.

14. The doctrine of the "last clear chance" is inapplicable where a girl thirteen years of age became frightened upon being carried past her destination, and stepped from a moving street car, since her only negligent act was in stepping from the car, after which no act of the conductor could have prevented the injury sustained by her. *Kruger v. Omaha & C. B. Street R. Co.* 17: 101, 114 N. W. 571, — Neb. —.

NEGOTIABLE INSTRUMENTS.

See *Bills and Notes*.

NEGOTIABLE INSTRUMENTS LAW.

See *Bills and Notes*, 3, 4.

NEWSPAPER.

Contempt of court by publication in, see *Contempt*, 2.

NEW TRIAL.

Granting or denying motion for, as final order from which appeal lies, see *Appeal and Error*, 1.

Necessity of filing motion for, in lower court to secure review of equity case, see Appeal and Error, 4.

1. A new trial will be granted in a criminal action, where the trial judge, in the absence of the attorneys, entered the jury room, at the request of the jurors, after they had retired to deliberate on their verdict, and conversed with them in reference to the case, whether the conversation was prejudicial to the accused or not. *State v. Murphy*, 17: 609, 115 N. W. 84, — N. D. — (Annotated)

2. A new trial will not be granted because of the erroneous admission of evidence, where the record affirmatively shows that the error was not prejudicial. *Kelly v. Tyra*, 17: 334, 114 N. W. 750, 115 N. W. 636, 103 Minn. 176.

NOISE.

Damages for diminution in value of property because of, see Eminent Domain, 10.

As nuisance, see Nuisances, 2-4.

NONRESIDENTS.

Effect of coming into state to start running of limitations in favor of, see Limitation of Actions, 16.

NOTARY.

Delivery by bank of check to, for protest, see Bills and Notes, 4.

NOTICE.

To carrier of loss, see Carriers, 10, 14.

Of infirmity in contract to purchaser of check, see Checks, 2, 3; Trial, 9.

Of claim on insurance policy, see Insurance, 11-14.

To railroad that presence of persons on track may be reasonably expected, see Railroads, 2.

A purchaser is chargeable with notice of a tenant's rights when the latter is in the actual possession of the real estate at the time it is sold. *Ogden v. Garrison*, 17: 1135, 117 N. W. 714, — Neb. —.

NUISANCES.

Injunction against, see Injunction, 8.

To health or comfort.

1. It cannot be said, as matter of law, that a stable cannot be kept in the residence portion of a large city in such a manner that it will not be regarded as a nuisance. *Oehler v. Levy*, 17: 1025, 85 N. E. 271, 234 Ill. 595. (Annotated)

2. Maintaining a stable in a state of uncleanness, and permitting the horses to be brought in in the night and the drivers to use loud and profane language so that the sleep of occupants of neighboring buildings is disturbed and their health impaired, is a nuisance. *Oehler v. Levy*, 17: 1025, 85 N. E. 271, 234 Ill. 595.

3. Mere increase of trains, more cars, and heavier engines making more noise and

smoke, upon a railroad track laid in a public street, does not constitute a nuisance giving an abutting property owner a right to damages. *Staton v. Atlantic C. L. R. Co.* 17: 949, 61 S. E. 455, 147 N. C. 428.

4. The operation of an ice plant constructed under a permit from the municipal authorities, and conducted in conformity with the requirements of the city ordinances relating to factories, will not be enjoined as a nuisance at the suit of an adjoining proprietor who made no opposition to the granting of the permit, where the machinery of the plant makes little or no noise and causes no vibration, and the only noise of any consequence results from the handling of large ice cans, and seems to be practically unavoidable. *Le Blanc v. Orleans Ice Mfg. Co.* 17: 287, 46 So. 226, 121 La. 249. (Annotated)

Speed of trains.

Evidence in action against railroad company for nuisance in manner of running trains, see Evidence, 42.

5. A railroad company is guilty of a nuisance in running its trains across a much-used street in a town, wilfully, habitually, and for an unreasonable length of time, at such an unreasonable and unsafe rate of speed as to endanger the lives and safety of persons using the crossing, without customary and usual warning signals. *Cincinnati, N. O. & T. P. R. Co. v. Com.* 17: 561, 104 S. W. 771, — Ky. —.

6. A railroad company which, in running trains rapidly over a street crossing in a town, gives the customary statutory signals, and maintains a watchman at the crossing from 6 A. M. to 6 P. M., relieves itself from the charge of committing a nuisance in so running its trains. *Cincinnati, N. O. & T. P. R. Co. v. Com.* 17: 561, 104 S. W. 771, — Ky. —.

Private right of action.

7. An owner of real estate abutting on a public street cannot compel the removal of an obstruction from the sidewalk thereof which is not shown to result in special injury to him. *Oehler v. Levy*, 17: 1025, 85 N. E. 271, 234 Ill. 595.

Defenses.

8. An owner of real estate may enjoin the maintenance of a nuisance upon adjoining property, although it existed at the time he purchased his property, where the nuisance exists in a section of a growing city largely devoted to residence purposes. *Oehler v. Levy*, 17: 1025, 85 N. E. 271, 234 Ill. 595.

NUNC PRO TUNC.

Entry of judgment *nunc pro tunc*, see Judgment, 2.

OBSTRUCTION.

Of waters, see Waters.

OCCUPATION TAX.

See License.

OFFICERS.

Of corporation, see Corporations.

Injunction against, see Injunction, 11, 12.

As to compensation of tax collectors, see Tax Collectors.

1. An ordinance providing that any acting mayor shall be entitled to the salary of the mayor is void under a statute providing for an acting mayor, and entitling an acting mayor who shall perform the duties of the mayor for a period longer than sixty days to the mayor's salary. *McGillic v. Corby*, 17: 1263, 95 Pac. 1063, — Mont. —.

2. A municipal council cannot allow compensation to the president of its board for services rendered as acting mayor, which are not provided for by statute or ordinance. *McGillic v. Corby*, 17: 1263, 95 Pac. 1063, — Mont. —. (Annotated)

OFFSETS.

See Set-Off and Counterclaim.

OIL.

See Mines.

OPINIONS.

See Evidence, 27-34.

ORDINANCES.

See Municipal Corporations.

PARAMOUR.

Presumption of undue influence in case of will in favor of, see Evidence, 5.

PARENT AND CHILD.

Damages for negligent killing of children on railroad track, see Damages, 15.

Validity of statute forbidding child labor, see Infants, 1.

PAROL EVIDENCE.

See Evidence, 18-26.

PARTIES.

Raising question of want of necessary parties for first time on petition for rehearing, see Appeal and Error, 19.

Action or suit by or against foreign corporation, see Corporations, 7, 8.

Estoppel to set up defect for lack of proper parties, see Estoppel, 4.

Sufficiency of deed of trust to pass interest of minors in land where they were not parties thereto, see Infants, 2.

Parties plaintiff.

Right of nonresident alien to maintain action for negligent killing, see Death.

1. One having no longer an interest in the performance of a contract by a railroad company to establish a station and stop trains at a certain place cannot maintain a bill to compel it to do so. *Herzog v. Atchison, T. & S. F. R. Co.* 17: 428, 95 Pac. 898, 153 Cal. 496.
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2. The holder of a promissory note payable to another or order, and unindorsed is the real party in interest. within the meaning of N. D. Rev. Code 1905. § 6807, and may sue thereon, where the consideration for the note passed solely between the holder and the maker, and the note was given to another person solely for the benefit of the present holder. *American Soda Fountain Co. v. Hogue*, 17: 1113, 116 N. W. 339, — N. D. —. (Annotated)

3. Persons furnishing labor and material to a contractor for a county building who has agreed to pay all claims for material furnished and labor performed. and has given bond conditioned to pay such claims, may maintain actions on the bond. *United States Gypsum Co. v. Gleason*, 17: 906, 116 N. W. 238, — Wis. —.

Parties defendant.

Proper parties defendant in suit to foreclose mortgage, see Mortgage, 5.

4. Members of an unincorporated labor union who are too numerous to be made individually parties to a suit to enjoin a strike may be brought before the court by joining as parties defendant persons who are and who are alleged to be proper representatives of the class, describing it, to which the members belong. *Reynolds v. Davis*, 17: 162, 84 N. E. 457, 198 Mass. 294.

5. Unincorporated labor unions are not proper parties to a suit to enjoin a strike by their members. *Reynolds v. Davis*, 17: 162, 84 N. E. 457, 198 Mass. 294.

Joinder.

6. The receivers of a railroad company who are jointly and severally liable for a personal injury caused by the negligence of themselves and another company may be joined with the latter in an action by the injured person for the damages. *Tandrup v. Sampsell*, 17: 852, 85 N. E. 331, 234 Ill. 526.

PARTITION.

Judgment in partition suit establishing existence of superior title a breach of covenant by vendor. see Covenants and Conditions, 2.

Contracts for sale of land secured by referee appointed to sell lands for partition as real estate, see Taxes, 1.

Taxation of contracts for sale in hands of referee appointed to sell real estate for partition, see Taxes, 6.

PARTNERSHIP.

As to bankruptcy, see Bankruptcy, 3-9, 11.

1. A member of a commercial partnership can bind it by signing its name to a promissory note under seal, in the course of the business of the partnership, under Ga. Civ. Code 1895, §§ 2643, 2651, providing that every partner has a right to contract or otherwise bind the firm in matters connected with its business, and to execute any writing or bond in the course of the business, and that all the partners are

bound by the acts of any one within the legitimate business of the partnership, until dissolution, or the commencement of legal process for that purpose, or express notice of dissent to the person about to be contracted with. *Merchants' & F. Bank v. Johnston*, 17: 559, 61 S. E. 543, 130 Ga. 661. (Annotated)

2. If an agent, at the instance and in the presence of a member of a partnership, signs the name of the partnership to a promissory note under seal, the note thus executed has the same legal effect as if the partner had performed the physical act of signing it. *Merchants' & F. Bank v. Johnston*, 17: 969, 61 S. E. 543, 130 Ga. 661.

Liability of partners.

Assumption of debts of insolvent partnership by partner as consideration for conveyance of interest in partnership property, see *Contracts*, 2.

3. Before the property of an insolvent partnership is placed in *custodia legis*, it is not held in trust for the partnership creditors, and they have no lien upon it. *Sargent v. Blake*, 17: 1040, 160 Fed. 57, — C. C. A. —.

4. The assumption of payment of partnership debts by one partner, in consideration of an absolute conveyance of the partnership property to him by the other, creates no trust in, and fastens no lien upon, the property thus conveyed, in favor of the partnership creditors, prior to any request for the interposition of a court to administer the partnership property. *Sargent v. Blake*, 17: 1040, 160 Fed. 57, — C. C. A. —.

Rights as to each other.

5. One member of a partnership which conducted a logging business is not, in the absence of an agreement to that effect, entitled to a greater share of the partnership earnings than the other by reason of the fact that the latter was frequently away from the field of operations, and, in consequence, the former did the greater amount of the work in connection with the firm's business. *Williams v. Pedersen*, 17: 384, 92 Pac. 287, 47 Wash. 472. (Annotated)

PASSENGER CARRIERS.

See *Carriers*.

PATENTS.

Duty of one other than original patentee making repair parts for machine, patent on which has expired, to indicate thereon their origin, see *Unfair Competition*.

PATROL.

Injunction against maintenance of, see *Injunction*, 7.

PAYMENT.

Presumption that stranger paying note takes as a purchaser, see *Bills and Notes*, 7.

Part payment of debt as consideration for release of whole, see *Contracts*, 5-7.

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Presumption of, see *Evidence*, 9.

Presumption as to how payment is to be applied, see *Evidence*, 10.

Necessity of demand of, to start limitations against liability for open bank account, see *Limitation of Actions*, 8.

Sufficiency of payment of mortgage to administrator of mortgagee, where will is afterwards discovered and executor appointed in other county, see *Mortgage*, 3.

Effect of extension of time for payment of note to release surety, see *Principal and Surety*.

The assumption by an agent of a debt due from a third person to the agent's principal does not constitute payment, when the agent's act is not authorized or ratified by the principal. *Plano Mfg. Co. v. Doyle*, 17: 606, 116 N. W. 529, — N. D. —.

(Annotated)

PENALTY.

Penalizing resistance by judicial interference to prevent enforcement of law, see *Constitutional Law*, 14.

PERFORMANCE.

Of contracts, see *Contracts*, 15-20.

PERPETUITIES.

1. A bequest of a life estate for the benefit of a testator's daughter, with remainder to her children, under conditions rendering the remainder void under the rule against perpetuities, may be upheld. *Quinlan v. Wickman*, 17: 216, 84 N. E. 38, 233 Ill. 39.

2. A bequest to take effect in the alternative at the death of the first taker without children, which is lawful, or at the death of all her children without reaching the age of thirty years, which is void as a perpetuity, will take effect or not, according to the event, so that it will take effect in case of the death of the life tenant without children, but not otherwise. *Quinlan v. Wickman*, 17: 216, 84 N. E. 38, 233 Ill. 39.

3. A bequest in trust for the benefit of testator's daughter during life, and to distribute the remainder among her children when the youngest reaches the age of thirty years, violates the rule against perpetuities where there is a possibility of the distribution being delayed more than twenty-one years after the death of the daughter. *Quinlan v. Wickman*, 17: 216, 84 N. E. 38, 233 Ill. 39.

PHYSICIANS AND SURGEONS.

Necessity of proving that woman had become quick, in prosecution for abortion, see *Abortion*.

Mandamus to compel medical college to issue diploma, see *Appeal and Error*, 11; *Mandamus*.

Right to practice.

Judicial interference with act of board of health in revoking license, see *Courts*, 4.

Opinion evidence as to what constitutes practising medicine, see Evidence, 33.
Right to jury in action to revoke license of, see Jury.

Sufficiency of complaint for revocation of license of physician, see Pleading, 16.

1. In an action under a complaint filed before the state board of health for the purpose of procuring an order revoking the license of a physician, it is not necessary that the proceedings should be conducted with that degree of exactness which is required upon a trial for a criminal offense, in an ordinary tribunal of justice. *Munk v. Frink*, 17: 439, 116 N. W. 525, — Neb. —.

2. A trial and conviction in a court of competent jurisdiction is not a condition precedent to a proceeding by the state board of health against a physician to revoke his license for any of the causes provided by statute. *Munk v. Frink*, 17: 439, 116 N. W. 525, — Neb. —.

3. The findings of the state board of health as to the sufficiency of the evidence to sustain the charges made against a physician, the revocation of whose license is sought, will be upheld, unless it appears that there is no evidence to sustain them, where the board took testimony and gave the respondent full opportunity to appear, in person or by counsel, to cross-examine the witnesses against him, and to introduce testimony in his own behalf, and has passed upon the sufficiency of evidence so taken. *Munk v. Frink*, 17: 439, 116 N. W. 525, — Neb. —.

4. A person without license may be found guilty of violating the statute requiring a license to practise medicine who practises midwifery making use of the instrument usually employed for that purpose, and of certain printed formulas for conditions encountered in the practice. *Com. v. Porn*, 17: 94, 82 N. E. 31, 196 Mass. 326.

(Annotated)

5. No constitutional rights are infringed by including midwifery in the provisions of a statute requiring a license to practise medicine. *Com. v. Porn*, 17: 94, 82 N. E. 31, 196 Mass. 326.

Liability for injuries.

6. The use by a physician of the X-ray in the treatment of a patient of the effect of which he is ignorant, may be found by the jury to be negligence *per se*. *Sauers v. Smits*, 17: 1242, 95 Pac. 1097, 49 Wash. 557.

7. A physician is not relieved from liability for burning a patient by the use of the X-ray by the fact that she quit his treatment before he was willing she should do so, or that she neglected to follow instructions as to the use and care of the affected part. *Sauers v. Smits*, 17: 1242, 95 Pac. 1097, 49 Wash. 557.

(Annotated)

PICKETING.

Injunction against, see Injunction, 7.
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PLAT.

Dedication by, see Dedication, 1.
Sufficiency of plat in condemnation proceedings, see Eminent Domain 1

PLEADING.

Right of appellate court to consider original petition when not preserved in record and no motion to strike out amended petition is made. see Appeal and Error, 5.

Variance between pleading and proof see Evidence, 66.

Definiteness; particularity.

1. A complaint for the violation of a municipal ordinance relating to Sunday labor is sufficiently specific as to time, when it alleges that the offense was committed on the first day of the week, commonly called Sunday, in a certain month and year. *Lepeka v. Crawford*, 17: 1156, 96 Pac. 862, — Kan. —.

Conclusions.

2. An allegation that it was the duty of a servant to do certain acts is not sufficient in an action to recover for the death of a coservant for failure to perform them, which does not show how it became his duty to perform them. *Chicago, I. & L. R. Co. v. Barker*, 17: 542, 83 N. E. 369, 169 Ind. 670.

Duplicity.

3. A clause in a declaration in assumpsit on a promissory note, "whereby he promised and agreed for a valuable consideration . . . to pay," is a sufficient averment of a promise, and is not merely descriptive of the note, but is affirmative and narrative, as well as descriptive, and, although performing a double function, does not subject the count to the rule against duplicity. *Acme Food Co. v. Older*, 17: 807, 61 S. E. 235, — W. Va. —.

Declaration or complaint.

Sufficiency of allegations in hearing before state board of health of charges against physician for procuring abortion, see Abortion.

4. Insufficiency of assets to pay the liabilities of the bankrupt estate need be alleged in an action brought by a trustee in bankruptcy, only when he seeks to avoid a preference or fraudulent conveyance made by the bankrupt. *Drew v. Myers*, 17: 350, 116 N. W. 781, — Neb. —.

5. A trustee in bankruptcy who seeks to recover the property of the bankrupt in an action which the bankrupt might have prosecuted but for the intervention of the bankruptcy is not required to allege that he has not sufficient assets of the estate in his hands to pay the liabilities thereof. *Drew v. Myers*, 17: 350, 116 N. W. 781, — Neb. —.

(Annotated)

6. A bill for specific performance of a contract to establish a railway station and stop trains at a certain place must allege that performance will not be detrimental to the interests of the public, or impose great burdens with no corresponding advantage.

Herzog v. Atchison, T. & S. F. R. Co. 17: 428, 95 Pac. 898, 153 Cal. 496.

7. In declaring on a promissory note in an action of debt, it is a sufficient affirmation of title, in the absence of an indorsement, to allege that the defendant promised by the instrument to pay the amount named therein to the plaintiff. *Boyd v. Beebe*, 17: 660, 61 S. E. 304, — W. Va. —.

8. The presumption of continuance of facts once shown to exist does not apply to an allegation in a bill of ownership of land at a certain place at a time twenty years before the bill was filed, so as to render the allegation a sufficient statement of present ownership. *Herzog v. Atchison*, T. & S. F. R. Co. 17: 428, 95 Pac. 898, 153 Cal. 496.

9. A common *indebitatus* count for goods bargained and sold is appropriate in an action to recover the purchase price of goods completely sold so as to pass the title, but not delivered. *Acme Food Co. v. Old-er*, 17: 807, 61 S. E. 235, — W. Va. —.

10. The statutory duty of a railway company to display a light upon the switch target when the day is "dark and foggy" is not charged by allegations that the weather was cold, the air filled with flying frost, that the railroad company well knew that the day was dark and hazy, and that it was impossible for an engineer injured by running into an open switch to see but a short distance along the track ahead of the engine. *Chicago, I. & L. R. Co. v. Barker*, 17: 542, 83 N. E. 369, 169 Ind. 670.

11. A single paragraph of complaint, in an action for death of an engineer by running into an open switch, is insufficient which alleges that the engineer could not see the target because of ice on the cab windows; and that the railroad company was negligent in permitting the color of the target to become obscured by a coating of ice. *Chicago, I. & L. R. Co. v. Barker*, 17: 542, 83 N. E. 369, 169 Ind. 670.

12. Liability of a railroad company for death of an engineer whose engine ran into an open switch is not charged by allegations of negligence in failing to provide double windows to prevent the accumulation of frost thereon, with nothing to show that the engineer attempted to use the windows to learn the condition of the switch, or that he would have seen the switch had the windows been double, or that he was ignorant of the fact that the frost would accumulate on single windows, or that he did not assume the risk. *Chicago, I. & L. R. Co. v. Barker*, 17: 542, 83 N. E. 369, 169 Ind. 670.

13. In an action against a railroad company for the death of an engineer by running into an open switch, based on the negligence of the railroad company in placing an obstruction between the switch and a semaphore, which prevented the one in charge of it from seeing that the switch was open, and signaling the train, the complaint is insufficient if it is not shown that such person could have seen the switch in the 17 L.R.A. (N.S.)

absence of the obstruction, or, except by inference, that there was a signal available to warn the engineer. *Chicago, I. & L. R. Co. v. Barker*, 17: 542, 83 N. E. 369, 169 Ind. 670.

14. A cause of action against a railroad company for the death of its engineer is not stated by an allegation that it negligently permitted a switch to be left open so as to carry decedent's train from the main track onto a siding, since the closing of the switch is not part of the master's duty. *Chicago, I. & L. R. Co. v. Barker*, 17: 542, 83 N. E. 369, 169 Ind. 670.

15. The duty of one in charge of a semaphore to determine the condition of a nearby switch cannot be inferred from allegations that it was his duty to manage and control the semaphore, and communicate to persons operating trains whether the track was in good condition and safe to proceed, and whether the switch was open or closed. *Chicago, I. & L. R. Co. v. Barker*, 17: 542, 83 N. E. 369, 169 Ind. 670.

16. A complaint filed before the state board of health for the purpose of procuring an order revoking the license of a physician is sufficient if it informs the accused not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration. *Munk v. Frink*, 17: 439, 116 N. W. 525, — Neb. —.

Pleas and answers.

17. Noncompliance by the shipper with a provision in a bill of lading relieving the carrier from liability for injury to property during transportation if the making of claim is delayed more than thirty days after delivery of the property is a matter of defense which will be waived by failure to plead it. *Hoye v. Pennsylvania R. Co.* 17: 641, 83 N. E. 586, 191 N. Y. 101. (Annotated)

18. That the act causing the injury to one suing a municipal corporation for personal injuries alleged to have been caused by its negligence was a part of its governmental function is merely a legal objection to the right to recover, which it is not necessary to plead. *Wilcox v. Rochester*, 17: 741, 82 N. E. 1119, 190 N. Y. 137.

19. A plea meager in its statement of facts, to which no exception is made, may be sufficient to require the court to submit to the jury the issue sought to be raised by it. *Kampmann v. Rothwell*, 17: 758, 109 S. W. 1089, — Tex. —.

20. Breach of a warranty, in an application for insurance, that applicant never had bronchitis, is not pleaded by averring breach of other warranties of freedom from bodily infirmities and soundness of physical condition. *French v. Fidelity & C. Co.* 17: 1011, 115 N. W. 869, — Wis. —.

Reply.

21. Defendant is not entitled to judgment for failure of plaintiff to reply to a defense set out in the answer, if the defense is not sufficient in law to defeat the action. *Ferrara v. Aurie Min. Co.* 17: 964, 95 Pac. 952, — Colo. —.

Demurrer.

Effect of failure to demur to declaration showing that action is abated on right to remove or dismiss, see Abatement and Revival, 1.

Sufficiency of exception as to overruling demurrer, see Appeal and Error, 10.

Waiver of error in overruling demurrer, see Appeal and Error, 21.

22. A demurrer on the ground that the action is barred by the statute of limitations is not good unless the complaint affirmatively shows that fact. *Corea v. Higueras*, 17: 1018, 95 Pac. 882, 153 Cal. 451.

23. Whether or not it would be reasonable to require a railroad company to run trains over the abandoned route after change of its location is a question for the determination of the court, and an allegation of reasonableness in the complaint is not admitted by a demurrer. *Whalen v. Baltimore & O. R. Co.* 17: 130, 69 Atl. 390, — Md. —.

PLEDGE AND COLLATERAL SECURITY.

By married woman, see Husband and Wife, 4.

Property pledged as collateral for a note will be released under the same circumstances that a surety personally bound would be. *Daviess County Bank & T. Co. v. Wright*, 17: 1122, 110 S. W. 361, — Ky. —.

POLICE POWER.

As justifying extension of municipality limits along toll road, and removal of tollgates, see Eminent Domain, 6.

Tax on dogs for promotion of sheep industry as police measure, see Taxes, 2.

See also Constitutional Law, 16-24; Courts, 6.

POSSESSION.

Presumption from long-continued possession of property, see Evidence, 9.

Of tenant as notice to purchaser of his rights, see Notice.

PREFERENCES.

See Bankruptcy, 10-12; Fraudulent Conveyances; Insolvency.

PREJUDICIAL ERROR.

See Appeal and Error, 24-29.

PRESCRIPTION.

Prescriptive right for artificial condition of water maintained, see Waters, 8.

PRESUMPTIONS.

On appeal, see Appeal and Error, 12.

Of acceptance of check, see Bills and Notes, 3, 4.

Generally, see Evidence, 1-12.

Sufficiency of evidence to justify presumption of guilt, see Evidence, 65.

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Sufficiency of allegation of ownership of land at time twenty years before bill was filed to raise presumption of present ownership, see Pleading, 8.

PRINCIPAL AND AGENT.

Right of agent to act for both parties in making contract requiring exercise of discretion, see Contracts, 11.

Embezzlement by agent, see Embezzlement.

Proof that agent in charge of railroad station was also agent of telegraph company, see Evidence, 59.

As to insurance agents, see Insurance. Signature to partnership note by agent in presence of one partner, see Partnership, 2.

Assumption by agent of debt due from third person to principal as a payment of the debt, see Payment.

1. A manufacturer of a beverage, whose agent, to make a sale, represents that it is nonalcoholic and not subject to license tax, and binds his employer to make good any sum which the purchaser is required to pay because of its alcoholic nature, must allow on the purchase price the amount paid by the purchaser as a tax because the beverage proves to be alcoholic. *Haynor Mfg. Co. v. Davis*, 17: 193, 61 S. E. 54, 147 N. C. 267.

2. A manufacturer of a beverage is responsible for the fraudulent representations of his agent, to secure a merchant to handle it, that it is not alcoholic. *Haynor Mfg. Co. v. Davis*, 17: 193, 61 S. E. 54, 147 N. C. 267.

PRINCIPAL AND SURETY.

Liability of sureties who place their names on face of note as makers, see Bills and Notes, 5.

Necessity of consideration to support agreement to indemnify surety on note against loss, see Contracts, 1.

Parol evidence to show intention of sureties on directors' bond, see Evidence, 19.

Right of married woman to become surety, see Husband and Wife, 3, 4.

1. Securing payment of a year's interest from the administrator of the maker of an overdue note for the purpose of indicating to the bank customers that the paper is still alive, and placing on the note an indorsement of extension for a year, are not sufficient to establish a binding contract to extend for such time, which will release sureties on the paper. *Daviess County Bank & T. Co. v. Wright*, 17: 1122, 110 S. W. 361, — Ky. —.

2. An administrator has no authority to enter into a binding contract for the extension of time on a note executed by his intestate, so as to release sureties thereon. *Daviess County Bank & T. Co. v. Wright*, 17: 1122, 110 S. W. 361, — Ky. —.

PRIOR APPROPRIATION.

See Waters.

PRIORITY.

As between mortgage and other claims,
see Mortgage, 1.

PRIVATE WAY.

See Easements.

PRIVILEGE.

Taxation of oil or gas privilege, see
Taxes, 3, 7, 15.

Taxation of privilege to take turpentine
from standing trees, see Taxes, 4.

PRIVILEGED COMMUNICATIONS.

See Evidence, 37.

PROBATE.

Of will, see Wills.

PROBATE COURT.

Finality of order of, for purpose of ap-
peal, see Appeal and Error, 2.

PROFITS.

Loss of, as element of damages, see
Damages, 20.

PROMISSORY NOTES.

See Bills and Notes.

PROOFS OF LOSS.

See Insurance, 15, 29.

PROPERTY RIGHTS.

See Constitutional Law, 10-15.

PROTEST.

Of check, see Bills and Notes, 4.

PROVOCATION.

Effect of reducing homicide to man-
slaughter, see Trial, 17.

PROXIMATE CAUSE.

1. Although one driving along a street ahead of a street car which is running so slow that he has time to cross the track without being struck is negligent in making the attempt, his act is not the proximate cause of his resulting injury, if, upon seeing his design, the motorman, because of his inexperience, becomes confused, releases the break, and causes the car to increase its speed so that it strikes the wagon, which which it would not do if he used ordinary care. *Smith v. Connecticut R. & L. Co.* 17: 707, 67 Atl. 888, 80 Conn. 288.

2. That a child, when injured by a machine, was not actually performing the duties to which he had been assigned, but had gone to another floor on an errand of his own, does not prevent his employment in the factory, contrary to the provisions of a statute, being the proximate cause of the injury. *Starnes v. Albion Mfg. Co.* 17: 602, 61 S. E. 525, 147 N. C. 556.

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PUBLICATION.

Sufficiency of publication of ordinance,
see Municipal Corporations, 1.
Service by, see Writ and Process.

PUBLIC CONTRACT.

See Contracts, 15, 16, 21-25, 27.

PUBLIC LANDS.

Damages to homesteader for overflow
of land by wrongful obstruction of
water way, see Damages, 16.

Right of homesteader whose title is not
perfected to compensation for in-
jury from overflow of water, see
Waters, 1.

Question for jury as to interest of
homestead settler in action for
injury to the property, see Trial,
14.

PUBLIC POLICY.

See Contracts, 10-13.

PUBLIC-SERVICE CORPORATIONS.

Providing special means for enforce-
ment of mechanics' liens against
property of, see Constitutional
Law, 5.

PUBLIC WATER SUPPLY.

See Waters, 6, 7, 9, 10.

PUNITIVE DAMAGES.

See Damages, 1.

QUALITY.

Expert evidence as to, see Evidence, 30.

QUANTUM MERUIT.

Recovery upon, see Contracts, 15.

RAILROAD COMMISSION.

Right to require stopping of trains, see
Carriers, 15.

Validity of rule of state railroad com-
mission imposing penalty on car-
riers for failure to furnish cars for
interstate shipments, see Com-
merce.

Sufficiency of evidence to establish un-
reasonableness of order of, see
Evidence, 63.

Delegation of legislative power to; re-
view of action by courts, see Con-
stitutional Law, 2.

Review by court of orders of, see
Courts, 2, 3.

RAILROADS.

Effect of purchase by bank of railroad-
aid bonds, and placing amount of
bid to credit of railroad company,
see Banks, 4.

Liability for negligence of railroad
maintaining hospital for benefit of
employees, see Charities.

Agreement to maintain siding for pri-
vate use and to run trains to and
from it, see Contracts, 13; Cove-
nants and Conditions, 4.

Covenants by, to leave cars at private siding, see Covenants and Conditions, 3.

Contract by company to establish station and stop trains at certain place, see Contracts, 12.

Review by court of orders of railroad commission, see Courts, 2, 3.

Damages for diminution in value of property because of smoke, noise, dust, etc., see Eminent Domain, 10.

Evidence to show consideration for land deeded to railroad company, see Evidence, 22-25.

Evidence in prosecution against railroad company for nuisance in manner of running trains, see Evidence, 42.

Sufficiency of evidence to establish reasonableness of order of railroad commission, see Evidence, 63.

Laying railroad tracks in public street, see Highways, 4.

Injunction to prevent breach of covenant to run trains to and from track of covenantee, see Injunction, 4.

Injunction against storage of cars in street, see Injunction, 14.

Injunction against use of railroad tracks in street, see Injunction, 13.

Injunction against running of trains at excessive speed, see Injunction, 15.

Effect of laches on right to injunction against operation of, in street, see Limitation of Actions, 1.

Running of limitations against action for injuries from operation of railroad in highway, see Limitation of Action, 2.

Liability of railroad company for injuries to servant, see Master and Servant.

Liability for negligence of independent contractor in setting out fire along track, see Master and Servant, 33-35.

Right of municipality to regulate speed of trains within city limits, see Municipal Corporations, 4.

Destruction by fire of cotton in compress, see Negligence, 13.

Liability for injury to guest in hotel on adjoining property, for failure to light or guard retaining wall between property, see Negligence, 5.

Increase of trains, noise, and smoke upon railroad track and street as nuisance, see Nuisances, 3.

Speed of trains as nuisance, see Nuisances, 5, 6.

Who may compel performance of contract to establish stations and stop trains at certain places, see Parties, 1.

Joining receivers of one railroad with other company in action for personal injury, see Parties, 6.

Sufficiency of allegations in bill for specific performance of contract to establish railway station and stop trains, see Pleading, 6.

Question for court as to reasonableness of requiring railroad company to run trains over abandoned route, see Pleading, 23.

Injury to persons on or near track.

1. To run a train through a town across a place where persons are reasonably to be expected on the track, without sufficient notice of its approach, and at such speed that those in charge of it are powerless to accomplish anything to avoid injury to a person on the track after they obtain sight of him, is negligence. *Louisville & N. R. Co. v. McNary*, 17: 224, 108 S. W. 898, — Ky. —.

2. A railroad company which maintains a depot with no adequate approach except by walking along the track is charged with notice that the presence of persons on the track at that point may reasonably be expected. *Louisville & N. R. Co. v. McNary*, 17: 224, 108 S. W. 898, — Ky. —.

3. A signal of the approach of a train is reasonable which is ordinarily sufficient to give notice of its coming to persons who are themselves exercising ordinary care for their own safety and in possession of their ordinary faculties. *Louisville & N. R. Co. v. McNary*, 17: 224, 108 S. W. 898. — Ky. —.

Accidents at crossings.

Damages in action against, for negligent killing, see Damages, 15.

4. A railway company which, by leaving cars near or upon a public crossing, has obstructed the view and created an extra danger to travelers, is bound to use extra precautions in the operation of its trains by approaching the crossing at a less amount of speed, or by increased warnings, or otherwise; and the fact that the crossing is within the yard of the railway company makes no difference. *Cherry v. Louisiana & A. R. Co.* 17: 505, 46 So. 596, 121 La. 471.

5. To sustain a penal prosecution against a railroad company for running its trains over a street crossing at a dangerous rate of speed, the running of the trains must be shown to have been attended with a failure to give the usual and necessary signals of their coming. *Cincinnati, N. O. & T. P. R. Co. v. Com.* 17: 561, 104 S. W. 771, — Ky. —.

Contributory negligence.

6. A traveler about to cross four railroad tracks, the distance across which is only 49 feet, exercises all due legal care and prudence if he stops and looks and listens before venturing upon the first track; and he is not required to repeat the precaution at each of the tracks in succession. *Cherry v. Louisiana & A. R. Co.* 17: 505, 46 So. 596, 121 La. 471. (Annotated)

7. To step upon a railroad track without looking or listening for approaching trains will not be held to be negligence as matter of law where the scintilla rule of evidence applies, and there is any evidence that under the circumstances due care was used. *Louisville & N. R. Co. v. McNary*, 17: 224, 108 S. W. 898, — Ky. —.

8. One who walks beside a load of wood towards a railroad crossing on a stormy day when the view of the track is obscured and sound diminished, without taking any precaution to ascertain whether or not a train is approaching from the opposite side, is guilty of negligence which will preclude recovery for his death in case he is killed by a train from that direction; and it is immaterial that, if trains were on time, the next one would approach on the side on which he was walking, where one was due to pass in the opposite direction but a short time previously. *Schwartz v. Mineral Range R. Co.* 17: 1253, 116 N. W. 540, — Mich. —. (Annotated)

REAL ESTATE BROKERS.

See Brokers.

REAL PROPERTY.

Effect of foreign bankruptcy proceedings to transfer, see Bankruptcy, 13.

As to perpetuities, see Perpetuities.

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Of classification for purpose of occupation tax, see License, 1.

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Of time to allow attorney to pay over money to client as question for jury, see Trial, 5.

Question for jury as to reasonableness of use of waters by landowners, see Trial, 15.

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Substituting for all other methods of enforcing stockholder's liability, action by receiver, see Constitutional Law, 27.

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As to exemption of, from succession tax, see Taxes, 16–18.

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Setting aside sale of, because of fraud, see Fraud and Deceit, 2.

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REMEDIES.

Conflict of laws as to, see Conflict of Laws, 5–8.

On unlawful contract, see Contracts, 14.

Of property owner in eminent domain case, see Eminent Domain.

Election of, see Election of Remedies.

REMOVAL OF CAUSES.

An action by an employee against a railroad company for personal injuries, in which the Federal statute requiring the use of automatic couplers is relied upon to defeat the defense of assumption of risk, is within the original jurisdiction of the circuit court of the United States, although the petition states a good cause of action independently of the statute, and the action, if brought in a state court, may be removed to the Federal court under the act of Congress providing that any suit of a civil nature arising under the laws of the United States, of which the circuit courts of the United States are given original jurisdiction, which shall be brought in the state court, may be removed to the Federal court. *Nichols v. Chesapeake & O. R. Co.* 17: 861, 105 S. W. 481, — Ky. —.

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Completion of sale of delivery to carrier for transportation, see Conflict of Laws, 4.

Rescission of, because of fraud or drunkenness, see Equity, 1-3.

Sufficiency of evidence to show incapacity of one executing, see Evidence, 64.

Indebitatus count for goods bargained and sold, in action to recover purchase price, see Pleading, 9.

Binding effect on seller of warranty of his agent, see Principal and Agent, 1.

Implied warranty.

1. A manufacturer of a beverage to be sold as a nonalcoholic drink impliedly warrants that it is not subject to tax as alcoholic. Haynor Mfg. Co. v. Davis, 17: 193, 61 S. E. 54, 147 N. C. 267.

Rights and remedies of parties.

Account in suit to set aside, see Accounting.

Right to maintain action on note for purchase price of property not delivered and title to which has not passed, see Bills and Notes, 2.

Defeating recovery on note given for price of goods because of failure of consideration, see Bills and Notes, 8.

Damages for breach by vendee of executory contract of sale, see Damages, 7, 8.

Equitable jurisdiction to rescind sale for fraud, see Equity, 1-3.

Evidence to show justification for rescission of sale, see Evidence, 30.

What constitutes fraud justifying rescission of sale, see Fraud and Deceit, 1, 3.

Money judgment where sale is rescinded for fraud, see Judgment, 1.

2. Neither an action for goods bargained and sold, nor for goods sold and delivered, will lie, if the title to the property
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has not passed to the vendee. *Acme Food Co. v. Older*, 17: 807, 61 S. E. 235, — W. Va. —.

Rescission of sale.

3. The rule that, upon the rescission of a contract for the purchase of a chattel, the parties must be placed *in statu quo*, does not require, in all cases, that an absolute and literal restoration shall be had; but it will be sufficient if such restoration be made as is reasonably possible, and such as the merits of the case demand. *Fairbanks, M. & Co. v. Walker*, 17: 558, 92 Pac. 1129, 76 Kan. 903.

4. The right to rescind a contract for the purchase of an oil tank to be erected on the lands of the purchaser will not be denied on the ground that the parties cannot be placed *in statu quo*, where the purchaser has not accepted the tank, and the seller has parted with nothing by reason of the sale, except the waste of material incident to putting the previously manufactured parts together, and the cost of labor in so doing. *Fairbanks, M. & Co. v. Walker*, 17: 558, 92 Pac. 1129, 76 Kan. 903.

5. A contract for the purchase of an oil tank to be erected upon the lands of the purchaser is an agreement for the sale of a chattel, and may be rescinded by the latter for failure to furnish a tank of the kind and quality agreed upon. *Fairbanks, M. & Co. v. Walker*, 17: 558, 92 Pac. 1129, 76 Kan. 903.

6. The unauthorized marking of goods bought in another state for resale, in such a manner that they cannot be sold in the state where the order was given and the resale intended, will justify the purchaser in rescinding the sale and returning them to the seller. *Loveland v. Dinnan*, 17: 1119, 70 Atl. 634, 81 Conn. 111.

7. A provision in an order for goods to be resold, that the seller will buy back, replace, or exchange goods, does not deprive the buyer of the right to rescind in case they are different in kind or quality from those ordered. *Loveland v. Dinnan*, 17: 1119, 70 Atl. 634, 81 Conn. 111.

8. That goods bought in another state for resale are fraudulently marked as to quality so as to make them unsalable under a statute of the state where the order was given, does not authorize the purchaser to rescind the contract and return them to the seller, if they comply with the order as given. *Loveland v. Dinnan*, 17: 1119, 70 Atl. 634, 81 Conn. 111.

SATISFACTION.

Of mortgage, see Mortgage, 3.

SCHOOLS.

Mandamus to compel issuance of diploma, see Appeal and Error, 11; *Mandamus*.

See also Medical Colleges.

Charter authority to appoint a board of health and make all regulations which may be necessary for the promotion of

health or the suppression of disease does not empower a municipal corporation to make vaccination a condition precedent to attendance of the public schools, where the Constitution provides for a system of free schools where all children may receive a good common school education. *People ex rel. Jenkins v. Board of Education*, 17: 709, 84 N. E. 1046, 234 Ill. 422.

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SEARCH.

Admissibility of evidence obtained by unreasonable search and seizure, see Evidence, 35.

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When right of action for breach of covenant of, accrues, see Limitation of Actions, 11-14.

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When limitations cease to run against offsets of defendant, see Limitation of Actions, 19.

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Agreement by railroad to construct and maintain siding, see Contracts, 13; Covenants and Conditions, 4.

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Negligence of fellow servant in charge of, see Master and Servant, 23, 24.
Sufficiency of signal of approach of train, see Railroads, 3.
Absence of signals on approach to crossing, see Railroads, 5.

SIGNATURE.

Necessity of authenticating typewritten signature to letter to render it admissible in evidence, see Evidence, 13.
Sufficiency of signature to will, see Wills, 3.

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Of property for purpose of taxation, see Taxes, 7-12.

SMALLPOX.

Validity of regulations of health commissioner to guard against, see Health.

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Requiring vaccination as condition of right to attend public schools, see Schools.

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As nuisance, see Nuisances, 3.

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Power of trial court to set aside special finding of jury, see Trial, 28.

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SPECIFIC PERFORMANCE.

Sufficiency of allegations in bill for, see Pleading, 6.

1. Equity has jurisdiction specifically to enforce an agreement between next of kin to share the estate in certain proportions, in compromise of a threat by one of them to contest the validity of the will. *Blount v. Dillaway*, 17: 1036, 85 N. E. 477, 199 Mass. 330.

2. To entitle one to specific performance of a contract, he must show that a recovery of damages for its breach will not be an adequate remedy. *Herzog v. Atchison, T. & S. F. R. Co.* 17: 428, 95 Pac. 896, 153 Cal. 496.

SPEED.

Injunction against excessive speed of trains, see Injunction, 15.

Of trains as nuisance, see Nuisances, 5, 6.

Dangerous speed of trains at crossing, see Railroads, 5.

Reasonableness of speed of street car, see Street Railways.

Question for jury as to negligence in speed of street car, see Trial, 10.

STABLE.

As nuisance, see Nuisances, 1, 2.

STATE.

An action against state officials to enjoin them from enforcing an unconstitutional legislative enactment must be regarded as against them in their individual capacities, and not as against the state. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

STATEMENT.

Striking proposed statement from files when not presented in time, see Appeal and Error, 7.

STATUTES.

Enforcement of statute of other state, see Conflict of Laws, 5.

Curative act to validate invalid municipal ordinance, see Municipal Corporations, 2.

Action against state officials to enjoin enforcement of unconstitutional statute as one against state, see State.

1. In determining the reasonableness of

a statute regulating the construction and maintenance of tenement houses, the court must look to the language of the statute and to all the facts bearing on the situation, of which it may properly be said to know judicially, because of their common nature or otherwise. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

2. Good intentions in the passage of a law, or a praiseworthy end sought to be obtained thereby, cannot save an enactment from judicial condemnation, if it transcends limitations which the Constitution has placed upon legislative power. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

3. Statutory regulations concerning the erection and maintenance of tenement houses, which are impossible or impracticable to comply with, either because of absence of facilities necessary therefor, or expense so great as to render the regulations prohibitive in many situations, are unreasonable. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

4. If parts of a law viewed by themselves are unconstitutional, and other parts so viewed are not, the former may be condemned and the latter upheld if the two are separable; but if the act as a whole has one or more features pervading the entire act, it must be regarded as an entirety, and all be condemned as unconstitutional. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

5. An unconstitutional legislative enactment, though law in form, is in fact not law at all, and can neither confer rights, impose duties, nor afford protection, and is in legal contemplation as inoperative as though it had never been passed. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

6. In testing a legislative enactment as regards its constitutionality, all reasonable doubts must be resolved in favor of legislative power. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

Validity; who may question.

Question as to constitutionality of, conferring appellate jurisdiction on supreme court, see *Appeal and Error*, 3.

Duty of court to test legislative enactment by all constitutional limitations, see *Courts*, 5.

7. A person specially injuriously affected by enforcement of an unconstitutional law may, in judicial proceedings, challenge the validity thereof. *Bonnett v. Vallier*, 17: 486, 116 N. W. 885, — Wis. —.

Plurality of subjects.

8. A title, "An Act to Promote the Sheep Industry and to Provide a Tax on Dogs" does not violate the constitutional provision forbidding a statute to relate to more than one subject, where the subject of the statute is the promotion of the sheep industry only by providing a tax on dogs. *McGlone v. Womack*, 17: 855, 111 S. W. 688, — Ky. —.

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Construction.

Construction of statute as to suits on causes of action barred in state where they arise, see *Conflict of Laws*, 7, 8.

9. In the interpretation of the statute regulating the execution of wills, the intention of the legislature controls; and a will that is not executed as required by statute is invalid, notwithstanding the intention of the testator. *Sears v. Sears*, 17: 353, 82 N. E. 1067, 77 Ohio St. 104.

10. An amendment to a statute imposing a succession tax, which relates to property which "shall pass by law," does not apply to estates in process of settlement at the time of its passage. *Carter v. Whitcomb*, 17: 733, 69 Atl. 779, 74 N. H. 482.

Repeal; amendment; revision.

Effect of change, by statutory revision commission, of language of statute as to conspiracy, see *Conspiracy*, 2.

Effect of amendment of statute to validate ordinance, void under statute before amendment, see *Municipal Corporations*, 3.

Implied repeal of statute exempting religious societies from succession tax, see *Taxes*, 17.

Amendment of statute exempting religious societies from succession tax, see *Taxes*, 16.

11. One having a claim founded on tort against a corporation whose business operations under four days after the repeal of Kan. Gen. Stat. 1889, §§ 1200, 1204, which authorized an action to be brought on a corporate debt directly against the stockholders of a corporation that had ceased business for a year, is precluded from maintaining such an action against stockholders, and has no remedy against them excepting that by the appointment of a receiver. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

12. The holder of a judgment rendered against a Kansas corporation in an action founded on tort, upon which an execution had been issued and returned *nulla bona* before the appeal of Kan. Gen. Stat. 1901, § 1302, declaring that, under such circumstances, the liability of stockholders may be enforced for the benefit of creditors by means of a receiver to be appointed for that purpose, may have such remedy notwithstanding such repeal, by virtue of the general saving clause (Kan. Gen. Stat. 1901, § 7342, par. 1), which provides that the repeal of a statute shall not affect any right which has accrued under it. *Henley v. Myers*, 17: 779, 93 Pac. 168, 76 Kan. 723.

STOCK.

See *Corporations*.

STOCKHOLDERS.

See *Corporations*.

STORAGE.

Of water for irrigation, see *Water*, 1.

STREET RAILWAYS.

As carriers, see Carriers.

Competency of witness to express opinion as to practicability of trolley wires for cross-over tracks, see Evidence, 32.

Negligence as to condition of that portion of highway occupied by its tracks, see Highways, 9, 10.

As to liability for injury to servant, see Master and Servant.

As railroad within constitutional provision abolishing fellow-servant rules as to employees of railroad company, see Master and Servant, 25.

Proximate cause of injury to one struck by street car while driving on street, see Proximate Cause, 1.

Question for jury as to negligence of, in running cars, see Trial, 7, 10.

Question for jury as to contributory negligence of person injured by street car, see Trial, 11.

The speed of a street car going 3 or 4 miles an hour may be found to be unreasonable if by maintaining it the car will collide with a vehicle in the act of crossing the track. *Smith v. Connecticut R. & L. Co.* 17: 707, 67 Atl. 888, 80 Conn. 268.

STREETS.

Sufficiency of performance by one employed to build street to certain level, see Contracts, 17.

As to streets generally, see Highways.

STRIKE.

See Conspiracy, 4.

STUDENTS' ASSOCIATION.

Liability for injury from fall of stand used at athletic exhibitions, see Exhibitions.

SUBTERRANEAN WATERS.

See Waters.

SUCCESSION TAX.

See Taxes, 16-20.

SUICIDE.

Burden of proving, see Evidence, 1.

Admissibility of evidence as to, see Evidence, 46.

Effect of suicide by insane person, see Insurance, 18-20.

SUMMONS.

See Writ and Process.

SUNDAY.

Sufficiency of complaint for violation of ordinance as to Sunday labor, see Pleading, 1.

To keep open, manage, and superintend a theater and sell tickets therein on Sunday is labor within the meaning of a municipal ordinance prohibiting Sunday labor. 17 L.R.A. (N.S.)

Topeka v. Crawford, 17: 1156, 96 Pac. 862. — Kan. — (Annotated)

SWITCHES.

Negligence of master as to open switch, see Master and Servant, 9.

Negligence of fellow servant in charge of, see Master and Servant, 23, 24, 31.

Sufficiency of allegations in action for death of engineer by running into open switch, see Pleading, 10-15.

TAKING.

What constitutes a "taking," see Eminent Domain, 5.

TAX COLLECTORS.

The compensation of the tax collectors under a statute laying a tax on dogs for the remuneration of the owners of sheep killed by them, which is to be assessed and collected as other taxes, should be paid in the same way and at the same rate at which they are remunerated for the collection of other taxes, in the absence of any provision of the statute upon the subject. public purposes and uniformly assessed. *McGlone v. Womack*, 17: 855, 111 S. W. 688, — Ky. —.

TAXES.

Tax lien or claim on property in control of bankruptcy court, see Bankruptcy, 2.

Right of taxpayer to recover interest on taxes wrongfully exacted. see Interest, 1.

As to uniformity of license or occupation tax, see License.

Enforcement of payment of license and occupation taxes, see License.

As to tax collector, see Tax Collector.

Double taxation.

1. Contracts for the sale of land, secured by a referee appointed to sell lands for partition, should be treated as real estate, so that the taxation of them in his hands would result in double taxation. *Re Boyd*, 17: 1220, 116 N. W. 700, — Iowa, —.

For what purpose.

Tax on dogs to indemnify owners of sheep injured by, see Animals, 3; Constitutional Law, 6, 13; Statutes, 8.

2. A tax on dogs for the promotion of the sheep industry by providing funds to make good losses of sheep caused by dogs is a police measure, and not within constitutional provisions requiring taxes to be for public purposes and uniformly assessed. *McGlone v. Womack*, 17: 855, 111 S. W. 688, — Ky. —.

What taxable.

3. The property held under an oil and gas lease which vests in the lessee all the property rights to the oil and gas that may be found in paying quantities on the premises is taxable to the lessee under statutes taxing all real and personal property within the state, and making it the duty of persons owning any oil or gas privileges by

lease or otherwise to list them for taxation. *Wolfe County v. Beckett*, 17: 688, 105 S. W. 447, — Ky. — (Annotated)

4. A grant of the right to take turpentine from standing trees for a specified time is not subject to taxation as a separate or special interest in land. *Board of Supervisors v. Imperial Naval Stores Co.* 17: 693, 47 So. 177, — Miss. — (Annotated)

5. An enforceable contract for the purchase of real estate is a credit subject to taxation, although it provides for forfeiture upon default of the purchaser. *Re Boyd*, 17: 1220, 116 N. W. 700, — Iowa, — (Annotated)

6. A referee appointed by the court to sell real estate for partition is not within the meaning of a statute requiring the listing of property for taxation by a trustee of property held in trust, or by one holding property for a nonresident in the assessment district where the property is held, so as to render the contracts for sale, when executed, subject to taxation in his hands. *Re Boyd*, 17: 1220, 116 N. W. 700, — Iowa, —

Situs.

7. A statute making it the duty, under penalty, of all persons owning any oil or gas privileges other than in the county in which the owners reside, to list the property for taxation in the county where situated at the same time and in the same manner as is now required by law of resident owners, applies alike to owners of such property whether resident or nonresident. *Wolfe County v. Beckett*, 17: 688, 105 S. W. 447, — Ky. —

8. Where a nonresident lender of money has no place of business or location or agent in the state, and accomplishes the loan beyond the limits of the state, the facts that negotiations for the loan were made by persons in the state, and it was secured by a mortgage on property there located, do not subject his interest in the loan to local taxation. *Adams v. Colonial & U. S. Mortg. Co.* 17: 138, 34 So. 482, 82 Miss. 263.

9. The mere insertion in a trust deed of a clause that the contract shall be construed according to the laws of the place where the land is located "where the same is made" does not localize the debt there, so as to subject it to taxation, if the facts show that the contract was made in another state. *Adams v. Colonial & U. S. Mortg. Co.* 17: 138, 34 So. 482, 82 Miss. 263.

10. The board of supervisors of a county cannot, by an order, fix the situs of a debt for the purpose of taxation. *Adams v. Colonial & U. S. Mortg. Co.* 17: 138, 34 So. 482, 82 Miss. 263.

11. A mortgagee has no interest or estate in the land mortgaged which is subject to taxation where the land is located. *Adams v. Colonial & U. S. Mortg. Co.* 17: 138, 34 So. 482, 82 Miss. 263.

12. It seems that a mortgagee has sufficient interest in the land mortgaged to en-

able the legislature to tax it, by express enactment, where the land is located, although the mortgagee does not reside within the state. *Adams v. Colonial & U. S. Mortg. Co.* 17: 138, 34 So. 482, 82 Miss. 263.

Exemptions.

13. A local auxiliary of a foreign missionary society whose funds are devoted to enterprises in foreign countries, or only a very small portion of which are expended within the state, from which no substantial local benefit of a public nature results, is not within the meaning of a statute exempting from taxation the property of charitable associations devoted exclusively to the uses and purposes of public charity, since the legislature will not be presumed to have exempted institutions having no relation to the welfare of the inhabitants of the state. *Carter v. Whitcomb*, 17: 733, 69 Atl. 779, 74 N. H. 482. (Annotated)

14. The provision of Minn. Laws 1907, chap. 288, p. 387, § 19, setting aside 2 per cent of the liquor license fees received by municipalities, for the purpose of establishing and maintaining a state hospital farm for inebriates, does not contravene Minn. Const. art. 9, § 3, declaring that "public property used exclusively for any public purpose shall be exempt from taxation." *Leavitt v. Morris*, 17: 984, 117 N. W. 393, — Minn. —

Valuation.

15. The owner of an oil and gas lease which requires him to deliver one eighth of the product of the wells to the owner of the land may deduct the value of such portion from that of the whole privilege, in listing his interest for taxation. *Wolfe County v. Beckett*, 17: 688, 105 S. W. 447, — Ky. —

Succession tax.

Construction of statute as to succession tax, see Statutes, 10.

16. An amendment of a statute exempting from the succession tax religious societies the property of which is by law exempt from taxation, by providing that the exemption shall apply only when the society is bound to devote the property solely to such uses that it will be, by law, exempt from taxation, cannot be construed as merely declaratory of the meaning of the original statute. *Carter v. Whitcomb*, 17: 733, 69 Atl. 779, 74 N. H. 482.

17. A statute exempting religious societies from the operation of the succession tax is not repealed by its re-enactment with a proviso that such societies shall be so exempt only when they are bound to devote the property received solely to such uses that the property would, by law, be exempt from taxation. *Carter v. Whitcomb*, 17: 733, 69 Atl. 779, 74 N. H. 482.

18. That some of the property held by a religious society is not exempt from taxation, or that the property received by will may be invested in taxable property, does not deprive it of the benefit of a statute providing that the succession-tax law shall not

apply to religious societies the property of which is, by law, exempt from taxation. *Carter v. Whitecomb*, 17: 733, 69 Atl. 779, 74 N. H. 482.

19. A church and its societies, the Young Women's Christian Association, the Women's Auxiliary to the Young Men's Christian Association, a home for aged women, although its beneficiaries are required to pay a sum for admission and turn over to it the property which they possess, the Women's Relief Corps of the Grand Army of the Republic, are charitable organizations, within the meaning of a statute exempting such organizations from succession tax. *Carter v. Whitecomb*, 17: 733, 69 Atl. 779, 74 N. H. 482.

20. Property received by collateral heirs by deed from testator's widow upon compromise of a contest of his will which gave all his property to her is not within the provisions of a statute taxing estates passing by will or inheritance, or by grant or gift made in contemplation of death, to other than parents, husband, wife, or lineal descendants of decedent. *English v. Crenshaw*, 17: 753, 110 S. W. 210, — Tenn. —.

TELEGRAPHS.

Oral evidence of contracts in action for refusal to transmit, see Evidence, 18.

Proof that agent in charge of railroad station was also agent of telegraph company, see Evidence, 59.

A telegraph company cannot escape liability for the statutory penalty for refusing to transmit over its lines a telegram informing a railroad superintendent that there was no fire in a railroad station, and asking whether it was the duty of the passenger or agent to make it, on the theory that it was improper. *Western U. Teleg. Co. v. Lillard*, 17: 836, 110 S. W. 1035, — Ark. —. (Annotated)

TENDER.

Of stock to carrier, see Carriers, 7.

TENEMENT HOUSES.

Regulating construction and maintenance of, see Constitutional Law, 18-23; Statutes, 1.

Sufficiency of evidence to show that owner placed mat at outer door, see Evidence, 61.

Failure of landlord to light common passages in tenement, see Landlord and Tenant, 3.

THEATERS.

Keeping open and managing on Sunday as labor, see Sunday.

THEFT.

Of property of hotel guest, see Innkeepers, 2.

TIMBER.

Waiver of trespass in cutting, see Election of Remedies, 2.

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Adverse judgment in action to recover value of timber wrongfully taken from land as bar to action to recover possession of land, see Judgment, 6.

TIME.

For serving notice of injury on insurance companies, see Insurance, 12-14.

Reasonableness of, to allow attorney to pay over money to client as question for jury, see Trial, 5.

TITLE.

As to covenants of title, see Action or Suit; Covenants and Conditions; Damages, 3-6; Limitation of Actions, 11-14.

Sufficiency of affirmation of title in action on promissory note, see Pleading, 7.

Necessity of passing of, to vendee to sustain action by seller, see Sale, 2.

Sufficiency of title of statute, see Statutes, 8.

TOLL ROADS.

Extension of limits of municipality over, see Eminent Domain, 5, 6.

TORT.

Liability of stockholders for judgment founded on, see Corporations, 4, 5.

TRANSFERS.

Of corporate stock, see Corporations, 6.

TRAP DOOR.

Negligence of master as to, see Master and Servant, 8.

Servant's assumption of risk of danger from, see Master and Servant, 17.

TREES.

Taxation of grant of right to take turpentine from standing trees, see Taxes, 4.

TRESPASS.

Waiver of, see Election of Remedies, 2.

Right of one assaulted by trespasser to defend himself, see Homicide, 3.

TRESPASSER.

Assault upon, see Assault, 2.

Negligence toward, see Negligence, 5, 6.

TRIAL.

Waiver of error in overruling demurrer, see Appeal and Error, 21.

Right to jury trial in proceeding to revoke physician's license, see Jury.

Necessity of trial and conviction in court of competent jurisdiction as condition to proceedings by board of health to revoke physician's license, see Physicians and Surgeons, 2.

Conduct and disposal generally.

1. Denial of a motion for change of

judge is not error where facts set out in the affidavits tending to show bias and favoritism are fully and completely denied, and the falsity of the charges to some extent established. *Swan v. Talbot*, 17: 1066, 94 Pac. 238, 152 Cal. 142.

Reception of evidence.

Reversible error in admission or exclusion of evidence, see Appeal and Error.

Discretion as to order of proof, see Appeal and Error, 15.

New trial because of erroneous admission of evidence, see New Trial. 2.

2. It is erroneous to permit a witness to answer a question calling for his conclusion on a matter within the province of the court or the jury. *American Soda Fountain Co. v. Hogue*, 17: 1113, 116 N. W. 339, — N. D. —.

3. A serious doubt as to the admissibility of evidence in a criminal case should be resolved in favor of the accused. *Gambrell v. State*, 17: 291, 46 So. 138, — Miss. —.

Questions of law and fact.

Question for jury as to negligence of passenger in riding on platform, see Carriers, 3.

Contributory negligence of servant as question for jury, see Master and Servant, 19.

Question for jury as to sufficiency of mortgagee's possession of premises to complete foreclosure, see Mortgage, 4.

Contributory negligence as question for jury, see Negligence, 10.

Question for jury as to whether stable is a nuisance, see Nuisances, 1.

Sufficiency of plea to require submission to jury of issue sought to be raised thereby, see Pleading, 19.

Question for court as to reasonableness of requiring railroad company to run trains over abandoned route, see Pleading, 23.

Question for jury as to negligence in failing to look or listen for trains before crossing track, see Railroads, 7.

4. Whether or not the rupture of an artery was due to a twist of the body in attempting to avoid injury by an object dropped on one's umbrella is for the jury upon evidence that the twist was accompanied by pain, soon after which the rupture was discovered, and expert testimony that it was caused by the wrench. *Philadelphia, B. & W. R. Co. v. Mitchell*, 17: 974, 69 Atl. 422, — Md. —.

5. Whether or not two months is a reasonable time to allow an attorney to pay over money collected by him for his client is a question for the court. *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17: 667, 69 Atl. 160, — Vt. —.

6. The testimony of the attending physician of an applicant for accident insurance, that he had chronic bronchitis, should not be accepted as conclusive of breach of 17 L.R.A. (N.S.)

warranty that he had not had. where there is other evidence that his general health was good. *French v. Fidelity & C. Co.* 17: 1011, 115 N. W. 869, — Wis. —.

7. Whether or not gas fixtures, steam radiators, a kitchen range, and window and door screens, annexed by the owner to his dwelling house and used with it, are fixtures which will pass under a mortgage of the realty, is a question for the jury under proper instructions. *Hook v. Bolton*, 17: 699, 85 N. E. 175, 199 Mass. 244.

8. Whether or not a check mark in the space following the word "except" in an application for insurance, that accused had not had a disease "except," was intended as a denial of the exception, or as a waiver of any answer thereto, is a question for the jury. *French v. Fidelity & C. Co.* 17: 1011, 115 N. W. 869, — Wis. —.

9. The purchase of a check by the vice president of the bank on which it is drawn, from his relative, in the near vicinity of the bank, without inquiry at the bank as to its validity, procuring the blank check with which to make payment from a hotel, and delivering it to a stranger for delivery to the payee of the check, is not sufficient, as matter of law, to show notice of facts sufficient to arouse suspicions as to the validity of the paper; but the question of good faith is for the jury. *Matlock v. Scheuerman*, 17: 747, 93 Pac. 823, — Or. —.

10. In an action for personal injuries sustained by one struck by a street car at a crossing where the cars are generally run at a high rate of speed, the question of the negligence of the street car company is for the jury. *Morris v. St. Paul City R. Co.* 17: 598, 117 N. W. 500, — Minn. —.

11. Whether one struck by a car at a street car crossing while intent upon avoiding a car approaching from the opposite direction was guilty of contributory negligence is a question for the jury. *Morris v. St. Paul City R. Co.* 17: 598, 117 N. W. 500, — Minn. —.

12. The question of the contributory negligence of one injured by falling into an elevator well when attempting to enter the car for transportation is for the jury on conflicting evidence as to whether or not the conductor, who had just come from the car, left the door open or closed. *Wilcox v. Rochester*, 17: 741, 82 N. E. 1119, 190 N. Y. 137.

13. Whether an erasure appearing upon a will duly admitted to probate was made before or after execution is a question of fact, to be determined by the court or jury trying the issue, upon all the evidence, including the probate, aided by all reasonable presumptions and inferences. *Scott v. Thrall*, 17: 184, 95 Pac. 563, — Kan. —.

14. In an action by a homesteader to recover damages arising from the overflow of his premises, due to the wrongful obstruction of a natural water way, the court should define the rights of the settler in the homestead, and leave it to the jury to determine

his interest, and the consequent liability of the wrongdoer, from a consideration of the improvements made, the length of time the homestead has existed, and all other facts that go to make up its value. *McLeod v. Spencer*, 17: 958, 95 Pac. 754, — Okla. —

15. What constitutes a reasonable use, by landowners, of waters located beneath their premises in well-defined strata, and upon which they are dependent for their water supply, is a question of fact, to be determined from the facts and circumstances of each particular case. *Erickson v. Crookston Waterworks P. & L. Co.* 17: 650, 117 N. W. 435, — Minn. — (Annotated)

16. In an action brought against a railroad company by a passenger negligently carried beyond his destination, the amount of damages to be awarded is a question for the jury and should not be withdrawn from its consideration, where there is any evidence tending to establish a right to recover. *Dalton v. Kansas City, Ft. S. & M. R. Co.* 17: 1226, 96 Pac. 475, — Kan. —

17. In the absence of dispute as to the facts attending a homicide, the question whether or not the provocation was sufficient to reduce the crime to manslaughter is for the court. *Com. v. Paese*, 17: 795, 69 Atl. 891, 220 Pa. 371.

Direction of verdict.

18. On the trial of an action to contest the validity of a will, when it appears on the face of the will that it was not signed at the end thereof as required by statute, it is not error for the trial judge to direct a verdict that the writing is not a valid will. *Sears v. Sears*, 17: 353, 82 N. E. 1067, 77 Ohio St. 104.

Instructions.

Error in refusing requested instructions, see Appeal and Error, 22.

Estoppel to complain of instruction as to damages, see Appeal and Error, 20.

19. It is not error to refuse instructions requested by the carrier as to a contract to furnish a shipper with cars, where the shipper does not rely upon a contract, and its existence is eliminated from the case. *St. Louis, I. M. & S. R. Co. v. Ozier*, 17: 327, 110 S. W. 593, — Ark. —

20. A requested instruction not required by the evidence is properly refused. *Morris v. St. Paul City R. Co.* 17: 598, 117 N. W. 500, — Minn. —

21. It is error to submit to the jury the question of punitive damages in an action to recover for the killing of a person by a railroad company where there is nothing in the evidence to warrant it. *Louisville & N. R. Co. v. McNary*, 17: 224, 108 S. W. 898, — Ky. —

22. An instruction allowing a recovery against a master if he allowed a device to become loose is not erroneous merely because there is no evidence that he allowed it to become loose, it being loose when constructed, if it is plain that the word "become" was used in the sense of "be." *Burn-17 L.R.A. (N.S.)*

side v. Peterson, 17: 76, 96 Pac. 256, — Colo. —

23. An instruction defining "manslaughter" is not erroneous in stating that it is necessary, to constitute that offense, that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty. *Com. v. Paese*, 17: 795, 69 Atl. 891, 220 Pa. 371.

Findings by court.

Review on appeal, of evidence on which finding is based, see Appeal and Error, 22, 23.

See also Appeal and Error, 6.

24. A finding that a right of way specifically described is appurtenant to and owned by the owner of a tract of land is one of fact, and not merely a conclusion of law. *Corea v. Higuera*, 17: 1018, 95 Pac. 882, 153 Cal. 451.

25. A finding of the court that a stipulation requiring a shipper to give notice of loss within ten days after the unloading of sheep was reasonable, where the answer contained no allegation, and there was no proof on the subject, is a mere conclusion of law; and will be treated as no finding on the subject, the question of reasonableness being one of fact. *Houtz v. Union P. R. Co.* 17: 628, 93 Pac. 439, 33 Utah, 175.

26. In an action to quiet title to an easement in a ditch and the right to use water flowing therein, where the answer interposes, as a defense, the statute of limitations under Idaho Rev. Stat. 1887, §§ 4036, 4037, it is incumbent upon the trial court to make a finding upon such defense, unless a finding thereon would not affect or control the judgment or call for a different judgment than authorized by the findings made. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.

27. A finding that, unless the use of water conveyed to a town for irrigation and domestic purposes be held to amount to a dedication, private rights and public accommodation will be materially affected, and that an interruption or cessation of the water supply will materially affect both private and public interests, is a conclusion of law, rather than a finding of fact; and it is the duty of the trial court to find the fact upon which such conclusion must necessarily rest. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.

Amendment or correction of verdict.

28. The trial court is without authority, on motion to reduce the amount of the general verdict, in an action brought against a carrier by a passenger negligently carried beyond his destination, to set aside a special finding of the jury as to inconvenience, and to render judgment for the amount of damages awarded by the jury after deducting the sum allowed for the inconvenience, if there is any evidence upon which the finding could have been based for any amount. *Dalton v. Kansas City, Ft. S. & M. R. Co.* 17: 1226, 96 Pac. 475, — Kan. —

TRUST DEED.

See Mortgage.

TRUSTS.

In property of insolvent partnership for creditors, see Partnership, 3, 4.

Validity of bequest in trust, see Perpetuities, 3.

1. A trustee who has never given the bond required by the order appointing him is without authority to execute a deed of trust on land forming part of the trust estate. *Talley v. Ferguson*, 17: 1215, 62 S. E. 456, — W. Va. —.

2. None of the beneficiaries under a deed conveying land for the maintenance of a family has any distinct or separable interest in the property, during the existence of the trust, which he can charge or alien. *Talley v. Ferguson*, 17: 1215, 62 S. E. 456, — W. Va. —.

3. A grant for the use and benefit of a wife and children, which by its terms is declared to be a provision for the family, will be construed as conferring a life estate upon the wife, with remainder to the children, if there are manifest indications which reasonably support such a construction, so that after-born children may take, and so that the life tenant may have sufficient income to support the children. *Talley v. Ferguson*, 17: 1215, 62 S. E. 456, — W. Va. —. (Annotated)

TURNPIKE COMPANY.

Extending limits of municipality to include road and tollgates, see Eminent Domain, 5, 6.

TURPENTINE.

Taxation of grant of right to take turpentine from standing trees, see Taxes, 4.

UNBORN CHILDREN.

Right to take under grant for support of wife and children, see Trusts, 3.

UNDUE INFLUENCE.

Presumption of, see Evidence, 5.
Evidence to show, see Evidence, 40.

UNFAIR COMPETITION.

One other than the original patentee manufacturing repair parts for a machine the patent on which has expired need not place thereon anything to indicate their origin, where there is no attempt to palm them off as made by the patentee. *Bender v. Enterprise Mfg. Co.* 17: 448, 156 Fed. 641, 84 C. C. A. 353. (Annotated)

UNIFORMITY.

Of license or occupation tax, see License.

USER.

User as evidence of dedication, see Dedication, 2-4.

VACCINATION.

Requiring vaccination as condition of right to attend public schools, see Schools.

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VARIANCE.

See Evidence, 66.

VENDOR AND PURCHASER.

What constitutes fraud justifying setting aside of sale of remainder, see Fraud and Deceit, 2.

Taxation of contracts for sale in hands of referee appointed to sell real estate for partition, see Taxes, 5, 6.

VERDICT.

Direction of, see Trial, 18.

Amendment or correction of verdict, see Trial, 28.

VOLUNTEER.

Liability of master for injury to volunteer servant, see Master and Servant, 11, 12.

WAIVER.

Of error, see Appeal and Error, 21.

Of claim against carrier for loss, see Carriers, 14.

Of trespass for entering upon land and cutting timber, see Election of Remedies, 2.

Of provision in insurance policy, see Insurance, 29.

Of defense by failure to plead it, see Pleading, 17.

WARNING.

Duty of master to warn servant, see Master and Servant, 7.

WARRANTY.

In insurance policy, see Insurance, 2-6.

By agent in making sale, see Principal and Agent, 1.

WATERS.

Dedication of water to public use, see Dedication, 1-5; Estoppel, 3; Trial, 27.

Condemnation of intangible rights of riparian owner, see Eminent Domain, 1.

Injunction to prevent interference with hunting on navigable waters, see Injunction, 3.

Question for jury as to reasonableness of use of subterranean waters by landowners, see Trial, 15.

Obstruction; overflow.

Overflow of lands of homesteader, see Damages, 16; Trial, 14.

1. A homesteader upon public land proceeding lawfully to perfect his title is entitled to compensation for injury done to the premises due to overflow because of the wrongful obstruction of a natural water way; but the measure of damages is not the same as if he owned the land in fee simple. *McLeod v. Spencer*, 17: 958, 95 Pac. 754, — Okla. —. (Annotated)

Prior appropriation; irrigation.

2. Water applied to a desert entry for the purpose of reclaiming the same does not become inseparable therefrom, and may

be conveyed separate and apart from a conveyance of the land. *Hailey v. Riley*, 17: 86, 95 Pac. 686, 14 Idaho, 481.

3. The owner of a prior right to make direct application of appropriated water to irrigation purposes during the irrigation season may, to the extent of his priority in volume and time, store it for later use. *Seven Lakes Reservoir Co. v. New Loveland & G. Irrig. & L. Co.* 17: 329, 93 Pac. 485, 40 Colo. 382. (Annotated)

4. A grantee of land containing an artesian well, whose conveyance is expressly made subject to the rights of persons who had been granted rights in the water, cannot deprive such persons of their rights, although the well is fed entirely by percolation. *Charon v. Clark*, 17: 647, 96 Pac. 1040, — Wash. —. (Annotated)

5. Grantees of specific quantities of water flowing from an artesian well take in the order of the grants, so that the first grantee will be entitled to the entire quantity granted to him, although the aggregate amount granted exceeds the supply. *Charon v. Clark*, 17: 647, 96 Pac. 1040, — Wash. —.

6. A water company engaged in supplying the inhabitants of a city with water for domestic and municipal purposes should not be limited in the use of artesian water so as not to lower the head of water in the well of a private owner, more than 50 feet from the surface, beyond which point artificial power is necessary for pumping, if it is reasonably necessary for the water company, in order to supply the municipality with water for such purposes, to reduce the head of water below that point. *Erickson v. Crookston Waterworks P. & L. Co.* 17: 650, 117 N. W. 435, — Minn. —.

7. That water is pumped by a corporation from an artesian basin for the purpose of supplying the inhabitants of a city with water for domestic purposes does not constitute an artificial taking, as distinguished from the right enjoyed by private well owners, but both stand upon the same basis, subject to the rule of correlative rights. *Erickson v. Crookston Waterworks P. & L. Co.* 17: 650, 117 N. W. 435, — Minn. —.

Maintenance of artificial condition.

8. A canal company which, under statutory authority, has constructed and maintained for more than forty years a channel to feed the waters of a lake into its canal, may abandon and close the channel, thereby causing the water of the lake to seek its former outlet, without liability for consequential injuries to lands not abutting on the channel, but which had been relieved by it from a burden which they formerly bore. *Lake Drummond Canal & W. Co. v. Burnham*, 17: 945, 60 S. E. 650, 147 N. C. 41. (Annotated)

Water supply: rates.

See also *supra*, 6, 7.

9. An ordinance authorizing the turning off of water upon failure to pay the rents does not give a lien against the property, so as to permit the city to refuse to

turn on the water at the request of a purchaser from the delinquent consumer until the arrears are paid. *Covington v. Ratterman*, 17: 923, 108 S. W. 297, — Ky. —.

10. A municipal corporation cannot, without statutory authority, compel the purchaser of property to pay rents for water consumed by his vendor, as a condition to furnishing his building a supply from its water system. *Covington v. Ratterman*, 17: 923, 108 S. W. 297, — Ky. —.

WAY.

See Easements.

WHARVES.

Liability for injury from collapse of, see Negligence, 4.

WILLS.

Error in excluding, in will contest, testimony as to contents of former will, see Appeal and Error, 27.

Note payable only if collected in lifetime of payee, as attempt to dispose of property at death, see Bills and Notes, 1.

Agreement not to contest will as consideration for promise of share in estate, see Contracts, 8.

Contract as to division of estate between next of kin, in compromise of contest, see Contracts, 9; Specific Performance, 1.

Presumption from fact of probate of will, see Evidence, 7, 8.

Presumption of undue influence, see Evidence, 5.

Burden of explaining erasure in will, see Evidence, 7.

Expert evidence as to erasures in wills, see Evidence, 31.

Admissibility in evidence of statements made by attorney or testator during preparation of, see Evidence, 37.

Evidence of provisions of former will, in contest on ground of undue influence, see Evidence, 40.

Effect of finding of will on prior appointment of administrator in other county, see Executors and Administrators.

Right of member of mutual benefit society to dispose by will of certificate, see Insurance, 24.

As to validity of remainders, see Perpetuities.

Question for jury as to time when erasure in will was made, see Trial, 13.

Directing verdict in will contest, see Trial, 18.

Testamentary character.

1. A letter written by a man sentenced to death, three days before the execution, to his daughters, stating that he made two of them a deed to the house and lot, and that he did not want them to have any trouble over it, and did so because of their attention to their mother, may be probated as a will sufficient to pass title to the property.

Milam v. Stanley, 17: 1126, 111 S. W. 296,
— Ky. —. (Annotated)

Execution.

Invalidity of will not executed as required by statute, see Statutes, 9.

2. A statutory requirement that a will shall be in writing, and may be hand written or type written, does not render a will invalid because it is partly in print. *Sears v. Sears*, 17: 353, 82 N. E. 1067, 77 Ohio St. 104.

3. A will written by the testatrix upon a printed blank form containing a testimonium clause with blanks for the name of the place and the date of execution, which she fills out, and followed by a blank line for the signature of the maker, which she leaves blank; with her name written in the attestation clause, in a blank left for the name of the maker, is not signed at the end thereof, in compliance with a statutory requirement, although the testatrix may have intended such act as a signing. *Sears v. Sears*, 17: 353, 82 N. E. 1067, 77 Ohio St. 104. (Annotated)

Construction generally.

4. The language of a will controls where a latent ambiguity in its terms is established by parol testimony which itself serves to explain and remove the ambiguity. *Modern Woodmen of America v. Puckett*, 17: 1083, 94 Pac. 132, — Kan. —.

Estates tail.

5. A devise to testator's children and to their personal and lawful heirs, share and share alike, creates a fee in the children, and the words "personal and lawful heirs" are not equivalent to "heirs of the body" so as to create an estate tail. *Webbe v. Webbe*, 17: 1079, 84 N. E. 1054, 234 Ill. 442.

WINDOW SHADES.

As fixtures, see Fixtures.

WITNESSES.

Sufficiency of bill of exceptions to raise question as to cross-examination of, see Appeal and Error, 8.

Review of trial court's decision as to competency of, see Appeal and Error, 14.

Competency of, to express opinion, see Evidence, 28, 29, 31, 32.

1. The possible interest of a prospective heir of a living person is not sufficient to disqualify him as a witness in a proceeding to settle the rights of heirs of one 17 L.R.A. (N.S.)

claimed to be the wife of such person to share in the community property after her death. *Sloan v. West*, 17: 960, 96 Pac. 684, — Wash. —.

2. It is not error to permit a witness whose name was not indorsed on the indictment to testify for the state in a criminal case. *State v. Henderson*, 17: 1100, 110 S. W. 1078, 212 Mo. 208.

WOMEN.

Annexing to city property of woman without opportunity to protest against proceedings, see Constitutional Law, 3.

WRIT AND PROCESS.

Summary process to compel presentation of claims before bankruptcy court, see Bankruptcy, 1.

Due process in service on domestic corporations by publication, see Constitutional Law, 15.

1. Jurisdiction of a defendant in a partition suit is not acquired by publication of a summons in which the middle initial of his name is erroneously stated. *D'Autremont v. Gaylord*, 17: 236, 116 N. W. 357, 104 Minn. 165.

2. Though the failure to insert the middle initial of the defendant's name in a summons where service is made by publication might not be fatal error, the use of a wrong initial will not confer jurisdiction over the real party defendant. *D'Autremont v. Gaylord*, 17: 236, 116 N. W. 357, 104 Minn. 165.

3. Errors and defects in the proceedings taken to obtain jurisdiction of nonresidents, of a nature tending to mislead and prejudice the defendant, are fatal to the jurisdiction of the court. *D'Autremont v. Gaylord*, 17: 236, 116 N. W. 357, 104 Minn. 165.

WRIT OF ERROR.

See Appeal and Error.

X-RAY.

Liability of physician for injury resulting from use of, on patient, see Physicians and Surgeons 6, 7.

YOUNG WOMEN'S CHRISTIAN ASSOCIATION.

Exemption of, from succession tax, see Taxes, 19.



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